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A

General Abridgment

OF

LAW and EQUITY

Alphabetically digeſted under proper TITLES

WITH

NOTES and REFERENCES

to the WHOLE.

By CHARLES VINER, *Eſq;*

Favente Deo.

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

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

TO THE HONOURABLE

Sir THOMAS BURNET Knight,

ONE OF THE

Juſtices of the Court of Common-Pleas

THIS Book (being a Twelfth Volume, Part of A General Abridgment of Law and Equity &c.) is moſt humbly dedicated by

Your moſt Oblig'd

and Obedient Servant,

Charles Viner.

A

TABLE

OF THE

Several TITLES, with their Diviſions and Subdiviſions.

Againſt

Who

Fol. 105.

(M. c) For what Act it lies. The Gift of the Action.

1. IF a Miller takes Toll of one that ought to be Toll-free, no Action upon the Case lies for this, but a general Action of Trespass; For it is altogether unlawful as if he had taken one half of the Corn. * 41 Edw. 3. 24. b. 44 E. 3. 20.

Br. Action sur le Case, pl. 19. cites 44 E. 3. 20. and pl. 14. cites 41 E. 3. 24. S. P. ——— But see Tit. Trespass (Y. 2) pl. [1] 10. and the Notes there.

* Le. 109. pl. 147. S. P. cites 42 E. 3. 24. but it should be 41 E. 3. 24. b. [pl. 17] as in Roll.

2. But if a Lord of a Manor prescribes to have his Tenants to be Toll-free in Markets for buying and selling, if Toll be taken in a Market from one of the Tenants, the Lord may have Trespass upon the Case. * 43 E. 3. 30. † adjudged. 7 H. 4. 2. b. per Roy (it seems as if the Books are so to be intended, for it is not a Trespass Vi & Armis as to him.)

Fitzh. Action sur le Case, pl. 32. S. C. ——* 7 H. 7. 2. b. pl. 13. was Trespass brought by the King against the Prior of N. and counted that he was Lord of L. and that those of L. ought not to pay Toll in any Part of England, and that they of N. had taken Toll of those in L. and the Bailiffs of N. came and said, that they held of the King, and prayed Aid of him, and it was granted &c. ——— Br. Aid of the King, pl. 24. cites S. C. and Brooke says it seems it was for Fee-Farm, but that it is briefly reported.

3. If a Man takes upon him to cure a Horse, if he performs the Cure so negligently that the Horse dies, an Action upon the Case lies against him, and not a general Action of Trespass. * 43 E. 3. 33. † 48 E. 3. 6.

* Fitzh. Action sur le Case, pl. 33. cites S. C. † Br. Action sur le Case, pl. 24. cites S. C.

4. So if a Surgeon takes upon him to cure the Hand of another that is wounded, and he does it tam negligenter that he is mayhem'd, an Action upon the Case lies against him. 48 E. 3. 6. * 11 Hen. 6. 18. by contrary Medicines. But if he does his Endeavour, the Action does not lie. 48 E. 3. 6. b.

But 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; quod nota. Br. Action sur le Case, pl. 24. cites S. C.

* (P. b) pl. 9 10. cites S. C. but not S. P.

5. If I cut down certain Wood, and a Stranger takes it out of my Possession, tho' I may have an Action of Trespass, yet I may also have an Action upon the Case at my Election. Pasch. 43 Eliz. B. R. adjudged between *Basset and Maynard.*

Mo. 691. pl. 955. Hill 36 Eliz. B. R. Maynard v. Basset. S C. adjudged for the Plaintiff in Action on the Case upon Trover, and affirmed in the Exchequer Chamber, and that the Plaintiff need not declare of taking &c. Vi & Armis in Action on the Case. ——— Cro. E. 819. pl. 14. S. C. ——— Noy. 32. S. C. ——— 5 Rep. 24. b. Sir Tho. Palmer's Case. S. C.

6. If a Man comes upon my own Land, and makes a Nusance to my Water-course, As if he makes a Lime-pit &c. I cannot have an Action upon the Case against him for this, but an Action of * Trespass. 13 H. 7. 26. b.

* Viz. Trespass Vi & Armis. Br. Action sur le Case, pl 123. cites S C. — All 84. cites S. C. and says it is no Law. ——— In Trespass the Plaintiff declared, quod cum he was seised

ſeiſed of two Cloſes, to which a Common was contiguous, and that the *Defendant broke down* 10 *Perches of Hedge* of the ſame Cloſe, *& ſic proſtratas for ſuch a Time cuſtodivit, per quod the Cattle depaſturing in the Common came into the Cloſes and eat the Graſs* ad damnum, &c. it was moved in Arreſt of Judgment, that it ſhould have been *Vi & Armis*, becauſe the Treſpaſs is laid to be done in the Plaintiff's own Soil; but adjudged, that the concludingit *per quod*, and the Commencement *quod cum* ſhew it to be an Action of the Caſe; and the *Cauſa cauſans of the Damages* may be laid with or without Vi & Armis. Allen 84. Mich. 24 Car. B R. Cooper v. St. John.——Sty. 130, 131. S. C. & S. P. as to the Vi & Armis and the quod cum.

Fitzh. Tit. Action ſur le Caſe, pl. 31 cites S. C. per Wyche, that no Action lies againſt him but a common Writ of Treſpaſs.

7. So if a Miller takes more Toll than he ought to have, no Action lies againſt him, but a Writ of Treſpaſs. 41 E. 3. 24. b.

S P. and *ſo of Goods carried away for Default of good keeping.* Br Action ſur le Caſe, pl. 34. cites 7 H. 4. 14. [and the Caſe is at 7 H. 4. 14. b. pl. 18. and ſo Roll miſprinted.]

8. If a Servant that drives his Maſter's Cart by his Negligence ſuffers the Beaſts to periſh, an Action upon the Caſe lies againſt him, and not an Accompt. 7 Hen. 4. 15. b.

Roll Rep. 391. pl. 11. S. C. adjudged for the Plaintiff.——Mo. 854. pl. 1168. Babington v. Lambert, S. C. adjudged for the Plaintiff.——(N) pl. 2. S. C.

9. If a Man delivers Money to my Uſe, I may have an Action upon the Caſe againſt the Bailiff. My Reports, Jac. *Beckingham and Lamb v. Vaughan.*

Cro. J. 265. pl. 30. Lewſon v. Kirk, S. C. The Barons at firſt conceived the Caſe did not lie but Treſpaſs Vi & Armis, becauſe this Matter was a mere Tort; But afterwards upon Conſideration, all, except Snig, conceived that the Action well lay for the ſpecial Loſs, which the Plaintiff had by this Male-feaſance, tho' the Defendant had been now taken as a Stranger, and tho' it is alleged that he did it in his Abſence the Plaintiff being beyond Sea, and Judgment for the Plaintiff.——Lane 65. S.C. and at laſt Snig agreed that Judgment ought ſo to be given for the Plaintiff, and ſo it was.

10. If a Merchant's Servant takes his Maſter's Goods that are arrived at a Port of England, and before Payment of the Cuſtom lands them, per quod the Goods are forfeited and ſeiſed by the King, tho' the Maſter may have an Action of Treſpaſs againſt the Servant, yet he may have an Action upon the Caſe againſt him. Trin. 8 Jac. Scaccario, between *Leveſon and Kirk* adjudged.

(Q. b) pl. 9. S. C.—Br. Action ſur le Caſe, pl. 73. cites S. C. per June Ch. Baron, before all the Juſtices of England in the Exchequer Chamber.——Fitzh. Action ſur le Caſe, pl. 1. cites S. C.

11. If in a real Action I loſe by Default after the Summoners, Vejors, and Pernors are dead, per quod I cannot have a Writ of Diſceit, I may have an Action upon the Caſe againſt the Sheriff if I was not ſummoned. 1 H. 6. 1. b.

12. If a Man that ought to encloſe againſt my Land does not encloſe, per quod the Cattle of his Tenants enter into my Land, and do Damage to me, I may have an Action upon the Caſe againſt him, without bringing any Curia claudenda. 11 R. 2. Action ſur le Caſe 36. adjudged.

13. If a Man that is bound by his Tenure to repair a certain Cauſeway by Preſcription does not repair it, per quod my Land is ſurrounded, I may have an Action upon the Caſe againſt him. 29 E. 3. 32. b.

Fitzh. Action ſur le Caſe, pl. 29. cites S. C.—Br. Action ſur le Caſe, pl. 43. cites S.C. but ſeems not to be very clearly abridged.

14. If a Man enters upon the Poſſeſſion of the King's Farmer, and takes the Profits, per quod the Farmer cannot pay the King, an Action upon the Caſe lies againſt him for the Profits. 11 H. 4. 65.

15.

15. But if a Man enters upon the King's Grantee of the Land of a Ward, where there is not any Rent reſerved, and takes the Profits, the Grantee ſhall not have an Action upon the Caſe againſt him, but an Ejectment de Gard. 11 H. 4. 65. Fitzh. Action ſur le Caſe, pl. 29. cites S. C. —Br. Action ſur le Caſe, pl. 43. cites S. C.

16 Where the Statute of 3 E. 4. enacts, That none ſhall import any foreign Cards within the Realm upon a certain Pain, if the King reſerving a Rent gives Licenſe to one Man to import Cards, if another Man imports Cards the King's Licenſee ſhall not have an Action upon the Caſe againſt him ſuppoſing that he cannot pay his Rent to the King, but the Remedy that the Statute of 3 E. 4. gives, ought to be purſued. Co. 11. Monopolies 88. b. Noy. 173. &c. Darcy v. Allen S. C. argued and many Caſes cited. Et adjornatur.——— Mo. 671. pl. 919. S. C. but S. P. does not directly appear.

17. But if the King reſerving a Rent grants that none ſhall uſe ſuch a thing but the Grantee (admitting this Grant good) if another does uſe it, the Grantee may have an Action upon the Caſe againſt him; ſuppoſing that by this he cannot pay the Rent to the King. (It ſeems as if this might be collected out of Co. 11. Monopolies 85.) See the Plea above; and I do not obſerve this Point either in Noy, or Mo.

18. If the Servant of A. buys Cattle of B. to the Uſe of A. for 20 l. to be paid at a time after, and the Servant by the Command of A. pays B. the 20 l. and after B. comes to A. and ſays, that his Servant had not paid him, upon which A. pays him again, A. may have an Action upon the Caſe againſt B. upon this Diſceit. Mich. 4 Car. B. R. between Dame Grace *Cavendiſh and Middleton*, adjudg'd, being moved in Arreſt of Judgment that ſhe ought to have Account, and not this Action; the which Intratur Trin. 4 Car. Rot. 243. Cro C. 141. pl. 18. S. C. adjudg'd accordingly.—Jo. 196. pl. 9 S. C. adjudg'd accordingly.

19. If a Copyholder hath Common by Preſcription in the Waſtes of the Lord, and the Lord ſtores the Waſte with Conies, every one of the Copyholders may bring an Action upon the Caſe againſt the Lord, averring that by this his Common is impaired. Mich. 11 Jac. B. R. between *Clayton* and Sir Jerom *Horſy*, per Curiam admitted. (N. b) pl. 9. —See tit. Commoner (A) pl. 2.—Godb. 252. pl. 350. Paſch. 12 Jac B. R. Claydon v. Horſey ſeems to be S. C. but S. P. does not appear.——Cro. J. 229. pl. 7. Mich. 7 Jac. B. R. Horſey v Hagberton is about filling up Coney-Burrowes in the Waſte, but S. P. as here does not appear, for which Reaſon, and likewiſe the Difference of the Year, it ſeems not to be the S. C.

(M. c. 2) Caſe or Account.

See pl. 8. 9. 18.

1. IF *I deliver Money* to a Man *to deliver over*, and he does not, but converts the Money to his own Uſe, I may chuſe to have Action of Account againſt him or Action upon the Caſe; but a *Stranger hath no other Remedy but* Action of Account. Per Frowike Ch. J. Kelw. 77. b. pl. 25. Mich. 21 H. 7. Anon.

2. The Plaintiff was Leſſee of a Parſonage, and the *Tithes being ſet out*, the *Defendant carried them away without any Manner of Claim* or Intereſt, and in Account brought againſt him, Manwood and Dyer held that the Action would not lie; for it is a Wrong, and ſuch are always without Privity; he may have an Electione firmæ; but Harper ſeem'd that Dal. 69. pl. 30. Tottenham v Bedingfield S. C. and Owen ſeems

to be a Tranſlation of Dal. — that Account lay. Owen 83. Mich. 14 & 15 Eliz. Tottenham v. Bodington.

3 Le. 24. pl. 50. S. C. accordingly, that Account does not lie; but ſays nothing of Ejectment; and otherwiſe is in totidem Verbis with Dal. and Owen.

S. C. cited by North Ch. J. Freem. Rep. 230. pl. 237. as reſolved by all the Jndges accordingly ——— 3. *Caſe* will not lie *againſt a Bailiff* or Factor *where Allowances and Deductions are to be made*, unleſs the Account be adjuſted and ſtated. Cited per Cur. 2 Mod. 312. Trin. 30 Car. 2. B. R. in Sir Paul Neal's Caſe.

S. P. But when an Account is ſtated there is an End of the Account, and then an Indeb. Aſſ. will lie but not before; Per tot. Cur. But they inclined that if an *Account* was *ſtated and reduced to a Sum certain*, yet if there were *further Dealings between the Parties*, and that Sum was to run on in Account, then that was Part of the Account current, and an Action of Account would lie Freem Rep. 242. pl 254. Hill. 1677. in Caſe of Harrington v. Lee.

S P. per Cur. accordingly; but when the Account is once ſtated, then an Action on the Caſe lies, and not an Action of Account. Mod. 268, 269. Trin. 29 Car. 2. C. B. Farrington v. Lee.

4. Caſe upon a *ſpecial Promiſe to Account*, the Plaintiff gave Goods to ſuch a Value, and a Sum of Money to the Defendant, being Maſter of a Ship then bound for India, who promiſed to bring him the Value of them home in India Goods; Per Holt Ch. J. if A. *takes Goods* from B. *to account* for them, if *they come to Account tho'* A. gives *no true Account*, yet if B. has *agreed to it* it is well. 12 Mod. 517. at Niſi prius coram Holt, Paſch. 13 W. 3. Spurraway v. Rogers.

5. *And* if one receives Goods of another, and *expreſsly promiſes* to be accountable for them, or to give an Account of them, Caſe will lie, if he will not account, on that Promiſe; *but upon a General Bailment* of Goods, without a particular Promiſe to Account, there the ſole Remedy is by Account. Per Holt Ch. J. 12 Mod. 517. Spurraway. v. Rogers.

(M. c. 3) Caſe or Covenant.

As in Diſceit the *Defendant for 6 s. covenants with the Plaintiff by Parol to enfeoff him of his Land in the County of H. and after enfeoffs another*, and he brings Writ of Diſceit in the County of L. where the Covenant is made; and per Thirne, he ought to have brought it in the County of H. where the Diſceit was. Quære. Ibid.

1. OF *Covenant by Parol*, Action upon the Caſe lies for the Non-feaſance. Br. Action ſur le Caſe, pl. 31. cites 3 H. 4. 3.

2. In Treſpaſs, if a Man *takes upon him to cauſe J. S. to releaſe to me all his Right in ſuch Land*, or *to make* me *a Houſe*, or a Surgeon *to cure a Man*, or to plow my Land and does not, or takes upon him *to do it well* and ſufficient, *and does it ill* or inſufficient, Action upon the Caſe lies, and he ſhall not be put to Action of Covenant. Br. Action ſur le Caſe, pl. 69. cites 14 H. 6. 18. per June Ch. J. and Paſton J.

3. If a Man *bargains* with another *for 2 Pipes of Wine for 10 l. and to deliver them to the Plaintiff at D.* and does not, Action upon the Caſe lies. Br. Action ſur le Caſe, pl. 56. cites 21 H 6. 55.

4. *So* of Non-feaſance *of all other Bargains*, as to cure a Wound, make a Houſe, ſhoe a Horſe &c. *which is not by Specialty*; for then Covenant lies. Br. Action ſur le Caſe, pl. 56. cites 21 H. 6. 55.

5. *So of Mis-feaſance* contrary to his Promiſe, by the beſt Opinion. Ibid. cites S. C.

6. In *Treſpaſs* &c. the Defendant *pleaded an Exchange of Lands* between him and the Plaintiff, *and that it was agreed* between them, *that the Plaintiff ſhould make the Fences and always maintain them, and that the Fences*

Fences of such a Close were in Decay, by Reason whereof &c. And upon Demurrer the Justices held this an ill Plea, because this Agreement can be no Bar to an Action of Trespass tho' it had been by Deed; for then he would only be put to his Action of Covenant, but now his proper Remedy is an Action on the Case upon the Promise if he doth not perform it. But Popham e contra. And Judgment for the Plaintiff. Cro. Eliz. 709. pl. 30. Mich. 41 & 42 Eliz. Nowell v. Smith.

(M. c. 4) Case, or Detinue.

1. IF I *deliver my Goods* to a Man *for safe keeping*, and he takes the Custody upon him, and my Goods for Default of his Custody are *lost or destroy'd*, I may have Action of Detinue, or upon the Case at my Pleasure, and shall charge him by these Words, *super se Assumpsit*. And if I bring my Action of Detinue, and he *wages his Law*, I shall be barr'd in Action upon the Case, because I had Liberty, and having chosen an Action of Detinue, this was at my Peril, and I lost the Advantage of the Action upon the Case; and this is adjudg'd per Frowike. Kelw. 77. b. 78. a. pl. 25. Kelw. 160. a. pl. 2.

2. The Plaintiff had counted that he bought 20 *Quarters of Malt*, and *hath not shew'd that it was in Sacks*, so by the Buying no Property was alter'd; for the Plaintiff cannot take this Malt out of the Garner of the Defendant by virtue of such buying of Malt not certain, nor he cannot have Action of Detinue. But if it was *in Sacks*, *or* in other manner *sever'd from the other Malt*, there the Buying alters the Property, so that the Vendee may take or have Action of Detinue, and by the same Reason have Action upon the Case; but as the Case is here, he is put to his Action of Debt for the Malt; and the Matter was perused at the Bar, and after by all the Bench. Kelw. 77. b. pl. 25.

(M. c. 5) Case, or Disceit.

See (M. c) pl. 11.

1. IT was agreed, Arguendo in Præcipe quod reddat, that if the *Tenant casts Protection, and does not go according to the Form of the Protection*, Action of Disceit lies; *but if he goes, and returns within the Time* &c. there Action upon the Case lies, and not Writ of Disceit. Note the Diversity. Br. Action sur le Case, pl. 18. cites 44 E. 3. 4. Br. Disceit, pl. 10. cites S. C.

2. In *Recovery by Default*, if the *Tenant* was *not warn'd*, they shall not have Writ of Disceit against the Sheriff to re-have the Land, but *Action upon the Case*; for he does not lose the Land there by the Default. Br. Disceit, pl. 16. cites 8 H. 6. 1.

3. Disceit, inasmuch as the Defendant was his *Attorney*, and *ought to have taken Obligation of J. S. of* 100 *l. to the Plaintiff, and he took it to himself, and* it is said that *he ought to confess that he took* [it as for] *his Fee*; and per Newton J. Action upon the Case lies, and not Action of Disceit. Br. Action sur le Case, pl. 117. cites 20 H. 6. 25.

4. It seems that where a Man *promises for a Consideration to do an Act, and does it not*, Action upon the Case lies. *But where* a Man does his Promise *As* where the Defendant had

ſold certain *Land to the Plaintiff for* 100 *l. and ought to have infeoff'd him within* 14 *Days*, he, after the Bargain had, *granted a Rent-Charge to a Stranger, and after infeoffed the Plaintiff* of the Land charged, where the Land was diſcharged at the Time of the Bargain, Action of Diſceit lies. Ibid. ——*So* if he *infeoffs a Stranger* after this Promiſe, *and firſt ouſts him, and infeoffs the Plaintiff*; but Brooke ſays it is not adjudg'd. Ibid.

miſe *falſely*, then Action of Diſceit lies. Br. Diſceit, pl. 2. cites 20 H. 6. 34.

5. Caſe, for that the Plaintiff *having* 100 *l. deliver'd to him to pay over to J. S.* and the *Defendant came to him, and falſo & fraudulenter affirm'd he was J. S.* whereupon he deliver'd the 100 l. to him; whereas, in Truth, he was not J. S. Adjudg'd that an Action of Diſceit lay againſt him. Mo. 538. pl. 705. Paſch. 39 Eliz. B. R. Thompſon v. Gardiner.

(M. c. 6) Caſe where, and where Treſpaſs.

See (M. c) pl 1. 2. 3. 4. 5. 6. 7. 10. 14.

Br. Action ſur le Caſe, pl. 101. cites 21 E. 4. 76. S. P.

1. A Man ſhall not have General Treſpaſs of *miſuſing a Licence in Fact*, as of riding a Horſe 20 Miles, where he borrow'd to ride but 10 Miles; and *contra of Licence in Law*, as to enter a Tavern &c. in the one Caſe Action upon the Caſe lies, and in the other Treſpaſs. Br. Action ſur le Caſe, pl. 95. cites 12 E. 4. 8.

2 Le. 93. pl. 116. Mich. 36 Eliz. in the Exchequer, S. C. ——Cro. E. 285 S. C. but I do not obſerve exactly S. P.

2. The Plaintiff had a Cellar, over which the Defendant had a Warehouſe, in which he laid ſo great a Burthen that the Floor broke, and fell into the Cellar, and ſpoil'd three Buts of Wine. 8 Mod. 274. Arg. cites it as adjudg'd, that an Action on the Caſe, and not an Action of Treſpaſs, lay againſt the Defendant. Edwards v. Hallender.

——Poph. 46 S. C. but I do not obſerve exactly S. P.

3. One cannot have Treſpaſs for *breaking another Man's Fence*; *but if* he be *damnified by the Breaking*, he may have Action upon the Caſe againſt the Party that broke it; per Bacon J. Sty. 131. Mich. 24 Car.

4. Caſe, for *entring upon the Poſſeſſion of a Term, which the Plaintiff had recover'd by Verdict* given for him *againſt the Defendant*. It was moved that the Action ſhould have been Treſpaſs, and not Caſe. But per Roll Ch. J. A. may have an Action on the *Caſe, or Treſpaſs*, againſt B. *at his Election*. Sty. 427. Mich. 1654. Jones v. Graves.

Caſe, for that he was *poſſeſſed of a Farm, whereof* 2 *Cloſes were Parcel, and of a River* running *near thoſe Cloſes, and that* the *Defendant did at S. in a certain Meadow there, dig duo Foſſata, by which the Water into the Ditches did run, ſo that pro diverſis diebus he loſt the Benefit of it* for his Cattle. It was moved in Arreſt of Judgment, that he ought to have brought Treſpaſs, and not an Action upon the Caſe; for the diverting the Water is Treſpaſs; for inaſmuch as the Plaintiff intitles himſelf to the River, it is a Treſpaſs in its Nature. Holt Ch. J. ſaid the *Diverſion muſt be in the Plaintiff's own Land to make it a Treſpaſs*, and Judgment for the Defendant. Holt's Rep. 24 Mich. 8 Ann. Leveridge v. Hoskins. ——11 Mod. 257. pl. 12. S. C. ——S. C. cited by Ld. Ch. J. Raymond. 2 Ld. Raym. Rep. 1402. 1403. accordingly.

5. Action on the Caſe, *Quare Aquæductum ſuum fregit* &c. lies well, unleſs it *appears that it was broken in the Plaintiff's own Soil*, and then Treſpaſs lies. Hardr. 61. Arg. cites Paſch. 12 Car. 2. B. R. Rot. 427. Forber v. Hayes.

6. Caſe doth not lie for *breaking a Wall, in which the Plaintiff had no Property*, and which was *betwixt the Plaintiff's Houſe and an Alley or Street, and making a common Paſſage thro' the Wall*; for if it be the Plaintiff's, Treſpaſs lieth; and if it be not, this Action doth not lie; for his being diſturb'd in Profit, Gueſts, or of his Reſt, without particular Damage, as that the Plaintiff's Houſe is undermin'd or worſted; per Wind-

Windham J. to which the Court agreed, and Judgment for the Defendant. Keb. 577. pl. 38. Mich. 15 Car. 2. B. R. Hill v. Kirkman.

7. Caſe for a *Nuſance for making a Lime-Kiln, without laying it to be upon* the *Defendant's own Soil*, was held bad; becauſe if it were upon the Soil of the Plaintiff, Treſpaſs were the proper Remedy, and not Caſe, tho' a conſequential Damage, viz. the Loſs of a Water-Courſe, was laid. Arg. 12 Mod. 382. in Caſe of Mikes v. Caly.

8. Caſe was againſt a Servant for *taking away Goods, for which Toll was due*, without paying Toll, whereby the Goods were forfeited, and there it was queſtion'd whether that were Caſe or Treſpaſs; but held to be proper for Caſe, becauſe it was by a Servant who had Authority. Arg. 12 Mod. 382. in Caſe of Mikes v. Caly.

9. Caſe was brought for *entering into Waſte, and driving Cattle, whereby they were damaged*, and Judgment was arreſted; for that Treſpaſs lay, and not Caſe. Arg. 12 Mod. 382. cites Paſch. 5 W. 3. enter'd Hill. 4. Rot. 105. Thornton v. Auſtine.

10. Caſe for *cutting the Plaintiff's Corn*, and Judgment arreſted; for it ſhould have been general Treſpaſs, and if every Treſpaſs were turn'd to Caſe, the *King would loſe his Fines*. Arg. 12 Mod. 382. cites Paſch. 9 W. 3. Gill v. Darle.

11. *Caſe, for that he was Maſter of a Ship laden with Corn in ſuch a Port, ready to ſail* &c. and that the *Defendant* enter'd and *ſeiz'd the ſaid Ship, and detain'd her, per quod he was hindered in his Voyage.* Upon a Demurrer it was objected that it ſhould have been Treſpaſs, and not Caſe; but adjudged for the Plaintiff; For per Holt Ch. J. the Plaintiff has no Property in the Ship, for that is the Owner's, and he only *declares as a particular Officer*, and can only recover for his particular Loſs; but he might have brought Treſpaſs, as a Bailee of Goods may; but then he muſt have declared upon his Poſſeſſion only. 1 Salk. 10. pl. 4. Paſch. 12 W. 3. B. R. Pitts v. Gainee. Ld. Raym. Rep. 558. S. C. adjudg'd for the Plaintiff.

12. In an Action on the Caſe, for *cauſing him to be arreſted and carried to Priſon without a Cauſe*, Exception was taken, That this ought to have been Treſpaſs, and not Caſe; that a Man cannot change the Nature of the Action by laying it with a Per quod. The true Difference is this, *Treſpaſs is where there is an immediate Injury; Caſe, where the Injury is collateral.* Powel J. ſaid we muſt keep up the Difference of Actions, and it will be hard to maintain this; but if a Man, by being impriſoned, ſhould have a *Special Damage, as forfeiting a Recognizance*, or that he *could not appear* at ſuch a Day, *per quod he was damnified* &c. there it muſt be Caſe; and Powis of the ſame Opinion. Gould ſaid, This is coupled with Special Matter, and laid to be done maliciouſly; Ergo, Caſe lay. But Pengelly ſaid you may as well ſay a Man may maliciouſly aſſault and wound, and therefore Caſe lies. Adjornatur. 11 Mod. 180. Trin. 7 Ann. B. R. Bourden v. Alloway.

13. Caſe, for *cauſing the Plaintiff to be arreſted* by a Conſtable, *and falſely and maliciouſly charging her with a Felony before a Juſtice of Peace, and* cauſing her *to be committed to Bridewell, and put to hard Labour.* Per Holt Ch. J. It doth not ſet forth that he arreſted her by his own Authority, neither doth it appear to be a falſe Impriſonment, and therefore it is not an Action of Treſpaſs, but an Action upon the Caſe; and Judgment accordingly. Holt's Rep. 22. pl. 20. Trin. 7 Annæ, ... v. Slater. A Juſtice of Peace has Power by Warrant to arreſt a Man, and if he does it wrongfully, Caſe lies againſt him that maliciouſly cauſes this to be done. Arg. 11 Mod. 180.

14. Where the *Complaint is not of a bare Treſpaſs, but for ſome ſpecial Damages ſuffer'd by* the Arreſt and Impriſonment, which are *not the Conſequences* * *As* the *ſtopping a Water Courſe* is

Trespass; but if it is set forth that the *Ground was spoiled*, it is Case. Arg. Holt's Rep. 22. Trin. 7 Ann.——And see (K. c) pl. 3.

sequences of every Arrest and Imprisonment, * [or *other such Act*] Case lies. Arg. Holt's Rep. 22. in Case of .... v. Slater.

8 Mod. 272. Trin. 10 Geo. S. C. adjudged accordingly; and says the Civilians call Trespasses on the Case Actiones Injuriarum; and in the principal Case an Injury was done by Consequence of a lawful Act, and therefore this Action, being founded on a Damage resulting from such Act, is the proper Action for the Plaintiff in this Case, and not an Action of Trespass.——Holt's Rep. 22. S. P. Arg. in Case of ..... v. Slater.

15. A Person that had a Right to enter into the Backside of his Neighbour for certain Purposes, enter'd thereinto, and fix'd a Spout to his House, by which the Water from the said House was convey'd into his Neighbour's Backside, by which his said Neighbour's Buildings received great Damage. Resolved per Cur. absente Powis, That Trespass Vi & Armis would not lie, but it ought to be Case. The Distinction in Law is, where the immediate Act itself is injurious to the Plaintiff's Person, House, Land &c. and where the Act itself is not an Injury, but by a Consequence from the Act, that in the first Case Trespass lies, but not in the last; but in that the proper Remedy is Case. 2 Ld. Raym. Rep. 1399. 1402. Trin. 11 Geo. Reynolds v. Clarke.

(N. c) [Case.] For what Things it lies.

1. If the Beadle of an Hundred ought, by Virtue of his Place, to have by Prescription certain Gallons of Beer of every Brewer at a certain Price, if the Brewers will not suffer him to have it accordingly, an Action upon the Case lies. 19 R. 2. Action sur le Case, 51. adjudged.

* Br. Action sur le Case, pl. 37. cites S. C.——Fitzh. Action sur le Case, pl. 26. cites S. C.——See (K. c) pl. 2.

2. If a Man ought to have Toll upon the buying of Cattle in a Market, if one buys Cattle, and does not pay the Toll, an Action upon the Case lies for this. * 7 H. 4. 44. b. 9 H. 6. 45. b.

* Fitzh. Action sur le Case, pl. 28. cites S. C. per Skrene.——Br. Action sur le Case, pl. 42. cites S. C. accordingly, because the Plaintiff has Interest certain in the Thing; per Skrene.

So in case of *forestalling* a Market, whereby Toll is lost; per Powel J. 6 Mod. 49. Mich. 2 Ann. B. R. in Case of Ashby v. White

† S. C. cited by Wylde J. 2 Vent. 26. and allowed by Vaughan Ch. J. Ibid. 28.

‡ Br. Action sur le Case, pl. 14. cites S. C.——Fitzh. Action sur le Case, pl. 31. cites S. C. & S. P. by Bel.

|| F. N. B. 124. (E) is not clearly S. P.

3. If those that are coming to my Market are disturbed, or beat, per quod I lose my Toll, an Action upon the Case lies. * 11 H. 4. 47. b. † 9 H. 6. 46. ‡ 41 E. 3. 24. b. || Fitz. Na. Bre. 124. c.

4. So if upon a Sale in a Fair, a Stranger disturbs the Lord in taking the Toll, an Action upon the Case lies for this. 9 H. 6. 45.

Br. Action sur le Case, pl. 74. cites S. C.——Fitzh. Action sur le Case, pl. 14. cites S. C.

5. If a Man hath the Assise of Bread and Beer, Fines, Amercements, and other Matters of Frankpledge by the King's Grant, and he distrains for an Amercement, and a Stranger makes a Rescue, an Action upon the Case lies against him. 38 H. 6. 9. b.

6. If

6. If a Man diſturbs my Steward in holding my Leet, an Action upon the Caſe lies againſt him. * 38 H. 6. 16. 19 R. 2. Action upon the Caſe, 52. * Br. Action ſur le Caſe, pl. 75. cites S. C.—— Fitzh. Action ſur le Caſe, pl. 15. cites S. C——F. N. B. 94. (G) in the new Notes there (a) cites Trin. 16 E. 3. S. P.

7. If a Man, Time out of Mind, hath had a Leet, and other Court &c. within a Manor and Town, and there hath not been any Courts in the Town, if a Stranger holds a Court in the Town, and diſtrains the Tenants, and them by many Diſtreſſes does impoveriſh, per quod they cannot pay their Rents, an Action upon the Caſe lies againſt him. 13 H. 4. 11.

8. If my Tenants within a certain Seigniory ought, Time out of Mind, to go free to every Market and Fair, to ſell and buy Goods without Payment of Toll, and one takes Toll of my Tenants in his Fair or Market, an Action upon the Caſe lies againſt him. 43 E. 3. 30. Fol 107.

9. If a Man diſturbs the Servants and Tenants of a Lord in the collecting of his Tithes &c. an Action upon the Caſe lies againſt him. 19 R. 2. Action ſur le Caſe, 52.

10. Where there is damnum abſque injuria, no Action upon the Caſe lies. 11 H. 4 47. Br. Action ſur le Caſe, pl. 42. cites S. C——Fitzh. Action ſur Caſe, pl. 28. cites S. C per Hanke.——Injuria ſine damno, or damnum ſine Injuria will not bear an Action, but both muſt neceſſarily concur for that Purpoſe; for Things muſt not only be done amiſs but it muſt redound to the Prejudice of him that will bring his Action for it; per Gould J Arg. 6 Mod. 46. but Holt Ch. J. ibid. 54. ſays, he thought it impoſſible there ſhould be an Injury without Damage; for *Injury* in its Nature *imports* Damage, tho' it coſts not the Party injured a Farthing; for *Damages* do not *conſiſt* in Things pecuniary, but *in Diſturbance of Right*; If Words are ſpoke of one whoſe Reputation is ſo very undoubted that no body believes them, ſo that he loſes nothing by them, yet becauſe it is an Injury to one to be ill ſpoken of, he ſhall recover Damages; Or ſuppoſe one gives another a Cuff on the Ear, but does not hurt him, yet for the Indignity offered his Perſon Action lies; So if another rides in a Path-way in my Land, I ſhall have Action, becauſe it is an Invaſion of my Property, and an Injury to my Right.

11. As if a School be ſet up in the ſame Town where an ancient School has been Time out of Mind, by which the old School receives Damage, yet no Action upon the Caſe lies, becauſe it is lawful for a Man to teach where he pleaſes, and this is for the Eaſe of the People. * 11 H. 4. 47. adjudged. † 22 H. 6. 14. b. * Br. Action ſur le Caſe, pl. 42 cites S. C. and a School and teaching of Infants is ſpiritual Matter, per Thirn; quære inde.——S. C. cited Arg. Noy. 184——S. C. cited Arg. 2 Brownl. 143.——The ſetting up another School is damnum abſque injuria; per Twiſden J. Mod 69. Mich. 22 Car. 2. B. R. in pl. 19.——† F. N. B 95 (A) in the new Notes there (b) cites S. C. accordingly.

12. [So] if I retain a Maſter in my Houſe to inſtruct my Children, this is to the Damage of the common Maſter, yet no Action lies. 11 H. 4. 47. Fitzh. Action ſur Caſe, pl. 28. cites S. C. but S. P. does not appear.

13. So if I have a Mill, and my Neighbour builds another Mill upon his own Ground, per quod the Profit of my Mill is diminiſhed, yet no Action lies againſt him; for every one may lawfully erect a Mill upon his own Ground. 11 H. 4. 47. * 22 H. 6. 14. adjudged. 24 H. 8. Fitz. 46. * F. N. B. 95. (A) in the new Notes there (b) cites S. C.——Fitzh. Action ſur Caſe, pl. 11 cites S. C——Noy 184. Arg. cites S. C.——S. P. Br. Action ſur le Caſe, pl. 42 cites 11 H. 4. 47. but contra if the Miller diſturbs the Water to come to my Mill, there I ſhall have Action upon my Caſe; per Hank. quod non negatur, and ſo was the Uſe about 24 H. 8.——S. P. ibid. pl. 57. cites 22 H. 6. 14. and per Newton the Plaintiff has no Remedy but againſt them who ought to grind at his Mill.

Fitzh. Action ſur le Caſe, pl 11. cites S. C. but I do not obſerve S. P. there.

14. So if a Man hath a Houſe upon his own Ground by Preſcription, yet if I build a Houſe upon my own Ground next adjoining, no Action lies againſt me. 22 H. 6. 14. b.

S. P. per Newton. Br. Action ſur le Caſe, pl. 57. cites 22 H. 6. 14. —Noy. 184. Arg. S. P. and ſeems to cite S. C.

15. So if I have 100 Acres of Paſture in a Town, and before this Time no Man hath ever had any Paſture within the ſame Town, and thoſe of the Town have uſed to agiſt their Cattle in my Paſture, and another, that has Freehold within the Town, converts his arable Land into Paſture, ſo that thoſe of the Town agiſt their Cattle there, per quod this is a Damage to me, yet I cannot have any Remedy againſt him; for it is lawful for him to make the beſt Advantage he can of his own Land. 22 H. 6. 14. b.

S. P. Br Action ſur le Caſe, pl. 57. cites S. C. but contra if I receive no Damage by ſuch Means; per Newton; But per Paſton the Action lies.——Fitzh. Action ſur le Caſe, pl. 11. cites S. C and S. P. by Markham.

16. If I have had a Mill by Preſcription in my Land, if another erects a new Mill upon his own Land, if this draws away the Stream from my Mill, or ſtops it, or makes too great a Quantity of Water to run to my Mill, by which I receive Damage, ſo that my Mill cannot grind as much as it was uſed to do, I ſhall have an Action upon the Caſe againſt him. 22 H. 6. 14

See more of this at Tit. Stopping Lights. —— * For if he does, I may have Aſſiſe of Nuſance. Br. Action ſur le Caſe, pl. 57. cites 22 H. 6. 14.——Fitzh. Action ſur le Caſe, pl. 11. cites 22 H. 6. 14. S. P. by Markham. [but it is 15. a. pl. 23.]—— S. C. cited 9 Rep. 58. a. in Aldred's Caſe, and then cites Trin. 29 Eliz. B. R. Bland's Caſe——2 Le. 93. pl. 116. Arg. cites Bland v. Moſely, adjudged.

17. If I have had a Houſe by Preſcription upon my Ground, another cannot erect an Houſe upon his own Ground next adjoining thereto ſo near to it that he ſtops the Light of my Houſe. * 22 H. 6. 15. per Markham. Co. 9. *Bland's Caſe*, 58. reſolved.

Br. Action ſur le Caſe, pl. 57. cites 22 H. 6. 14. ——F. N. B. 184. (D) S. P.——S. C. cited Arg. 2 Le. 93. in pl. 116.

18. So he cannot build an Houſe upon his own Ground, ſo near my Ground as to cauſe the Rain to fall and drop upon my Houſe. 22 H. 6. 15. per Markham.

Br. Action ſur le Caſe, pl. 90. cites S. C. —— Fitzh. Action ſur le Caſe, pl. 16. cites S. C.——Kelw. 26 b. 2. a. Arg. S. P.——Ibid. 40. a. pl. 1. Mich. 17 H. 7. Anon. it was clearly agreed by all the Bar and the Court, that if I threaten to ſeiſe one as my Villein, this is no Cauſe of Action without more viz. an Act in Fact, as lying in wait to take him, or the like &c.

19. If I am a Freeman, and another ſays I am his Villain, and lies in wait to take and impriſon me, & tantis inſultibus & affraiis effecit per quod circa negotia mea &c. palam intendere &c. an Action upon the Caſe lies againſt him. 2 E. 4, 5.

Br. Action ſur le Caſe, pl. 90. cites S. C.—Fitzh. Action ſur le Caſe, pl. 16. cites S. C.

20. But if he does not allege that he in tantis inſultibus & affraiis effecit per quod circa negotia ſua &c. palam intendere &c. no Action lies. 2 E. 4, 5. b.

Fol. 108.

Fitzh. Action ſur le Caſe, pl. 21. cites S. C. & S. P. by Fairfax; for the Departure is the Cauſe of the Action, which Keble agreed.

21. If a Man menaces my Tenants at Will of Life and Member, per quod they depart from their Tenures, an Action upon the Caſe lies againſt him. 9 H. 7. 8.

But the threatning without their Departure is no Cauſe of Action. 9 H. 7. 8.

22.

22. If a Copyholder prescribes to have the Toppings of Trees growing upon his Copyhold, and the Lord cuts down the Trees, and carries away the Body of the Trees, and leaves the Toppings to the Copyholder, yet the Copyholder shall have an Action upon the Case against the Lord; for he ought to have not only the present Toppings, but also those that shall grow hereafter. Mich. 3 Jac. B. R. cited per Coke to have been so adjudged in B. R. between *Stebling and Gosnold*, which was adjudged. Mich. 40. 41 Eliz. B. R. Mo. 546 pl. 727. Stebbing v. Gosnell, S. C. adjudg'd for the Plaintiff. —Cro. E. 629. pl. 24. S. C. adjudg'd by Popham and Fenner, (absente Gawdy) but Clench doubted, because by this Means the Lord who had Interest in the Timber should never have any Profit thereof, and so lose his Inheritance, and therefore it is Reason that he take his Timber, and leave the Loppings to the Copyholder, otherwise they should never be cut down, and so the Timber decay, to the Prejudice of the Commonwealth.——S. C. cited Roll. Rep. 196, in pl. 37. by Coke Ch. J. but states it that the Copyholder shrowded the Trees first, and then the Lord cut down the Bodies, and adjudged that the Action lay; for the Shrowds are renewing annually; and Haughton and Geo. Crooke remember'd the Case.——S. P. Arg Brownl. 197.—— 2 Brownl. 149. S. P. cited by Coke Ch. J. as adjudged in one Whitehand's Case.

23. If the Lord in ancient Demesne will not hold his Court out of Malice &c. the Demandant in a Writ of Right there shall have an Action upon the Case against the Lord; for otherwise by such Means the Lord at any Time might make it Frank-fee. 11 E. 2. Action sur le Case 46.

24. But if the Custom of a Copyhold Manor be that a Copyholder for Life may name his Successor, and that the Lord ought to admit him, and a Copyholder for Life, according to the Custom names his Successor, who after the Death of the Copyholder comes to the Lord according to the Custom, and prays to admit him, and the Lord refuses to admit him, yet no Action upon the Case lies for him against the Lord, because this was but an Estate at Will at Common Law, and tho' Custom hath fixed the Estate, yet that shall not enure to such collateral Purposes as this is, adjudged. By Reports, 12 Jac. between *Ford and Hoskins*, 13 Jac. adjudged. Cro. J. 368. pl. 1. S. C. the Court held the Action lay not, and Judgment for the Defendant. —Roll Rep. 125. pl. 7. S. C. adjornatur. —Roll Rep. 195. pl. 37. S. C. adjudged per tot. Cur. against the Plaintiff.——Mo 842. pl. 1137. S. C. resolved that the Action does not lie.—— 2 Bulst. 336 S. C. adjudg'd accordingly.

25. So if a Copyholder surrenders to the Use of one, and the Lord refuses to admit him, no Action upon the Case lies against him. By Reports. 12 Jac. Roll Rep. 125. per Coke Ch. J. Arg in pl. 7. S. P. accordingly.——4 Rep. 28. b. 8. P. resolved Trin. 33 Eliz. pl. 17. in Case of Westwick v. Wyer.—— S. P. arg. Sid. 34 in pl. 2.——2 Vent. 27. S. P. by Tyrrel J.

26. So if such a Copyholder, that is to be admitted, prays the Lord to hold a Court, and he will not, yet no Action upon the Case lies against him. By Reports, 12 Jac. Roll Rep 125. Hill. 12 Jac. B. R. per Coke Ch. J. quod fuit concessum per Cur. in pl. 7.——2 Bulst. 336. S. P. accordingly by Haughton J.

27. If Cesty que Use at common Law had requested his Feoffees to make a Feoffment to J. S. and they had refused, yet no Action upon the Case lay against him, but his Remedy was in Chancery only. By Reports, 12 Jac. per Curiam. Roll Rep. 125. pl. 7. S. C. and S. P. by Coke Ch. J. quod fuit concessum per Cur.—— 2 Bulst. 337. S. C. and S. P. by Coke Ch. J.—S. P. by Tyrrel J. 2 Vent. 27.

28. If it be the Custom of a Copyhold Manor that Surrenders shall be made to one of the Tenants of the Manor, if he will not take such Surrender, Roll Rep. 126. in pl. 7. S. C. and

S. P. by Haughton J. quod fuit concessum per Coke Ch. J. Arg.

Surrender, yet no Action upon the Case lies against him. By Reports, 12 Jac.

Roll Rep. 126 S. C. and S. P. by Coke Ch. J. Arg. in pl. 7. —— 2 Bulst 336. S. C. and S. P. by Coke Ch. J. Arg.—S. P. by Tyrrel J. 2 Vent. 27.

29. But if a Man brings a Bargain and Sale to an Officer to be inroll'd, according to the Statute, and he will not inroll it within 6 Months, an Action upon the Case lies against him. By Reports, 12 Jac. per Coke.

* This should be 24 H. 8. 24. b. pl. 2. which says the Remedy was by Subpœna, or by Action on the Case against the Feoffee.

30. If Feoffees to my Use at the Common Law would not have join'd in Voucher where they might, per quod Judgment passed against them, yet I could not have an Action upon the Case against them; but my Remedy was in Chancery only; Contra 14 H. * 4. 24. b.

* Roll Rep. 125. pl. 7. S. C. and S. P. agreed per Cur. obiter. —— † This should be F. N. B. 47 (H) where Fitzherbert says, he conceives the Clerk shall have Action on the Case against the Archdeacon because the Induction is a temporal Act; but that some have said he shall have Citation in the Spiritual Court and punish him there; for perhaps he may allege a special Cause, why by the spiritual Law he ought not to be inducted, and which cannot be determined in the temporal Court; Ideo Quære.——S. C. cited Cro. J. 369. at the End of pl. 1.——Action on the Case well lies; per Doderidge J. Arg. 2 Bulst. 265. Mich. 12 Jac. cites 7 E. 4. 21. & 18 E. 4. 14. & 17. and yet he hath Remedy in the Spiritual Court.——Ibid. 266. Coke J. agreed that Case lies; for till Induction the Party cannot make a Lease nor have any of the temporal Profits of the Land, which is a Wrong, and therefore Case lies.——S. P. agreed per Cur. Obiter Roll Rep. 64. Mich. 12 Jac. in pl. 9.——S. P. affirm'd per tot. Cur. for good Law, 12 Rep. 128. and says that with this agrees 26 H. 8. 3. and that tho' it is held 38 H. 6. 14. that he shall have Remedy against the Archdeacon to punish him [in the Spiritual Court] yet saving the Opinion there, they cannot award him Damages in such Case, but he shall recover them at Common Law.— S. P. by Archer J. Arg. 2 Vent. 26.

31. If an Archdeacon will not induct a Clerk, who is admitted and instituted, an Action upon the Case lies against him for that; because he had jus ad rem, and the Church is full by Institution. * F. N. B. 46 H. † My Rep. 21 [12] Jac. per Curiam.

Cro. J. 478. pl. 12. Hunt * Fol. 109. v. Dowman S. C. and all the Court held the Action maintainable, and Judgment for the Plaintiff. —— 2 Roll Rep. 21. Hunt v. Dadvert S. C. adjudg'd accordingly.——2 Roll Rep. 312. S. P. cited by Chamberlaine J. to have been adjudged.

32. If a Man seised in Fee makes a Lease for Years, and after comes to the Land to see if any Waste be there committed, and endeavours to enter upon the Land *, but a Stranger disturbs him and will not let him enter to view the Waste, the Lessor may have an Action upon the Case against him; for the Law allows him to enter and see whether any Waste is committed, and for want thereof he may be prejudiced for want of knowing for what or when to bring his Action; and so this is damnum & injuria. Pasch. 16 Jac. B. R. between *Hunt and Todner* adjudged, the Novelty of this Action being shewed in Arrest of Judgment.

* The Sense of this does not seem very clear.

33. Mich. 10 E. 3. B. R. Rot. 27. An Action brought by the Patron against the Parson for suing in Court Christian for the Advowson of the Church, and Tithes, against the Statute, and Damage recovered to 40 l.

34. Hill. 9 E. 3. 6. Rot. 58. A Man recovers 60 Marks Damage against the Prior of Lewis for prosecuting an Excommunication in the Court Christian upon a Suit there for Rent, and the Prosecution was after a Prohibition, and something was there raised afterwards. * And there immediately after prædictus Prior convictus est pro prosecutione de transgressionibus contra pacem Regis in Curia Christianitatis, & similiter ratum est judicium.

If

35. If it be the Custom of a Parish that the Parson of the Parish ought yearly to find one Bull and one Boar, within the same Parish, for the Increase of Cattle for the Maintenance of Hospitality, and that in Consideration thereof the Parson shall have the tenth of the Increase &c. if the Parson does not find a Bull and a Boar according to the Custom, every Parishioner that receives Damage thereby by the want of Increase of his Cattle, and in Decay of his Hospitality, may have an Action upon the Case against the Parson. Trin. 39 Eliz. B. R. per Curiam. Mo. 355. 481. Trin. 36 Eliz. Yelding v. Fay adjudg'd that the Action lay. —— Cro. E. 569. pl. 4. Trin. 39 Eliz. B.R. Yielding v. Fay, adjudg'd for the Plaintiff. ——S. P. but upon Demurrer to the Declaration these Exceptions were taken, viz. That he did not shew whether the Defendant was obliged to keep them by Custom, Prescription, or otherwise; neither hath he alleged any particular Loss or Damage by his Cattle not increasing, nor that the Defendant being Rector of a Church ought to find them in Consideration of paying him Tythes; and for those Reasons the Declaration was held ill. 4 Mod. 241. Mich. 5 W. & M. in B. R. Waples v. Basset. —— Skinn. 399. pl. 33. S. C. and the Court strongly inclined that it was not good.

36. If a Parishioner sets out his Tithes of Hay duly, and requires the Parson to carry them off his Land, but he does not carry them off in a convenient time, per quod his Grass where the Hay lies is impaired by the Hay's lying upon the Grass, an Action upon the Case lies against the Parson. Mich. 13 Car. B. R. between *Chase and Ware*, per Cur. adjudg'd in a Writ of Error, and such Judgment given in Banco affirm'd accordingly. Intratur Trin. 13 Car. B. R. Rot. 564. Mich. 15 Car. B. R. between *Lee and Russel*, per Curiam. Palm. 341. Arg. cites S. P. adjudg'd in C. B. 16 Jac. Stukely v. Newman. —— Palm. 381. Arg. cites S. P. to have been adjudg'd accordingly in a Cornish Case; and Doderidge J. said he remember'd this Case and agreed to it. —— Case lies for not carrying away the Tithe-Corn in convenient Time. Noy. 51. in Dr. Bridgman's Case. —— ——S. P. per Cur. Hill. 1 Car. 1. B R. Lat. 8. Arg. ——S. P. and the Court held that the Plaintiff could not put in his Cattle and eat the Corn, for that would subvert the Foundation of his Action for the other Part, which has been often adjudg'd maintainable, and it is unreasonable that the Plaintiff himself should judge what is time convenient; and permitting him to put in his Cattle and eat all the Corn would be a much greater Loss to the Parson than what the Plaintiff hath sustain'd by the Corn's continuing on the Land; but 'tis more reasonable to allow an Action and so the Court to judge of the Reasonableness of the time, and that the Recompence be proportionable to the Loss sustain'd; and therefore Judgment was given for the Plaintiff. Ld. Raym. Rep 187. Pasch. 9 W. 3. C. B. Shapcott v. Mugford. ——Ibid 189. Arg. cites the S. P. to have been adjudg'd for the Plaintiff, Mich. 22 Car. 2. B. R. Rot. 249. Lutscombe v. Porter. —— Ld. Raym. 187. Shapcott v. Mugford.

37. But in the said last Case when the Tithes are set out, and Notice thereof given to the Parson, and he sends his Servant to carry them away, and the Parishioner then threatens the Servant and will not suffer him to carry them away, and after the Parson leaves them there a long time, to the Damage of the Grass of the Parishioner, yet the Parson is excused, if no new Request was after made to the Parson to carry them away. Mich. 15 Car. B. R. between *Lee and Russel*, adjudg'd a good Plea in Bar of the Action of the Parishioner against the Parson, no new Request being alleged, and this upon Demurrer. Intratur Trin. 15 Car. Rot. 691.

38. If a Man makes a Feoffment of certain Lands by Indenture, reserving a Way over the Land from such a Place to such a Place, tho' this Way commenced by Reservation and not by Grant or Prescription, yet if it be stopped he may have an Action upon the Case. Trin. 11 Jac. B. R. between *Chollocombe and Tucker*, adjudg'd. 2 Bulst 121. Collicum v. Tucker S. C. adjudg'd for the Plaintiff and held that the Plaintiff need not come to the Defendant and shew him that he had Occasion to make Use of the Way.

39. If an Owner suffers Beasts in *Agistment* to continue beyond their Time, Action lies. Palm. 341. Arg. cites 45 E. 3. 6.

40. Action upon the Case lies for a *Thing which lies in Feasance*, as for *burning of Goods or Deeds* &c. Br. Action sur le Case, pl. 111. cites 2 E. 6.

S. C. cited 2 Le. 93. in pl. 116. Arg. —S. C. cited Palm. 381 Arg.—S. C. cited 2 Roll Rep. 328. Arg.—Ibid. 329. S. C. cited by Doderidge J.——S. C. cited Godb. 329. in pl. 424. Arg. and Ibid. by Doderidge J. 331.

41. The Plaintiff *ſold certain Truſſes of Hay* to the Defendant *in ſuch a Meadow, to be carried away within ſuch a Time*; but the Defendant *let it lie there till it putrified the Meadow*, ſo that the Plaintiff loſt the Profit of the Meadow for a long Time, and thereupon brought Action on the Caſe againſt the Defendant, and adjudged maintainable. Fitzh. Action ſur le Caſe, pl. 48. cites Hill. 13 H. 4.

42. If I have a *Way over your Land*, and you make *a Houſe a-thwart the Way*, I ſhall have Aſſiſe of Nuſance; but if a *Stranger* makes it, or a Trench &c. Action upon the Caſe lies. Br. Action ſur le Caſe, pl. 57. cites 22 H. 6. 14. Per Markham.

F. N. B. 94. (D) in the new Notes there (a) cites S. C. and 21 H. 6. 55.

43. If a *Smith refuſes to ſhoe my Horſe*, Action on the Caſe lies againſt him. Agreed by the whole Court. Keilw. 50. a. pl. 4. Paſch. 18 H. 7. Anon.

—— Ld. Raym. Rep. 654 S. P. by Holt Ch. J. For if a Man takes upon him a publick Employment, he is bound to ſerve the Publick as far as the Employment extends, and for Refuſal an Action lies.

44. Action upon the Caſe lies, *where no other Remedy is provided* &c. Br. Action ſur le Caſe, pl 64. cites 14 H. 8. 31. Per Brooke J.

45. A *Feoffment* was made *to B. to the Intent that he ſhould convey* the Lands *to C.* and afterwards *B. ſold the Lands to J. S. and refuſed to convey it to C.* whereupon C. brought an Action on the Caſe. Wray Ch. J. and Gawdy held that the Action lies; for a Truſt to convey the Land to another is a good Conſideration in Equity; but Shute J. held e contra. Godb. 64. pl. 77. Mich. 28 & 29 Eliz. B. R. Megot's Caſe.

S. P. by Haughton J. quod fuit conceſſum, per Coke & Doderidge. Arg. Roll Rep. 196.

46. If *one has the Nomination*, and *another the Preſentation* to an Advowſon, and *he that has the Preſentation will not preſent* the Party nominated, no Action lies; per Cur. obiter. Mo. 842. Paſch. 13 Jac. in pl. 1137.

S. P. 2 Bulſt. 338. by Doderidge J. Arg.——S. P. 2 Vent. 27. Per Tyrrel J.——Roll Rep. 196. in pl. 37. S. P. by Doderidge J. and agreed by Coke Ch. J.

47. If a *Feoffor ſeals* a Deed of Feoffment, and afterwards *refuſes to make Livery*, no Action lies; per Cur. obiter. Mo. 842. Paſch. 13 Jac. in pl. 1137.

S. P. 2 Bulſt. 338. by Haughton J. Arg.——S. P. by Tyrrel J. 2 Vent. 27.

48. If the *Tenant will not attorn* to the Grant of a Reverſion en Pais, no Action lies. Mo. 842. per Cur. obiter. Paſch. 13 Jac. in pl. 1137.

49. A. was ſeiſed of a Houſe newly built, and B. was ſeiſed of a Houſe next adjoining, and B. in *digging a Cellar* ſo near the Houſe of A. that he undermined it, by reaſon whereof *Part of A.'s Houſe fell into the Hole ſo digg'd*, Action on the Caſe lies for A. Adjudged. Roll Rep. 430. pl. 24. Mich. 14 Jac. B. R. Slingsby v. Barnard.

Palm. 341. 381. Wiſeman v. Denham, S. C. but no Judgment.—— 2 Roll Rep. 328. S. C. adjornatur ——Godb. 329. pl. 424. S. C. adjornatur. But the Reporter ſays, that he had heard it was afterwards adjudged for the Plaintiff.

50. Caſe, for that there is a *Cuſtom that every Pariſhioner ſhall pay to the Parſon the 15th Cheeſe, and* that at the Time *he tender'd them* to the *Parſon*, who *refuſed them, and let them remain in his Houſe, without taking them away.* Ley Ch. J. and Haughton held, that in this Caſe the Action well lies; but Doderidge e contra. Ley 68. 69. Trin. 20 Jac. Anon.

51. Case against the Parson, for *not carrying away his Tythe-Cheese*, amounting to so many, and which he offered to him, but he let them bide half a Year in the Plaintiff's House against his Will, to his Damage &c. The Court seemed to agree that Action lay; but on some Doubt as to the Place of Tender, as it was pleaded, (viz. That it was at L. which was the Parish, and not said to be at the House) and the Action not being favour'd by the Court, the Judgment was stay'd. Palm. 341. Hill. 20 Jac. B. R. Wiseman v. Denham.

Palm. 381. Trin. 21 Jac. B. R. S. C. Lea Ch. J. and Haughton held the Action maintainable, because the Property was alter'd by the Tender, and then the Continuance in his House was a Damage; but Doderidge seem'd e contra. And as to the Pleading, Lea thought the Tender should be intended at the House; but Doderidge and Haughton e contra. No Judgment was given.——2 Roll Rep. 328. S. C. adjornatur.——Godb. 329. pl. 424. S. C. and Lea and Haughton held the Action lay; but Doderidge e contra. And as to the Pleading and Intendment, Ley held it good enough; but Doderidge and Haughton e contra. The Reporter adds, that he had heard that Judgment was afterwards given for the Plaintiff———Ley's Rep. 69. 70. Anon. S. C. accordingly; but no Judgment mention'd.——S. C. cited Noy 7. 31.

52. H. obtained a *Judgment* in Debt *against A. as Executor*, and takes out a Fi. Fa. but before the Sheriff could execute it, *A. secrete & fraudulenter sells, removes, and disposes of all the Testator's Goods, so that the Sheriff is forced to return Nulla Bona* &c. An Action upon the *Case lies against A.* For the Sheriff could not return a Devastavit; for he could not tell what became of the Goods, nor can the Plaintiff have Remedy by any other Action, per Ley Ch. J. to which Doderidge agreed; but Haughton e contra, & adjornatur. Godb. 284. pl. 408. Pasch. 21 Jac. B. R. Yates v. Alexander.

2 Roll Rep. 292 S. C. accordingly.

53. If a Man seised of Land in Fee *contracts to make a Lease for Years, and to deliver quiet Possession*, and a *Stranger disseises him*, he may have Action on the Case, shewing this Special Disturbance; per Ley Ch. J. 2 Roll Rep. 354. Trin. 21 Jac. B. R. Per Ley Ch. J. obiter.

54. Case for *killing Cattle infected with the Murrain, and throwing the Entrails into the Plaintiff's Field, per quod several Beasts of the Plaintiff's died*; adjudged for the Plaintiff, and that this Declaration was certain enough. All. 22. Mich. 23 Car. B. R. Lodge v. Weeden.

Sty. 50 S. C. adjudged for the Plaintiff Nisi &c.

55. Whenever there is *Malice and Damage* a Man may have Action on the Case Arg. 11 Mod. cites * 3 Keb. 753. and Vent. 348. Trin. 32 Car. 2. Anon.

* It seems that it should be 2 Keb. 753 Stowers v. Dennington.——But Holt Ch. J. said he was not satisfied with this Case. 11 Mod. 74. Pasch. 5 Ann B. R.

(O. c) Spiritual.

Fol. 110.

See (N. c) pl. 31.

1. **If A. and his Predecessors have** used Time out of Mind to find a Chaplain to sing Divine Service, **and to perform the Sacrament and Sacramentals in the Chapel of B. within the Manor of D.** for B. his Servants and Family, **and he** does not find **a Chaplain according to the Custom, B. may have an Action upon the Case against him.** * 22 H. 6. 46. b. Co. 5. Williams 73.

Fitzh. Action sur le Case, pl. 12. cites S. C. ——Br. Jurisdiction, pl. 43. cites 22 H. 6. 52 S. P. ——Br. Action sur le Case, pl. 61. cites S. C. and S. P. accordingly, and that the *Defendant being required had refused, ad damnum* &c. Markham said this is Rent-Service, and the Plaintiff may distrain; & non allocatur; and a good Count, tho' the *Plaintiff did not shew Seisin in himself, nor in his Ancestors*, and notwithstanding that the Plaintiff *did not say that he was there when the Defendant refused*; but because the Plaintiff *did not count what 4 Days in Lent, nor what Days after Lent the Service should be done*, the Writ was abated, and the Plaintiff brought other Writ, and alleged all in certain. It was objected, that before the Statute the Plaintiff's Ancestor enfeoff'd the Defendant's Predecessor of such Land to

to find a Chaplain ut supra, by which the Plaintiff may *have Cessavit*, and not this Writ; Judgment of the Writ; & non allocatur; because he did not *traverse the Prescription*, and by this way he may find 2 Chaplains; whereupon he traversed the Prescription, and the others e contra. Br. Action sur le Case, pl. 61 cites 22 H. 6. 40 ——5 Rep. 73. a. Mich. 34 & 35 Eliz. B. R. Williams v. Jones.—— S. C. cited Arg. Litt. Rep. 95. the Services being to be performed in his private Chapel, and that with this accords Mich. 11 E. 4. Rot. 262. where Littleton, then a Judge, brought an Action against the Abbot of Hull in Yorkshire, for not finding a Chaplain to celebrate Divine Service in a Chaple within his Manor, and prescribed that he and all those whose Estate he had in the Manor &c. and recovered against the Abbot.

S. C. cited Cro. E. 664. in pl. 14.

2. If the Vicar of B. hath used Time out of Mind, either by himself or another Chaplain, to celebrate Divine Service in the Chapel of D. within the Manor of S. which is within the Parish of B. every Sunday and Holy-day throughout the Year, before the Noon of the same Day, and to administer the Sacrament to the Lord of the said Manor of S. his Men, Tenants and Servants within the Precinct of the same Manor inhabiting and commorant, and the Vicar does not perform it, yet the Lord shall not have an Action upon the Case against him for this, but he ought to sue him in the Spiritual Court, to compel him to perform it; for if the Lord might have this Action, then might every Tenant of the Manor have the same Action, of which perhaps there are many, and so there should be an infinite Number of Actions for one Default, for this is not a private Chaple as it is in 22 H. 6. Co. 5. *Williams's* Case 72, resolved.

This belongs not to this Head.

3. If the Inhabitants of a Town have by Custom had a Watering-place for their Cattle, if this be stopp'd by another, any Inhabitant of the Town may have an Action upon the Case against him that stops it, for otherwise he should be without Remedy, in as much as such Nuisance is not presentable in a Leet or Turn. Co. Litt. a Case cited to have been adjudg'd so between *Westbury and Powel* for the Inhabitants of Southwark, in B. R.

S. C. cited Raym. 226. Arg.

4. If a Man be *excommunicated*, and *offers to* obey and *perform the Sentence, and the Bishop refuses to accept it, and to assoile him*, he shall have a Writ to the Bishop, requiring him, upon the Performance of the Sentence, to assoile him &c. and the reason thereof is, for that by the Excommunication the Party is disabled to sue any Action, or to have any Remedy for any Wrong done unto him, so long as he shall remain excommunicate. And also the Party grieved may have his Action upon his Case against the Bishop, in like Manner as he may when the Bishop doth *excommunicate him for a Matter which belongeth not to ecclesiastical Conusance.* 2 Init. 623.

5. For a *Non-feasance* of a spiritual Matter, no Action on the Case lies; but otherwise it is where the Party receives a Wrong; but be it for a *Mis-feasance*, or a Non-feasance, if *no Damage* comes to the Party by it, no Action on the Case lies for it; per Coke Ch. J. 2 Bulst. 266. Mich. 12 Jac. in the Case of Pool v. Godfrey.

Keb. 947. pl. 9. Hill. 17 & 18 Car. 2. B. R. in Case of Sir Andrew Henly v. Dr. Burstow, says the Court agreed that an Action on the Case lay for refusing the Sacrament, because by the Statute of 1 Eliz. cap. the Party is bound to receive on a Penalty.

6. An Action on the Case was brought for refusing to *admit A.* to the *Sacrament.* Judgment was staid for a Fault in the Pleadings; but the Court delivered no Opinion as to the Gist of the Action. Sid. 34. pl. 2. Pasch. 13 Car. 2. C. B. Clovell v. Cardinall.

Raym. 23. S. C. adjudged for the Defendant nisi &c. —Keb. 116. pl. 20. S. C. adjudged for the Defendant, nisi.

7. Action on the Case does not lie *for a Legacy*, but the Parties ought to sue for it in the Spiritual Court, and tho' such Actions were lately [viz. in the Time of Cromwell's Rebellion] allowed, yet it was only propter Necessitatem least there should be a Failure of Justice, there being then no Spiritual Courts; resolved per tot. Cur. Sid. 45. pl. 4. Mich. 13 Car. 2. B. R. Nicholson v. Shirman.

8. Caſe *by a Parſon for Dilapidations* againſt his Predeceſſor who had accepted another Benefice, and left the Houſes out of Repair, and *ſet forth, that by the Cuſtom of the Realm he ought to pay to the Succeſſor tantas denariorum ſummas as are ſufficient ad reparand', and that the Repairs amount to ſo much* &c. It was moved in Arreſt of Judgment that this Action does not lie, and of that Opinion was Pollexfen Ch. J. who tried the Cauſe, and was of the ſame Opinion now, becauſe it was *merely ſuable in the Eccleſiaſtical Court*, and though the Caſe of **Day v. Hollington** was cited as adjudged, Mich. 3 Jac. 2. C. B. for the Plaintiff on a Demurrer, yet the Court now inclined to Pollexfen's Opinion, but the Caſe being in the Paper to be argued again, and Pollexfen and Ventris dying in the mean time, and the Caſe being argued again before Powell and Rooksby J. they gave Judgment for the Plaintiff. 3 Lev. 268. Paſch. 2 W. & M. in C. B. Jones v. Hill. Carth. 224. Paſch. 4 W. & M. in C. B. S. C. and after long Debate the Plaintiff had Judgment.—S. P. upon a *Reſignation made by the Predeceſſor*, but it being moved in Arreſt of Judgment, that the Reſignation was *alleged too generally quod reſignaſſet, without ſaying in manus Epiſcopi* as it ought to be, and without which it does not appear that the Plaintiff is legal Succeſſor, and for that Reaſon the Declaration was held ill, notwithſtanding it ſet forth that *Poſtea the Plaintiff was preſented* &c. *et fuit legitimus & proximus Succeſſor* &c. whereupon the Plaintiff for a ſmall Matter compounded the Matter with the Defendant Lutw. 115. Mich. 12 W. 3. Reynolds v. Hewett.

(P. c) In Nature of a * Conſpiracy. [*And Pleadings.*] [*And in what this Action differs from Conſpiracy.*]

*If a Writ of Conſpiracy be brought againſt 2, then it ſhall be properly *called a Writ of Conſpiracy*; but if it be brought againſt one Perſon only,

1. **If in an Iſſue between two a Stranger** gives falſe Evidence **againſt one**, per quod the Verdict paſſes **againſt him, yet no Conſpiracy lies againſt him, becauſe that which is given in Evidence is** not upon Record. 39 E. 3. 13. **adjudged.**

then it is but *an Action on the Caſe* upon the Falſity and Diſceit done, becauſe one Perſon cannot conſpire with himſelf. F. N. B. 116. (L.)

In a Writ of Conſpiracy it muſt be *between* 2, but in an *Action on the Caſe* it is otherwiſe. Arg. 2 Show. 50. ſaid this Difference has often been allowed in this Court.

The *Difference* between *Caſe and Conſpiracy* is, that it is only properly an Action of Conſpiracy where Indictment is for Treaſon or Felony, and cites 2 Inſt. 562. and therefore if ſuch Action be brought againſt 2, and 1 only is found guilty, no Judgment can be given; for this is properly a Conſpiracy, it being to indict a Man for a *criminal Matter*; but where it is only to indict a Man for a *Miſdemeanor*, tho' the Action be againſt 2, and 1 only is found guilty, yet Judgment ſhall be againſt him as in the Caſe of Treſpaſs; for really it is an Action on the Caſe, and not an Action of Conſpiracy; Per Holt Ch. J. in delivering the Opinion of the Court. 5 Mod. 407, 408. Paſch. 9 W. 3 Roberts v. Savill ——All other Caſes of Conſpiracy mentioned in the old Books were but Actions on the Caſe, and not properly Writs of Conſpiracy; per Holt Ch. J. Carth. 417. S. C.——12 Mod. 209. S. C. & S. P.

2. **If a Man brings Action upon the Caſe in nature of a Conſpiracy, and that he** maliciouſly procured him to be indicted **of an Offence, and proſecuted till ſuit legitimo modo acquietatus, if the** Indictment was not good, **the Action does not lie, for he** was not legitimo modo acquietatus; **and this Action is** all one with a Conſpiracy **as to this. Hill. 8 Car. B. R. in *Hunt and Line's* Caſe reſolved per Curiam.** If one be *indicted of Felony*, and the *Judgment* [*Indictment*] *is inſufficient*, but he takes not Advantage of it, but *pleads the General Iſſue*, *and is acquitted*, he ſhall never after have a Writ

3. As **in an Action upon the Caſe, if the Plaintiff declares that the Defendant** falſely and maliciouſly procured him to be indicted for Deceit, in the Sale to him of one ſilk Stocking, (**and the Word** Pair **is** omitted **between the Word one and Silk**) **after Verdict for the Plaintiff, adjudged that the Action does no lie, becauſe the** Indict-

of Conſpiracy &c per Coke; Arg. Le. 279. in pl 377. cites 9 E 4 12. by Littleton.

ment was not good, by reaſon of the Omiſſion of the Word Pair. Hill. 8 Car. between *Hunt and Line*, per Curiam adjudged.

It has been often allow'd in B R. that in Conſpiracy it muſt be alleged, that the Party was *legitimo acquietatus*, and ſhew that it was a fair Acquittal; but Caſe will lie for ſuch a malicious Proſecution where the Jury find an *Ignoramus* &c. and Judgment for the Plaintiff. 2 Show. 50. pl 37. Paſch. 31 Car. 2. B. R. Pollard v. Evans & al'.

In Action on the Caſe for maliciouſly procuring J. S. to be indicted for exerciſing the *Trade of a Badger without Licence*, per quod he was put to great Expence, (but the Iudictment was inſufficient.) It was reſolved, per Parker Ch. J. and the whole Court upon great Conſideration, that there was *no Reaſon for this Diverſity between a malicious Proſecution on a good Indictment, and on a bad one*, and that this Action lies as well for *Damage by Expence*, as by Scandal or Impriſonment, *tho' the Indictment be inſufficient.* 1 Salk. 15. Marg. cites 12 Annæ B. R Jones v. Gwynn ——— 10 Mod. 148. 149. S. C. Hill. 11 Ann. B. R. the Court were of Opinion that ſuch Diverſity was good; but ibid. 217. Hill. 12 Ann. Parker Ch. J. in delivering the Opinion of the Court, ſaid that his Opinion at firſt was, that where the Indictment was neither ſcandalous nor ſufficient, this Action would not lie, but that upon further Conſideration he had charged his Mind; for Impriſonment, Vexation and Expence, are the ſame upon a groundleſs and inſufficient Indictment as upon a good one.

Fol. 111.

4. In an Action upon the Caſe in Nature of a Conſpiracy againſt A. and B. his Wife, for that they maliciouſly conſpired to indict, and did indict him accordingly for the Stealing of a Ruff, Anglice a Woman's Ruff de bonis & catalis de B. the Wife, and upon Not Guilty pleaded a Verdict was found for the Plaintiff, though a Woman being a Feme-Covert can have no Goods, yet after a Verdict it ſhall be intended to have been as it might be, ſcilicet, that this was the Goods of the Wife dum ſola fuit, and that the Stealing was then, and not when ſhe was Covert. Hill. 9 Car. B. R. between *Skinner and Parker*, and Mary his Wife, in Camera Scaccarii in a Writ of Error per Curiam adjudged, and the firſt Judgment affirmed accordingly. Trin. 8 Car. Rot.

If an Action upon the Caſe be brought againſt three, for that they conſpiratione inter eos habita maliciouſly and falſely did accuſe the Plaintiff of a certain Felony, and did procure him to be bound to the Aſſizes, and did there prefer a Bill of Indictment againſt him, of which an Ignoramus was found, and two of the Defendants plead Not Guilty, and the third juſtifies, and they who pleaded Not Guilty are found Not Guilty, and the Iſſue as to him who juſtified is found for the Plaintiff, the Plaintiff ſhall have Judgment; for this Action upon the Caſe differs from a Writ of Conſpiracy. Mich. 9 Car. B. R. between *Palke and Dunning*, adjudged per Curiam, this being moved in Arreſt of Judgment; but after Judgment was ſtaid per Curiam, for another Exception, and after the Parties agreed, and ſo no Judgment was entered. Intratur. Trin. 9 Car. Rot.

6. In an Action upon the Caſe, if the Plaintiff declares that the Defendant did procure him to be brought before J. S. a Juſtice of Peace, and there accuſed him for the ſtealing of a Bull de homine ignoto; and after Examination the Juſtice, as much as in him lay, diſcharged him, and after the Defendant procured him to be brought before J. D. another Juſtice, and there accuſed him of the ſame Felony, and maliciouſly procured him to be bound by the ſaid Juſtice to anſwer this at the next Aſſiſes; at which Aſſiſes he appeared, and the Defendant falſo & malitioſe ambiit & conatus fuit to indict him of the ſaid Felony, the Action does not lie upon this Declaration, becauſe all that is laid to be done, beſides the laſt Part of the Endeavour, is not laid to have been done falſo & malitioſe, but only to be done ordinarily by legal Proceſs; and tho' the Procurement of him to be bound to the next Aſſiſes is laid to have been done maliciouſly, yet this is not laid to have been done falſely; and that which is laid in the End, that he ambiit & conatus fuit falſo & malitioſe to indict him, this is not any Act done, but an Endeavour only, for which no

Action

Action lies. Pasch. 11 Car. B. R. between *Palke and Dunning*, per Curiam, resolved after a Verdict for the Plaintiff, and after Judgment for him, and this staid, and a Supersedeas granted.

7. If A. and B. prefer a Bill of Indictment of Felony against B. [D.] before the Justices of Gaol-Delivery to the Grand Inquest, by Conspiracy before-hand had, and in an Action upon the Case, in nature of a Conspiracy, for this malicious Prosecution, if the Plaintiff does not aver that he was then in the Gaol, or that the said Justices had Power ad audiend' & terminand' felonias, yet it seems the Action lies; for tho' they had not Power to take his Indictment, yet this is a great Slander and Defamation. Mich. 9 Car. B. R. between *Palke and Dunning*, after a Verdict for the Plaintiff upon such a Declaration, this Matter being moved in Arrest of Judgment, and the Postea staid per Curiam; and the Court seemed to incline that the Declaration was not good; but after the Parties agreed, and so no Judgment was given. Trin. 9 Car. Rot.

8. In an Action upon the Case, if the Plaintiff declares that the Defendant A. being a Woman, to the Intent to defame him &c. and to hinder his Marriage with any Woman, exhibited quendam famosum & scandalosum Libellum in the Consistory of Norwich against the Plaintiff, in which it was contained, That the Plaintiff did often in the Night resort to her, under Colour of being a Suitor to her, and lay with her, and had a Child by her, and after falso & malitiose publish'd and affirmed all the said Matter, per quod all honest Persons, Deum præ oculis habentes, have refused, and yet do refuse to give any of their Daughters or Relations in Marriage to him; and upon Not Guilty pleaded, the Jury found a Special Verdict, scilicet, That the Defendant did prefer the said Libel; and that after, at the General Sessions of the Peace, the Defendant being examined in open Sessions, who was the Father of the said Child, on her Body out of Wedlock begotten, She said and affirmed, that the Plaintiff was the Father of the said Child, and the Jury find that the Defendant said the Words of the Plaintiff falso & injuriose, and that by reason thereof all honest Persons, Deum præ oculis habentes, have refused, hucusque, to give in Marriage to the Plaintiff any of their Daughters or Relations. In this Case this Matter found is not sufficient to maintain the Action; for the Loss of his Marriage is too generally laid, inasmuch as he does not mention any Communication of Marriage with any Woman, or Loss of Marriage with any particular Woman; and it is not alleged or found that the Libel was preferr'd falso & malitiose, but only a legal Proceeding in the Spiritual Court, for which no Action lies; and the Finding of the Jury that she said before the Justices that he was the Father of the Child, and that she said it falso & injuriose, will not maintain the Action; because every Prosecution, tho' without Malice, if it be false is injurious, and yet no Action lies, and this is none of the Matter mentioned in the Declaration. Mich. 10 Car. in Camera Scaccarii, between *Norman and Symons*, adjudged, and the Judgment given in B. R. e contra reversed per Curiam in a Writ of Error.

Fol. 112.

See (D a) pl. 12. S. C.

9. An Action upon the Case lies against Church-wardens, for that they falsely and maliciously, to the Intent to draw the Plaintiff within the Censures of the Ecclesiastical Court for Adultery, presented him there, upon a Fame of his living in Adultery with A. S. Pasch. 16 Car. B. R. between *Damont Ruddock and Sherman*, adjudged per Curiam, this being moved in Arrest of Judgment; and though the Declaration was that they two conspired to do this, and the one found Guilty, and the other Not Guilty, yet this being but an Action upon the Case the Action lies, and adjudged accordingly; and tho'

S. C. cited by Holt Ch. J. in delivering the Opinion of the Court. 5 Mod. 409. Pasch. 10 W. 3.

it

it was alleged that they made the Presentment before the Archdeacon of Sudbury, and did not aver that it was within the Jurisdiction of the Archdeacon, yet the Action lies; for tho' it is not within his Jurisdiction, yet the Vexation is the greater.

Br. Conspiracy, pl 25. cites S. C. — Br. Bill, pl. 17. cites S.C

10. A Writ of Conspiracy lies for him that is indicted of a common Trespass, and acquitted, notwithstanding it was not of Felony. 3 Ass. 13. Adjudged.

—S. P. Pasch. 3 E. 3. 19. a. pl. 34. For the Party is as much damaged by Imprisonment in Case of Trespass as of Felony, tho' not in so great Peril; and the Law wills in every Case where a Man is damag'd, that he have Remedy without regard to the Quantity of the Damages ———Raym. 176. Arg. says that before the Statute 33 E. 1. of Conspirators, an Action of Conspiracy lay only for Indictments of Treason or Felony; but by this Statute it lies for Trespass, and so against one only, and cites Trin. 11 H. 7. 25. [26. a] pl. 7. [Per Pairfax.]——S. P. Arg. Vent. 18. ——S. C. cited Mod. 52.———Vent. 86. Trin. 22 Car. 2. B. R. Arg. says it has been lately held that no Action will lie for an Indictment of Trespass, tho' false.

Case for *indicting* him of a *common Trespass*, of which he was acquitted. The Ch. J. held the Action will lie for the Charges and Expences in defending the Prosecution, which the Acquittal proves to be false, and the indicting him proves to be malicious; for if he had intended any thing for his own Benefit or Recompence, he might have brought a Civil Action; and then, if he had been found Not Guilty, he would have had his Costs allowed. *Though* the Prosecution be for a Trespass, for which *there is a probable Cause, yet after Acquittal it shall be accounted malicious*; The Difference only is where the Indictment is for a criminal Matter; but where it is for such a Thing for which a Civil Action will lie, the Party can have no Reason to prosecute an Indictment; it is only to put the Defendant to Charges, and to make him pay Fees to the Clerk of the Assises 2 Mod. 306 Pasch. 30 Car 2. in C. B. Anon.——— Ld Raym. Rep 381. S P. cited by Holt Ch J. as adjudg'd Hill. 34 & 35 Car. 2. B. R. in Shutter's Case, and in the Case of Dobbins v. Sir Richard Newdigate, at the End of the Reign of King Charles II.

But if A. prefers a Bill of Indictment against B. for a common Barretor, and A. is sworn before a Justice of Peace that the Matter of the Bill is true, and the Jury find against B. and he brings Case in nature of a Conspiracy, pretending that by reason of A's Oath the Jury found the Indictment against him, the Action does not lie; per tot. Cur. clearly, and Judgment for the Defendant. Bulst. 185 Pasch. 10 Jac. Willins v. Fletcher.———And in the above Case it was said, Arg. that in a like Case it was adjudg'd lately, in Case of Porter v. Griffith, in this Court, that such Action would not lie; for then no Man would dare complain, if thereby he should be liable to an Action; and if a Juror or a Witness come in upon his Oath, Case lies against him for this.

11. If A. causes B. to be indicted for a common Barretor, upon which Indictment B. is acquitted, he may have an Action upon the Case against A. Mich. 10 Jac. B. R. between *Messenger and Read*, admitted.

12. So if a Man maliciously causes another to be indicted for a common Barretor without Colour, tho' he be not acquitted, yet an Action lies. Vide Mich. 10 Jac. B. R.

† In Case in nature of Conspiracy, * Fol. 113. for procuring one to be *indicted of Treason*, it was insisted that every Man is bound to discover Treason, and ought not to conceal it for the least Time, because it is against the State of the Commonwealth Coke Ch. J. conceived that the Action lies not; and the Court said they would well advise whether such Action lies, and stay'd Judgment Quousque. And says no Judgment was ever given. Cro. J. 357. pl. 16. Mich. 12 Jac B. R. Lovet v. Falkner.———2 Bulst. 270. S. C. The Court inclined to be all clear of Opinion, that no Action lies in this Case; but for a Fault in the Declaration, and for that Cause only, the Judgment was Quod querens nil capiat per Billam.——Roll Rep. 109. pl. 49. S C. and Coke, Doderidge, and Haughton thought that no Action lies, but no Judgment appears.———S. C. cited 2 Roll Rep. 237. Arg. and says it was adjudged 12 Jac. that it does not lie, because it is dangerous to the Commonwealth.

13. So if a Man procures another, falsely and maliciously, to be indicted upon the Statute for a Recusant, by which he should be made a Traytor &c. yet no Action upon the Case lies against him; for no * Conspiracy in such Case lay against 2, for Treason is secret in the Mind, and where no Conspiracy lies against 2, no Action upon the Case lies against one. Mich. 12 Jac. B. R. between † *Lovet and Fawkner*, per Curiam, tho' this be Treason by Statute, and not by Common Law, the which intratur Mich. 11 Jac. Rot. 464. Mich. 20 Jac. B. R. between ‡ *Smith and Crashaw*, adjudged in Arrest, where it was for Treason in Words; and the same Case was after adjudged accordingly between the same Parties in a new Action, though it was there laid that it was done falsa Conspiratione præhabita.

monwealth. But Ibid. 258. Arg. cites S. C. as ſhewn that Judgment was never given, as appear'd by the Roll.——Ibid. 260. Doderidge J. ſaid he thought the Judgment was ſtay'd for Miſrecital of the Statute, on which the Action was founded.

‡ 2 Roll Rep. 236. 237. S. C. held by Chamberlain J. that it did not lie; but Haughton J. e contra. ——Ibid 258 S. C. The Indictment was found Ignoramus. [See 260. by Doderidge.] The Ch. J. held that Caſe does not lie in nature of Conſpiracy, for indicting another of High Treaſon. Haughton J. held that if the Malice be proved, and the Party acquitted, Conſpiracy would lie. Doderidge J. took it, that when either Caſe or Conſpiracy is brought for accuſing another for traiterous Words, he may by Plea diſcharge himſelf, as to ſay that he heard the Plaintiff ſpeak ſuch Words, and he, as his Duty was, reveal'd it, and the Juſtices cauſed him to be indicted. But when he *pleads the General Iſſue*, as in this Caſe, then, if the Party was indicted, and found Not Guilty, the Suborner is puniſhable in this Action; but here, it being found Ignoramus, is no Acquittal by Verdict, but is ſtill ſubject to another Indictment.———Palm. 315. S. C. ſtates the Bill found Ignoramus; and by 3 Juſtices (abſente Chamberlaine) the Judgment was arreſted.———Cro. C. 15. pl. 6. Mich. 1 Car. B. R. the S. C. Reſolved after divers Motions that the Action lies; for it being alleg'd to be falſely and maliciouſly, and by Conſpiracy exhibited, and this being found by Verdict, it ought to be puniſhable, otherwiſe none would be ſafe. All the Judges delivered their Opinions ſeriatim, and they gave Judgment for the Plaintiff.———Lat. 79. S. C. Paſch. 1 Car. adjudg'd that the Action was maintainable.———2 Bulſt. 271. 272. S. C. cited as adjudg'd Mich. 1 Car. B. R. by all the Judges for the Plaintiff. ——Jo. 93. pl. 6. Hill. 1 Car. B. R. S. C. adjudged for the Plaintiff.

14. But **Paſch. 1 Car. between the ſame Parties, ſcilicet,** * *Smith, Plaintiff, and Crawſhaw, Spurle, and Ward, Defendants,* **per Curiam, an Action lies, where** laid that they maliciouſly, and by Conſpiracy among them before-hand **had,** preferr'd a Bill of Indictment **againſt him,** for ſpeaking treaſonable Words, **and this found by Verdict, and after this Matter moved in Arreſt of Judgment, the which is entered Trin. 21 Jac. B. R. Rot. 651. and this was after, ſcilicet, Mich. 1 Car. at Reading Term. Adjudged per totam Curiam, that the Action lies.** * See pl. 13. S. C.

15. A Man *recovered Damages*, and took Execution by *Elegit*, and *E. by Conſpiracy cauſed the Jury to extend the Land too low, and cauſed them to find that the Defendant had more Land than he had in Fact, ſo that the Plaintiff, who recovered, had all the Land of the Defendant in Execution, by Name of the Moiety*; and yet becauſe it is by Verdict that it is ſo extended, therefore Conſpiracy upon the Caſe does not lie againſt the Offender who cauſed it; by Award. Br. Action ſur le Caſe, pl. 81. cites 27 Aſſ. 73.

16. Conſpiracy, in Nature of Action upon the Caſe, was brought againſt *three*, who *conſpired to make the Plaintiff make one of them his Attorney, by which he ſhould plead as they pleaſed, and ſo to cauſe the Plaintiff to be found a Villein to one of the Defendants* in another County, where the Defendant had many Friends, and the Plaintiff was a Stranger, and this was put in Ure accordingly. The Writ of Conſpiracy may be brought in the County where the Conſpiracy was. See Br. Conſpiracy, pl. 6. cites 42 E. 3. 14. and Br. Action ſur le Caſe, pl. 16. cites S. C. and Br. Lieu &c. pl. 12. cites S. C. Br. Conſpiracy, pl. 8. cites S. C.

17. *A. complained to J. S. a Juſtice of Peace, that B. had ſtolen his Hogs*, whereupon *he iſſued out his Warrant, and A. was brought before him and examined, and bound over to Seſſions*, where he appeared; but upon Proclamation made, That if any one would inform againſt the Plaintiff &c. *none came to give Evidence againſt A.* and ſo he was diſcharged. In Action for this, brought by A. he had Judgment. 3 Le. 101. pl. 146. Paſch. 26 Eliz. B. R. Fuller v. Cook.

18. The Court took a *Difference* where one, whoſe Goods are ſtolen, comes to a Juſtice of Peace, and ſhews him the Matter, and *prays that the Matter be examined, and* that *ſuch a one is examined* upon it; here in this Caſe no Action lieth. But if ſuch a Perſon in ſuch Caſe will *expreſsly ſay, that ſuch a one hath ſtolen* &c. *and procures a Warrant* from a Juſtice of Peace, upon ſuch Surmiſe to arreſt the Party, upon ſuch Matter an Action upon the Caſe will lie. 3 Le. 101. pl. 146. Paſch. 26 Eliz. B. R. in Caſe of Fuller v. Cook. Action upon the Caſe, in nature of a Conſpiracy, lies not againſt any who *prefers an Indictment, and ſwears it to be true*; for it is for the King and the Commonwealth, and if it ſhould be allow'd, no Indictment would be preferred. Cro. E. 724. pl. 57. Mich. 41 & 42 Eliz. B. R. Sherington v. Ward.

- Rep. 14 b. Bulwer's Caſe, S. C. For he having been imprisoned by it, is good Cauſe of Action.

19. Action lies for *maliciouſly outlawing* of a Man, whereby he became very *much damnified*, tho' the Proceeding were erroneous. 4 Le. 52. pl. 137. Mich. 20 Eliz. B. R. Bulwer v. Smith.

20. Caſe does not lie where a Man *purſues the ordinary Courſe of Juſtice*, per Crooke J. Bulſt. 151. in Caſe of Wale v. Smith, cites 4 Rep. 146. [14. b.] Cutler v. Dixon.

21. An Action upon the Caſs lieth not for Conſpiracy where an *Indictment* is *preferred for Felony by the Party grieved, and he purſues it according to the Law*, and the Statute of W. 2. which giveth Damages where the Party is acquitted, proves this, and this Caſe remaineth at the common Law. Per tot. Cur. Cro. E. 70. pl. 25. Mich. 29 & 30 Eliz. B. R. Knight v. German.

Caſe for proſecuting the Plaintiff upon a falſe and malitious *Indictment for Battery*, whereof he was Legitimo modo acquietatus; upon the Trial it appeared that the *Plaintiff was no otherwiſe acquitted than by a Nolle proſequi*, and this being made a Point for the Opinion of the Court, it was held that this Evidence did not ſupport the Declaration, becauſe the Nolle proſequi was only a Diſcharge as to the Indictment, but no Acquittal of the Crime. 1 Salk. 21. pl. 11. Mich. 3 Ann. Goddard v. Smith.——6 Mod. 261. S. C. the Court all ſeem'd clear that the Action did not lie, but gave no Rule.——11 Mod. 56. pl. 32. Paſch. 4 Ann. S. C. that the Non-pros is only a Diſcharge of the Indictment.——3 Salk. 245. S. C. the Court held that it ought to be an Acquittal upon the Merits of the Cauſe, which was never tried in this Caſe, and the not trying it was no Default of the Defendant; And per Holt Ch. J. this is no Diſcharge, but is only putting the Defendant Sine Die; for the Attorney may take out new Proceſs if he will.

22. A Writ of Conſpiracy does not lie before he is acquitted of the Indictment, or before it be traverſed or otherwiſe avoided by Error; for if it ſhould, it might prevent the Trial at Law. Golds. 51. pl. 14. Paſch. 29 Eliz. Hurliſtone v. Glaſtour.

If a *Juſtice of Peace cauſes one accuſed to him for an Offence to be arreſted by his Warrant*, altho' the Accuſation be falſe, yet *he is excuſable*; *but if the Party be never accuſed*, but the Juſtice of his Malice and own Head cauſe him to be arreſted it is otherwiſe. Per Clench and Gawdy. Cro. E. 130 pl. 2. Paſch. 31 Eliz. B. R. in Caſe of Windham v. Clere.——Le. 187. pl. 263. S. C. and S. P. by Gawdy and Clench.

23. If one comes to a Juſtice of Peace, and complains that J. S. is a Felon, and hath ſtole certain Goods, and the *Juſtice commands the Party, who complains, to be at the next Seſſions and prefer a Bill of Indictment againſt the Felon, and give Evidence againſt him*, who doth accordingly; in this Caſe neither he nor the Juſtice ſhall be puniſhed in Conſpiracy, although the Felon ſo indicted be acquitted. Per Mountague Ch. J. Mo. 6. pl. 22. Paſch. 3 E. 6. Anon.

In Caſe for malitiouſly proſecuting an Indictment againſt the Plaintiff of which he was acquitted; it appear'd upon the Evidence that the Defendant was *a Juſtice of Peace*, and *procured ſome Witneſſes to appear againſt the Plaintiff, and his own Name was indorſed upon the Indictment to give Evidence.* The Court agreed that this does not make him a Proſecutor; for if a Juſtice of Peace knows any that can give Evidence againſt one indicted, he ought to cauſe him to do it. Vent. 47. Mich. 21 Car. 2. B. R. Girlington v. Pitfield.——2 Keb. 573. pl. 85. S. C. ſays it was alleged that he refuſed Bail, and that by Hearſay he paid the Fees of the Proſecution; but the Refuſal of Bail not being proved, nor any poſitive Averment of his Proſecution or Payment of Fees, the Plaintiff was nonſuited; And per Cur. Strict Proof of Malice in this Caſe of a Juſtice is requiſite, and procuring Witneſſes is no Proſecution.

Caſe *againſt a Juryman for malitiouſly indicting the Plaintiff of of Barretry.*

24. If one *Juror labours another unduely*, an Action lies becauſe it is in Nature of a Conſpiracy; cited by Doderidge J. Palm. 143. as 34 Eliz. Jerome v. Maſon.

Reſolved that the Action does not lie tho' it be ſaid Malitioſe; And Judgment againſt the Plaintiff. Comb. 116. Trin. 1 W. & M. in B. R. Stowball v. Anſell.——Ibid. the Court cited the Caſe of Lord Macclesfield v. Grosvenor in the Exchequer in Action of the Caſe, where the Defendant pleaded that he was a Juryman, and made his Preſentment as a Juryman on his Oath, and tho' the Declaration was Malitioſe yet the Plea was held good.——3 Mod. 41. the Earl of Macclesfield's Caſe. Paſch. 36 Car. 2. B. R. the S. C. but S. P. does not appear.

25. Caſe

25. Case in Nature of Conspiracy for a Slander is only for Damages, and lies well tho' the *Indictment is erroneous*, or, as has been adjuged (as Yelverton J. said) if a Bill be offered and *Ignoramus* found. Yelv. 46. Trin. 2 Jac. B. R. When an Indictment of Treason is preferr'd and *Ignoramus* found, the Defendant may be guilty notwithstanding; so that Action does not lie. Lat. So. Arg. cites Mich. 11 Jac. Falkner's Case [alias, Lovet v. Falkner]

26. Action upon the Case in Nature of Conspiracy, for that the Defendant procured the Plaintiff to be *indicted for a common Barretor, before J. S. and J. D. Justices of the Peace, nec non ad diversas felonias &c. audiend' & terminand'* and said that he was acquitted. But in the Record they are mention'd as Justices of Peace only. Resolved by all the Justices, contra Williams, that because the Justices of Peace have Authority to inquire and hear it without any Commission of Oyer and Terminer, there was *no Failure of the Record*, and the Action did lie. Cro. J. 32. pl. 4. Trin. 2 Jac. B. R. Barnes v. Constantine. Yelv. 46. S. C. adjudg'd accordingly.

27. In Case for conspiring to *indict* one for a *Felony*, Crooke J. took this *Difference*, *where a Felony was done* revera, *and where not*; if it be a mere false Allegation, and no Felony done, yet if such a Matter is laid to his Charge, and he acquitted, there this Action well lieth; but otherwise where in Facto & in Veritate, such a Felony was done, and this laid to his Charge, and he acquitted, he shall not for this Prosecution have this Action, because this is in Advancement of Justice, and for the finding out and due punishing of Offenders. 2 Bulst. 331. Hill. 12 Jac. in Case of Hercot v. Underhill. Godb. 406. in pl. 486. the like Difference taken. Arg.

28. A. indicted B. for a *Robbery* of him, but the Bill was found Ignoramus. B. brought an Action and sets forth all the Matter, that A. *falso & malitiose* charged him with Felony &c. and falso & malitiose exhibited a Bill of Indictment &c. whereby he was put to great Charge for Defence of his good Name. The *Defendant justified, and found against him.* And adjudg'd for the Plaintiff. Upon Error brought in the Exchequer-Chamber, it was assign'd that this *exhibiting a Bill of Indictment* is no Cause of Action. But adjudged by all that the Action lies; for tho' the exhibiting a Bill upon true and just Presumptions be excusable, and no Action lies, yet when it is alleged that he falso & malitiose, without any such Cause, had accused him of Felony, and exhibited this Bill falso & malitiose, it is great Cause of Slander and Grievance, and just ground of Action; the Defendant having also made his Justification, and *all his Causes of Justification found false.* Cro. J. 490. pl. 10. Trin. 16 Jac. B. R. Pains v. Porter.

29. An Action upon the Case will lie for malitiously bringing an Action against one *where he had no probable Cause*, and if such Actions were used to be brought it would deter Men from such malitious Courses as are so often put in Practice. Per Roll Ch. J. Styl. 379. Trin. 1653. in Case of Atwood v. Monger.

30. Case for causing a *false Presentment* to be made against the Plaintiff *before the Conservators of the River Thames*; after a Verdict for the Plaintiff it was moved that the Conservators &c. had *no Authority* to take such Presentment. Roll Ch. J. held it all one whether here was any Jurisdiction or not; for the Plaintiff is prejudiced by the Vexation, and the Conservators took upon them to have Authority to take the Presentment. Sty. 378. Trin. 1653. Atwood v. Monger. And it is there cited to have been adjudg'd accordingly. Trin. 16 Car. B. R. in Case of Damon v. Sherman

An Action upon the Case lies for *bringing an Appeal* against one *in C. B.* tho' it be *coram non judice* by Reason of the Vexation of the Party Per Roll Ch. J. Sty. 279. Trin. 1652. —— S. C. cited by Parker Ch. J. in delivering the Opinion of the Court. 10 Mod. 219. Hill. 12 Ann. B. R.

31. Goods

31. Goods were *imported by* Merchants *Denizen, who paid the Custom as such*, and afterwards *B. seised the Goods as the Goods of Merchants Alien*, the Custom being paid as for the Goods of Merchants Denizen only, and then *prosecuted an Information in the Exchequer suggesting as above*, whereby the Goods were condemned as forfeited. Thereupon the Merchants brought an Action on the Case against *B.* and it was found that B. falsely and maliciously exhibited the Information. The Question was whether the Action lies, the Goods being *condemned as forfeited by the Judgment of the Court*, which the Party might have prevented by coming in before Judgment upon Proclamation, and claiming Property as Hale Ch. Baron said, and that if such Action should be allow'd the Judgment would be blown off by a Side-Wind, that the Mischiefs are great on both Sides, and the Case is of great Concernment. The Case was afterwards argued for the Defendant and Exceptions taken to the Pleadings. And in Hill. Term. 14 & 15 Car. 2. Judgment was given for the Defendant [but whether on the Point of Law or on the Pleadings non constat.] Hard. 194. &c. 200. Trin. 13 Car. 2. Vanderbergh v. Blake.

If there be a *probable Cause* Innocence is not material, for it must be direct Malice without any Colour of Cause, per Cur.

32. If a Man be prosecuted with all possible Violence, and with apparent Malice express'd in Words or otherwise, yet if such Prosecution were for a just Cause, and the Party be condemned, such Action lies not; for the Law takes no Notice of Malice where the *Cause* of Prosecution is *not false* Arg. Hard. 196. in Case of Vanderberg v. Blake.

6 Mod 25. Mich. 2 Annæ B. R. Anon.

Sid. 261. pl. 11. S. C. and several agreed that no Action lies for indicting one of a Trespass or Rescous.

33. Case &c. for falsely and maliciously *indicting* the Plaintiff *for a Rescous*; it was moved in Arrest of Judgment that this Action would not lie, because this Indictment was only for a *bare Trespass*; the Court inclined that the Action would not lie; but no Judgment. Raym. 135. Trin. 17 Car. 2. Low v. Beardmore.

For if it should it would be a great Discouragement to Prosecutors; But Twisden J thought that if Scienter & malitiose be in the Declaration, and the Intent to vex him, and all this proved upon the Evidence as it ought, that then the Action would lie; But Judgment was stay'd till moved again.——Lev 169. S. C. and S. P. by Twisden, but it not being so laid, he and Windham only in Court, held that the Action did not lie, and stay'd the Judgment.

Vent. 23. S. C. the Court inclined that an Action lies; Sed adjornatur.—Ibid. 25.

34. Case for maliciously *indicting a Justice of Peace for delivering a Vagrant out of Custody without Examination, contrary to Law*; adjudged an Action will lie for that the Indictment *contains Matter of Imputation and Slander as well as Crime*, and it is not like an Indictment of forcible Entry &c. where the Indictment contains Crime without Slander. Raym. 180. Pasch. 21 Car. 2. Sir Andrew Henly v. Dr. Burstal.

S. C. adjudg'd for the Plaintiff.——2 Keb. 486 pl. 29. S. C. the Court inclined against the Action; Sed adjornatur.——Ibid. 494. pl. 48. S. C. Judgment for the Plaintiff, Nisi &c.——— S. C. cited by Holt Ch. J. Ld. Raym. Rep. 379. Mich. 10 W. 3. that the Opinion of the Judges in the Case of Henly v. Burstall was that no Action will lie for falsely and maliciously procuring one to be *indicted of a Trespass*, and said he remember'd they were of such Opinion, and denied the Case of 7 H. 4. 31. But he said that tho' he had great Regard to what the Judges then said, the Court being then composed of very learned Men, yet that Opinion was not judicial, such Matter not being then in Question.

35. In Case &c. in the Nature of a Conspiracy, for *indicting* the Plaintiff *for Barretry, one of the Defendants only was found guilty*. It was moved in Arrest of Judgment, that one cannot be guilty of a Conspiracy alone; but adjudg'd that this being an Action on the Case it is well enough. Raym. 180. Pasch. 21 Car. 2. B. R. Price v. Crofts.

Raym. 176. S. C. adjudg'd per tot. Cur. for the Plaintiff. ——Saund. 228. pl. 34. S. C. adjudged for the Plaintiff; for

36. A Bill in Nature of a Conspiracy against 3, for *causing the Plaintiff to be arrested in London on Purpose to vex and imprison him, knowing that he was not able to find Bail, when in Truth they had no Cause of Action*; Upon Not Guilty pleaded, only one of them was found Guilty. It was moved in Arrest of Judgment, that the Plaintiff ought to have shewed that he was acquitted, for a Bill of Conspiracy will not lie till Acquittal; but because this Bill is in Nature of an Action on the Case, and the *Conspiracy alleged is by way of Aggravation*, the Ground of the Action

Action being the cauſeleſs troubling the Plaintiff to put in Bail, and in this Caſe the Action does not fail, tho' one only was found guilty; for the Title of the Action here is in placito Tranſgreſſionis ſuper Caſum, and therefore all the Court were of Opinion for the Plaintiff. Vent. 13. 18. Paſch. 21 Car. 2. Skinner v. Gunter.

the Subſtance of the Action was the undue arreſting the Plaintiff, and not the Conſpiracy; but Morton J. was of Opinion that this was an Action of Conſpiracy, and that two being acquitted, the Plaintiff cannot have Judgment againſt the third. The Reporter adds a Nota, that it ſeems to him that the Plaintiff ought not to have Judgment, becauſe it ſeems to be a formed Action of Conſpiracy by the Words in the Declaration, viz. *per Conſpirationem inter eos habitam*, and the Verdict has falſified the Declaration; for by the Acquital of all the Defendants but one, it is found in Effect that there was no Conſpiracy as the Plaintiff has counted.

37. Caſe for falſely indicting the Plaintiff *of Perjury, in ſwearing in a Suit between the Father and J. S.* tried before Wylde, that &c. Exception was taken, that it was *not ſhewed in what Suit, whether in Debt, or an Action upon the Caſe &c.* ſed non allocatur; For per Curiam were the firſt Indictment ill, though no Conſpiracy will lie, yet an Action upon the Caſe will lie, and Judgment for the Plaintiff. 3 Keb. 141. pl. 10. Paſch. 25. Car. 2. B. R. Smithſon v. Simpſon.

38. In Action on the Caſe for falſely and maliciouſly *indicting the Plaintiff for a deceitful Sale of Hair*; It was moved in Arreſt, that this was only a mere Treſpaſs, and no Matter indictable; ſed non allocatur; for it is a Matter criminal, ſlanderous, and fraudulent, and Judgment for the Plaintiff. 3 Keb. 837. pl. 75. Brigham v. Brocas.

39. Caſe lies for a malicious Proſecution *of an Information* in the Clerk of the Crown's Name for ill Words and a Battery, of which the now Plaintiff was acquitted by Verdict. 2 Show. 295. pl. 292. Paſch. 35 Car. 2. B. R. Moor v. Shutter.

40. An Action lies for a malicious Proſecution, tho' the Judges Proceedings are erroneous. 2 Show. 145. pl. 121. Mich. 32 Car. 2. B. R.

As Caſe for that the Plaintiff being *Churchwarden*, and *having given an Account* at the End of the Year to his Succeſſor and the Pariſhoners, the *Defendant falſely and maliciouſly cited him in the Spiritual Court to render an Account, and* that *the Judge, at the Requeſt of the Defendant, excommunicated him for not giving an Account.* It was moved in Arreſt of Judgment, that the Court was to blame, and not the Defendant, for the Sentence was given by the Court; but adjudged, that the Action lies againſt the Defendant. Raym. 418. Mich. 32 Car. 2 Grey v. Day.——2 Jo. 132. Gray v. Dregge S. C. ſays nothing of the Excommunication, but adjudged for the Plaintiff; for the malicious Proſecution is a temporal Injury, which ought to be recompenced in Damages.——2 Show. 144. pl. 121. Gray v. Dight. S. C. adjudg'd for the Plaintiff by the whole Court on a ſolemn Debate, tho' they did not ſhew the Cauſe upon which he was proſecuted, but only to account generally; and to cite a Churchwarden to Account that has accounted before is actionable, tho' he goes no farther, and *though nothing enſued but an Excommunication, and no Capias nor any expreſs Damage laid*; for the Court will conſider of the Conſequences of an Excommunication.

41. A. brought Caſe againſt B. for falſely and maliciouſly procuring him to be *indicted for conſpiring to lay a Baſtard* Child *to B. of which* Indictment, *upon Trial, A was acquitted*; after Verdict for the Plaintiff, upon Not Guilty pleaded, adjudged that the Action well lay, for the Conſpiracy was a Thing puniſhable at Common Law by Fine and Impriſonment &c. Ld Raym. Rep. 81. Paſch. 8 W. 3. Pedro v. Barret.

42. Caſe in Nature of Conſpiracy for malitiouſly cauſing him to be indicted of a *Riot* of which he was acquitted by Verdict; upon a Motion in Arreſt of Judgment the Court held that Action lies for malitiouſly cauſing A. to be indicted whereby he is *damnified* 1. *In his Perſon*, as by Impriſonment, 2. *In Reputation*, as by Scandal, 3. *In Property*, as by Expence. But in the laſt Caſe the Indictment muſt be found or Ignoramus return'd, tho' it needed not in the 2 firſt. But if the *Indictment be found* by the Grand Jury, Defendant ſhall not be obliged to ſhew a *probable Cauſe*, but the Plaintiff muſt *prove expreſs Malice* and Rancour; and ſo it muſt be where the Indictment contains Scandal, or the Party has been impriſoned, tho' *Ignoramus* be return'd; for Innocence is not ſufficient

Carth. 416. S. C. and Judgment affirm'd.—— 5 Mod. 394. S. C. argued.—Ibid. 405. S. C. the Reſolution of the Court, and Judgment affirmed—12 Mod. 208. S. C. and

Judgment affirmed.— Ld. Raym. Rep. 374.

ſufficient; Judgment affirmed. 1 Salk. 13. pl. 5. Mich. 10 W. 3. B. R. Savil v. Roberts.

S. C. and Judgment affirm'd.——S. C. cited by Parker Ch. J. 10 Mod. 217.

43. There is a great *Difference* between bringing an Action maliciouſly, *and proſecuting an Indictment maliciouſly*; and that Notion, that no Action doth lie for *bringing an Action maliciouſly* is not to be taken largely and univerſally, but *with ſome Reſtrictions*; for if a Man brings an Action, he either claims a Right, or complains of an Injury; and the Law always allows him to take his Courſe of Law to obtain his Right, or to be ſatisfied for his Injury; and this is allowed in all Courts. 4 Co. 16. If a Man ſays to another who is Heir at Law, and ſeiſed of Lands, you are a Baſtard, theſe Words are actionable; but if he ſays, you are a Baſtard, and I am Heir to the Eſtate, the Addition of the latter Words, tho' falſe, make them not actionable, becauſe he claims a Right. The Law hath provided that no Man ſhould proſecute without finding Pledges, and that was a Security againſt troubleſome Actions; then if the Plaintiff's Suit be vexatious and groundleſs, he ſhall be amerced pro falſo clamore, and tho' theſe Amerciaments be now Matters of Form, and therefore ſeveral Acts of Parliament have given Coſts to Defendants, yet we muſt judge by the Reaſon of the Law, as it ſtood anciently; but in the Caſe of an Indictment there is no Proviſion or Remedy but by bringing an Action; but if it appears the Action is brought merely for Vexation and Oppreſſion, the Party grieved in ſome Caſes ſhall have Action ſur Caſe; he ſhall not indeed ſay generally, that he falſely and maliciouſly, without probable Cauſe, did bring an Action &c. but if he ſhews any ſpecial Matter, whereby it appears to the Court that it was frivolous and vexatious, he ſhall have an Action, as in the Caſe of **Daw v. Swaine.** 1 Sid. 424. 1 Saund. 228. **Skinner v. Gunton.** Per Holt Ch. J. in delivering the Opinion of the Court. 12 Mod. 210, 211. Mich. 10 W. 3. B. R. Savill v. Roberts.

44. There is no arguing from Actions on the *Caſe* to Actions of *Conſpiracy*. Actions of Conſpiracy are the worſt Sort of Actions in the World to be argued from, for there is more Contrariety and Repugnancy of Opinions in them than in any other Species of Actions whatſoever; Per Parker Ch. J. in delivering the Opinion of the Court. 10 Mod. 218, 219. Hill. 12 Annæ B. R. in Caſe of Jones v. Gwynn.

45 *Caſe* lies not unleſs the *Indictment* be either *determined or deſerted*; per Parker Ch. J. in delivering the Judgment of the Court. *But Conſpiracy* lies not without *Acquittal*, and the only Reaſon is, becauſe it is a *formed Action*, and the Form of the *Writ in the Regiſter* is ſo, whereas Action on the Caſe is ty'd down to no Form at all, and lies on an Indictment on which no Acquittal can be; as where *Ignoramus* is found, or it was *coram non Judice*, or the Indictment was *inſufficient*. 10 Mod. 219. Per Parker in delivering the Opinion of the Court. Hill. 12 Annæ in Caſe of Jones v. Gwynn.

46. *Nor* as to the bringing an Action on the Caſe is it neceſſary that the Party ſhould have been in *Danger*; for it is not the Danger, but it is the Expence which is the Ground of the Damage; for whed an Indictment is returned Ignoramus, or is coram non Judice, the Party is in no Danger at all; yet this Action lies. Ibid. 220.

(Q. c) [*In Nature of a Conspiracy.*] In what Cases it lies. Where *no Felony* is *committed.* [*And what shall be good Cause of Suspicion.*]

1. IF a Man hath good Cause of Suspicion that a Felony is committed, and that J. S. is guilty thereof, and thereupon takes the ordinary Course of Law, and causes him to be indicted, tho' no Felony was in Truth committed, yet no Action upon the Case lies against him, because he did it in Prosecution of Justice; for otherwise every one will be deterr'd from prosecuting in such manner. By Reports, 14 Jac. B. R. *Wells and Wells.* Roll Rep. 438. pl. 4. Webb v. Wells. S. C. argued & adjornatur. —Bridgm. 60. Weal v. Wells. S. C. ——2 Bulst. 284. S. C. ——(R. c) pl. 2. S. C.

2. As if the Daughter of J. S. complains to him that J. D. hath ravished her, upon which he complains to a Justice of Peace, and upon his binding him over indicts him, tho' no Rape was committed, yet no Action upon the Case lies against him, inasmuch as he being the Father had good Cause of Suspicion upon the Complaint of his Daughter. By Rep. 14 Jac. is cited, Hill. 14 Jac. B. R. *Cox and Wirral*, Rot. 886. Adjudged. Cro. J. 193. pl. 19. Mich. 15 Jac. S. C. by 3 Justices, contra Crooke; but if it had been alleged that there had not been any Ravishment, and that the Defendant knew as much, it might peradventure be otherwise; but, as it is, it was adjudged for the Defendant.——Yelv. 105. Mich. 5 Jac. S. C. adjudg'd accordingly. ——Roll Rep. 430. Arg. cites S. C. Hill. 4 Jac. B. R. adjudged accordingly.——Bulst. 150. Arg. cites S. C. Hill. 5 Jac. B. R. ruled accordingly.——Ibid. 286. Arg. cites S. C. accordingly.

3. If a Man takes my Goods, and sells them to a Broker in London, and I supposing them to be stolen, and finding them in the Possession of the Broker, demand of him how he came by them, if he gives an uncertain Answer, which gives me good Cause of Suspicion, for which I complain of him to a Justice, and, upon his binding of him over, indict him, tho' the Goods were not stole, and so no Felony committed, yet no Action lies against me. By Rep. 14 Jac. cites 44 Eliz. B. R. *Chambers and Taylor*, adjudged. Cro. E. 900. pl. 4. S. C. adjudged for the Defendant, and they all resolved, that the Allegation in the Declaration that the Defendant falso & malitiose procured him to be indicted, is not traversable when the Defendant alleges the special Matter of procuring the Indictment, which the Plaintiff has confess'd by the Demurrer, which if false, the Plaintiff might have traversed it.———S. C. cited as adjudged accordingly. Arg. Roll. Rep. 439. pl. 4.——3 Bulst. 286. Arg. cites S. C. accordingly.

4. If a Man casually loses 2 Sheep, and after he finds J. S. driving 20 Sheep by the Highway, mark'd with 12 several Marks, and upon this suspects him to have stole them, and that his 2 Sheep were among them, and procures the Constable of the Town to arrest him, an Action upon the Case lies for J. S. against him, if he does not aver that his 2 Sheep were stolen; for if no Felony was committed, the Arrest was not lawful, or at least a greater Cause of Suspicion that the 2 Sheep were stolen than the casual Losing of them. Mich. 10 Car. B. R. between *Ley and Webb*, adjudged.

5. If A. impose the Crime of Felony upon B. where no Felony is committed, and maliciously causes him to be arrested for it, * an Action upon the Case lies upon such a Declaration, without alleging any particular Felony of which he was accused. Hill. 11 Jac. B. R. between *Best and Aier*, adjudged. * Fol. 114.

6. A

6. A Man may *encourage another, who was robb'd, to cauſe the Felon to be indicted, and accompany him to the Aſſiſes in order to proſecute him*, and no Action on the Caſe upon a Conſpiracy will lie againſt him; but otherwiſe if he knew that he was not robb'd. Brownl. 9. Paſch. 12 Jac. Stone v. Bates.

7. *A. had Goods taken from him by B. which Taking he ſuppoſeth to be Felony, but it is not. A. complains to a Juſtice of Peace, who commits B.* and binds A. to proſecute. Accordingly A. preferr'd a Bill at the Seſſions, and B. is acquitted. The Opinion of Hutton was, that Action upon the Caſe lies not againſt the Proſecutor; for ſuch Action ſhall never be maintained without *apparent Malice* in the Proſecutor. Win. 73. Paſch. 22 Jac. C. B. Mankleton v. Allen.

8. Caſe, for cauſing him to be *indicted of Felony, as Acceſſary in ſuffering a Priſoner convicted to eſcape*; After Judgment for the Plaintiff it was aſſigned for Error, that the Indictment was for a Matter which was only Treſpaſs, and not Felony; But the Court anſwer'd, that tho' the Matter with which the Defendant is charged is not Felony, yet there is a Charge of Felony in the Indictment, and the Plaintiff was ſcandaliz'd by it, and therefore the Action lies. Sty. 157. Mich. 1649. B. R. Gardiner v. Jolley.

(R. c) In what Caſes it lies, *tho'* a *Felony* was *committed*. For Proſecution upon *Malice*.

See (Q. c) pl. 5. If the *Indictment* be *fairly proſecuted*, no Action lies. So if the Court has a Juriſdiction, tho' the Matter be ſcandalous, yet if there be *no Malice*, no Action lies; per Holt Ch. J. in delivering the Opinion of the Court. 12 Mod. 211. Savill v. Roberts.

1. NO Action lies for procuring one to be indicted of Felony without more, as without Averment that this was maliciouſly done, or without ſhewing that he was acquitted thereupon; for it may be that he is guilty, and an Indictment is the ordinary Proceeding of the Law. Mich. 5 Jac. B. R. between *Nyn and Taylor*, adjudged.

Roll Rep. 438. pl. 4. Webb v. Wells, S. C. & S P. agreed per Cur. but upon Exceptions taken to the Pleadings, adjornatur.——3 Bulſt. 284. S. C.——Bridgm. 60. S. C.——See (Q. c) pl. 1. S. C.

2. If my Cattle are ſtole, and I find them in the Hands of a Butcher, and I knowing that he bought them lawfully in a Market, and yet of Malice I impoſe on him the Crime of Felony, and cauſe him to be arreſted and indicted, upon which an Ignoramus is found, an Action upon the Caſe lies againſt me for my falſe and malicious Proſecution. My Rep. 14 Jac. *Wells and Wells*, adjudged.

* Cro. J. 130. pl. 3. Markam v. Peſcod, S. C. adjudg'd and affirm'd in Error accordingly.—Noy 116. Peſcod v. Marſam, S. C. and the Court held it good, without ſaying legitimo modo acquietatus.

3. If one Man falſo & malitioſe procures another to be arreſted and indicted for Felony, tho' he was never acquitted thereof, yet this Action lies; for a malicious Proſecution, without an Acquittal, is ſufficient to maintain this Action, tho' no Writ of Conſpiracy lies without an Acquittal. Mich. 4 Jac. B. R. between * *Marſham and Peſcodd*, adjudged. 29 Eliz. B. between *Knight and Jerom*, adjudged. Paſch. 11 Jac. B. R. between *Horwood and Corders*, adjudged, an Ignoramus being found.

4. If

4. If one falso & malitiose imposes the Crime of Felony upon another, upon which he is committed to Gaol, and indicted; and after also falso & malitiose swears and gives Evidence against him to the Petit Jury, that he stole a certain Thing, and yet he is acquitted, an Action upon the Case lies against him for this malicious Prosecution. Mich. 12 Jac. B. between *Philips and Shale*, per Curiam.

5. If a Man falso & malitiose preters an Indictment of Felony against J. S. to the Grand Jury, and gives Evidence thereupon to the Grand Jury upon Oath, that the Matter of the Bill was true, and yet the Jury find an Ignoramus, an Action upon the Case lies against him, shewing all this Matter, how he gave Evidence upon his Oath, this being falsely and maliciously done. Mich. 9 Car. in a Writ of Error in Camera Scaccarii, adjudged, and the first Judgment given in B. R. affirmed, between *Blackman and Trunket*.

6. In an Action upon the Case, if the Plaintiff declares that the Defendant falsely and maliciously charged him with the Crime of Suspicion of Felony, for the felonious stealing of certain Goods; and thereupon did procure him to be brought before a Justice of Peace, who did bind him over to the next Assizes, where he did also falsely and maliciously prefer a Bill of Indictment against him to the Grand Jury, who found an Ignoramus, and the Defendant pleads to this Declaration, and justifies that the Plaintiff did steal the Goods, and thereupon he prosecuted him, and preferr'd the Bill as in the Declaration; upon which the Plaintiff replied De injuria sua propria sine tali Causa, and this was found for the Plaintiff, the Action lies; for the Crime of Suspicion of Felony is intended, according to common Parlance, that he accused him of Suspicion of Felony, and he explains this by the Words for the felonious taking of Goods, and the * Defendant has justified this also; and if a Man might accuse and prosecute others for Suspicion of Felony maliciously and falsely without Punishment, any Man might be scandalized; and the Maintenance of such Actions for malicious Prosecutions, will not hinder any Man from prosecuting without Malice. Mich. 9 Car. B. R. between *Palke and Dunning*, per Curiam, in 2 Actions, in one of which the Defendant pleaded Not Guilty, and was found Guilty; and in the other he justified as before, but no Judgment was given; but the Parties agreed. Pasch. 10 Car. B. R. between *Shapcott and Rowe*. Intratur Trin. 9 Car. Rot. 1312. in which the Defendant upon such a Declaration justified, and such an Issue de injuria sua propria, and this was moved in Arrest of Judgment, and Judgment was given by all the Court for the Plaintiff.

* Fol. 115.

7. In an Action upon the Case, if the Plaintiff declares that the Defendant intending, ex malitia sua propria, to take away his good Name and Fame, falso & invidiose crimen feloniæ ei imposuit, (and it is not malitiose) but after it is alleged that he maliciously caused him to be indicted, and upon this to be tried; and then maliciously gave Evidence against him to the Grand Jury, and an Ignoramus was thereupon found, tho' it is that he invidiose crimen feloniæ ei imposuit, and not malitiose, yet all the Declaration being laid together, it is well alleged that the Prosecution was malicious. Mich. 14 Car. B. R. between *Moore and Rock*, this being moved in Arrest of Judgment. But Hill. 14 Car. adjudged a good Declaration.

8. Case, for that the Defendant intending to detract from his Name and Fame, and to put his Life in Jeopardy, maliciously *caused a Bill of Indictment of Felony to be written before he came into Court*, which is not the Office of a Witness. Per Gawdy J. to which Wray agreed, *if the Defendant did it upon good Presumptions, he ought to plead them*, as that he found him in the House, or the like Cause of Suspicion; but no such

Le. [illegible] J. 146 Jerom v. King. S. C. adjudged [illegible] the J[illegible] was affirmed in

Error. — But if he had done it *by Command of the Court*, it had been otherwiſe.

Thing is pleaded in this Caſe, therefore conceived the Action did lie, otherwiſe every one will be in Danger of his Life by ſuch malicious Practices. Cro. E. 134. pl. 12. Paſch. 31 Eliz. B. R. Knight v. Germin.

Admitted Arg. and cites 21 E. 3. 17. 22 H. 6. 5.—Cro. E. 134 accordingly in S. C.

Hutt. 49 Hord v. Corderoy, S. C. cited, and Hutton ſays he ſaw the Record,

9. Caſe, for *indicting* the Plaintiff *for raviſhing the Defendant's Daughter*, and giving it in Evidence to the Grand Jury, who found it *Ignoramus*; notwithſtanding which it was adjudged that the Action lies. Win. 54. cites Hill. 10 Jac. B. R. and that it was affirm'd in the Exchequer-Chamber. Whorewood v. Corderoy.

and that it is well and fully *averr'd that he did not raviſh the Feme.*——Jenk. 300. pl. 64. S. C. adjudged, and affirm'd in Error; for it is a Slander of Record. Jenkins ſays if there was a probable Cauſe, an Action does not lie, otherwiſe the ordinary Courſe of Juſtice would be obſtructed.——S. C. cited Win. 28. Arg.

S. C. cited by the Name of Deney v. Ridge, Win. 54.

10. A Bill of *Indictment* was brought for *ſtealing of a Horſe*, but the *Bill was not found*; and yet adjudged that an Action on the Caſe would lie for it. Arg. Win. 29. cites 14 Jac. B. R. Rot. 236. Demey v. Ridge.

(S. c) Pleadings.

In Caſe for indicting the Plaintiff for ſtealing Sheep, *without ſaying that he was acquitted, or that Ignoramus was found*, was held good by Twiſden J. the Jury having found it to be falſo & malitioſe; but that it ſeems otherwiſe upon Demurrer. Sid. 15. pl. 7. Mich. 12 Car. 2. B. R. Wine v. Ware.

1. CASE, for cauſing the Plaintiff to be *indicted for a Robbery*, and doth *not ſhew that he was legitimo modo acquietatus.* Per Clench J. The Plaintiff, both in Conſpiracy and in Caſe, ought to ſhew that legitimo modo acquietatus fuit. Godb. 76. pl. 91. Mich. 28 & 29 Eliz. B. R. Shotbolt's Caſe.

Caſe for *indicting the Plaintiff at the general Seſſions of the Peace* coram A. & B. & ſociis ſuis

2. Caſe for that he procured the Plaintiff to be *indicted before Juſtices of the Peace in the County of* W. *as a common Barretor*, and that afterwards he *was acquitted before Anderſon and Clench Juſtices of Aſſiſe there.* Per tot. Cur. The Declaration is not good; for he cannot be acquitted before them as Juſtices of Aſſiſe but as Juſtices of Oyer and Terminer. Cro. E. 563. pl. 24. Paſch. 39 Eliz. C. B. Throgmorton's Caſe.

tunc Juſticiariis ſuis &c. Malitioſe &c. for breaking his Houſe and ſtealing Wheat. It was moved that it did not appear that the Juſtices before whom &c. were Juſtices of Oyer and Terminer; but per Cur. the Declaration is good; for the laying it to be Ad generalem Seſſionem muſt be intended to be before Juſtices as had ſufficient Authority, eſpecially as in this Action their Authority cannot come in Queſtion. Yelv. 116. Mich. 5 Jac. B. R. Arundel v. Tregono.

In Caſe the Plaintiff declared that Defendant cauſed him to be *indicted* for ſtealing a Mare, and that upon preferring the Bill to the Grand Jury they found an *Ignoramus*; and all the *Proceedings* are *expreſſed to be before the Judges as Commiſſioners for the Gaol Delivery, and not as Commiſſioners of Oyer and Terminer.* But per Roll Ch. J. We will intend it was before them as Juſtices of Oyer and Terminer, but it is not material before what Authority he was indicted; for the Trouble the Party is put to by this Indictment is the Cauſe of the Action, and not his Trial upon it; neither is it material whether the Indictment be good or no, and the Words are to be conſtrued according to common Intendment, viz. That he was indicted, tho' only an Ignoramus was found, and ſo no Indictment in Law whereon he could be tried and brought in Danger of his Life. Sty. 372. 373. Trin. 1653. Anon.——See Sty. 10. 11. Paſch. 23 Car. B. R. Anon. ſeems to be S. C. and the Court ſaid that the Action might be as well grounded

grounded upon the Scandal which grew to the Party indicted as upon the Trouble which might have befallen him by Reaſon of preferring the Bill againſt him.

Exception was taken that the Declaration was that the Defendant indicted the Plaintiff before A. B. and C. and other Perſons Juſtices of Oyer and Terminer, and that it does not appear that thoſe Juſtices were any of the Judges of the one Bench or the other as the Statute 2 E. 3. cap. 2. ordains, viz. That in every Commiſſion of Oyer and Terminer there muſt be named ſome of the Juſtices of the one Bench or the other, or Juſtice errant. But per Cur. the Words (other Juſtices in the County) ſhall be intended ſome of the Juſtices of the Bank &c. and thereupon the Plaintiff had Judgment Sid. 15. pl. 7. Mich. 12 Car. 2. B. R. Wine v. Ware.——The Reporter adds a Nota, That the Juſtices ſeemed that admitting the Commiſſion to be erroneous, the Plaintiff might notwithſtanding have his Action, becauſe it was the Malice and the Indicting him which was the Ground thereof, but they ſaid nothing thereof poſitively; Ideo Quære; for on the other Side it ſeems that the Party indicted might in ſuch Caſe have pleaded to the Juriſdiction.

3. Conſpiracy *againſt* 2, who pleaded Not guilty, *one was found guilty and the other not*; Per tot. Cur. Adjudg'd that the Writ ſhould abate; for it ought to be againſt two, and one cannot conſpire alone; But Caſe in Nature of a Conſpiracy would lie in ſuch Caſe. Cro. E. 701. pl. 18. Mich. 41 & 42 Eliz. B. R. Marſh v Vaughan.

4. Plaintiff declared, that the Defendant falſely and maliciouſly at A. *charged him with Felony*, and there cauſed him to be brought *before J. S. a Juſtice of the Peace*, and procured him to bind the Plaintiff to appear at the Gaol Delivery in the County of D. and there *exhibited a Bill of Indictment, which was found minime vera.* The Defendant *pleaded that he had divers Sheep ſtolen, and miſſed others, which were found in the Plaintiff's Poſſeſſion, going with 12 Sheep which were ſtolen, whereupon he complain'd to the ſaid J. S. who examined him, and finding him variant in his Examination bound him to appear at the next Gaol Delivery, and the Defendant to give Evidence, whereupon* at E. at the Gaol Delivery, *he exhibited his Bill, which is the ſame Conſpiracy.* The Plaintiff *replied, De ſon tort demeſne.* It was found for the Plaintiff, and adjudg'd for him; for he having laid it to be falſely and maliciouſly, and the Jury having *found it to be without ſuch Cauſe*, it is therefore puniſhable. Cro. J. 190. pl. 16. Mich. 5 Jac. B. R. Doggate v. Lawry.

5. In Action on the Caſe for indicting the Plaintiff Malitioſe; it did *not appear what was done upon the Indictment, whether the Plaintiff was acquitted or arraign'd upon it or not*, and therefore per tot. Cur. Judgment was enter'd againſt the Plaintiff; for if nothing was done on the Indictment the Plaintiff would clear himſelf too ſoon, viz. before the Fact tried, which would be inconvenient. Yelv. 116. 117. Mich. 5 Jac. Arundel v. Tregono.

In Caſe for a malicious Proſecution for arreſting him for 100 l. on purpoſe to hold him to ſpecial Bail, where not one Penny was due. Defendant demurr'd ſpecially becauſe the Declaration did *not ſhew what became of this malicious Proſecution.* It was admitted that this, objected after a Verdict for the Plaintiff, would not be good. Reſolved that the Declaration was naught; for as it now ſtands the firſt Suit may either be determined, and that, by what appears, either for or againſt the Plaintiff, or it may be deſerted, or it may be ſtill regularly going on, a Verdict or a Plea in Bar admitting and confeſſing the firſt Action falſe and hopeleſs might cure this Defect; But the admitting this Declaration good, as it is, would introduce inconſiſtent Verdicts in different Actions. Indeed if the *firſt Action goes off by Nonſuit*, it may be ſaid that in another Action for the ſame Cauſe a Verdict may be given inconſiſtent with the Verdict in the preſent Cauſe; tho' this may be, yet the Poſſibility of ſuch Verdict in a future and not exiſting Action, ſhall not hinder the bringing ſuch Action as this; Per Parker Ch. J. in delivering the Reſolution of the Court. And Judgment for the Defendant. 10 Mod. 145. Hill. 1 Ann. B. R. and 269. Hill. 12 Ann B. R. Parker v. Langley.

6. Conſpiracy, for that the Defendant cauſed the Plaintiff to be *indicted for a Felony, and in priſona detineri quouſque* before ſuch Juſtices *legitimo modo acquietatus fuit.* It was moved in Arreſt of Judgment, becauſe it is *not ſaid* that he was *(inde)* acquietatus * [*or de præmiſſis*] acquietat' and that it was ſo adjudg'd in Caſe of Pricket v. Style; and the Court at firſt were of the ſame Opinion, but afterwards held it well enough

* Yelv. 161. S. C. but there it is of an Indictment of Barretry, and adjudg'd for

the Plaintiff for the Writ never has the Word (inde,) and the Precedents are both Ways.——Cro. C. 286 pl. 33 Mich. 8 Jac. B. R. Hitchman v. Porter, S. P. in Action on the Caſe in nature of Conſpiracy Adjornatur——Cro. C. 315. pl. 7. Trin. 9 Car. B. R. Porter v Hutchman, S. C. & S. P. and cited the Caſe of Bell v. Gamble, and alſo Prickel's Caſe. Sed adjornatur.——Ibid 419 pl. 9 Mich. 11 Car. B. R. the S. C. and reſolved per tot. Cur. in Error of a Judgment given for the Plaintiff in C. B. that the Judgment was good, and affirm'd it accordingly.——Jo. 367. pl. 9. S. C. but S P. does not appear.——S. P. agreed accordingly, Cro. J. 131 pl. 3. Mich. 4 Jac. B. R. in Caſe of Marham v. Peſcod, and cited to have been ſo adjudg'd 31 Eliz. B. R. in Caſe of Knight v. Jerome; and Tanfield ſaid he well knew this Difference to be ſo agreed in that Caſe. After long Debate and Adviſement in that Caſe, it was agreed per tot. Cur. that (inde) ought to be in Conſpiracy.

enough; for it *cannot be intended of any other* Acquittal than that whereof he was indicted. Cro. J. 230. pl. 8. Mich. 7 Jac. B. R. Bell v. Fox & Gramble.

7. Caſe for conſpiring to indict the Plaintiff for the ſuppoſed counterfeiting a Letter, and maliciouſly proſecuting him for it at the Aſſizes, where he was acquitted; the Defendant made a ſpecial Juſtification, that a Stranger brought the Letter to him, with which he cheated him of 30 l. that there were three Perſons with the Defendant when the Letter was delivered to him, who ſaid that the Plaintiff was very like him, and that they believing him to be the Perſon, he complained to a Juſtice, who upon Examination found Cauſe of Suſpicion, and bound him over to the Aſſizes, and there he was acquitted; By 3 Juſtices this Juſtification is not good, for the Proſecution was upon *Suſpicion of other Perſons*, when it ought to be upon his own Suſpicion, and probable Cauſe, but no Judgment was given becauſe the Court was not full, and the Parties were upon agreeing. Bulſt. 149. Trin. 9 Jac. Wale v. Hill.

2 Bulſt 270. S. C. and for the ſame Exceptions Judgment was given per tot. Cur. againſt the Plaintiff.—— Roll Rep. 109. pl. 49. S. C. but the Point of the Pleadings does not appear there.——S. C. cited Palm. 315.——S C. cited Lat. 80.

8. In Caſe, for that *at the General Gaol-Delivery at W. before A. and B. Juſtices of C. B. and of the Peace, nec non ad diverſas felonias audiend' & terminand' aſſignati*, the Defendant falſo &c. cauſed the Plaintiff to be indicted of Treaſon &c. But becauſe the Indictment did *not ſhew that A. and B. were Juſtices ad Gaolam deliberand' aſſignati*, the Court held the Declaration not good, notwithſtanding it be ſhewn that they were Juſtices of Peace, and of Oyer and Terminer, and tho' they were in Truth Juſtices of Aſſiſe. Cro. J. 357. pl. 16. Mich. 12 Jac. B. R. Lovet v. Fawkner.

Bridgm. 60. S. C. ſays, that Paſch. 15 Jac. Judgment was given againſt the Plaintiff by the Opinion of 3 Juſtices, becauſe all that was done after the Warrant was legal; but they agreed that the Plaintiff might have Action for the charging him with Felony, and for all that was done before the Warrant. But Haughton J. diſagreed, and conceived that Judgment ſhould be given for the Plaintiff, becauſe the Plea of the Defendant was no Juſtification for what was done before the Warrant; but at length Judgment was given for the Defendant.——Roll Rep. 438. pl. 4. S C. adjornatur.

9. In Caſe &c. for conſpiring to *indict* the Plaintiff *of Felony for ſtealing 5 Steers*, who was acquitted; the Defendant *pleaded that he was poſſeſs'd of 5 Steers, which were ſtolen from him, and that upon freſh Purſuit they were found in the Poſſeſſion of the Plaintiff, and* that the *Defendant demanding the Sight of them, the Plaintiff ſaid, he had killed four, but refuſed to ſhew the Skins, upon which he ſuſpected him, and by Warrant was brought before a Juſtice of Peace, and bound over* to the Seſſions, and the Defendant to proſecute him, and there he was indicted and acquitted; the Plaintiff *replied, and confeſſed that they were ſtole and brought to Market at B. where he, being Butcher, bought and tolled them*, and afterwards was indicted for ſtealing them, and acquitted, *abſque hoc that he refuſed to ſhew the Skins to the Defendant.* The Court ſeemed of Opinion that this was a good Traverſe, but would adviſe; but the ſame was never moved again, and ſaid to be compromis'd. 3 Bulſt. 284. Hill. 14 Jac. Weale v. Wells.

10. Caſe

10. Caſe for that the Defendant cauſed him to be *indicted* at &c. *for Perjury*, upon the Statute of 5 Eliz cap. 17. and that he was arraign'd for the ſame &c on the 18th of September, in the Year &c. and that he was *debito modo acquietatus* on the ſaid Indictment remaining in the Court &c. And it was objected that the Plaintiff ought to have alleged that he was *legitimo modo* acquietatus; But Mountague and Doderidge argued ſtrongly that the Action lies, and ſaid that Caſe differs much from Conſpiracy, and that the Indictment is not the Cauſe of the Action, but the ſcandalous Words which may occaſion the Loſs of his Reputation, and the Damage received by him is Cauſe ſufficient, tho' the Jury had found Ignoramus, but that Conſpiracy is a ſtrict Action in which he ought to be debito modo acquietatus by Verdict. And this was the Opinion of the Court at this time. Palm. 44. Mich. 17 Jac. B. R. Taylors Caſe.

11. Caſe for maliciouſly preferring an *Indictment* againſt the now Plaintiff *for Felony, and inciting J. S. to give Evidence* that it was true, by which the Plaintiff was bound to anſwer it the next Aſſiſes, and there he *was acquitted*. It was argued that tho' it was not ſhew'd in the Declaration that the Bill was found; yet Hobart Ch. J. held it was a great Scandal to give this Matter in Evidence to a Jury, for which the Action lay. No Judgment was then given; but the Reporter ſays he heard the Judgment was afterwards given for the Plaintiff; but ſays quære better of that. Win. 28. 54. Mich. 20 Jac. C. B. Wright v. Black.

12. Action on the Caſe in Nature of a Conſpiracy is *not bound to any preciſe Form as a Writ of Conſpiracy is, but* is to be *form'd as the Matter requires*, and therefore lies, tho' one only does it; and tho' no Acquittal, but an Endeavour falſo & malitioſe to indict one by which he is grieved by Impriſonment, or otherwiſe, tho' there was an Ignoramus upon it; per Cur. Jo. 94. Hill. 1 Car. B. R. in Caſe of Smith v. Cranſhaw.

13. Caſe for that the *Defendant ex malitia* (but did *not ſay falſo*) *impoſed Felony on the Plaintiff's Wife, and before a Juſtice of Peace falſo & malitioſe charged her with Felony*. It was moved in Arreſt of Judgment, that it was *not ſaid that he falſo impoſed upon her the Crime of Felony*. Sed non allocatur; for having ſaid that the Defendant *ex malitia* impoſed on her the Crime of Felony, that *implies* he did it *falſo*. Cro. C. 271. pl. 6. Mich. 8 Car. Manning v. Fitzherbert.

14. Caſe in the Nature of a Conſpiracy, for that the Defendant falſo & malitioſe cauſed ſuch an *Indictment of Perjury* to be written, containing hanc falſam materiam &c. reciting it verbatim, and exhibited it to the Grand Jury, and procured it to be found, *and that afterwards S. one of the Juſtices of the Peace of Middleſex, delivered it with his own Hands to the Juſtices of Gaol-Delivery &c. whereby he was brought to the Bar, and arraigned, and acquitted*. After Judgment for the Plaintiff in C. B. it was aſſigned for Error, that the Declaration was not good, becauſe it is *only by way of Recital* of the Indictment; ſed non allocatur, for it is *ſcribi fecit talem falſam materiam*, which *is a direct Affirmative*. 2dly, Becauſe he doth not ſhew that he was in the Goal, and then the Juſtices of Gaol-Delivery cannot meddle with him; ſed non allocatur; for *ducta ad barram ſub Cuſtodia ſhews him to be in the Gaol*. Cro. C. 553. pl. 8. Paſch. 15 Car. B. R. Bagnal v. Knight.

15. In Caſe for preferring a Bill of Indictment of Felony againſt him; it was moved in Arreſt that *falſo was not in the Declaration*, nor was it ſaid that the Indictment was deliver'd to the Grand Jury but to the Court. But it being *ſaid to be malitioſe*, Roll Ch. J. ſaid it cannot be malitioſe unleſs it be alſo falſo, beſides *falſo is expreſſed in the Beginning of the Record*, and it is not neceſſary to repeat it throughout the Record; for the Words ſubſequent are coupled to the precedent; and a Bill of Indictment is to be deliver'd to the Court, and the Grand Jury receives it from thence. Sty. 374. Trin. 1653. Kitchinman's Caſe.

Sid. 95 pl 21. S. C and S P.—— Keb. 389 pl. 99 S. C. and S P.

16. In Caſe for that the Defendant crimen Feloniæ ei impoſuit, the Defendant as to the Impoſition of Felony, otherwiſe than by ſpeaking of ſcandalous Words, pleaded Not guilty; and as to ſpeaking the Words that it was not intra duos Annos. Per Twiſden J. if the Words are actionable at firſt then the Damages after do not give Cauſe of Action, and the firſt Plea is a full Bar and the other fruitleſs. And of that Opinion was the whole Court, and ſo Judgment for the Defendant niſi &c. Rayn. 61. Mich. 14 Car. 2. B. R. Saunders v. Edwards.

17. In Action upon the Caſe, quod falſo & *malitioſe crimen feloniæ ei impoſuit & quandam Billam Indictamenti ſcribi fecit continens hanc falſam materiam ſequentem*, viz. &c. Wild excepted in Arreſt of Judgment, in that the Malitioſe is not added to the latter Part of the Preferment of the Indictment. Sed non allocatur; but *Malitioſe* being *in the Beginning, goeth to the whole Sequel*, altho' one Part do not depend on the other, as here it doth. Judgment for the Plaintiff, Niſi. 1 Keb. 697. pl. 20. Paſch. 16 Car. 2. B. R. Atkins v. Down.

18. In Caſe for falſely indicting, it was moved in Arreſt, 1ſt, That the Plaintiff declares quod juratores dixerunt quod *ignorabant, (inſtead of Ignoramus)* &c. The whole Court (abſente Wild) held this a good Declaration; and it was agreed by the Prothonotaries to be the common Form either to ſay Quod ignorabant, or fuerunt ignorantes. 2dly, That the Exhibiting this Indictment is in Courſe of Juſtice, and it would be great Diſcouragement to the Execution of Juſtice on Malefactors, if Action ſhould lie upon every Ignoramus return'd, and that falſo & malitioſe are Words of Form. Judgment was arreſted. 2 Jo. 20. Caſes in C. B. Paulin v. Shaw.

Sid. 95. in pl. 21. at the End of the Caſe, ſays it has been adjudg'd that Reporter ſays Quære, becauſe it ſeems it would be miſchievous; for that the Defendant on ſuch Declaration could not know how to defend himſelf, ſince he is not particularly charged.

19. In Caſe the Plaintiff *declared that the Defendant malitioſe crimen feloniæ ei impoſuit*, and did *not mention any Felony in particular*; and yet held to be well enough. Vent. 264. Mich. 26 Car. 2. B. R. Anon.

Such Declaration is good; but that the Plaintiff ought to prove the Special Matter. But the

In the Declaration againſt the Defendant for malicious Proſecution, it muſt be *alleged* to be *without probable Cauſe*; per Holt Ch. J.

20. Caſe, for a falſe and *malicious Proſecution of a Suit in an inferior Court*, and ſaith only *abſque cauſa juſta*; and held naught, becauſe it might be with a probable Cauſe, and if there were a *probable Cauſe* for the Suit, then it could not be malicious, and this Action will not lie; *abſque aliqua cauſa* will do, or *ſine cauſa juſta vel probabili*; but Aſque cauſa juſta is not good for the Reaſon aforeſaid; and Judgment for Defendant. 2 Show. 154. pl. 139. Hill. 32 & 33 Car. 2. B. R. Box v. Taylor.

6 Mod. 170. Paſch. 3 Annæ, B. R. Muriell v. Tracy & al'.

In the Caſe of an *Indictment* the laying it *falſo & malitioſe*, without *abſque probabili cauſa*, is enough. *But in Action* for a malicious Proſecution, thoſe Words muſt be in. Reſolved. 10 Mod. 148. Hill. 11 Ann. B. R. Jones v. Gwinn, cites Cro. J. 193. 490. 2 Mod. 51. Jo. 93. 94.

The Words *abſque rationabili & probabili cauſa*, are not always neceſſary to be uſed; and no Authority has been cited to prove them neceſſary, tho' many have been cited, in which they are wanting; and the Word *malitioſe implies it* to be abſque rationabili & probabili cauſa, and a great deal more; per Parker Ch. J. in delivering the Judgment of the Court. 10 Mod. 214. 215. Jones v. Gwynn.

21. Caſe, for that the Defendant tali die & loco *falſo & malitioſe ei crimen feloniæ impoſuit*. It was moved that it was too general and uncertain; and per Cur. no other Act is neceſſary to be alleged. But yet Words importing a Charge of Felony will not be Proof of it; there *muſt be Proof of ſome Act*. Judgment for the Plaintiff. Show. 282. Mich. 3 W. & M. Haynes v. Rogers.

22. Caſe,

22. Case for malicious *holding to Special Bail without Cause.* The *Sum for which* he was arrested should be shewn. It was objected, that this Matter could not be specially shewn, because the *Writ remains in the Hands of the Officer.* It was answered, that the Plaintiff might have *moved the Court* that the Sheriff might have returned the Writ, and then all would appear; besides the *Warrant* under the Hand of the Sheriff *to the Bailiff* would be good Evidence. 12 Mod. 273. Hill. 11 W. 3. Robins v. Robins.

1 Salk 15. pl. 6. S. C. and S. P. accordingly by Holt Ch. J. and that this Action is a tender Action, and lies not till the original Action is determined.——Ld. Raym. Rep. 503. S. C. and S. P. accordingly per Cur. But Judgment was order'd to stay, on Account of the new manner of Pleading &c.

23. In Action on the Case for a malicious Prosecution, the Plaintiff must *shew what became of the former Action.* 10 Mod. 145. Hill. 11 Ann. B. R. adjornatur. Ibid. 209. Hill. 12 Ann. B. R. S. C. adjudged for the Defendant. Parker v. Langley.

The Plaintiff brought an Action upon the Case against the Defendant, for maliciously *prosecuting him* in the Sheriff of London's Court, *without any true or probable Cause arising within the Jurisdiction of the same Court*; but did *not shew what was become of that Action.* The Defendant demurr'd generally, and Judgment was given for the Defendant: and the Court said that it had been resolved, upon great Consideration in the Case of Parker v. Langley, that it is necessary for the Plaintiff, in an Action for a malicious Prosecution, to set forth what is become of that Prosecution, and disallow'd the Entry in * Lutw. 68, 69. MS. Rep. Mich. 4 Geo. B. R. Blackgrave v. Oden.

* The Case of Pritchard v. Papillion, Pasch. 36 Car. 2.

24. *But* a Verdict, or a Plea in Bar, admitting and confessing the first Action to be false and hopeless, may *cure this Defect* in a Declaration. 10 Mod. 210. per Parker Ch. J. in Case of Parker v. Langley, cites Raym. 418. 2 Keb. 456. 753. 3 Keb. 781.——*So* if the first Action goes off by *Nonsuit*, tho' it may be said that in another Action for the same Cause, a Verdict may be given inconsistent with the Verdict given in the present Case; yet the *Possibility of* such *a Verdict in a future*, and not existing *Action*, shall not hinder bringing such Action as this; per Parker Ch. J. 10 Mod. 210. in Case of Parker v. Langley, cites Ashton, 40. Brownl. Rediv. 61. Robinson Ent. 91.

(T. c) Pleadings &c. in Actions on the Case in General. Nonfeasance, Misfeasance &c.

1. TRespass upon the Case, that the Defendant held 2 Houses and 20 Acres of Land &c. in B. by reason of which he and all Tertenants thereof have used, Time out of Mind, to *repair and amend all Rivers and Banks*, and he has not done it, by which 30 *Acres of the Plaintiff are surrounded*, so that he lost the Profits of it for 5 Years, to the Damage of 30 l. and the *Writ was contra pacem*, and therefore abated. Br. Action sur le Case, pl. 20 cites 45 E. 3. 17.

2. Trespass upon the Case, inasmuch as the Defendant holds certain Land in R. by which he ought to cleanse and repair the Ditches and Banks, and did *not shew where* he ought to cleanse the Ditches and Banks, nor in what Vill, and therefore the Writ ill. Br. Action sur le Case, pl. 21. cites 46 E. 3. 8.

3. If the Plaintiff recovers, [in Trespass on the Case for not repairing a Wall, by which the Land of the Plaintiff is surrounded] the *Defendant shall be distrained to repair*; per Thirne. Quod non negatur But Brooke

Brooke ſays *mirum in this Action*; but that it ſeems to be Law in Aſſiſe of Nuſance. Br. Action ſur le Caſe, pl. 32. cites 7 H. 4. 8.

4. Treſpaſs, inaſmuch as the Defendant and thoſe whoſe Eſtate he has in 3 Acres of Land in B. *uſed to repair certain Banks of the Sea, and for not repairing, the Sea has ſurrounded his Land*; and the *Defendant demanded the View of the Land, by which he ſhall be bound to repair*; & non allocatur, by which the *Defendant ſaid that he himſelf has nothing in this Land, by which he ſhall be charged* to repair &c. *unleſs in Jure Uxoris, who is not named*; Judgment of the Writ, by which it was awarded that the Plaintiff ſhould take nothing by his Writ. Quod nota. Br. Action ſur le Caſe, pl. 36. cites 7 H. 4. 31.

5. In Caſe of *Laches of Nonfeaſance*, or Non-repairing &c. by which the Land is ſurrounded, there the Writ ſhall not be *Vi & Armis*. Br. Action ſur le Caſe, pl. 46. cites 12 H. 4. 3.

S. P. Br. Preſcription, pl. 16 cites 22 H. 4. - but both Books are miſtaken. * For it is 12 H. 4. 8. pl. 13.

6. Treſpaſs upon the Caſe was brought againſt the Maſter of St. Mark in Briſtol, that the ſaid Maſter, by reaſon of his Tenure, *ought to cleanſe a Ditch*; and he and all other Tenants aforeſaid having the ſaid Ditch, ought and uſed to cleanſe and repair, and uſed to do it Time out of Mind, *the ſaid Maſter had not cleanſed the Ditch, by which the Water, which ought to have its Courſe there, was turned out of its direct Courſe, and has ſurrounded* 20 *Acres of Land ſown.* Skrene, We and our Predeceſſors have been ſeiſed of the Tenure &c. Time out of Mind, by which the *Writ ſhould be, that we and our Predeceſſors have cleanſed the Ditch, by reaſon of ſuch Tenure, Time out of Mind*; Judgment of the Writ, and becauſe it was not in ſuch Form, *or that another and his Predeceſſors or Anceſtors, Time out of Mind, whoſe Eſtate the Defendant has*; therefore the Writ was abated by Award. Quod nota. Br. Action ſur le Caſe, pl. 47. cites 12 H. 4. * 7.

7. Action upon the Caſe lies as well for *Non-feaſance* of a Thing, *as for Miſ-feaſance.* Br. Action ſur le Caſe, pl. 71. cites 21 H. 7. 30.

8. Treſpaſs upon the Caſe by the Biſhop of Sarum, and *counted that King R. 2. granted to J. his Predeceſſor View of Frankpledge, Aſſiſe, and Aſſay* &c. and ſeveral other Things *in all his Lands and Fees, and* counted further, *that J. the Predeceſſor was ſeiſed of the Vill of New Sarum, and that this Plaintiff is alſo ſeiſed, and* that the *Defendant diſturbed him to collect Fines and Amerciaments there*, and becauſe it is an Action upon the Caſe, and that the *Certainty ought to be compriſed in the Writ*, and not only in the Count, and he *has not expreſſed in the Writ that the ſaid J. to whom* the Grant was made *was ſeiſed of S. where &c. at the Time of the Grant* made, therefore ill; per Cur. Br. Action ſur le Caſe, pl. 74. citer 38 H. 6. 9.

9. *For*, per Priſot, the *Writ in* Action upon the *Caſe ſhall be as certain as the Count*, and *ſhall have all that the Count has except the Year and the Day, and Quantity or Certainty of the Land*, but the Writ ſhall ſay that the Place where &c. was Parcel at the Time of the Grant, and ſo was the Opinion of the Court. Ibid.

10. Action upon the Caſe, where the Plaintiff *delivered Goods to the Defendant*, and the *Defendant for* 10 *s. promiſed to keep them ſafely, and did not*, ad damnum &c. *Non habuit ex deliberat'* is a good Plea; per Fitz. herbert and Shelly J. Br. Action ſur le Caſe, pl. 103. cites 26 H. 8.

11. And in Action upon the Caſe *that the Goods of the Plaintiff came to the Hands of the Defendant, and he waſted them*, the *Defendant ſaid that they did not come to his Hands*, and a good Plea, and *gave in Evidence that they were the proper Goods of the Plaintiff.* Ibid. cites Paſch. 34 H. 8.

Cro. E. 285. pl 3. Edwards's Caſe. S. C. the principal

12. Caſe, for that *H. being ſeiſed of an Houſe in L. let a Cellar to the Plaintiff, and a Warehouſe over it to the Defendant, who laid ſo great a Burthen in the Warehouſe, that by the Weight thereof the Floor broke and fell into the Cellar, and beat to Pieces* 3 *Buts of Wine*; the Defendant pleaded, that the

the ſaid Floor had ſuſtained as great a Weight, and that for want of repairing by thoſe to whom the Warehouſe did belong it was ſo ruinous that the Poſt of the Cellar broke &c. Adjudged upon Demurrer for the Plaintiff, and affirmed in the Exchequer Chamber, for the Plaintiff had expreſsly alleged, *that the Floor broke by the Weight*, which *ſhould have been confeſſed and avoided, or travers'd*; and the Defendant pleading that it bore as great a Weight, is only Argumentative. Poph. 46. Paſch. 36 Eliz. Edwards v. Hallender. Cauſe of the Demurrer was, that the overloading was laid to be malitioſe &c. and Gent and Clerk held ſtrongly, that the Plea was not good for want of a Traverſe, becauſe he is charged with a Male-feaſance; but Manwood Ch. B. e contra ſtrongly; for the Defendant confeſs'd that it fell, and ſhewed how. But Gent and Clerk ſaid, that here being an ill Act expreſsly ſuppoſed, ought expreſsly to be traverſed, and they ſaid, that ſo was the Opinion of the other Judges with whom they had conferred, and therefore, againſt the Opinion of Manwood, gave Judgment for the Defendant.— 2 Le. 93. pl. 116. S. C. adjudged accordingly, and afterwards affirmed in the Exchequer Chamber.

13. In Caſe for *hindering an Officer to exerciſe his Office and take his Fees*, and laid it *Vi & Armis*, the Court reſolved the Writ and Count good, and took a Diverſity between Non-feaſance and Mis-feaſance; that for Non-feaſance or Negligence it never ſhall be ſaid Vi & Armis, it being Oppoſitum in Objecto; But when there are *two Cauſes* of an Action on the Caſe, the one *Cauſa cauſans*, and the other *Cauſa cauſata*, the Cauſa cauſans may be alleged Vi & Armis, becauſe this is not the immediate Cauſe or Point of the Action, but Cauſa cauſata, as 12 H. 4. 3. a. the putting the Dung into the River was Cauſa cauſans, and therefore may be Vi & Armis, but the Cauſa cauſata, viz. the Point of the Action on the Caſe, was the drowning of the Plaintiff's Land; for in the principal Caſe, the hindring the Exerciſe of the Office is Cauſa cauſans by which he loſt his Fees, which loſing the Fees is Cauſa cauſata, and the Point of the Action. 9 Rep. 50. b. Trin. 8 Jac. the Earl of Shrewsbury's Caſe. S. C. cited Arg. Poph. 169. and ibid. 171. cited by Doderidge J. and ſaid to be good Law. —— S. C. cited Arg. Raym. 72. —— S. C. cited Palm. 446. and Doderidge and Jones J. ſaid, that true it is if the Action by which the Nuſance is done be a Treſpaſs to the Owner, it ſhall be Vi & Armis. —— S. C. cited 2 Roll Rep. 248. —— S. C. cited Cro. C. 325 in pl. *. Arg —— S. C. cited Cro. C. 377, 378. —— 2 Brownl. 333. ſame Diverſity by Coke Ch. J. Paſch. 8 Jac. in the Earl of Rutland's Caſe, which ſeems to be S. C. as the Principal Caſe of 9 Rep. 50.

14. Caſe, for that he had a Meadow &c. and that the *Defendant Vi & Armis erected a Bank, per quod the Water overflowed and drowned his Meadow*. Upon a Demurrer it was objected, that he ſhould not have declared Vi & Armis in an Action on the Caſe; beſides, he could not erect a Bank Vi & Armis on his own Land; ſed per Cur. the *Vi & Armis goes to the erecting the Bank, which was only an Inducement* to the Action, and the *Overflowing was the Point of the Action*, which is not alleged Vi & Armis. It was adjudged good. 2 Roll Rep. 248. Mich. 20 Jac. B. R. Whiting v. Beenway.

15. A Difference was taken by Jones J. that where the *Act is a Treſpaſs and a Nuſance*, there it may be laid to be *Vi & Armis*, but if it be a *Nuſance only and not a Treſpaſs*, it is otherwiſe; *As* if I have a Way over another Man's Land, if a Stranger digs in the Land ſo as I cannot have the Way, now becauſe it is a Treſpaſs to the Owner of the Soil, in my Action on the Caſe againſt a Stranger I may have Vi & Armis, but if the Owner ſtops the Way, there Vi & Armis ſhall not be in my Action on the Caſe. Poph. 170. Paſch 2 Car. B. R.

16. In Caſe for keeping a Dog that bit his Sow &c. the *Recital of the Bill was* * *in placito Tranſgreſſionis*, and the *Declaration* was *in placito Tranſgreſſionis ſuper Caſum*, but upon Exception taken it was held good. Cro. C. 254. pl. 5. Paſch. 8 Car. B. R. Boulton v. Banks. * See Tit. Treſpaſs (Y. 2) pl. [6] 15, and the Notes there.

17. The Record was *Queritur in Placito Tranſgreſſionis pro eo quod Vi & Armis cepit & chaſeavit his Cattle into the Cloſe of J. S.* It was moved S. C. cited Hob 180. pl. 215. at

the End, and says, if the Bill be general, neither saying Vi & Armis, nor super Casum, specially, the Plaintiff may use it to either.

ved in Arrest, that the Bill recites it to be Placitum Transgressionis, and the Declaration is Vi & Armis, and therefore should have concluded contra Pacem; but it was answered, that this is an Action on the Case, it not being brought merely for the taking or chasing of his Cattle, but for an especial Wrong, viz. for chasing into another's Soil, so that they were Trespassors there, and he forced to compound for the Damage; And the Vi & Armis does not prove it to be an Action of Trespass; for they may be in an Action on the Case; and the Recital of the Bill being in Placito Transgressionis does not necessarily make it Trespass only, but may serve for Trespass on the Case; and per tot. Cur. adjudged for the Plaintiff. Cro. C. 325. pl. 7. Mich. 9 Car. B. R. Tyffin v. Wingfield.

18. In Trespass on the *Case for false Imprisonment*, it was moved in Arrest, that the *Declaration wanted Vi & Armis*, this not being a mere Action on the Case, but is in its Nature an Action of Trespass. Roll Ch. J. ask'd what they said to the Case Quare fregit suum Mill-dam, which had been adjudg'd good without Vi & Armis as well as with it. And said, that with Vi & Armis it is Trespass, and without it it is an Action on the Case, and that it is a plain Action on the Case, for in the Record it is with an Et quod cum; and Bacon J. seems to agree. Sty. 130. Mich 24 Car. Sir A. A. Cooper v. St. John.

19. In Action on the Case for indicting the Plaintiff; *if the Indictment was found by the Grand Jury*, the *Defendant shall not be obliged to shew a probable Cause*, but it shall lie on the Plaintiff's Side to prove an express Rancour and Malice; per Cur. 1 Salk. 15. pl. 5. Mich. 10 W. 3. B. R. Savil v. Roberts.

(U. c) Where several Matters may be joined in one Action.

S. P. accordingly, and yet one is at the Common Law, and the other by Statute. Br. Plaint, pl. 29. cites 11 Ass. 13.

1. ASSISE was brought *of two several Estovers in two Places*, and well. Br. Joinder in Action, pl. 49. cites 7 Ass. 18.

2. *So* of one and the same Assise *of Land and Cawsey*. Br. Joinder in Action, pl. 49. cites 7 Ass. 18.

Br. Plaint, pl. 29 cites 11 Ass. 13. S. P. of two Rent-Services, and the like of two Rents in Gros.

3. *So* of one and the same Assise *of two several Rents*; and one and the same Plaint shall serve; quod nota. Br. Joinder in Action, pl. 49. cites 7 Ass. 18.

Br. Joinder in Action, pl. 118. cites 14 E. 3. that a Man may have one and the same Assise of several Rents, but that there shall be several Plaints, and not one and the same Plaint of both.

4. A Man shall not have in one Writ *Ejectment of Ward and Quod blada sua apud B. nuper crescen' messuit* &c. Et blada & alia bona &c. cepit &c. For Proclamation lies in the one, and not in the other. Thel. Dig. 106. lib. 10. cap. 15. S. 1. cites Pasch. 11 E. 3. 471. Contra Trin. 29 E. 3. 48. in Oyer and Terminer, and 29 Ass. 35.

5. If Land of *Gavel-kind descend to two Sons*, and *they enter, and are disseised*, the *one dies without Issue*, and the *Disseisor dies seised*, and *his Son enters and dies seised, and his Heir enters*; and the *Son, who survived, brings Writ of Entry sur Disseisin against the Heir of the Son of the Disseisor*, he shall have several Writs, the one of his own Moiety, and the other

of

of the Moiety of which the Right is deſcended to him by his Brother; and otherwiſe the Writ ſhall abate. Nota. Br. Joinder in Action, pl. 37. cites 24 E. 3. 13.

6. A Man ſhall have one Writ upon the Statute of Labourers *againſt the Maſter for the Retainer, and againſt the Servant for his Departure* out of his Service. Thel. Dig. 106. lib. 10. cap. 15. S. 2. cites Hill. 29 E. 3. 7. and Mich. 28 E. 3. 97.

7. Where *one is outlaw'd* at the Suit of divers Perſons in ſeveral Actions, he ought to *ſue ſeveral Scire Facias's*. Thel. Dig. 106. lib. 10. cap. 15. S. 4. cites Paſch. 29 E. 3. 43.

8. One *Scire Facias* lies upon the *Recognizance*, for the good Behaviour enter'd into by the Principal and his Surety; for though they are bound ſeverally, yet it is but as one Recognizance. 2 Roll Rep. 200. by Mountague Ch. J. Mich. 18 Jac. B. R. cites 29 E. 3. 33.

9. One *Writ of Attachment upon a Prohibition* was maintained *by ſeveral Pone per Vadios's*, the *one againſt the Official for holding the Plea* &c. and *the other againſt the Party, becauſe he had ſued* contrary [to the Prohibition] &c. Thel. Dig. 106. lib. 10. cap. 15. S. 5. cites Hill. 33 E. 3. Brief 912. But Ibid. 107. S. 20. cites Hill. 19 H. 6. 54. where Newton ſeemed to doubt if ſuch Writ was good.

10. Falſe Impriſonment, for that he *took him at S. in the County of E. and carried him to O. in the County of S. and there detained him till he had made Fine of* 10 *l.* and the Action was brought in the one County, but it did not appear in which. Cheir. ſaid he ought to have two Actions in this Caſe; but the Defendant was awarded to anſwer. Quod nota. Br. Lieu, pl. 23. cites 38 E. 3. 34.

11. Writ of *Treſpaſs* was *Quare Parcum ſuum fregit*, and afterwards *Quare arbores ſuas ſuccidit & aſportavit* &c. and adjudg'd good, notwithſtanding the 2 *Quare's*. Thel. Dig. 107. lib. 10. cap. 15. S. 23. cites Trin. 38 E. 3. 19.

12. It was agreed that *a Man may have as many Treſpaſſes in one and the ſame Writ as he will*, and if Vi & Armis be at the Commencement, it ſhall refer to all the Matters enſuing. Br. Treſpaſs, pl. 112. cites 38 E. 3. 15. 16. Several *Treſpaſſes at Common Law* may be join'd in one Writ, but not where Common Law gives one, and Statute Law gives another. Jenk. 24. pl. 46.

As an Action of *Treſpaſs by a Statute*, and an Action of *Detinue at Common Law*, cannot be joined, 3 H. 6 53. 11 Aſſiſe, pl. 13. But *many Treſpaſſes at Common Law* may be joined in one Writ, and many *Detinues, Waſte* &c. Jenk. 211. pl. 46.

13. *But* it ſeems that *Treſpaſs Vi & Armis* and *Treſpaſs upon the Caſe* ſhall not be join'd in one and the ſame Writ, for they are of diverſe Natures. Br. Treſpaſs, pl. 112. cites 38 E. 3. 15. 16. *Treſpaſs Vi & Armis and Matter upon the Caſe* may be in one and the ſame Writ. Br Double Plee, pl. 108. cites F. N. B. in Writ of Treſpaſs.

A *general Action of Treſpaſs and a ſpecial Action on the Caſe* may be join'd in one Action; as Treſpaſs will lie for entring the Houſe of the Plaintiff and breaking his Cheſts and carrying away his Goods, and for beating his Servant, per quod ſervitium amiſit. Agreed. All 9. Paſch. 23 Car. B. R. Vincent v Furſy.——Sty. 43. S. C where S P. was moved but not reſolved.

Treſpaſs *Vi & Armis for entring his Cloſe and pulling down his Booths* (in a Fair) *and for hindering him to erect new Booths*, by Reaſon whereof the Plaintiff loſt the Profits of Piccage and Stallage. It was moved in Arreſt that the Hindring the Building new Booths ſounds wholly in Caſe, and therefore is incompatible with the firſt Part of the Declaration which is Vi & Armis, the Judgment in the firſt Caſe being a Capiatur, but the laſt is only a Miſericordia Sed non allocatur; for *the Hindering &c. is laid only in Conſequence of the firſt Treſpaſs &c and of the ſame Effect as a Per quod* in a Declaration, which is often uſed in Actions of Treſpaſs Vi & Armis, to let in the conſequential Damages &c. and one Plea goes to the Whole; for if the Defendant had pleaded a Licence from the Plaintiff to enter the Cloſe, that would have been a good Juſtification of the Treſpaſs. And Judgment for the Plaintiff. Carth. 113. Paſch. 2 W. & M. in B R. Drake v. Cooper ——S. C cited Ld. Raym Rep 273. in Caſe of Courtney v. Collet.

Treſpaſs

Treſpaſs, for *breaking his Cloſe, treading down the Graſs*, and laying *Nets on the Soil, and for carrying away of his Fiſh*; *nec non eo quod* the *Defendant Vi & Armis* did *break down certain Weares, whereby the Water overflow'd the Piſcary of the Plaintiff* adjoining, *per quod the Fiſh eſcaped out of the* Piſcary, *and the Plaintiff* and his Servants were *hinder'd* from *fiſhing there*. Verdict pro Quer. And moved in Arreſt of Judgment, that here *Treſpaſs and Caſe* were joined together, which could not be; but it was urged on the other Side that it was all Treſpaſs, and that the *Per quod was only in Aggravation of Damages*, and this Term the Court was of Opinion that it was all Treſpaſs; and Judgment was pro Quer 12 Mod. 164. Hill 9 W. 3. Courtney v Collet.———Carth. 436. S. C. adjudged accordingly ———Ld. Raym. Rep. 272. S C. The Court thought this a plain Treſpaſs; for the cauſing a Superfluity of Water to overflow the Plaintiff's Fiſhery is a plain Treſpaſs, and the Per quod the Fiſh eſcaped, is but in Aggravation of Damages. Sed adjornatur.

Actions can never be joined that *have different Judgments*, as *Treſpaſs* and *Treſpaſs on the Caſe* are two diſtinct Things of different Natures; and tho' if Vi & Armis is put in, in Treſpaſs on the Caſe for Maleſeaſance, it will not vitiate, yet the Judgments in Treſpaſs and Caſe are different; for in Treſpaſs the Judgment always is Quod capiatur; but in Treſpaſs on the Caſe, tho' Vi & Armis be inſerted, yet the Judgment is Quod ſit in Miſericordia; per Cur. Ld. Raym. Rep. 273. Mich. 9 W. 3. in Caſe of Courtney v. Collet.

Br. Iſſues Joines, pl. 66. cites S. C. —Br. Treſpaſs, pl. 408. cites S. C.— 39 E. 3. 20.

14. Action *upon the Statute of Marlebridge*, that the Defendant *diſtrain'd in the High Street*, and *detain'd them till Plaintiff made Fine*, where *the one* of them *is by the Common Law and the other by the Statute*, and yet good becauſe the one *is purſuant upon the other*, Br. Joinder, pl. 42. cites

S. P. For a Man may have ſeveral Treſpaſſes in one and the ſame Writ. Br. Double Plea, pl. 144. cites S. C — Thel Dig. 106. lib 10. cap. 15. S. 10 cites 39 E. 3. 25. that it is not double, notwithſtanding the one is prohibited by the Statute, and the other by the Common Law.

Heath's Max. cites S. C. and 1 H 5. 4. accordingly, becauſe there Debt is the only Cauſe of Action.

15. A Man ſhall have one Writ of *Debt* where *Parcel* of the Debt is *duë by Obligation, and Parcel by Contract*. Thel. Dig. 106. lib. 10. cap. 15. S. 9. cites Paſch. 41 E. 3. Damages 75.

Theol. Dig. 106. lib. 10. cap. 15. S. 12. cites Paſch. 43 E. 3. 12. S.C. and S. P.

16. Scire Facias to execute a *Fine levied of one Manner and 2 Parts of another Manor to one for Life*, the *Reverſion in Tail to R. D. of one Part*, and *of another Part to A. for Life*, the *Reverſion in Fee to R.* and the *Heir of R. brought Scire Facias to execute the Tail.* Judgment of the Writ, becauſe he demanded *divers Eſtates*, therefore he ought to have *ſeveral Writs*; & non allocatur, becauſe it was by one and the ſame Fine; Quod nota. Br. Scire Facias, pl. 24. cites 43 E. 3. 11.

17. In Writ of *Audita Querela* was compriſed, that he had *performed all the Covenants of the Defeaſance, and alſo had releaſed* all Actions &c. yet the Writ ſhall not abate; for he may hold himſelf to one. Thel. Dig. 106. lib. 10. cap. 15. S. 13. cites Mich. 44 E. 3. 36.

Heath's Max. 7. S. P. becauſe there one Thing is the Ground of the Action.

18. But a Man ſhall have *Detinue of Charters and of Chattels* in one Writ. Thel. Dig. 106. lib. 10. cap. 15. S. 6. cites Mich. 44 E. 3. 41. Brief 583.

Br. Joinder in Action, pl. 10. cites S. C.

19. *Detinue of a Cheſt and a certain Sum of Money, and certain Charters*, and ſhew'd ſpecially the Contents of them, and what Land they concern'd, and both in one and the ſame Writ, where the one demands Proceſs by Capias, and of the Cheſt and Money, and of the Charters, Special lies only in Diſtreſs, and not Capias or Exigent, and yet good. Br. Detinue de Biens, pl. 14. cites 44 E. 3. 41.

Br. Joinder in Action, pl. 17. cites S. C. accordingly.—— Nor upon *Diſſeiſin done to two Anceſtors.* Thel Dig 106. lib. 10. cap. 14. S. 11. cites Paſch. 31 H. 6. 15.

20. A Man ſhall not make Title in one Writ of the *Seiſin* or dying *of two Anceſtors.* Thel. Dig. 106. lib. 10. cap. 14. S. 11. cites Paſch. 48 E. 3. 14.

If

If *two Coparceners are diſſeiſed*, and the *one has Iſſue and dies*, and the *other dies without Iſſue*, the Iſſue ſhall not have one and the ſame Writ of Entry of the Whole againſt the Diſſeiſor but ſeveral Writs. Br. Joinder in Action, pl. 101. cites 31 H. 6. 8.

21. One Writ upon the Caſe was maintained for *Diſturbance to hold a Leet*, for diſturbing *of his Tenants and Servants from collecting Tithes*, for *Menaces made that the People durſt not come to the Chapel of the Plaintiff to pay their Devotions and Offerings*, and for *taking of his Servants and Chattles*. Thel. Dig. 107. lib. 10. cap. 15, S. 15. cites Hill. 19 R. 2. Action ſur le Caſe, 52. Heath's Max. 7. cites S. C. and ſays, that in Things of the like Nature one Declaration may contain divers ſeveral Torts as theſe are in the principal Caſe.

22. A Man may have *Debt and Detinue* in one and the ſame Writ *by ſeveral Præcipes*, for they are of one and the ſame Nature. Br. Joinder in Action, pl. 97. cites 3 H. 4. 13. Thel. Dig. 107. lib. 10. cap 15. S. 16. S. P. cites Paſch. 5 E. 3. 181. and 11 H. 6. 60. and ſays, that by the new Nat. Brev. 152. it lies. [But I do not obſerve it there.] But ibid S. 6. ſays the Opinion of Hill. 33 E. 3. Brief 913. is, that a Man ſhall not have one Writ of *Debt and Detinue of Chattle upon Bailment* &c. and cites 3 H. 4. 13 and 32 E. 3. Brief 288. —— S. P. accordingly, L. P. R. 16 cites Raſt. Ent. 150. pl. 13. 174. pl. 15. —— 5 Mod. 92. Trin. 7 W. 3. B. R. the Court ſaid it ſeemed ſtrange that Debt and Detinue ſhould be joined, becauſe thoſe Actions have different Judgments.

23. *Contra* of Action of ſeveral Natures, as *Debt and Treſpaſs*, *Debt and Account* &c. Br. Joinder in Action. pl. 97. cites 3 H. 4. 13.

24. *Debt upon an Obligation of* 20 *l. and demanded the ſame Sum and certain Chattles by one and the ſame Præcipe*; Tirwit ſaid the Writ ſhall abate, becauſe all is demanded in one and the ſame Præcipe; but it was agreed, in the time of H. 8. that a Man may have *Debt and Detinue* by one and the ſame Writ, by ſeveral Præcipes; for the *one ſhall be Debet, and the other Detinet*. Br. Several Præcipe, pl. 5. cites 3 H. 4. 13.

25. In a *Replevin* the Plaintiff *counted of* 4 *Oxen taken at divers Days and Places, and that the Deliverance was made of* 2 &c. *and that he yet detains the other* 2, *ad damnum* 40 *s and did not ſever the Damage*, and yet good; and ſo ſee a Replevin of * ſeveral Takings, and ſeveral Days and Places, and one entire Damages. Br. Replevin, pl. 13. cites 7 H. 4. 11. * Thel. Dig. 106. lib. 10. cap. 15. S. 3. cites 10 E. 3. 508. 29 E. 3. 30.

26. *Treſpaſs by Executors of breaking Teſtators Cloſe, and carrying away a certain Sum of Money*, and admitted that it lies for the Sum of Money, but not for the breaking of the Cloſe, and ſo it lies in Part, and in Part not. Br. Joinder in Action, pl. 26. cites 11 H. 4. 3.

27. Audita Querela containing 2 Matters, the one *Performance of Conditions, and* the other of *Deceit, for delivering of the Statute, contrary to his Promiſe*, and the Writ was againſt a Stranger to the Statute, and held good; per Opinionem. Thel. Dig. 106. lib. 10. cap. 15. S. 14. cites Hill. 12 H. 4. 15.

28. If a *Præcipe quod reddat* be brought *of Land, Parcel in Guildable, and Parcel in Franchiſe*, the Writ ſhall abate. Br. Privilege, pl. 12. cites 14 H. 4. 21. *But* in Præcipe *of Rent out of* Land in Guildable and Land in Franchiſe the Writ ſhall not abate, but the Common Law ſhall have Juriſdiction. Br. Privilege, pl. 12. cites 14 H. 4. 21.

29. In Præcipe quod reddat *of* 2 *Acres, whereof one is ancient Demeſne*, the Writ ſhall abate as to that, and ſtand as to the other. Br. Privilege, pl. 12. cites 14 H. 4. 21. per Hals.

30. A Man brought *Scire facias* to have Execution out of a Fine *as Heir to 2 Parceners*. Thel. Dig. 24. lib. 2. cap. 1. S. 38. cites Mich. 9 H. 5. 12.

Parco fracto and *Reſcous* may be joined, adjudged per tot. Cur. though at firſt they inclined otherwiſe. 2 Lutw. 1259, 1260. Trin. 7 W. 3. Alwayes v. Broom.——— Ld. Raym. Rep. 83. S. C. adjudged accordingly.

31. One Writ of Treſpaſs comprehended *Reſcous, Entry, and Chaſing in a Warren*, and *Aſſault of his Servants*. Thel. Dig. 107. lib. 10. cap. 15. S. 17. cites Trin. 3 H. 6. 53.

Br. Joinder en Action, pl. 2. cites S. C. accordingly; Per tot. Cur. becauſe the Reſcous is intire.

32. In Reſcous the Plaintiff *counted that J. held of him certain Land in D. by certain Services, and other certain Land there by other Services, and for the Rent and Services arrear he diſtrained*, and the Defendant made Reſcous, and broke his Warren, and beat his Servants, and the Defendant demanded Judgment of the Writ, becauſe he joined the Reſcous of ſeveral Tenures in one and the ſame Writ, and yet well; per tot. Cur. Quod Nota. Br. Reſcous, pl. 1. cites 3 H. 6. 52.

33. One Writ upon the Caſe contained, *that the Plaintiff for a certain Sum had retained the Defendant to do a certain Thing*, and that the *Defendant for the ſame Sum had aſſumed to do this Thing* &c. and it was held good, and not double. Thel. Dig. 107. lib. 10. cap. 15. S. 18. cites 11 H. 6. 21. 29. 69.

As a Man may declare upon one Writ *all the Covenants in an Indenture*, in the ſame manner he may have Action upon the Caſe for *all Matters agreed in one and the ſame Aſſumpſit*; per Newton. Quod non negatur, and ſo it is uſed now. Br. Action ſur le Caſe, pl. 108. cites 11 H. 6. 55.——*Aſſumpſit expreſs and imply'd* may be join'd. Jenk. 331. pl. 62.——The Caſe was this: Goods were ſold by A. to B. for 100 l. whereof 50 l. was to be paid at Lady-Day, and the other 50 l. on May 1. The firſt 50 l. was duly paid, and then B. asked A. to take his Bill off his Hand for 40 l. Part of the other 50 l. to be paid at Chriſtmas after, which A. did; but neither the 40 l. nor the other 10 l. was then paid; whereupon A. brings Aſſumpſit, and declares on the Promiſe to pay the 40 l. which the Defendant made on A.'s accepting the ſaid Bill, and that A. had not paid the ſaid 40 l. nor the 10 l. Reſidue of the ſaid 50 l. and held good. Cro. J. 544 pl. 4. Mich. 17 Jac. B. R. Heath v. Dauntley.

34. A Man ſhall have *ſeveral Aſſumpſits in one and the ſame Action upon the Caſe*, and the Defendant ſhall anſwer to all, and divers Iſſues may come upon them. Br. Action ſur le Caſe, pl. 108. cites 11 H. 6. 24.

Thel. Dig. 107. lib. 10. cap. 15. S. 22. cites S. C.

35. Treſpaſs for *Hunting in 2 Parks*, and good, tho' ſeveral Puniſhments are given; for a Man cannot have Writ of Raviſhment of 2 Wards, nor one Quare Impedit of 2 Churches, and yet by the Juſtices the Writ is good; for *Land of 20 Titles* may be well joined in one Writ of Treſpaſs. Br. Joinder in Action, pl. 120. cites 13 H. 7. 12.

36. A Man cannot join in one and the ſame Writ *things of which Parcel of the Proceſs ſhall be Diſtreſs infinite, and of the reſt Exigent*, and if this be apparent in the Writ the Writ ſhall abate clearly, and the ſame Law where it appears in the Declaration, per Paſton; but quære of his Opinion; for this is permitted elſewhere often. Br. Brief, pl. 236. cites 14 H. 6. 1.

37. If a Man *forges a Deed concerning Land in the County of W. and in the County of D.* he ſhall have one and the ſame Writ of Forger of Deeds, tho' the Land be in two Counties. Br. Joinder in Action, pl. 75. cites 21 H. 6. 51.

Br. Patents, pl. 17 cites 22 H. 6. 11. S. C. & S. P. by Danby and Portington.

38. Where the *King grants* to me *the Office of Parkerſhip in D. and S.* and I *am diſſeiſed*, I *ſhall have two Aſſiſes*; for this is a ſeveral Grant in itſelf. Br. Joinder in Action, pl. 34. cites 21 H. 6. 10.

Br. Patents, pl. 17. cites S. C. & S. P. by Danby and Portington; quod nemo negavit.

39. *So* where he grants to me *a Fair in D. and S.* And ſo ſee that both ſhall not be join'd in one Aſſiſe, or in one Action. Br. Joinder in Action, pl. 34. cites 22 H. 6. 10.

If *Land* had been given *to a Brother and a Siſter, and the Heirs of their 2 Bodies* begotten, the *Remainder over in Fee*; if the *Brother dies without Iſſue*, now the Siſter has an

40. It was ſaid that one Writ of *Formedon* lies *of divers Gifts*. Thel. Dig. 106. lib. 10. cap. 14. S. 11. cites Paſch. 31 H. 6. 15. Quære.

an Eſtate for Life in one Moiety, the Remainder over in Fee; and for the other Moiety ſhe has Eſtate Tail, the Remainder in Fee; and after the *Siſter has Iſſue, and dies*, and a *Stranger abates*, now for her one Moiety the Remainder commences, and after the *Iſſue dies without Iſſue*, tho' the Remainder happened at ſeveral Times, yet he in Remainder ſhall have one *Formedon*; for *both Remainders which depend upon one and the ſame Eſtate, are come to one and the ſame Perſon.* 8 Rep. 87. a. (c) cites 17 E. 3. 51. a. 78. a. b. and ſays that ſo the 31 H. 6. 14. b. is to be intended, where it is ſaid that Trin. 7 Jac. B. R. a Man may have Formedon of divers Gifts.

But ſee Formedon in Reverter conveying the *Deſcent* by the Count *to 2 Daughters, and that they died without Iſſue, by which the Land reverted to the Demandant.* Thel. Dig. 106. lib. 10. cap. 14. S. 12. cites Trill. 29 E. 3. 5. Quære.

41. A Man ſhall have Action of Debt upon *divers Contracts.* Thel. Dig. 106. lib. 10. cap. 14. cites Paſch. 31 H. 6. 15. *Goods ſold at two ſeveral Times*

by A. to B. *The Goods firſt ſold were paid for at the Time agreed.* In an Action for the reſt of the Money A. declared upon one Contract for all the Goods; but it was held that it ought to have been a Several Action upon the *Several Contracts.* Godb. 244. pl. 339. Hill. 11 Jac. C. B. Lambert's Caſe.

42. Debt lies for *felling of Cloaths, and* for *Salary*, in one and the ſame Writ; per Cur. Br. Joinder in Action, pl. 86. cites 16 E. 4. 10.

43. A Man ſhall have Treſpaſs *tam contra Pacem Regis H. 6. quam contra Pacem Regis nunc E. 4.* Quod nota, and ſhall recover Damages for both Times, and otherwiſe not. Br. Treſpaſs, pl. 301. cites 2 E. 4. 24. S. P. per all the Juſtices. Br. Treſpaſs, pl. 314. cites 8 E. 4. 5.

44 If A. has Plaint of *Replevin againſt J. C. and B. has another Plaint of Replevin againſt him*, they cannot have one and the ſame *Recordare to remove thoſe two Plaints*, and cannot declare ſeverally; for every one of them ought to have a Recordare in this Caſe. Br. Joinder in Action, pl. 62. cites 3 H. 7. 14. *So* if it be removed *at the Suit of the Defendant*, and not at the Suit of the

Plaintiff; for per Cur. if there are divers Plaints, they ſhall not be removed; and therefore the Plaintiffs may proceed in Pais in their Plaints. Br. Joinder in Action, pl. 62. cites 3 H. 7. 10.

45. In Debt; *a Man ſold a Piece of Cloth and leaſed* an Acre of *Land for* 40 *s. at Michaelmas* * [the Money for the Cloth and alſo the Rent to be paid at Michaelmas] and *after* the Feaſt of *Michaelmas he brought Debt.* Keble demanded Judgment of the Writ; for the Debt for the Leaſe and the buying of the Cloth cannot be join'd in one Contract; for they are of ſeveral Natures; for the one is a Duty immediately, and the other is no Duty till Michaelmas that the Defendant has had the Occupation of the Land demiſed; for by Releaſe of all Actions before Michaelmas the Debt of the Cloth is determined, but not the Debt of the Land. But per Fiſher, the Action does not lie till Michaelmas for the one nor for the other, for it is the Day of Payment; by which the Defendant was awarded to Anſwer. Br. Dette, pl. 143. cites 7 H. 4. * Br. Joinder en Action, pl. 90. cites S. C. accordingly.

46. One Writ of *Raviſhment of Ward, for* the Raviſhment of 2 *Daughters*, was adjudg'd good. Thel. Dig. 106. lib. 10. cap. 15. S. 7. cites Paſch. 41 E. 3. Briet 541. But ſays, ſee that it is ſaid the contrary Hill. 13 H. 7. 12.

47 Land was given *to Father and Son, and the Heirs of their two Bodies begotten*, the *Remainder over in Fee.* The *Father died* without any other Iſſue than the Son, and the *Son died without Iſſue*; and a *Stranger abates*, or the [Son who was] Survivor made Diſcontinuance. Quære, per Prideaux, if *Remainderman ſhall have one Formedon*, or ſeveral; and it ſeem'd to Saunders, Brooke, and Brown, that one Writ would be ſufficient. Tamen Quære bene. D. 145. a. b. pl. 64. Paſch. 3 & 4 P. & M. Anon. S. C. cited 8 Rep. 87. without any Quære, and ſays that tho' the Eſtates Tail were ſeveral, yet inaſmuch as the ſeveral

Eſtates in Tail, as the Remainder alſo depends upon *one joint Eſtate in the Father and Son for their Lives, and all commenced at one Time*, therefore one *Formedon in Remainder* lies.——S. C. cited Arg. Le. 213.

48. In

48 In *Debt on 2 E. 6. 13. for not ſetting out Tythes*, Plaintiff ſhewed that the *Rector of M had 2 Parts and the Vicar the third Part* of the Tythes, and laid it to be *by Preſcription* as to the Manner of taking them by the Parſon and the Vicar; and alſo that the *Parſon and Vicar had by ſeveral Leaſes demiſed the Tithes to him*, and he ſo being *Proprietarius* of the Titnes, the Defendant carried away his Corn without ſetting out the tenth Part. It was found for the Plaintiff, and moved in Arreſt of Judgment that in this Writ were compriſed ſeveral Actions upon this Statute, as appears by his own ſhewing, he claiming under the ſeveral Titles of the Parſon and Vicar, and that as the Parſon and Vicar could not join, ſo neither can the Plaintiff; And if all the Tithes had belonged to the Parſon he could not have this Action againſt ſeveral Tenants, for not ſetting forth there ſeveral Tithes, becauſe he cannot comprehend two Actions in one; which Fenner granted, but all the other Juſtices contra. For tho' *Parſon and Vicar* in this Caſe cannot join, becauſe they *claim by divided Rights ſeverally*, yet when *both their Titles are conjoined in one Perſon*, as here, then the Matter of the Title is conjoin'd alſo in one, and it *ſuffices generally to ſhew that the Plaintiff is Firmarius* or *Proprietarius* of the Tithes, without ſaying of what Title; for this is not a perſonal Action, founded merely upon the Contempt againſt the Statute in not ſetting forth the Tithes; nor does he by this Action demand any Tithes, ſo as the Title may come in Debate; but the *Defendant is only to excuſe himſelf of the Contempt.* Yelv. 63. Paſch. 3 Jac. B. R. Champertion v. Hill.

Nov. 5. Champion v. Hill. S. C reſolved accordingly — Mo. 914 pl. 1293, S. C adjuded accordingly; for the Suit is conceived upon the Tort as well as upon the Title.—— Brownl. 86. Campion v. Hill, S. C. accordingly; but ſeems to be taken from Yelv. —— Cro. J. 68. pl 6. S C. adjudg'd for the Plaintiff.

49. In *Debt on the Statute of Uſury*, 2 ſeveral uſurious Loans may be ſued for by the ſame Writ. Cro. J. 104 pl. 40. Mich. 3 Jac. B. R. Woody v. . . . . .

50 Where a *Gift* which is the Foundation of a Writ is diſtinct, and ſeveral in ſuch Caſes upon the ſeveral Foundations, ſeveral Writs ought to be founded; and to make one Writ ſufficient, (even if they were the ſame Parties or Donees) the *Foundation* ought to be *one*, and *at one Time*, and *out of one Root*. 8 Rep. 87. Trin. 7 Jac. in Buckmer's Caſe.

A. ſeiſed of Gavelkind *had Iſſue 3 Daughters, B. C. and D deviſed all his Land to B. in Tail*, the *Remainder of one half to C. in Tail*, the *Remainder of the other half to D. in Tail*, and *if C died without Iſſue, the Remainder of her Moiety to D. and her Heirs of her Body*, with like Remainder to C. for Default of Iſſue of D. Afterwards *B. dies and C dies* without Iſſue, B. having firſt diſcontinued, (as appeared by the Manner of Pleading) and afterwards D died. In a *Formedon* in Remainder brought by the Heir of D. it was reſolved, that the whole being deviſed to B. in Tail, notwithſtanding that the Deviſor divided the Remainder by Moieties, yet when all the Land remained to D. and all the Remainders depend upon one Eſtate, and commenced by Deviſe at one time, the Heirs of the Body of D. ſhall have a Formedon in Remainder in the ſame Manner as if the Remainder had been limited to C. and D. and the Heirs of their two Bodies, the Remainder, for Default of Iſſue of C. to D. and to her Heirs for ever. 8 Rep. 86, 87. b. Trin. 7 Jac. B. R. Buckmer's Caſe——— 2 Brownl. 274. Buckmer v. Sawyer, S. C. and it ſeemed accordingly to all the Juſtices.

51. There is a Difference between *Actions real* and Actions *perſonal*, and between *Actions real which are founded on a Title in the Writ* and Actions real which are founded on *Wrong or Deforcement, and contain no Title* in them; in this laſt Caſe the Demandant may demand in one Writ diverſe Lands and Tenements which came to him by diverſe ſeveral Titles, As if diverſe Manors deſcended to me from diverſe ſeveral Anceſtors, and I am diſſeiſed or deforced of them, I may have Writ of Right or Entry in Nature of an Aſſiſe, or Writ of *Aſſiſe*, and comprehend all thoſe Rights in one and the ſame Writ, becauſe in thoſe Caſes no Title is made in the Writ. But if I bring Writ of *Entry ſur Diſſeiſin* done to my Mother and to my Aunt, Coparceners in Fee Simple, the Writ ſhall abate; for here Title is made in the Writ; and it appear'd that there were ſeveral Cauſes of Action, becauſe the Title is by ſeveral Anceſtors. 1 Rep. 87. b. Trin. 7 Jac. in Buckmer's Caſe.

And in perſonal Actions, *ſeveral Torts* and Cauſes of Action may be comprehended in the ſame Writ as *Treſpaſs for Treſpaſſes done in ſeveral Places, and at ſeveral Times*; And ſo for *Waſte upon ſeveral Leaſes*. Ibid. ——And *ſo* of *Debt* on ſeveral Leaſes. Ibid.

52. The

52. The *Teſtator's Promiſe for his Debt, and* the *Executors Promiſe for his own Debts*, cannot be joined in one Action againſt the Executor, for they *require different Judgments*. Jenk. 296. pl. 49. Hob. 88. pl. 116. Hill. 12 Jac. S. C. adjudged for the Plaintiff, but Judgment reverſed; for he ought to be charged by 2 ſeveral Actions, one Charge being in his own Right, and the other as Executor.

53. Debt lies *upon 3 ſeveral Obligations* in one Action. See Hob. 178. pl. 205. Andrews v. Delahay. Brownl. 68. Hill. 14 Jac. S. C. that it was brought on 2 Bonds.——S. C. cited 5 Mod 213.

54. *Ejectment and Treſpaſs for Aſſault and Battery* were brought againſt the Defendant; upon Not Guilty pleaded the Plaintiff had a Verdict both for the Ejectment and Battery, and entire Damages aſſeſſed; the Court took Time to adviſe what Judgment ſhould be given, becauſe it was without Precedent, but the Damages for the Battery could not be releaſed, becauſe they were entire with the Ejectment. It is ſaid there, that it ſeems to be holpen by the Verdict. Hill. 16 Jac. Hob. 249. Bird v. Snell. Brownl. 235 Bide v. Snelling, S. C. ſays the Damages were found ſeverally, and the Plaintiff had releaſed the Damages for the Battery, and prayed Judgment for the Ejectment, that Winch held the Writ naught, but Judgment was given for the Plaintiff notwithſtanding.

55. Caſe for that the Plaintiff had *lent to the Defendant a Gelding to ride from L. to E. and there to be delivered* to the Plaintiff, the *Defendant intending to deceive the Plaintiff, rode* upon the ſaid Gelding *from L to E. and from E. unto L. again*, and thereby ſo much abuſed the ſaid Horſe, that he became of little Value, and tho' the Plaintiff at E required a Re-delivery, yet the Defendant then did, and yet does refuſe to deliver him, and the ſame Day at E. converted him to his own Uſe &c. It was moved, that the *Non-delivery* according to the Contract at E. *and the Miſuſing* him in the Journey, are ſeveral Cauſes of Action, and ſhould not be joined in one Action. But per tot. Cur. when he denied the Re-delivery, and afterwards converted him to his own Uſe, the Plaintiff may well have Action for both, and together; and though perhaps the Defendant might have demurred, (as Ld. Hobart conceived) for the Doubleneſs of the Declaration, yet he having pleaded Not Guilty, and being found Guilty, that makes the Declaration good. Cro. C. 20. pl. 13. Mich. 1 Car. C. B. White v. Ryſden.

56. In Caſe the Plaintiff declared *upon the Cuſtom of the Realm*, and the Defendant, 10 May, was a *common Carrier*, and that the Plaintiff, 6 May, was poſſeſſed of 50 l. which on the ſame Day &c. he delivered to the Defendant to carry, which he did ſo negligently that it was loſt, *and alſo declared in Trover* for the ſame Sum. It was moved in Arreſt of Judgment, that *Caſe and Trover* could not be joined, becauſe one is founded on a Cuſtom, and the other on a Wrong, to which it was anſwered that the Plea of Not Guilty goes to both; but per Cur. this Declaration is ill. Sid. 244. pl. 5. Paſch. 17 Car. 2. Matthews v. Hopkin. Keb. 852. pl 57. Matthews v. Hopping, S. C. adjornatur.—— Ibid. 870, pl. 19 S. C and by Twiſden 1 a Tort with which Trover may be joined, muſt be ſuch as implies Force and Arms; but what is generally called Tort, as where-ever any Parlance is of Malice and Fraud, or Negligence, is not ſufficient to be joined with a Trover; and Judgment for the Defendant.

Plaintiff declared in *Caſe upon the Cuſtom* of the Realm *againſt a commonCarrier, and* alſo *upon Trover and Converſion*. Hale Ch. J. held it well, becauſe Not Guilty anſwers both. Vent. 223 Mich. 24 Car. 2. B. R Owen v. Lewyn.

5 Mod. 91. cites the Caſe of Matthews v. Hopkins, and ſays the Judgment was arreſted, becauſe the Plaintiff had alleged that the Defendant was a Carrier on the 10th of May, and that he was poſſeſſed of Goods on the 6th of May, on which Day he did deliver them, ſo that it did not appear that he was a Carrier on the Day of the Delivery; and the S. was cited ibid. 92. per Cur and ſaid it was held, that theſe are different Actions, and ought not to be joined, and the principal Caſe being on the ſame Point, they gave Judgment for the Defendant Trin. 7 W. 3. Dalſton v Janſon. ——1 Salk. 10. pl. 2. in S. C. of Dalſton v Janſon, Judgment was arreſted, becauſe the Aſſumpſit is Ex quaſi contractu, and a Contract

a *Contract and a Tort* cannot be joined; and Holt Ch. J. ſaid he had ſeen the Record of Matthews v. Hopkins 1 Sid. 244. in which Caſe the Judgment was arreſted.——12 Mod. 73. Dalſton v. Evenſon, S. C. accordingly, and Judgment arreſted.——Comb. 333. Darlſton v. Hianſon, S. C. ſays, that upon the whole the Court ſeemed to incline for the Plaintiff; ſed adjornatur. —— 3 Salk. 204, pl. 10. Dalſon v. Tyſon, S C. adjudged ill.

57. In Action ſur Caſe on two Promiſes for not delivering two Bonds, the latter Promiſe being aggravated by Delivery of two forged Bonds inſtead of them, to which the Defendant demurred, here being *Promiſe and Diſceit*, which cannot be joined, which the Court agreed; but here the Diſceit being not the Matter of the Promiſe, but Aggravation, it is well enough, and may be helped, however, by a Nolle Proſequi as to one; and Judgment pro Plaintiff. 2 Keb. 803. pl. 52. Trin. 23 Car. 2. B. R. Vere v. Hillam.

2 Lev. 101. Holms v. Taylor, S. C. that they were joined in one Action by ſeveral Declarations, and Hale Ch. J. held, that though by the Verdict the Cauſes were ſever'd, yet ſince no ſuch Action lies, the Declaration is ill ab initio, and the Judgment ought to be void; but Twiſden doubted if the Severance by the Verdict has not made it good, tho' ill at firſt; adjornatur.——Freem. Rep. 360. pl. 462. S. C. adjornatur.——Ibid. 367. pl. 471. The Court ſeemed to incline they would not lie together; but adviſare volunt.

59. *Aſſumpſit and Trover* in one Declaration; the Defendant pleaded Non Aſſumpſit as to the Aſſumpſit, and Not Guilty as to the Trover. The Jury found for the Plaintiff upon the Aſſumpſit, and for the Defendant upon the Trover; a Writ of Error was brought, and the joining the Actions was aſſigned for Error; ſed adjornatur; but the Reporter ſays it ſeems not to be good. Raym. 233. Mich. 25 Car. 2. B. R. Tailour v. Holmes.

Trover and *Aſſumpſit* lie not together, and tho' the Jury found the Trover for the Defendant, and the Aſſumpſit for the Plaintiff, and ſo had ſever'd them, yet the Declaration being ill at firſt, the Plaintiff cannot have any Judgment, per tot. Cur. 3 Lev. 99. Paſch. 35 Car. 2. C. B. Bage v. Bromuel.

3 Keb. 331. pl. 27 Robotham v. Baily, S. C. but obſcurely reported.

60. An Action was brought for *Battery of a Servant, per quod Servitium amiſit, and for taking 9 Pounds of Butter*; After Verdict the Court held, that the one was Caſe, and the other Treſpaſs, and therefore they could not be joined. Arg. Ld. Raym. Rep. 273. cites Hill. 25 & 26 Car. 2. B. R. Robinſon v. Baily.

Where ſeveral Actions are brought for ſeveral Cauſes, the Court may *compel to join them in one*, where they may be join'd; but where ſeveral Pleas are requiſite, as in *Aſſumpſit and Trover*, they cannot be join'd. Per Holt. Cumb. 244. Paſch. 6 W. & M. in B. R. Saracini v. Kilner.

64. *Debt on a Bond and a Mutuatus* may be join'd, tho' there muſt be ſeveral Pleas; for Nil debet, which is proper for the one, will not ſerve for the other. Per Cur. Arg. Vent. 366. Mich. 34 Car. 2. B. R.

The Warranty (being of a perſonal thing as Pot-Aſhes &c.) is in Nature of a Contract as well as the Aſſumpſit, and ſo the Court took time to adviſe, and afterwards the Plaintiff ſtruck out that Part relating to the Warranty. Skin. 66. pl. 12. Bevingſay v. Ralſton, S. C.——Vent. 365. Deniſon v. Ralphſon, S. C. and the Court were of the ſame Opinion that they could not be joined; ſed adjornatur.

64. In Caſe the Plaintiff declared on an Aſſumpſit to deliver Pot-Aſhes, merchantable Commodities, but that Defendant deliver'd dirty ones, and declared alſo on a Warranty; but adjudg'd that *Aſſumpſit and Warranty* are of ſeveral Natures, the one in the Tort and the other in the Right, and ſo cannot be join'd. 2 Show. 250. pl. 256. Mich. 34 Car. 2. B. R. Beningſage v. Ralphſon.

Action was brought by the Baron alone, for a *Battery of himſelf, and alſo of his Wife, per quod Conſortium &c. amiſit*, and held good without the Wife's joining; for it is not brought in reſpect of the Harm done to the Wife, but for his own particular Loſs in loſing her Company. Cro. J. 501. pl. 11. Mich. 16 Jac. B. R. Gay v. Liveſey

65. Treſpaſs for *Battery of the Wife* and *taking Husband's Goods*, cannot be join'd. Show. 345. Hill. 3 W. & M. in B. R. Meacock & Ux' v. Farmer.

66. *Where there may be ſeveral Pleas*, Actions ought not to be join'd. Notes in C. B. 250. Paſch. 7 Geo. 2. Jeffs v. Jones.

(W. c) Joinder in Action, where the *Demand, Charge &c.* is in different Reſpects.

See (U. c)

1. ENtry in the Poſt the Tenant vouch'd, and the Writ was brought againſt two, and the Vouchee diſcloſed the Caſe to be that a *Diſſeiſor died*, and his *Heir enter'd and endow'd the Feme* of the Diſſeiſor, and *alien'd the other two Parts*, and therefore ought to be *ſeveral Writs*, the *one againſt Feme in the Per*, for ſhe is in by her Baron, and the *other againſt the Alience* of the Heir *in the Per and Cui*. Br. Joinder in Action, pl. 39. cites 24 E. 3. 40.

2. It was ſaid by Rolfe, That if my *Tenant holds* of me *diverſe Parcels of Land by ſeveral Services of Chivalry ſeverally* and *dies, his Heir within Age*, and a *Stranger gets the Profeſſion of all* the Land, I ought to have ſeveral Writs of Ward. Quære. Thel. Dig. 107. lib. 10. cap. 15. S. 17. cites Trin. 3 H. 6. 53.

3. If *a Man holds two Acres* of Land of one Lord *by ſeveral Services, and dies without Heir*, the Lord cannot have one Writ of Eſcheat of both, but ſhall have ſeveral Writs. Br. Eſcheat, pl. 13. cites 21 H. 7. 39. Per Juſticiarios. Br. Joinder in Action, pl. 46 cites S. C. and S. P. accordingly; but Brooke ſays it ſeems that he may have one Writ by ſeveral Præcipes.

4. A. ſeiſed of one Houſe in Fee and poſſeſſed of another for Term of Years, makes a *Leaſe of both Houſes to B. rendring* 10 *l. per Ann. and B. covenanted to repair it.* Afterwards A. grants the Fee of one by one Deed, and the Reverſion for Years of the other by another Deed to C.—C. brought one Action of *Covenant* for not repairing the two Houſes; and adjudg'd well brought. Cro. J. 329. pl. 8. Mich. 11 Jac. C. B. Pycot v. St. Johns. Brownl. 20. S. C. adjudg'd accordingly.—2 Brownl. 56. S. C. argued, and adjornatur.—2 Bulſt. 102. St. John v. Piott S. C. adjudg'd accordingly in C. B. and upon a Writ of Error brought, and other Errors aſſign'd for other collateral Matters in the Declaration, this Matter remain'd unqueſtion'd.——S. C. cited Lev. 110. the Court ſaid that in this Caſe Pyot was Tenant in common with himſelf.

5. *Aſſumpſit againſt an Adminiſtratrix*, and declares *for Goods ſold to the Inteſtate for* 200 *l. and for other Goods ſold to the Defendant herſelf for* 27 *l.* and *that upon Account the Defendant was found indebted to the Plaintiff in thoſe Sums, and promiſed Payment.* The Charge being in ſeveral Manners, one in her own Right and the other as Adminiſtratrix, there ought to have been ſeveral Actions; And Judgment reverſed. Hob. 88. pl. 119. Hill. 12 Jac. Herrenden v. Palmer. Jenk. 296. pl. 49. S. C. accordingly; for they require Different Judgments.

6. An *Adminiſtratrix declared that Defendant was indebted to her in* 300 *l.* but did not ſay to her as Adminiſtratrix, *and* then declares *for another Debt due to her as Adminiſtratrix* &c. It was moved in Arreſt of Judgment, that the firſt Promiſe muſt be intended of a Debt due to her in her own Right, notwithſtanding ſhe *concluded with a Profert of the Letters of Adminiſtration*, that being only to warrant the 2d Count in Right of the Inteſtate; But adjudg'd by 3 Juſtices againſt the Opinion of Twiſden J. that both might be join'd in one Declaration, and that *after a Verdict it ſhall be intended that the firſt Debt was due to her as Adminiſtratrix.* 2 Lev. 110. Trin. 26 Car. 2. Curtis v Davis.

7. *Trover*

7. *Trover* and an Action upon the *Caſe* were join'd, and the Court ſtopp'd the Action and made the Attorney pay Coſts. Cited per Pemberton Ch. J. Mich. 34 Car. 2. Skin. 66. 67. cites it as a Caſe in C. B.

Show. 366. S. C. —— And upon opening the Cauſe, the Court *Ex officio abated the Bill*, becauſe it appear'd on the Record itſelf that the ſeveral Demands in the Declaration were *incompatible* and could not be join'd in one and the ſame Action; for it *requires ſeveral Judgments, and of diſtinct Natures.* Carth. 235. 236. S. C. —— 1 Salk. 10. pl. 1. reports that the Reaſon why a Plaintiff cannot proſecute his own Right and another's in one Action is, becauſe the *Coſts to be recover'd are intire*, and then Plaintiff cannot diſtinguiſh how much he is to have as Adminiſtrator, and how much as his own.

8. Action by *Adminiſtrator* who declared on an *Indebitatus Aſſumpſit to Inteſtate*, and an *Inſimul Computaſſet between Plaintiff and Defendant* for Money due to the Plaintiff himſelf, is ill. 1 Salk. 10. pl. 1. Trin. 4 W. & M. in B. R. Rogers v. Cook.

A *Promiſe to the Inteſtate and a Promiſe to the Adminiſtrator* cannot be join'd, and upon a Demurrer it would be ill. But a *Remittit Damna* after Verdict will cure it. 11 Mod. 196.

9. Indebitatus Aſſumpſit by the Plaintiff as Executor of B. and declared of a *Promiſe to the Teſtator himſelf and a Promiſe to the Executor* upon ſtating the Accounts between the Executor and the Defendant touching only the Dealings between the Teſtator and him. The Court held that the Promiſes might well be join'd in one Action; that the Promiſes might well be join'd in one Action; that the taking the Account did not at all vary the Nature of the Debt; that the Plaintiff lay under a Neceſſity of naming himſelf Executor to introduce the Cauſe of Action; that the Pleading, the Judgment, and the Effect of the Judgment being here all the ſame, there could be no Reaſon for dividing them and multiplying Actions. 10 Mod. 170. Trin. 12 Ann. B. R. Nutton v. Crow.

M. 7 Ann. B. R. Tate v. Whiting. ——*But* where in the ſame Action *ſeveral Promiſes to Teſtator* were join'd *with a promiſſory Note to himſelf Ut Executori*, it was adjudg'd upon Demurrer for Defendant; for Plaintiff might either have brought his Action on this Note without naming himſelf Executor, or might have transferr'd it to any other Perſon by Indorſement; and the naming him Executor is only a Deſcription of his Perſon. 10 Mod. 315. Paſch. 1 Geo. B. R. Betts v. Mitchel.

(X. c) Where ſeveral Perſons for the ſame Fact or Thing may have ſeveral Actions.

1. IF *two are convicted as Diſſeiſors* in Aſſiſe, yet the *one only may have Attaint without the other.* Br. Joinder in Action, pl. 50 cites 8 Aſſ. 30.

2. *Attaint*; A Man brought *one Writ by ſeveral Præcipes*, and *all pleaded to traverſe the Action*, and the *Roll made mention but of one Jury*, which ſaid Jury [&c.] And ſo *againſt the Demandant it is but one Jury, and one Attaint only may be brought by him*; *but* the *Tenants ſhall have ſeveral Attaints*; *for it is a ſeveral Jury againſt them.* Br. Joinder in Action, pl. 51. cites 14 Aſſ. 2.

3. If *Profits apprender* are granted *to a Commonalty in Guildable out of the Foreſt*, the Claim muſt be made by them all, nevertheleſs *otherwiſe it is if the Claim is made within the Foreſt*, where every one ſhall have Action by himſelf of that which to him belongs; per Bank. Br. Foreſt, pl. 3. cites 21 E. 3. 48.

4. *In* Treſpaſs and ſuch like *Action perſonal*, *Tenants in Common* ought to join in Action, and yet in *Aſſiſe and Action real* they ſhall not join. Br. Joinder in Action, pl. 9. cites 43 E. 3. 23.

5. If

5. If a *Man levies* the *Rent of my Tenant by Coercion* of Diſtreſs, *I ſhall have Aſſiſe, and* yet the *Tenant may have Treſpaſs*; for this is an Act which gives double Cauſe of Action, as Battery of my Servant &c. Br. Treſpaſs, pl. 259. cites 43 Aſſ. 9.

6. *Treſpaſs for taking Beaſts agiſted* may be brought either by the *Owner or Agiſtor*. Br Treſpaſs, pl. 67. cites 48 E. 3. 20. per Cand. Br. Brief, pl. 514. cites S. C. that the Agiſtor ſhall have Treſpaſs and the Owner may have *Replevin*.

So Tenant by Elegit and *Tenant of the Franktenement* may each of them have *Aſſiſe*. Br. Treſpaſs, pl. 67. cites 48 E. 3. 20. per Cand.——Br. Brief, pl. 514. cites S. C.

But when one recovers, the Action of the other is gone. Br. Treſpaſs, pl. 67. cites 41 E. 3. 20. per Perſey.——Br. Brief, pl. 514. cites S. C.——S. P. Arg. Skinn. 257. of Tenant by Elegit and Tenant by Statute Merchant, cites 33 H. 6. 22. per Moyl.

7. *Maintenance* was brought *by two*, becauſe the *Defendant maintained one G. againſt the Plaintiff in Action of Treſpaſs brought by the ſaid Parties againſt the ſaid G.* and *in Truth there were three Parties in the Action of Treſpaſs*, and two brought Action of Maintenance alone. And per June Ch. J. where the *Maintenance* is ſuppoſed *in Action Perſonal*, all ought to have join'd. Br. Joinder in Action, pl. 44. cites 14 H. 6. *Contra* if the Maintenance had been *upon a * Real Action*; for there is Severance in the firſt Action, and therefore they may ſever in the Action of Maintenance. Contra in Treſpaſs, there they could not have ſevered; Quære the Reaſon thereof; for it was not adjudg'd. Br. Joinder in Action, pl. 44. cites 14 H. 6.——Thel. Dig. 32. lib 2. cap. 12. S. 5. cites S. C.——See 31 H. 6. & 36 H. 6. 27. 29 at (C. d)

* As in Præcipe quod reddat. Thel. Dig. lib. 2. cap. 12. S. 5. cites 18 H. 6. 5.

8. If I *leaſe Land at Will*, and a *Stranger enters, and diggs the Land*, the *Tenant ſhall have Treſpaſs of his Loſs, and I ſhall have Treſpaſs for the Loſs and Deſtruction of my Land*; per tot. Cur. Br. Treſpaſs, pl. 131. cites 19 H. 6. 44. 45.

9. *And* if *a Man beats my Servant*, I ſhall have Treſpaſs for the Loſs of the Service; and the Servant another Action of his Wrong and Damages ſuſtained; per tot. Cur. Br. Treſpaſs, pl. 131. cites 19 H. 6. 44. 45.

10. If the *Sheriff arreſts a Man by Capias, and does not return the Writ*, the Party who was arreſted ſhall have Writ of *Treſpaſs*, or of *Falſe Impriſonment*, and the *other Party ſhall have Recovery alſo*; per Paſton. Br. Treſpaſs, pl. 137. cites 21 H. 6. 5.

11. If *Eſtate for Life, Remainder over*, be made *by Deed*, the Deed belongs to the Tenant for Life during his Life; and yet if a *Stranger gets the Deed*, he in Remainder ſhall have one Action of Treſpaſs, and the Tenant for Life another Action; and if *Land contained in one Deed* be *parted between Parceners by Partition*, every one of them ſhall have an Action of Treſpaſs. Br. Forger de Faits, pl. 6. cites 33 H. 6. 22. Per Priſot.

12. Where 2 *plead Not Guilty in Treſpaſs, and are found Guilty*, they may ſever in Action of Attaint upon it of the Principal, becauſe it is ſeveral Pleas. *Contrary upon a joint Plea*, as Releaſe, or the like; but contrary of the Damages; for this is intire, therefore they ſhall join in Attaint, or abridge his Demand of the Damages; for it was agreed that where the Defendants join in Anſwer, as they plead Releaſe or the like, they cannot ſever in Attaint for the Principal; ſo for the Damages, notwithſtanding that their Pleas are ſeveral; for yet the Damages are intire, and therefore ſhall not be ſever'd. Br. Joinder in Action, pl. 4. cites 34 H. 6. 12.

13. *And* in *Conſpiracy againſt two*, the *one pleaded Not Guilty*, and the *other pleaded another Plea*, and the Iſſue found againſt both to the Damage of 100 l. and the *one alone brought Attaint*; and upon long Argument it was awarded that it ſhall lie of the Principal, and that he ſhall abridge his Demand of the Damages. Br. Joinder in Action, pl. 4. cites 34 H. 6. 30 & 35 H. 6. 19.

14. And where *Feoffment is* made *to two and the Heirs of the one*, and *they loſe by Default in Præcipe quod reddat*, yet the *one ſhall have Writ of Right, and the other Quod ei deforceat* of their Moieties. Br. Joinder in Action, pl. 4. cites 34 H. 6 12.

Br. Joinder in Action, pl. 33. cites 19 H. 6. S. P.

15. If 2 *Barons and their Femes* are, and they *alien in Fee*, and the Barons die, the Femes ſhall have ſeveral *Cui in Vita's*; per Davers. Ibid.

See (C. d) 31 H. 6. 21.

16. If 2 *Men are ſued in the Court Chriſtian for Scandal, Battery*, or the like, which is ſeveral in itſelf, there every one of them ſhall have Attachment upon Prohibition by himſelf; *but where they are ſued for finding of a Lamp* &c. *by reaſon of their Land* which they have, there they ſhall join in Attachment upon Prohibition. Note the Diverſity of a *joint Cauſe and ſeveral Cauſe*. Br. Joinder in Action, pl. 4. cites 34 H. 6. 43. Per Littleton.

17. If a Man *bails his Goods to W. N.* and *a Stranger takes them*, each of them, viz. *the Bailee and the Owner ſhall have Treſpaſs or Detinue*; and if the one recovers, he ſhall have Audita Querela againſt the other who ſues forth. Br. Audita Querela, pl. 32. cites 5 H. 7. 15.

18. A. *delivers* 40*l. to B. to be delivered to C. and D. to be divided between them.* They bring two ſeveral Actions of Debt for their reſpective 20 l. Adjudged well brought, and affirmed in Error. Jenk. 263. pl. 64. Mich. 44 Eliz. C. B. Whernwood v. Shawe.

19. If A. *bails Goods to B. to bail over to C.* and *B. does not bail them over*, as he ought to have done, but converts them to his own Uſe, either A. or C may bring his Action againſt B. but both ſhall not have the Action; but he that firſt begins his Action ſhall go on with the ſame. Bulſt. 68. Mich. 8 Jac. in Caſe of Flewelling & Rave.

20. If a *Bond Debt due to a Bankrupt is aſſign'd to* 2 Creditors, Part to one, and Part to another, the Act of Parliament operates upon it, and therefore they ſhall ſue ſeverally; per Warburton J. Godb. 196. pl. 282. Trin. 10 Jac. C. B. Anon.

21. Where *Goods of* 3 ſeveral Perſons are *delivered to merchandize*, each Party may bring his Action for his 3d. Part, and Judgment for the Plaintiff. Cro. J. 410. pl. 10. Mich. 14 Jac. B. R. Hackwell v. Euſtman.

22. If a 3d Perſon be to have the Benefit of a Promiſe, as where a Promiſe is made to the Father for the Benefit of the Son, there they cannot join; but either of them may bring the Action; But in ſuch Caſe the Declaration muſt be of a Promiſe made to the Father, tho' the Son brings the Action. Per Cur. Hardr. 321. pl. 3. Hill. 14 & 15 Car. 2. in the Exchequer, in Caſe of Bell v. Chaplain.

23. When *Words are ſpoken in the plural Number*, all may bring Actions; but they muſt have ſeveral Actions, and cannot join. Per Cur. Keb. 525. pl. 15. Trin. 15 Car. 2. B. R. Henacre &c. v. .....

3 Lev. 351. S. C.

24. Caſe by an *Owner of a 5th Part of Goods in a Ship*, lying infra Corpus Com. and ready to ſail, and that the Defendant ſtopp'd his Voyage, by getting an Order of Council for arreſting her by Proceſs out of the Admiralty, by which the Voyage was loſt. It was agreed, that tho' here was but one Act, and but one Offence, yet *every ſeveral Perſon injur'd* may have an Action, and recover Damages. 1 Salk. 31. 32. pl. 2. Paſch. 5 W. & M. in B. R. Child v. Sands.

3 Mod. 321. Mich. 2 W. & M. in B. R. S C. adjudged accordingly; and that in all Caſes grounded upon Con-

25. An Action was brought againſt the Defendant, for that he and 7 other Perſons were Proprietors of a Veſſel which uſed to carry Goods for Hire, and that the Plaintiff's Goods were damnified by the Negligence of the Defendant, who was one of the Proprietors, againſt whom alone the Action was brought. There it was held, that tho' there was no actual Contract between the Plaintiff and the Part Owners, yet they all having an equal Benefit, and the Ground of the Action ariſing upon a Truſt, which ſuppoſes a Contract, the Action ought not to be brought againſt

againſt one, but all. 4 Mod. 181. cites it as adjudg'd in B. R. Boſon v. Sandford. tracts the Parties who are Privies

muſt be join'd in the Action.———2 Lev 258. [tho' wrong pag'd as 268.] S. C. adjudg'd accordingly. ——2 Show. 478 pl. 442. Trin. 2 Jac. 2. adjornatur.———Show. 29. S. C. adjornatur. Ibid. 101. adjudg'd for the Defendant———Skinn 278. pl. 1. Boulſton v. Hardy, S. C. adjudg'd by 3 Juſtices for the Defendants; but Dolben J. e contra, becauſe it might have been pleaded in Abatement.——1 Salk. 440 pl. 1. S. C. adjudged for the Defendant, becauſe all the Owners were not joined, this being not an Action ex Delicto, but ex quaſi Contractu; and that it was not the Contract of one, but of all; and that there was no other Tort but a Breach of Truſt.———Carth. 58. S. C. ſays Judgment was given for the Plaintiff.——Comb. 116. S. C. ſays he was inform'd that it was adjudg'd, that the Owners ought all to have been join'd.

26. The Plaintiff having brought 3 *ſeveral Actions againſt* 3 *ſeveral Indorſers of one and the ſame Note*, Motion was made that the Plaintiff might make her Election againſt which of the 3 ſeveral Defendants ſhe would proceed, and that Proceedings might be ſtay'd againſt the other two. Page J. ſaid, that the Plaintiff could not take out Execution but againſt one of the Defendants; however thought that the Plaintiff had a Right to proceed to Judgment againſt all. Accordingly the Motion was refuſed, Judge Probyn abſent. 2 Barnard. Rep. in B. R. 313. Trin. 6 Geo. 2. 1733. Wirley v. Budder.

(Y. c) Where ſeveral may join.

1. TWO cannot join in *Aſſiſe of a Corody* to make their Plaint, that each of them ſhould have certain Robes, Bread, or Beer &c. Thel. Dig. 25. lib. 2. cap. 2. S. 8. cites 30 E. 1. Itin. Cornub. Joinder in Action, 32.

2. Several may join in *Writ of Attachment upon a Prohibition.* Thel. Dig. 32. lib. 2. cap. 12. S. 3. cites Trin. 13 E. 2. Mich. 10 E. 3. and Trin. 28 E. 3. 95. Joinder in Action 2. 5. 6. and that ſo is the Opinion of 14 H. 6. 9. See (X. c) 34 H. 6. 43. —See (C d) 31 H. 6. 1.

3. *And* ſee an *Attachment upon a Prohibition* brought *by three in common*, for that they were *ſued in the Spiritual Court, becauſe they brought a Writ of Land* &c. Br. Joinder in Action, pl. 50. cites 8 Aſſ. 30.

4. *And* if an *Aſſiſe* be *brought againſt ſeveral Tenants who loſe*, they all may have *one Suit to reverſe the Judgment*; and if it be reverſed, every one ſhall have that which he loſt. Ibid.

5. *Two brought* Writ of *Error of a Judgment* given *againſt them in Aſſiſe of Freſhforce*, and *pending this the one died*, by which the one *who ſurvived, and the Heir of the other, brought new Scire Facias*; and good, and the Court proceeded and reverſed the Judgment. Br. Joinder in Action, pl. 53. cites 19 Aſſ. 7.

6. *Aſſiſe againſt three. Two were attainted, and the third acquitted of* the Diſſeiſin, and all *three join'd in Attaint*; and he who was acquitted was ſummon'd and ſever'd; and after the Defendant pleaded the Joinder of them who was acquitted and ſever'd to the Writ, by which the Writ was abated per Judicium, and yet after Severance. Br. Joinder in Action, pl. 78. cites 21 Aſſ. 14.——But 39 E. 3. and 11 H. 4. contra.

7. If *two Infants alien in Fee*, they ſhall not join in *Dum fuit infra ætatem*, but ſhall have ſeveral Actions, as it ſeems. Br. Joinder in Action, pl. 30. cites 21 E. 3. 50. S. P. Br. Dum fuit &c. pl. 2 cites S. C. ——Ow. 106. Arg. S. P. cites 29 E. 3.

8. *Contra*

S. P. Br. Dum fuit &c. pl. 2. cites S. C.

8. *Contra where* two are *diſſeiſed* &c. Br. Ibid.

9. In Aſſiſe *four Jointenants* are; *two diſſeiſe the other two*, they *ſhall have Aſſiſe in Name of the four*, quod diſſeiſiverunt eos, *and the two ſhall be ſummon'd and ſever'd.* Br. Joinder in Action, pl. 55. cites 23 Aſſ. 9.

10. *But if two Jointenants* are, *and the one diſſeiſes the other*, he ſhall have Aſſiſe of the Moiety, and ſhall not join. Ibid.

11. *But* where two Jointenants are diſſeiſed, and *the one re-purchaſes the whole Land*, the other ſhall have Aſſiſe in the Name of both, and the other ſhall be ſummon'd and ſever'd. Ibid.

Thel. Dig. 25. lib. 2. cap. 2. S. 7. cites S. C. and Fitzh. Joinder in Action, 10. but adds quære, and ſays ſee Mich. 38 E. 3. 26.

12. *Fine* was levied *to A. for Life*, the *Remainder to 2 Barons and their Femes in Tail*, the *Tenant for Life died*, the 2 *Barons and their Femes had Iſſue, and died before Entry*, the *one Iſſue and a Stranger enter'd*, and the *other Iſſue brought Scire facias upon a Fine de Medietate*, and good; for it was agreed that the Iſſues in Tail ought to ſever in Action, and not to join in Action; for it is a *joint Gift, and ſeveral Inheritance.* Br. Joinder in Action, pl. 38. cites 24 E. 3. 29.

If 2 *Siſters are diſſeiſed*, and the *one dies*, the *other ſhall have Aſſiſe of the Moiety*, and the *Iſſue of the other Writ of Entry ſur Diſſeiſin*; per Thorp. Br. Joinder in Action, pl. 12. cites 45 E. 3. 3 — S. P. Br. Joinder in Action, pl. 7. cites 48 E. 3. 14.

13. *And* where *Coparceners* are *diſſeiſed* they *may join* in Action, *but* * *their Heirs ſhall ſever* in Action, per Cur. Br. Joinder in Action, pl. 38. cites 24 E. 3. 29.

* The one ſhall have Action of the one Moiety, and the Iſſue of the other Writ of Entry ſur Diſſeiſin of the other Moiety, and when they have recovered and had Execution they ſhall be Coparceners again. Br. Joinder in Action, pl. 43 cites 39 H. 6. 8.

It was ruled by Holt Ch. J. at Rygate in Surry, Summer Aſſizes, 10 W. 3 upon Evidence at a Trial, that *Coparceners may join in Ejectment*; and (by him) the Caſe in † Moor 682. n. 939. is not Law. Ld Raym. Rep 720. boner v. Juner

† This is the Caſe of Milliner v. Robinſon. Mich. 42 & 43 Eliz.

14. Three *Coparceners made Partition in Chancery*, upon which one *granted Rent to the two of* 100 *s. per Annum*, by theſe Words, viz. *50 s. to the one, and 50 s. to the other*, and alſo joined in Scire facias in B. R. ſuper Tenorem Recordi ibidem miſſi, and Exception taken that the Rent is a ſeveral Rent by the Words ſubſequent; & non allocatur; but the Joinder awarded good. Quod Nota. Br. Joinder in Action, pl. 79. cites 29 Aſſ. 23.

15. *Treſpaſs againſt* 2, who pleaded *Not Guilty* and both found Guilty, and they *joined in Attaint*, and Exception taken, that upon the ſeveral Pleas there ought to be ſeveral Attaints, and yet the Writ awarded good. Br. Joinder in Action, pl. 80. cites 30 Aſſ. 49.

16. *Executor who ſurvives* ſhall have Action alone, and the Executor of the Executor who is dead ſhall not join with the firſt Executor who ſurvived. Br. Joinder in Action, pl. 28. cites 38 E. 3. 17.

17. And where 2 *have Wood in Common, and make a Bailiff*, and the *one makes Executor and dies*, and the *other after makes his Executor and dies*, the Executor of the Survivor alone ſhall have the Action of Account, and the Executor of the other ſhall not join. Ibid.

If 2 *Coparceners* are, and *the one has Iſſue and dies*, and the *Iſſue and the other enter and are diſſeiſed*, they may join in Aſſiſe, becauſe the *Coparcenary continues*, and ſo if there were *twenty Deſcents* where the Coparcenary continues and no Partition had; per Danby and Littleton. Br. Joinder in Action, pl. 40. cites 9 E. 4. 14.

18. Per Belk, if a Man has 2 *Daughters, and dies ſeiſed*, and *a Stranger abates*, and the one has Iſſue and dies, the Aunt and the Niece ſhall join in *Mortdanceſtor*; quod non Negatur. Br. Joinder in Action, pl. 12. cites 45 E. 3. 3.

19. *Two*

19 *Two* Men *brought Quod ei deforceat upon Eſtate Tail as Heirs in Gavelkind*, quod clamat & Heredibus de Corporibus ſuis exeuntibus and yet the Writ good by the Opinion of the Court. Br. Joinder in Action, pl. 14. cites 46 E. 3. 21. See 44 E. 3. 21. at (Z. c)

20. If 2 *bring Aſſiſe which paſſes againſt them by Conſpiracy of others*, and they two *join in Writ of Conſpiracy againſt them*, it is good by Award; Quod Nota. Br. Conſpiracy, pl. 10. cites 47 E. 3. 17. Br. Joinder in Action, pl. 16. cites S. C. accordingly, because they were joint Plaintiffs in the Aſſiſe.——Thel. Dig. 32. lib. 2. cap. 12. S. 4. cites S. C. adjudg'd accordingly, but cites it adjudged 19 R. 2. that 2 cannot join in Writ of Conſpiracy.

21. But 2 brought Writ of *Champerty* in Common. Thel. Dig. 32. lib. 2. cap. 12. S. 4 cites 47 E. 3. 6. See 31 H. 6. 1. at (C. d)

22. Four Barons and their Femes brough Writ of Entry ſur Diſſeiſin en le Poſt of a Diſſeiſin made to the ſame Anceſtor, and counted how 4 *Siſters were ſeiſed in Fee*, and was to *deſcend from two to two others, and from thoſe two to two of the Demandants as to Coſins and Heirs, and to the other two as Daughters and Heirs* of thoſe who were diſſeiſed, and becauſe they ought to have ſeveral Actions the Writ was abated; for tho' the Anceſtor may have Aſſiſe in Common, yet the *Heirs ſhall have ſeveral Actions*. Br. Joinder in Action, pl. 17. cites 48 E. 3. 14.

23. *All the Tenants in ancient Demeſne may join in Monſtraverunt*, but they may count ſeveral Counts if they will; per Belk. Br. Monſtraverunt, pl. 3. cites 49 E. 3. 22. See 39 E. 3. 7. at (Z. c) ——S. P. Thel. Dig. 31. lib. 2. cap. 10. S. 1. ſays it appears in diverſe ancient Books, and in F. N. B.——And Thel. Dig. 32. lib. 2. cap. 12. S. 2. cites 8 E. 4. 16. that ſeveral may join.

24. If *J. S.* is *poſſeſſed of* 3 *Oxen*, *and W. N.* is *poſſeſſed of* 4 *Horſes* &c. there if *a Man diſtrains all thoſe Beaſts*, J. S. and W. N. *cannot join in Replevin*, becauſe they have *ſeveral Properties*, and it is a good Plea to 3, that J. S. is Owner, abſque hoc that W. N. any thing thereof has, and that W. N. is Owner of the 4, abſque hoc that J. S. any thing thereof has. Br. Joinder in Action, pl. 74. cites 3 H. 4. 16. Br. Replevin, pl. 12. cites S. C. and ſays that the Writ ſhall abate.——S. P. and therefore they were not ſuffered to count. Br. Retorne de Avers, pl. 14. cites 8 H. 4. 21.——Br. Replevin, pl. 37. cites 12 H. 7. 4. S. P.—— Br. Joinder in Action, pl. 63. cites 12 H. 7. 5. S. P. —— Ow. 106. Arg. S. P.

25. If a Man *joins with a Monk in Action*, all the Writ ſhall abate, becauſe the Monk is not a Perſon able to bring Action. Pr. Joinder in Action, pl. 72. cites 7 H. 4. 1. Where one is *bound to an Abbot, and J. N. not naming him his Monk*, in the Obligation, yet the Abbot ſhall have the Action alone, and ſurmiſe that the other was Commoign at the Time &c Quod Nota; per Judicium. Br. Dette, pl. 190. (191) cites 32. H. 6 30 —— Br. Obligation, pl. 77. cites S. C.

26. If 40 *are outlawed in Appeal brought by Feme of the Death of her Huſband*, they may join in *Writ of Error* upon it, or ſever at their Pleaſure; but if they join all ought to appear, or otherwiſe the Defendant never ſhall be demanded. Br. Joinder in Action, pl. 24. cites 7 H. 4. 45.

27. Three Men join'd in *Homine Replegiando*, and no Exception taken but admitted good; quod nota. Br. Joinder in Action, pl. 25. cites 8 H. 4. 2. Thel. Dig. 32. lib. 2. cap. 12. S. 2. cites Hill. 8 H. 4 137. [but ſeems miſprinted] that 2 or 3 Men cannot join in this Writ; but ſays that the contrary was held 8 E. 4. 16. propter favorem Libertatis.

28. *But* Anno 8 H. 4. 21. per Cur. they ought not to join, and therefore were not permitted to Count, but were let to go, and the Defendant pray'd Deliverance from them, and could not have it becauſe they had

had found Surety to ſue with Effect, ſo that the Defendant might have Execution againſt the Mainpernors. Br. Joinder in Action, pl. 25.

29. Two ſhall not join in *Falſe Impriſonment*. Arg. Ow. 106. cites 8 E. 4. 18 H. 6. 10 E. 4.

30. Several may join in *Ex Parte talis*. Thel. Dig. 32. lib. 2. cap. 12. S. 2. cites 8 E. 4. 16.

31. In *Appeal againſt three, if every one be outlaw'd, and every one has Charter of Pardon*, they ſhall not join in *Scire Facias* to have it allow'd, but ſhall have ſeveral Scire Facias's. Br. Joinder in Action, pl. 84. cites 8 E. 4. 13.

32. *All of one and the ſame Blood* may join in Writ *de libertate probanda* in favorem Libertatis. Pet Markham, & Laicon quod non negatur. Br. Joinder in Action, pl. 85. cites 8 E. 4. 16.

Thel. Dig. 32. lib. 2. cap. 12. S. 2. cites S. C. & S. P. accordingly.

33. Two cannot join in Action of *Battery* done to them. Br. Joinder in Action, pl. 68. cites 12 E. 4. 6.

Thel. Dig. 32. lib. 2 cap. 12. S. 4. cites S. C. accordingly, and that ſo agrees Mich. 19 R. 2. Brief 926.——Ow. 106. Arg. cites 8 E. 4. 18 18 H. 6. 10 E. 4. S. P. accordingly.

34. If there are 2 *Tenants* and *one brings Replevin upon a Diſtreſs taken by the Lord*, the *Meſne cannot join to the Plaintiff unleſs the other Jointenant firſt joins to the Plaintiff*; for the One alone does not hold of the Meſne but Both hold of the Meſne. Br. Jointenants, pl. 35. cites 12 E. 4. 2.

35. Where it is by way of *Defence* 2 may join altho' their *Plea be ſeveral*. Arg. Cro. E. 473. pl. 36. in Caſe of Worſely v. Charnock, cites 12 E. 4. 6.

36. If two *Jointenants have a Bailiff*, and *one aſſigns Auditors*, both ſhall join in Action of Debt; for the Aſſignment of one is the Aſſignment of both. Br. Joinder in Action, pl. 87. cites 18 E. 4. 3.

37. Treſpaſs *by S. and D. of 50 Cygnets taken*, the *Defendant ſaid as to 20 that the Property, at the Time of the Treſpaſs, was in S. alone abſque hoc that the other any thing had*, and *as to 20 that the Property &c. was in the other at the time of the Treſpaſs*, Judgment of the Writ, and *as to 9 Not guilty*, and *as to the other One, pleaded Cuſtom of the County of Bucks, that of Land adjoining to the Land where* &c. And the Pleas were held good to the Writ, and e contra in Bar. Br. Treſpaſs, pl. 418. cites 2 R. 3. 15.

A. and B. Grantees of the next Avoidance of a Church. Before any Avoidance *A. releaſed to B.*

38. Two *Jointenants* ſhall join in *Quare Impedit* of an Advowſon; for the thing is entire, and none of them ſhall have Quare Impedit of the Moiety of an Advowſon of a Church, nor of the third or fourth Part, but ſhall join, and therefore they ought to agree in Preſentment. Br. Joinder in Action, pl. 103. cites 5 H. 7. 8.

and then the Church avoided. B. may have *Quare Impedit* in his own Name only. Cro. E. 600. pl. 7. Mich. 39 & 40 Eliz. B R. Bennet v. Biſhop of Norwich.

Under-Leſſee and his Aſſignee of Part of the Land being ſued in the ſpiritual Court

39. B. and 2 others ſue for [are ſued by] 3 *ſeveral Libels* in the Spiritual Court, and they join in a *Prohibition*. And by the Court that is not good. But they ought to have had three ſeveral Prohibitions. And therefore a Conſultation was granted. Noy 131. Anon. cites M. 26, 27 Eliz. C. B.

for *Tythes* may join in a *Prohibition*. Owen 13. Hill. 36 Eliz. B. R. William Bartue's Caſe.

Prohibition cannot be brought by 2 where the Griefs are ſeveral. Cro. C. 162. pl. 3 Mich. 5 Car. B. R. Kadwallader v. Bryan.

It was ſaid by the Court that 2 may join *in a Prohibition tho' the Gravamen be ſeveral*; but they muſt ſever in their Declarations upon the Attachment. Vent. 266. Mich. 22 Car. 2. B. R. per Cur.

See (A. d) 34 H. 6. 43. —And ſee

40. *T. and R. acknowledged a Statute Merchant*, and Judgment was had upon it in C. B. and the *Land of T. only was extended*, becauſe the other had

had not any thing; And he brought Error in B. R. and the Judgment in C. B. was reverſed. And the Queſtion was, if they both may join in the *Scire Facias* for *to have Reſtitution* of that which they loſt, and the mean Profits, where in Truth one of them had not loſt any thing. But reſolved by the Court that they may join, and that the Words of the Reſtitution to T. only may be good enough, becauſe he only had ſuſtain'd the Loſs, and both were *Parties to the firſt Judgment*, and to the Reverſal of it; and by the Reſtitution he that loſt nothing ſhall recover nothing. Noy. 130. Thompſon & al'. 34 H. 6. 43. at (Z. c.)

41. *Defendant in Quare Impedit and the Biſhop* may join in a Writ of *Error*. Cro. E. 65. pl. 11. Mich. 29 & 30 Eliz. B. R. The Biſhop of Glouceſter and Savacre's Caſe.

42. *Cauſe of Action* being *ſeveral*, and not joint, they cannot join in the Action; as in Caſe of a *Fine levy'd by an Infant and one of full Age*, they cannot join to reverſe the Fine for the Infancy. Cro. E. 115. pl. 15. Mich. 30 & 31 Eliz. B. R. Piggot v. Ruſſel. Le. 317. pl. 445 Piggot v. Harrington Mich. 30 & 31 Eliz.

B. R. ſeems to be S. C. and upon a Writ of Error brought by the Infant alone, the Writ was held good, and the Fine reverſed as to the Infant only.

43. The *Owner of the Land let it to be ſow'd by Halves*, viz. he was to find half the Seed, and three more were to manure the Land, and find the other half of the Seed. A *Stranger broke the Cloſe*, and all 4 brought an Action of Treſpaſs. Adjudged that this was no Leaſe of the Land, and therefore they could not all join in Treſpaſs Quare clauſum fregit &c. Cro. E. 143. pl. 10. Trin. 31 Eliz. C. B. Hare & al'. v. Celey. Le. 315. pl. 439. Hill. 29 Eliz. C. B. Hare v. Okelie, S. C. adjudged that they could not

join in Treſpaſs for breaking of the Cloſe, and Judgment againſt the Plaintiff.——Goldsb. 77. pl. 9. Hare's Caſe. S. C. held accordingly as to the Clauſum fregit.

44. *Principal and Bail*, where Judgment is given againſt the Principal, and another Judgment againſt the Bail, they cannot join *in a Writ of Error*; for theſe are 2 *ſeveral Judgments*. Jenk. 302. pl. 74. cites Hill. 11 Jac. Anon. Hob. 72. pl. 85. S. P. held accordingly. Foreſt v. Sandland — Show. 8.

S. P accordingly, and cites S. C. Paſch. 1 W. & M. Evans v. Pettifer.——Comb. 108. S. C. and the Writ of Error was quaſh'd; and held that Hob. 72. is good Law.

45. A. *diſtrained the Beaſts of B. and C.* whereupon *D.* the Defendant, *in Conſideration of* 10 *l. paid to him by the Plaintiffs, promiſed to procure the Cattle to be re-deliver'd to them on or before ſuch a Day*, and for not performing this Promiſe B. and C. brought this Action. It was moved in Arreſt of Judgment, that the Plaintiffs ought not to join in this Action, becauſe the Promiſe on which it was founded was not one intire, but a ſeveral Promiſe made to each of them; but by 3 J. contra Jerman, the Conſideration is intire, and cannot be divided, and here is no Inconvenience in joining; but if one had brought the Action alone, it might have been queſtionable. Sty. 203. Hill. 1649. Vaux v. Draper.

46. Caſe by *A. and B.* for that *each of them had a Mill* in the ſame * Manor, *which they have uſed* * [*reſpectively*] *to repair*, and *Time out of Mind all the Tenants of the Manor*, whereof the Defendant is one, have and ought to *grind all the Grain* ſpent in the Houſes *at thoſe* 2 *Mills*, *or one of them*; but that the Defendant grinds Grain ſpent in his Houſe at another Mill &c. Per Hale, & tot. Cur. They may well join, for the Damage is intire to both their Mills. But Hale took Exception to the Declaration, that it is not well laid to grind at thoſe 2 Mills, or one of them; for *it might be that all ought to be ground at one of them*, and in ſuch Caſe the Plaintiffs cannot join; but the Declaration ſhould have been, that *all* is *which is not ground at the one Mill ſhould be ground at the other*. And another Exception being taken by Twiſden J. the Plaintiff pray'd a Nil Capiat 2 Saund. 115. Coryton v. Lithebye, S. C. held per tot. Cur. that they may join; for tho' the Intereſts are ſeveral, yet the Damage is an intire joint Damage to both, for which they

shall have their joint Action, or

piat per Billam, and had it. 2 Lev. 27. Mich. 23 Car. 2. B. R. Litheby v. Coriton.

otherwise their Damages will be recovered twice, if they bring their ſeveral Actions.——— Vent. 167. S. C. held accordingly. ——2 Keb. 631. pl. 42. 803. pl 51, 822. pl. 35. 838. pl. 71. 850. pl. 100. S. C. and they may join.

47. Several Men that have *ſeveral Eſtates, and no Relation the one to the other*, cannot join in making *Preſcription*, (as Freeholders and Copyholders of a Manor for Common;) for the Preſcription of the one does not concern the other. Vent 388. Arg.

48. The *Father and Son covenanted with a Purchaſer to ſell Lands* &c. and it was *agreed* between the Parties, *that the Purchaſer ſhould pay ſo much of the Purchaſe-Money to the Son.* The Action was brought in the Name of both; and upon a Demurrer to the Declaration it was held ill, becauſe the Duty is veſted in the Son, and he alone ought to have brought the Action; and Judgment for the Plaintiff. 3 Mod. 263. Mich. 1 W. & M. Tippett v. Hawkey.

49. In Caſe the Plaintiffs declared of a *Cuſtom* in the Pariſh of C. *for the Pariſhioners yearly to elect two Perſons to be Churchwardens* there, and that they *elected* according to the ſaid Cuſtom *B. and C.* but the Defendant, *Surrogate of the Biſhop, refuſes to admit* and ſwear them into the ſaid Office; upon which *they bring a Mandamus, and he falſely returns* a Cuſtom for the Vicar to chuſe one Churchwarden, and that therefore he cannot admit both the ſaid Plaintiffs, but is ready to admit one of them. It was moved that they could not join; but adjudg'd per tot. Cur. for the Plaintiffs; for the Mandamus, and the whole Proſecution and Charge thereof was joint; and this is no Office of Profit, nor is the Action brought for that, but for the unjuſt Return, by which they were put to the Charge of the Mandamus. 3 Lev. 362. Trin. 5 W. & M. C. B. Ward & al'. v. Brampton.

3 Lev. 351. 255. S. C. and Judgment affirm'd.—

50. In Caſe for ſtopping a Ship, by Proceſs out of the Admiralty, all the Proprietors of the Goods ought to join; but where one only brought the Action, and had Judgment, the joint Proprietorſhip not being pleaded in Abatement, the Judgment was affirmed in Error. 1 Salk. 31. pl. 2. Paſch. 5 W. & M. in B. R. Child v. Sands.

4 Mod. 176. S. C. and the Defendant not pleading this Matter in Abatement, and averring that the others were living at the Time of the Action brought, the Plaintiff had his Judgment.——Skin. 334 Sands v. Child, S. C. argued. Sed adjornatur.——Ibid. 361. S. C. and Judgment affirm'd.——Carth. 294. S. C. and Judgment affirm'd. ——Comb. 255. S. C. and Judgment affirm'd.

Action for a *falſe Return to a Mandamus* was brought by 2 *Church-wardens*, and moved in Arreſt of Judgment that it could not be, ſeems to be

51. Several Inhabitants procur'd a *Licence of a Chapel for a Conventicle*, which the *Biſhop's Regiſter refuſes to regiſter according to 1 W. & M. and upon a Mandamus* to regiſter it, *made a falſe Return.* Several of the Inhabitants join'd in one Action againſt him; and adjudg'd upon Demurrer, after divers Arguments, that it well lay per omnes Conjunctim. 3 Lev. 363. Trin 8 W. 3. The Inhabitants of Hinley-Chapel in Lancaſhire v. the Regiſter of the Biſhop of Cheſter.

becauſe the *Fees of the one* were not the Fees of the other, but ſeveral. Cur' adviſare vult. 12 Mod. 349. Paſch. 12 W. 3. Butler v. Rews.—12 Mod. 371. Paſch. 12 W. 3 Butler and Lewin v..... S. C. and the Exception weighing much with the Court, the Matter was compromiſed.

52. If a *Legacy* be given *to two*, one cannot ſue. So of a *Reſiduum Bonorum to divers*, they muſt all join; but when Legacies are given to divers Perſons, each alone may ſue for his own Legacy; per the Solicitor-General. 2 Chan. Caſes, 124. Mich. 34 Car. 2. in Caſe of Haycock v. Haycock.

53. If

52. If *all the Mariners* of a Ship join to *ſue the Maſter* in the Admiralty, they may do it, and no Prohibition lies; but if the *Maſter and Seamen* join in a Suit againſt the *Owners* for Wages, a Prohibition may iſſue on Motion. 2 Show. 86. pl. 75. Hill. 31 & 32 Car. 2. B. R. Anon.

53. A *Note* made *by one of a Society to another* of them, is a Note to all except him that gives it. The ſame of Debt on Account ſtated, and they muſt all join. If there are 20 *Partners*, and one of them covenants with all the reſt, he is in that Reſpect ſeveral from them all, and they ſhall all join againſt him. 7 Mod. 116. Mich. 1 Annæ, B. R. Thimeblethorp v. Hardeſty.

54. Several *Inhabitants in a Pariſh* may *appeal* together to the Seſſions *againſt a Poor-Rate for Inequality*. 12 Mod. 259. 260. pl. 14. Mich. 8 Ann. B. R. Per Cur. in Caſe of the Queen v. St. Giles's Pariſh.

(Z. c) Where ſeveral muſt join.

1. WHERE *a Man has ſeveral Infants, and dies*, where the *Cuſtom is that the Infants ſhall have a third Part of the Goods of the Father*, they ſhall not be compell'd to join in Action of Detinue, nor in Writ of Rationabili parte bonorum. Br. Joinder in Action, pl. 93. cites 1 E. 2. & 34 E. 2. & Fitzh. Detinue 56 & 60. Thel Dig. 26. lib 2. cap. 2. S. 31. cites S. C.

2. If a Man covenants *with* 20 *to make the Sea-Banks* of A. B. [&c.] *and with every one of them*, and after he does not do it, by which the *Land of two of them is ſurrounded ad dampnum* &c. thoſe two may have Action of Covenant without the others, by the Opinion of the Court. Brooke makes a Quære; for it ſeems that every one ſhall have Action by himſelf. Br. Covenant, pl. 94. cites 6 E. 2. It. Kanc. A. B. and C. *covenant* with J. S. and W. R. & *cum quolibet & cum qualibet eorum*, all the 3

Covenantors muſt join. Adjudged on a Writ of Error brought in the Exchequer, and a former Judgment reverſed, becauſe they did not join. 3 Le. 160. pl. 209. Hill. 29 Eliz. C. B. Beckwith's Caſe.—2 Le. 47. pl. 60. Anon. but ſeems to be S. C. adjudged accordingly, notwithſtanding this Caſe of 6. E. 2. was ſtrongly inſiſted upon.——— Jenk. 262. pl. 63. cites 5 Rep. 18. b. Slingsby's Caſe, S. C. and ſays that the Caſe was: A. *conveys a Manor to* 3 *in Fee*, and *covenants with them, & quolibet eorum*, that he has convey'd a good Eſtate to them. This is a joint Eſtate, and therefore a joint Covenant, and they *ought to join* in Covenant *before Partition*; for it is a Covenant real, and goes with the Eſtate; but after Partition the ſaid Feoffees may have ſeveral Actions of Covenant; for it is a real Covenant, and goes with the Eſtate; and the Word *quolibet* in this Caſe helps them alſo after Partition. Adjudged upon Error in the Exchequer-Chamber.

And if 3 *Manors* had been *convey'd to* 3 *Perſons ſeverally with ſuch a Covenant*, this had been ſeveral Covenants, and not a joint Covenant. Jenk 262. pl. 63. Mich. 29 & 30 Eliz. in Cam. Scacc.

Grant to 2, and *covenant with them, and either of them*, that he was lawfully ſeiſed &c. yet they cannot ſue ſeverally, becauſe the *Intereſt is joint*, and an Intereſt cannot be granted jointly and ſeverally. 5 Rep. 18. b. Mich. 29 & 30 Eliz. in Cam. Scacc. Slingsby's Caſe.

3. In *Covenant* the Writ was brought *by* 2 *Chaplains where the Indenture was made between the* 2 *Chaplains, and one Hugh, of the one Part, and the Defendant of the other Part*, and it was held a good Writ without naming Hugh, becauſe the Agreement was by the Indenture, that the Defendant ought to infeoff the Chaplains only &c. and Hugh was nam'd for Teſtimony only, and put his Seal, and was not to have any Profit. Thel. Dig. 32. lib. 2. cap. 12. S. 1. cites Hill. 19 E. 3. Variance 65.

4. Where *Feoffment by Deed with Warranty* was made *to* 3 *in Fee*, and the one of them *ſurrenders to the two* his Eſtate, the Opinion of the Court was, that *the two may maintain Writ of Warrantia Chartæ* without the 3d. Thel. Dig. 25. lib. 2. cap. 2. S. 12. cites Mich 20 E. 3. 41. And *ſo* it ſhould have been *if the one had releaſed* to the others. Ibid.

——*But as to the Surrender, it was* held 22 H. 6. 51. that ſuch Surrender ſhould be *void*, notwithſtanding that he who ſurrender'd had only an Eſtate for his Life. Ibid.

5. *False Claim* made *before Justices of Forest was traversed in B. R.* viz. it was of making a Woodward of the Wood of P. and to have Windfalls there, and *he who traversed made Title to himself* thereof, *and that the Judgment before the Justices of the Forest was ad Exhæredationem of him, and of all other Commoners of S.* Skip. said the Grief is supposed as well *to all the Commoners* as to himself; Judgment of the Writ; & non allocatur; but the Writ awarded good. Br. Brief, pl. 156. cites 21 E. 3. 48.

6. In Detinue, if 2 *bail a Deed to deliver to them, or to one of them;* both shall have the Action, and not the one alone; for if they should bring several Actions, the Court could not know to whom to deliver it; per Thirning; Quod Cur. conceisit. Br. Bailment, pl. 4. cites 12 H. 4. 18.

7. *Four Jointenants were,* and 2 *of them disseised the other* 2, upon which an *Assise was brought in the Names of all the* 4 *against the* 2 *Disseisors, who were summon'd and sever'd,* and the 2 *Disseisees made their Plaint of the Moiety,* and the Writ was adjudg'd good. Thel. Dig. 25. lib. 2. cap. 2. S. 11. cites 23 Ass. 9. and that so agrees Trin. 3 E. 4. 10. and 47 E. 3. 23.

8. If 2 *Jointenants are disseised by a Stranger,* and afterwards the *one of them comes to the Tenancy by Purchase,* and the other is put to his Action, *both* of them *ought to be named Demandants* notwithstanding that one be Tenant &c. Thel. Dig. 25. lib. 2. cap. 2. S. 11. says it was so held 23 Ass. 9. and says see 23 H. 6. 9.

9. If there are 3 *Brothers of Land partible,* and the *one holds out the 3d.* he alone may have Ase of the 3d. Part of 20 Acres of Land without naming the 2d. for it may be that he has his Land in Quiet. Br. Joinder in Action, pl. 56. cites 23 Ass. 12.

10. *Assise of Rent by E.* the *Defendant said, that the Plaintiff had nothing unless in Common with J. S. Daughter of A. Sister of the Plaintiff, who is alive, not named*; Judgment of the Writ; and if &c. nul tort; *it was found that M. was seised in Fee of the Rent and died seised, and the Land descended to A. and E.* which *A. had Issue J. S. and died,* and *J. S. was within Age,* and *E. took him in Ward, and received the whole Rent to his own Use,* and not to the Use of J. S. nor was any Thing assigned to J. S. in Allowance, nor the Ancestor had no other Land, and by Award the Writ was abated by the not naming of J. S. Quod Nota; And so see the * Seisin of the one is the Seisin of both; Quod nota bene. Br. Joinder in Action, pl. 60. cites 36 Ass. 1.

See 49 E. 3. 22. at (Yc) —Br. Monstraverunt, pl. 4. cites F N. B. 14.

11. If *any of the Tenants in ancient Demesne be distrain'd for more Services than they ought to make,* there all the Tenants in ancient Demesne ought to join in Monstraverunt, and if any be omitted the Writ shall abate. Br. Joinder in Action, pl. 81. cites 39 E. 3. 7.

S P. and says, that it shall be sued by all without naming any of them by the proper Name, but Homines &c. de tali Manerio de J. S. which is ancient Demesne; but in the Attachment thereupon he shall be nam'd.

And so it shall be where the 2 *are Tenants for Life.* Thel. Dig. 26. lib. 2. cap. 2. S. 14. cites Trin. 3 E. 4. 10.

12. Where 2 *Jointenants of a Fee simple lose by Default,* they shall join *in Writ of Right*; *but if* the *one of* them *has only* an Estate *for his Life, and the other have the Fee,* the *one shall have Quod ei deforceat* for his Moiety, *and the other a Writ of Right,* and after they have recovered they may enter and hold in Jointure as before &c. Thel. Dig. 25. lib. 2. cap. 2. S. 14. cites Mich. 46 E. 3. 21. and that so agrees Mich. 19 H. 6.

13. In *Præcipe quod reddat against* 2, *where in Truth the one has nothing,* if the *Demandant recovers by Default after Default against both,* he who was *Tenant shall have the Quod ei deforceat alone* without the other. Thel. Dig. 27. lib. 2. cap. 2. S. 35. cites Pasch. 8 R. 2. Brief. 931.

14. One *Jointenant* without his Companion *may sue his Purparty out of*

of the Hands of the King where all is ſeiſed into the King's Hands. Thel. Dig. 26. lib. 2. cap. 2. S. 15. cites Trin. 2 H. 4. 23.

15. If *Goods are bailed to two*, and the *one has Poſſeſſion*, and *a Stranger carries them away*; yet both ſhall have Action of Treſpaſs. Br. Joinder in Action, pl. 31. cites 7 H. 4. 43.

Detinue of *two Writings*, the *Defendant prayed Garniſhment*, and had it, and the *Garniſhee* came and *ſaid, that the Writings were made to two, and delivered by the two into indifferent Hands, and the one of them has brought the Action alone; Judgment of the Writ*; and per Thirn and Cur. the Action does not lie, tho' the Garniſhee cannot plead in Abatement of the Writ which the Defendant has admitted good, yet becauſe it appears, the *Writ ſhall abate*, and *they ſhall bring the Action in Common*; Quod Curia conceſſit. Br. Detinue de biens, pl. 20, cites 12 H. 4. 18.

16. *So* where 2 *are joint Preſenters*, and the one has Poſſeſſion, and a Stranger carries them away; per Vampage, for otherwiſe it is a good Plea that the Property is in the Plaintiff and in J. B. not named; Judgment of the Writ. Ibid.

17. If *Tenant in Tail has Iſſue 2 Daughters*, and *diſcontinues and dies, or a Man abates*, they ſhall have *one Formedon*, and ſhall join; *but if Tenant in Tail dies ſeiſed, and his 2 Daughters* and Heirs *enter and diſcontinue, and each has Iſſue and dies*, there each Iſſue ſhall have Formedon of his Moiety by himſelf. Br. Joinder in Action, pl. 33. cites 19 H. 6. 45.

18. *So* if 2 *Barons and Femes ſeiſed in Jure Uxorum alien*, and the Barons die, there each of the Femes ſhall have *Cui in Vita* by herſelf, and ſhall not join; note the Diverſity for the Alienation of the one is not the Alienation of the other. Br. Joinder in Action, pl. 33. cites 19 H. 6. 45. Br. Joinder, in Action, pl. 4. cites 34 H. 6. 12. S. P. accordingly by Davers.

19. Where *two Jointenants* are, and the *one* of them *leaſes that which to him belongs* to one *for term of Years*, and the *Leſſee will not ſuffer the other Jointenant to occupy*, the *Aſſiſe ought to be brought in both their Names*, notwithſtanding that the one has no Cauſe of Complaint &c. Thel. Dig. 26. lib. 2. cap. 2. S. 16. cites Trin. 28 H. 6. 9. per Forteſcue.

20. If a Man *recovers in Value againſt two*, and *takes Execution againſt the one*, yet both ſhall have *Attaint*, and ſhall join in Attaint. Br. Joinder in Action, pl. 4. cites 34 H. 6. 43. per Forteſcue. See Noy. 130. Thompſon's Caſe at (Y. c)

21. *Jointenants* ought to join *in* Action of *Treſpaſs of a Cloſe broken* Thel. Dig. 25. lib. 2. cap. 2. S. 10. cites 35 H. 6. 55. and Hill. 32 H. 6. 33. *and of Goods carried away.* Paſch. 19 H. 6. fol. 65.

22. Where an *Obligation* is made *to an Abbot and a ſecular Perſon*, and the *ſecular Perſon dies*, the Abbot and the Executor of the ſecular Perſon ſhall join in Action; for the Action ſhall not ſurvive to the one for *ſeveral Capacities.* Br. Joinder in Action, pl. 71. cites F. N. B. tit. Debt.

23. *Two Prebendaries may be one Perſon of a Church*, and they ſhall join in Juris Utrum; quod nota, that they may have this Action; for it is twice alleged there that they may have Juris Utrum. Br. Prebend. pl. 3. cites F. N. B. 49. F. N. B. 49. (O)

24. If *two Tenants in Common join in a Leaſe for Life rendring 2 s. and a pound of Pepper, and a Hawk, or a Horſe*, there *they ſhall join in Aſſiſe of the Hawk* &c. which is entire, *and ſhall have 2 Aſſiſes of the 2 s. and the pound of Pepper*, which are ſeverable. Br. Reſervation, pl. 44. cites Littleton tit. Tenants in Common.

25. *But of Treſpaſs in the Soil* they ſhall join in Action, and in other ſuch Actions perſonal. Ibid.

26. *And* they ſhall join *in* Action of *Debt for Rent reſerved by them upon their Leaſe for Years.* Ibid.

27. *And yet in Avowry for the ſame Rent, they ought to ſerve*; for this is by Reaſon of the *Reverſion*, which *is ſeveral.* Ibid.

28. Where 2 *have a Horſe in common*, and the *one* of the *two ſells the Horſe* for 10 l. they ſhall join in Action of Debt; for it ſhall be adjudg'd the

the Contract of both. Thel. Dig. 26. lib. 2. cap. 2. S. 19. cites 18 E. 4. 3.

29. A. *expoſed Land to* 3 *to ſow at Halves* for one Crop In an Action againſt a Stranger for *ſpoiling the Corn*, they muſt all join, viz. A. and the 3 others. Cro. E. 143. pl. 10. Trin. 31 Eliz. C. B. Hare & al' v. Celley.

30. *Bond to* 3 *to pay the Money to one of them*, all ought to join in the Suit; for they are all as one Obligee. Yelv. 177. Trin. 8 Jac. Rolls v. Yate.

31. It was ſaid at the Bar, and not gainſaid, if *a Man perjures himſelf againſt two*, the one by himſelf cannot have an Action upon the Statute, but they ought to join; for he is not the only Party grieved. Het. 73. Hill. 3 Car. C. B. Deakins's Caſe.

In Covenant between Partners ſo far as the *Intereſt* of the Covenantees are *joint* and not ſeveral, they muſt join in Action in Caſe of Breach; but where one of them has a *ſeveral Intereſt* and Cauſe of Action for it, he may have Action alone. Saund. 155. Trin. 20 Car. 2. Eccleſton v. Clipſham.

32. In Covenant the Plaintiff declared upon an Indenture made between A. of the firſt Part, B. of the ſecond, and C. of the third, in which quilibet eorum covenanted with each other reſpectively to raiſe a Joint-Stock of 6000 l. and to buy Brandies in Partnerſhip, and that none of them during the Partnerſhip, ſhould trade in Brandies upon his own Account &c. or in Company with any other, but only upon the Joint-Account &c. C. brought Action againſt B. the Defendant, and amongſt other Things aſſign'd for Breach, that B. the Defendant had during the Partnerſhip traded for 200 l. Tuns of Brandy upon his own Account, and not upon the Joint-Account. After Judgment given for the Plaintiff by Default, it was objected that A. ought to be join'd with C. in this Action; for tho' the Covenant, by the Words of it, was joint and ſeveral between all the Parties, yet the Intereſt and Cauſe of Action is joint only; for upon every Breach A. had an equal Damage with C. and therefore he ought to be join'd with the Plaintiff in this Action; upon its being moved again, the Court was of Opinion againſt the Plaintiff, but no Judgment was given; for the Plaintiffs had Leave to diſcontinue, and bring a new Action. 1 Saund. 153. Trin. 20 Car. 2. Eccleſton & Ux' v. Clipſham.

33. Where there are *ſeveral Reſiduary Legatees*, they muſt all join in an Action; but where the Share of each was left to the Diſcretion of the Executor, as he without Compulſion at Law ſhould declare, and the Executor had declared, and had paid all the Legatees but one, yet he alone ſued for an Account in Chancery, without the others joining, and was relieved. 2 Ch. Caſes, 198. Trin. 26 Car. 2. Gibbons v. Dawley.

Covenant on Articles of Agreement between ſeveral Fidlers, that they would not play &c. aſunder, unleſs on my Ld. Mayor's Day &c. and they were *bound in* 20 *l. each to the other jointly and ſeverally*, and one only brings Covenant, and aſſigns the Breach, that the Defendant play'd ad quandam Tabernam &c. Judgment for the Defendant; for they ought all to have joined, the Intereſt being joint, and it is repugnant and contradictory for 4 Perſons to bind themſelves the one to the other, jointly and ſeverally. Comb. 115. Trin. 1 W. & M. in B R. Spencer v. Durant. ——Show. 8. S. C accordingly.

34. A. *covenanted with B. and C. that he would not make any Agreement to farm the Exciſe* of Beer in Cornwall *without their Conſent*. B. alone brought Covenant againſt A. and aſſigned the Breach, that A. made an Agreement for farming the Exciſe without his Conſent. The Court held that here was no joint Intereſt, but that each might maintain an Action for his particular Damages, or otherwiſe one of them might be remedileſs; for if one had conſented to A.'s farming it, and had ſecretly received ſome Recompence for it, it is not reaſonable that the other, who never conſented, ſhould loſe his Remedy; and therefore the Plaintiff had Judgment. 2 Mod. 82. Paſch. 28 Car. 2. C. B. Wilkinſon v. Loyd.

(A. d) Where the King and a Subject ſhall join in a Writ.

See Prerogative (Q 3)

1. A Suit was maintain'd in the Exchequer by *the King and the Mayor*, Bailiffs and Commonalty *of Southampton, who held the Vill and Port in Fee-Farm of the King, againſt* certain *Perſons who* had taken certain Cuſtoms, and *diſturbed the Corporation from taking Cuſtom* &c. Thel. Dig. 28. cap. 4 S. 1. cites Trin. 2 E. 3. 51.

2. Where *the King had given the Ward of a Chappel to D.* againſt whom *A. brought Aſſiſe*, and the Plaint was of a Houſe, Land, and Rent &c. and pending the Aſſiſe *D. reſign'd to the King*, and *the King gave it to one O.* and after the *Plaintiff in the Aſſiſe recover'd*, and O. was ouſted &c. upon which a *Writ of Error was maintain'd by the King and O. jointly* &c. Thel. Dig. 28. lib. 2. cap. 2. S. 2. cites 15 Aſſ. 8.

3. A Writ was maintained for the *King and the Guardian of the Hoſpital of St. Leonard of York*, which was of the Patronage of the King, *againſt certain Perſons who had withdrawn the Alms of the ſaid Hoſpital*; and it is ſaid there, that the *King and the Clerk who is diſturbed by Proviſo*, ſhould *join in Præmunire* by the new Statute. Thel. Dig. 28. lib. 2. cap. 4. S. 3. cites Mich. 25 E. 3. 50.

4. Where an *Obligation is made to the King and to his Cuſtomers*, they ſhall join with him in Action. Thel. Dig. 28. lib. 2. cap. 4. (bis) S. 6. cites it as adjudged 21 R. 2. Joinder in Action 3.

But where an *Obligation* is made *to* 2, *and the one is out-law'd*, the King alone ſhall have Action for the Whole without the other. Thel. Dig. 29. lib. 2. cap. 4. (bis) S. 6. cites Mich. 19 H. 6. 47.

(B. d) Againſt whom. Where Action may be brought againſt ſeveral for the ſame Fact or Thing.

1. COvenant was brought *by the Leſſee againſt the Leſſor*, becauſe the *Leſſor*, after the Leaſe, *made Feoffment to one who ouſted the Leſſee*, and awarded that it lies well; quod nota; and yet the Leſſee might *have had Re-entry, or* have *had Quare ejecit* infra Terminum by the Statute; and yet this does not toll the Action of Covenant, which is given by the Common Law, notwithſtanding that Quare ejecit infra Terminum is given by the Statute; but Brooke makes a *Quære if he cannot recover againſt the Leſſor by the one Writ, and againſt the Feoffee by the other Writ*; for he may recover by two Quare Impedits of one Avoidance. Br. Covenant, pl. 7. cites 46 E. 3. 4.

2. A. demanded 5 l. of B. and C. as Monies expended for them pro diverſis Negotiis; and upon an Arbitration B. and C. were *awarded to pay 4 l. viz. B. to pay* 40 *s. and C.* 40 *s.* A ſeveral Action may be brought againſt B. or C. For the *Viz.* makes it as ſeveral Arbitrements for both; and Judgment for the Plaintiff. Cro. E. 422. pl. 18. Mich. 37 & 38 Eliz. B. R. Sower v. Bradfield.

3. If *A. takes* Beaſts *by Command of B.* the Replevin may be brought againſt *both*, or againſt the Commander only. Mich. 8 Ja. B. per Curiam, See Replevin (D)

4. *If one cuts my Corn*, and *another carries it away*, Action lies againſt any of them. Cited by Jones J. Mar. 22. in pl. 49. Paſch. 15 Car. to have been adjudg'd in B. R.

Upon a Bond you cannot ſue *both jointly and ſeverally*, but upon a *Recognizance* you may; per Holt Ch. J. 6 Mod. 197. Trin. 3 Annæ, in Caſe of Fanſhaw v. Moriſon.

5. *Debt upon an Obligation againſt two, by ſeveral Præcipes*, and *demanded againſt each the Whole*, and *Judgment of the Writ was demanded*, becauſe he ought to demand the Whole againſt the one only, or againſt both by one Præcipe, by which the Writ *was abated* for Contrariety, Anno 14 H. 4. 19. But the Plaintiff elected his Execution at his Peril; for he ſhall have but one Execution againſt the one of them only. Br. Dette, pl. 59. cites 7 H. 4. 6.

(C. d) Where ſeveral may be join'd.

Br. Joinder in Action, pl. 100. cites 31 H. 6. 1. S. P. where the Offence is ſeveral, concerning one and the ſame principal Matter.——See 47 E. 3. 17. at (Y. c)

1. A Man may maintain one Writ againſt ſeveral *of Champerty for ſeveral Champerties*. Thel. Dig. 49. lib. 5. cap. 21. S. 1. cites Mich. 31 H. 6. 9,

2. Writ of *Dower* was brought *againſt Tenant by Elegit, and him in Reverſion*. Thel. Dig. 47. lib. 5. cap. 11. S. 1. cites Mich. 2 E. 3. 42. and ſays it is held that it may lie. Hill. 1 E. 3. 3.

Br. Brief, pl. 159. cites 7 H. 6. 16. 17. S. P. accordingly; for there is Privity between them.

3. A Man may well maintain one Writ *againſt the Mortgagee and the Mortgagor jointly*, notwithſtanding that the Mortgagor be not Tenant, for doubt of the Redemption pending the Writ. Thel. Dig. 46. lib. 5. cap. 8. S. 1. cites Paſch. 6 E. 3. 252. Trin. 11 E. 3. Brief 474. Trin. 26 E. 3. 62. Trin. 41 E. 3. 16. Paſch. 7 H. 6. 19. Trin. 32 E. 3. Per quæ ſervitia 9.

4. *Mortdanceſtor* may be *by ſeveral Summons* againſt ſeveral Perſons. Br. Several Præcipe, pl. 11. cites 10 Aſſ. 3.

5. And where 2 were obliged & uterque eorum in Solido, one Writ was maintained againſt one of them alone. Thel. Dig. 48. lib. 5. cap. 18. (bis) S. 2. cites Paſch. 10 E. 3. 502.

6. And where two were obliged & uterque eorum in Solido, one Writ was maintain'd againſt one of them alone. Thel. Dig. 48. lib. 5. cap. 18. (bis) S. 2. cites Paſch. 10 E. 3. 502.

7. It was ſaid that Writ of *Right of Advowſon* lies *againſt Tenants in Common* of the Advowſon jointly. Thel. Dig. 44. lib. 5. cap. 3. S. 4. cites Trin. 17 E. 3. 38.

8. A Man cannot maintain one Writ jointly *againſt the Heir and againſt the Executors*. Thel. Dig. 47. lib. 5. cap. 12. S. 2. cites Hill. 18 E. 3. 4.

If a Man *gives Land to two Men, and to the Heirs of their Bodies*, there is *Jointure for Term of Life, and ſeveral Inheritances*; and if each have Iſſue and die, and *the Iſſue of the one and a Stranger enters into the whole Land*, the Iſſue of the other ſhall have his *Action of the Moiety againſt the Stranger only*; for the other Iſſue is in, in his Moiety by Title, and the Stranger has the other Moiety by Tort. Br. Demand, pl. 48. cites 24 E. 3. 29.

9. If 2 *Parceners* are Coheirs *by Fine Executory*, and the *one and a Stranger enters*, the other ſhall have Scire Facias to execute the Fine againſt the Stranger of the Moiety; for the other Siſter is in in the other Moiety by Title, and ſo it ſhall not be againſt both. Br. Joinder in Action, pl. 96. cites 24 E. 3. 28.

See 9 E. 4. 14. at (C. d)

10. Writ brought *againſt one Parcener and one who has the Eſtate of the Tenant by the Curteſy, who was Baron to her Siſter*, ſhall be good, by the Opinion of all the Court. Thel. Dig. 44. lib. 5. cap. 3. S. 2. cites Trin. 24 E. 3. 29 & 31 E. 3. Several Tenancy 21.

10. One

11. One joint *Scire Facias* was maintain'd *against ſeveral Tenants out of a Fine, without ſeveral Garniſhment.* Thel. Dig. 108. lib. 10. cap. 16. S. 7. cites Hill. 24 E. 3. 23. Ibid. 115. lib. 10. cap. 23. S. 6. cites S. C. and 38 E. 3. 32.

12. One and the ſame Writ of *Quid juris clamat* was maintain'd *againſt ſeveral Tenants for Life*, and not accepted. Br. Several Tenancy, pl. 23. cites 24 E. 3. 37.

13. In *Aſſiſe* brought *againſt a Feme*, it was *found that ſhe had enter'd claiming to her Uſe, and to the Uſe of her Siſter and Co-heir, where their Entry was not lawful* &c. The Writ was adjudg'd good, notwithſtanding that the other Siſter was not named &c. For a Man ſhall not be Co-heir to a Diſſeiſin. Thel. Dig. 44. lib. 5. cap 1. S. 4. cites 27 Aſſ. 68.

14. *Scire Facias out of a Recovery in Writ of Debt* may be brought *againſt the Executors alone without naming the Heir or Tertenants.* Thel. Dig. 47. lib. 5. cap. 12. S. 7. cites Trin. 27 E. 2. 80.

15. A *Scire Facias* brought *againſt Tenants in common* was adjudg'd good. Thel. Dig. 44. lib 5. cap. 3. S. 2. cites Hill. 28 E. 3. 90. A Præcipe does not lie againſt two Tenants in common, but there ſhall be ſeveral Writs of Moities. Br. Joinder in Action, pl. 83. cites 8 E. 4. 10.

16. One *Writ upon the Statute of Labourers* was maintain'd *againſt the Servant for departing out of Service and the Maſter who had retain'd him.* Thel. Dig. 49. lib. 5. cap. 20. S. 1. cites Paſch. 29 E. 3. 35. and Paſch. H. 6. 7. and Mich. 28 E. 3. 97.

17. Where 2 *were obliged jointly, after the Death of both a Writ of Debt was brought againſt the Executors of the Survivor of them alone.* And it was ſaid by Thorp, that after the Death of one of them the Writ may be brought againſt the Survivor alone, or againſt him, and the Executors of the other jointly. Thel. Dig. 47. lib. 5. cap. 12. S. 6. cites Paſch. 31 E. 3. Executors 82.

18. One *Writ of Attachment upon a Prohibition* was maintain'd againſt 2 by *ſeveral Pone per Vad.* &c. Thel. Dig. 107. lib. 10. cap. 16. S. 5. cites Hill. 33 E. 3. Brief 913.

19. *Decies tantum* was brought againſt Jurors, and *ſuppoſed that J. and W. received ſuch a Sum* &c. and the Defendant demanded Judgment of the Writ, becauſe the Receipt of the one is not the Receipt of the other; & non allocatur. Br. Joinder in Action, pl. 5. cites 40 E. 3. 33.

20. Action upon *the Statute of Labourers* was brought *againſt two*, becauſe he *retained* them in the Office of Carvers *for a Year, and they departed*; and becauſe the Retainer nor Departure of the one is not the Retainer nor Departure of the other, therefore the Writ was abated by Exception of the Party. Br. Joinder in Action, pl. 6. cites 40 E. 3. 35. Br. Joinder in Action, pl. 41. cites 39 E. 3. 7. S. P. and that there ought to be ſeveral Actions.——Thel. Dig. 49. lib. 5. cap. 20. cites S. C.——F. N. B. 167. (C) in the new Notes there (a) cites 39 E. 3. 6. S. P. —— S. P. Br. Joinder in Action, pl. 16. cites 47 E. 3. 6.

21. *And* yet *contrary in Treſpaſs*, and it is found that the one did Part of the Treſpaſs by himſelf, and the other the reſt by himſelf, the Plaintiff ſhall recover; for there the Writ does not appear ill in itſelf, and yet contrary here; Note the Diverſity. Br. Joinder in Action, pl. 6. cites 40 E. 3. 35. *But* in Treſpaſs againſt two, if the *one is attainted of the Treſpaſs, and the other acquitted*, the Plaintiff ſhall recover againſt the one, and ſhall be amerced againſt the other; for there the *Writ might have been true*. Br. Joinder in Action, pl. 15. cites 47 E. 3. 16.

Where the Treſpaſſes are ſeverally done by two Men ſeveral Actions ſhall be brought, but contra of joint Treſpaſſes done by ſeveral. Br. Joinder in Action, pl. 47. cites 36 H. 6. 27. 29.

22. In one and the ſame Writ the *one Præcipe was againſt J. W. and Rich. of* 4 *Acres of Land, another againſt J. W. alone of* 4 *Acres* of Land, and *the* 3*d. againſt Rich. alone of* 4 Acres of Land, and held that all the Writ

Writ ſhall abate, if they are the ſame Perſons and the ſame Land. Thel. Dig. 107. lib. 10. cap. 16. S. 4. cites Mich. 41 E. 3. Brief. 544.

23. Several Tenants may be join'd in one and the ſame Writ of *Per quæ Servitia*. Br. Joinder in Action, pl. 95. cites 43 E. 3. 7.

24. In Treſpaſs *againſt a Corporation and J. N.* the ſaid *J. N. pleaded to the Writ becauſe it was brought againſt both* where it ſhould be by ſeveral Writs; for againſt one lies Capias and Exigent, and againſt the Corporation only Diſtringas, but it was not adjudg'd. Br. Brief, pl. 71. cites 45 E. 3. 2.

25. *Where Action is to be ſued againſt 2 Tenants in Common a Man ſhall have ſeveral Actions.* Br. Tenant in Common, pl. 4. cites 48 E. 3. 16, 17.

26. If *two Abbots* or Priors *have Ward and do Waſte*, one and the ſame Writ ſhall lie againſt both without ſuing ſeveral Writs, as admitted clearly in a Writ of Waſte. Br. Joinder in Action, pl. 18. cites 49 E. 3. 25.

Ibid. cap. 18. (bis) S. 4. cites S. C.—Br. Action ſur le Caſe, pl. 33. cites S. C. & S. P accordingly, and becauſe the Act of the one is not the Act of the other, the Writ was abated.——Br. Joinder in Action, pl. 20. cites S. C. and becauſe the Nonfeaſance of the one is not the Act of the other, they ought not to be joined, and the Writ was abated.

27. It was adjudg'd, that one Writ upon the *Caſe* does not lie againſt ſeveral for *not doing Suit at a Court* which they ought ſeverally to do. Thel. Dig. 48. lib. 5. cap. 17. S. 4. cites Hill. 7 H. 4. 9.

Br. Replevin, pl. 15. cites S. C. & S. P. accordingly.

28. *Replevin againſt* 4, *two juſtified for Execution upon Recovery as Bailiffs* &c. and the *third came in Aid* &c. and this to the taking of two Beaſts, where the Replevin was of four Beaſts, and the fourth juſtified the taking of the other two Reſidue for Rent Arrear to himſelf by reaſon of Tenure; and ſo ſee that a Man may join ſeveral in Replevin who diſtrain'd ſeveral Beaſts by ſeveral Titles, and yet well as in Treſpaſs where they juſtify ſeverally; Quod Nota. Br. Joinder, pl. 22. cites 7 H. 4. 27.

29. A Man may have one and the ſame Writ of *Scire facias againſt ſeveral Tenants by Words of ſeveral Summons or Garniſhment*, as Præcipe quod reddat may be by ſeveral Summons. Br. Several Præcipe, pl. 6. cites 11 H. 4. 15.

30. In Scire facias it was agreed, that a Man may have *Præcipe* quod reddat, againſt the Lord and the Villein, for doubt of Entry of the Lord; for *between them is Privity*. Br. Brief, pl. 159. cites 7 H. 6. 16. 17.

31. *But* a Man ſhall *not* have Writ *againſt the Diſſeiſor and the Diſſeiſee*, for *there wants Privity, and the one Eſtate does not depend upon the other*, as above; Note the Diverſity. Ibid.

32. A Man may have one joint Writ *againſt the Bailiff or Steward, and againſt the Party alſo, for holding* Plea *and ſuing Plea in Court Baron of the Sum of* 40*s*. Thel. Dig. 48. lib. 5. cap. 17. S. 3. cites Hill. 19 H. 6. 54.

33. Bill *of Diſceit by L. againſt P. and W. Attorney*, becauſe *P. was Deputy of the Sheriff of D. to put Writs, ſerved by the Sheriff, into C. B. and the Defendants embezzled a Writ of Habeas Corpora in a Plea of Land between L. and D.* It was pleaded in Abatement of the Bill, *that P. was Deputy, and that W. the Attorney had nothing to do, and therefore ought to have ſeveral Bills*; & non allocatur. Br. Bille, pl. 9. cites 19 H. 6. 29. 50 & 72.

34. *And* there it is agreed, that if *one does a Diſceit or Treſpaſs by Excitation of another*, 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. Ibid.

35.

34. It was agreed, that if 4 *beat my Father*, and the *one ſtrikes him, by which he dies*, yet an *Appeal* lies againſt all. Br. Joinder in Action, pl. 100. cites 31 H. 6. 1.

35. So Writ of * *Premunire* lies againſt all who offend ſeverally, concerning one and the ſame principal Matter. Br. Joinder in Action, pl. 100. cites 31 H. 6. 1. * See Paſch. 18 H. 6. 6. at (Y. c)

36. *And* one and the ſame Writ of *Attachment upon Prohibition*, lies againſt ſeveral likewiſe; and yet the Act of the one is not the Act of the other. Ibid. See 34 H. 6. 43. at (X. c)

37. Where *one maintains generally, and another ſpecially, as by giving of 6 s. to a Juror*, ſeveral Actions ſhall be brought of this Matter; per Cur. except Needham. Br. Joinder in Action, pl. 47. cites 36 H. 6. 27. 29. See 14 H. 6. at (Z. c) *Maintenance againſt* 2, the *one pleaded Not Guilty*, and the *other juſtified as for his Servant*; and Exception was taken that *Special Maintenance and General Maintenance* cannot be joined in one and the ſame Writ; ſed non allocatur. Br. Joinder in Action, pl. 100. cites 31 H. 6. 1.——Thel. Dig. 49. lib. 5. cap. 21. S. 1. cites 31 H. 6. 9. that a Man may maintain one Writ of Maintenance againſt ſeveral for ſeveral Maintenances; but ſays the contrary is held for clear Law 36 H. 6. 30.

38. *But* one and the ſame *Decies tantum* may be brought againſt all the Jurors of one and the ſame Pannel who took Money; for they all give but one Verdict, and are but one ſole Jury. Br. Joinder in Action. pl. 47. cites 36 H. 6. 27. 29. S. P. Br. Joinder, in pl. 100. cites 31 H. 6. 1. ——S. P. Ibid. pl. 108. cites 21 H. 6. 22.——S. P. for it is *founded upon one and the ſame Record.* Br. Joinder in Action, pl. 66. cites 8 E. 4. 24.——Thel. Dig. 49 lib. 5. cap. 21. S. 1. cites Mich. 31 H. 6. 9. accordingly, and that the ſame was agreed accordingly * Trin. 40 [E.] 3. 33.

* See pl. 19.

39. *And* if *two conſpire, and* the *one only gives Money*, yet joint Action lies againſt them both, and not ſeveral Actions; for the Agreement or Communication only is the Conſpiracy; but in divers of thoſe Caſes the Damages ſhall be ſever'd. Ibid. [36 H. 6. 30. a.]

40. If an *Abbot and a Layman diſſeiſe* J. S. *and make a Feoffment*, and take the Profits, and the *Layman after is made an Monk in the ſame Abbey*, there the Action ſhall not lie againſt the Abbot but for the Moiety; for the Abbot and the Secular were not jointly ſeiſed, but by Moieties; quod nota. Br. Parnor, pl. 15. cites 39 H. 6. 44.

41. If 2 *diſſeiſe a Man*, and make a Feoffment, and the *one alone takes the Profits of the Whole to the Uſe of him, and the other*, Action lies againſt both. Br. Pernor, pl. 15. cites 39 H. 6. 44. But where *two Diſſeiſors* are, and *make a Feoffment*, and the *one takes the Profits* [*to his own Uſe*,] the Action lies againſt him alone of the Whole. Br. Parnor de Profits, pl. 21. cites 5 E. 4. 1. 2.

But if 2 *Feoffees of the Diſſeiſor make a Feoffment*, and the *one takes the Profits*, the Action ſhall be brought againſt both as Tenants of the Franktenement. Br. Parnor de Profits, pl. 21. cites 5 E. 4. 1. 2.

But if all take the Profits, Action is maintainable againſt them as Parnors of the Profits. Br. Parnor de Profits, pl. 21. cites 5 E. 4. 1. 2.

42. Action *upon the Statute of Liveries, ſuppoſing that they received certain Liveries of Cloth* of one J. W. and *counted that every one received a Gown* &c. Catesby demanded Judgment of the Writ, for the Receipt of the one is not the Receipt of the other; to which Pigot agreed. But per Choke & Needham, the Writ is good; for it *is in nature of ſeveral Præcipes*. Quære. Br. Joinder in Action, pl. 66. cites 8 E. 4. 24. R. C. brought Action *upon the Statute of giving Liveries* or Badges, contra formam Statuti, and *counted that the Defendant gave Liveries to ſeveral named in the Writ*, and Exception was taken to the Writ, becauſe the Tort of the one was not the Tort of the other, and the Writ awarded good, and well; for it

it was againſt the Donor for giving to ſeveral Thel. Dig. 49. lib. 5. cap. 21. S. 3. cites Paſch. 11 H. 4. 65. and Mich. 8 E. 4. 22.

Br. Joinder in Action, pl. 27. cites 11 H. 4. 67.

But if it had been *againſt ſeveral Persons of Liberties*, it ſeems that there ſhould have been ſeveral Actions. Note the Diverſity; for ſeveral Torts *by one and the ſame Man may be in one and the ſame Writ.* Ibid.

44. In *Detinue of Charters* the *Defendant ſaid that they were deliver'd to him by the Plaintiff and another who was dead, and had not made Executors*, and pray'd *Garniſhment againſt his Heir and the Ordinary*, and had it. Thel. Dig 47. lib. 5. cap. 12. S. 2. cites Hill. 14 E. 4. 1.

45. If Writ of *Falſe Judgment* be brought *againſt the Suitors and the Steward* of a Court-Baron, the Writ ſhall abate, becauſe the Steward is named; per Vaviſor. *Quære how this is intended*; for the Writ is not brought againſt the Suitors, but is directed to the Sheriff that he ſhall record the Plea, and ſend it into Bank ſuch a Day, and ſummons the Party to be there this Day, to anſwer to the Matter. Br. Joinder in Action, pl. 102. cites 1 E. 5. 3.

46. Where 2 *are obliged & uterque in Solido*, one Writ may be brought jointly againſt them, or one Writ by ſeveral Præcipes, or 2 ſeveral Writs at the ſame Time &c. Thel. Dig. 48. lib. 5. cap. 18. (bis) S. 1. cites Mich. 46 E. 3. 29. But ſays the contrary was adjudged Mich. 7 H. 4. 6. and that the contrary is Law alſo; for where five are obliged, and each in Solido, Writ does not lie againſt three of them by one Præcipe &c. and cites Paſch. 12 H. 4. 21. and that ſo agrees Paſch. 27 H. 8. 6. For one Writ, and by one Præcipe, ought to be againſt all, or ſeveral againſt each, and that ſo agrees Hill. 10 H. 7. 16.

47. Where a Man is *bound who has Land by his Father and by his Mother*, and *dies without Iſſue*, the Obligee ſhall have ſeveral Actions *againſt the Heirs*, and not joint Action; and if he recovers againſt the one, Execution ſhall ceaſe till he has recover'd againſt the other; for the one ſhall not be charged of all, for they are in as ſeveral Heirs. Br. Joinder in Action, pl. 119. cites 11 H. 7. 12.

48. *And* per Fineux, *againſt the Heirs in Gavelkind*, joint Action of Debt lies upon the Obligation of their Father; for they are one Heir. Ibid.

So where it was brought *againſt two Tenants in Common*, and it appeared

49. A. and B. were *Leſſees* of Lands, and did *not ſet out their Tithes. Debt was brought* upon the Statute *againſt A.* The Action does not lie. But here it was found that *A. only occupied the Land*, and therefore the Action well lies. Het. 121. 122. Mich. 8 Car. Coles v. Wilkes.

that *one had ſet out the Tithes, and the other carried them away*; it was adjudg'd that the Action lies only againſt him who carried them away. Hutt. 12. cites Mich. 8 Jac. Gerard's Caſe.

50. If 2 *Leſſees make Partition*, the Leſſor may have one Action againſt them. Cro. J. 411. Mich. 14 Jac. in Caſe of Ipſwich Bailiffs &c. v. Martin & Parker.

3 Bulſt. 211. S. C. and the Court clear of Opinion, that the Action of Debt was well brought, and

51. *Two Jointenants of a Term, one aſſigns* his Intereſt *to J. S. and the other dies and leaves M. Executor*, Action may be brought againſt the Aſſignee and the Executor jointly for *Rent due afterwards*; for the *Act of Leſſee* ſhall not divide the Action of the Leſſor. Cro. J. 111. pl. 11. Mich. 14 Jac. B. R. Ipſwich Bailiffs &c. v. Martin and Parker.

Judgment for the Plaintiff.—Roll Rep 404. pl. 33. S. C. adjornatur.

W. the *Plaintiff made a Leaſe for Years to A. and B. rendring Rent; B. aſſigned his Moiety to C.—W. brought his Action againſt A. and C. jointly for the Rent*, and had a Verdict It was moved in Arreſt of Judgment, that tho' Leſſor has Election to ſue the Leſſee alone for the whole Rent, or to have ſeveral Actions againſt the Leſſee and Aſſignee, yet he cannot join them both in one Action, becauſe the one is charged upon the Contract, which continues notwithſtanding the Aſſignment, and the other is charged by reaſon of the Occupation of the Lands, and not upon the Contract, there being none between him and the Leſſor, ſo that theſe are Actions of ſeveral Natures; but adjudged by 3 Juſtices, contra Chamberlaine J. that the Action lies jointly againſt one Leſſee and Aſſignee, but he may have one Action againſt both the Leſſees notwithſtanding the Aſſignment. Palm. 283, 284. Paſch. 20 Jac. B. R. Waldron v. Vicars & al'.

Or,

Or, if the Leſſor will, he may bring Debt againſt the Aſſignee for a Moiety of the Rent, for the Aſſignee having the intire Eſtate in the Moiety of the Land, has *Privity of Eſtate ſufficient* to be ſo charged; and Judgment for the Plaintiff. 2 Lev. 231. Mich. 30 Car. 2. B. R. Gamman v. Vernon. ——S. C. 2 Jo. 164 reſolv'd per tot. Cur. that the Action well lies.

52. *Caſe &c. againſt* 2 Defendants *for ſpeaking ſcandalous Words* of the Plaintiff. Upon Not Guilty pleaded he had a Verdict againſt both, but reſolved, that the Action will not lie againſt 2 Defendants jointly, for ſeveral Cauſes cannot produce a joint Action, and therefore Judgment was arreſted. Palm. 313. Mich. 20 Jac. Chamberlaine v. Wilmore.

53. Caſe *againſt* 2 *for procuring the Plaintiff to be indicted for a common Barretor.* It was moved in Error, that the Action lies not againſt 2, for that the Procurement of one is not the Procurement of the other; but the Court was of Opinion that the Action lies againſt both. Lat. 262. Mich. 3 Car. Pencavin v. Trapping.

54. One Action cannot be brought *againſt A. for* an Aſſault and *Battery of the Plaintiff, and againſt B. for taking away his Goods,* becauſe the Treſpaſſes are of ſeveral Natures, and againſt ſeveral Perſons, and the Parties cannot plead to ſuch a Declaration; Per Roll Ch. J. this being aſſigned for Error. Sty. 153. Mich. 24 Car. Cutworth's Caſe.

55. If *ſeveral Tenants claim under one Perſon by one Title,* and the *Plaintiff hath but one* [*Title*] *againſt them,* they all may be joined in one Action; but not ſo where he hath ſeveral [Titles.] Keb. 238. pl. 72. Hill. 13 Car. 2. B. R. (Ld.) Clare's Caſe.

56. An *Executor* cannot be jointly *ſued with* another, becauſe he is charged De bonis Teſtatoris, and the other De bonis propriis. 2 Lev. 228. Trin. 30 Car. 2. B. R. in Caſe of Hall. v. Huffam. S. C. cited accordingly. Carth. 171.

(D. d) Where ſeveral muſt be join'd.

1. A Man ought to ſue ſeveral Writs of Præcipe quod reddat *againſt Tenants in Common who are in by ſeveral Titles,* otherwiſe they ſhall abate. Thel. Dig. 44. lib. 5. cap. 3. S. 1. cites Mich. 6 E. 3. 283. and that ſo agrees Trin. 18 E. 3. 23. and Paſch. 42 E. 3. 17. and Trin. 48 E. 3. 17. and Mich. 12 H. 7. 1. Trin. 8 E. 3. 418. 5 E. 3. 179. and 17 E. 3. 24. 52. and 53.

2. An *Obligation* made which binds the Heir ought to be ſued jointly *againſt the Heirs Male in Gavelkind and againſt the Heir at Common Law.* Thel. Dig. 44. lib. 5. cap. 1. S. 10. cites Mich. 11 E. 3. Dett. 7. Wherean Obligee [an Obligor] who has Land by Deſcent of the Part of the Father, and alſo of the Part of the Mother, dies without Iſſue of his Body, ſeveral Writs ſhall be brought againſt the ſeveral Heirs, and not jointly &c. but one Writ ſhall be brought againſt all the Heirs in Gavelkind. Thel. Dig. 47. lib. 5. cap. 14. S. 1. cites Hill. 11 H. 7. 12.

3. Where a *Fine* is levied *of Lands in ancient Demeſne, by which* Fine divers Remainders are intail'd, it ſuffices to bring *Writ of Deceit* to annul this Fine *againſt the Tenant of the Land only* without naming thoſe in Remainder. Thel. Dig. 48. lib. 5. cap. 17. S. 2. cites Trin. 26 E. 3. 65.

4. *Parceners* ſhall be jointly ſued always, notwithſtanding that they are *in by diverſe and ſeveral Deſcents* before Partition. Thel. Dig. 44. lib. 5. cap. 1. S. 7. cites Mich. 37 H. 6. 9. and Trin. 9 E. 4. 14. Paſch. 42 E. 3. 17. Thel. Dig. 44. lib. 5. cap. 1. S. 6. ſays it appears, as it ſeems by the Opinion of 9 H. 6. 5. that Writ of Formedon may well lie againſt one Parcener without naming the other

other after Partition made, notwithſtanding that he who is named was within Age at the Time of the Partition, and yet is &c.

When *Coparceners* are *in by one Deſcent*, if the *one has Iſſue and dies*, and the *other has Iſſue and dies*, and their *Iſſue enter*, yet they ſhall be in as Parceners, and Writ of Partitione faciend' lies againſt them; therefore he who brings Præcipe quod reddat ſhall have it againſt them by one joint Præcipe. Br. Joinder in Action, pl 43. cites 39 H. 6. 8

But contra where they are *in by ſeveral Titles, or by Partition.* Ibid.

But where they are to *demand* they ſhall have ſeveral Actions, and yet when they recover they are in Coparcenary as before, and ſo was the Opinion of the Court, that where they are in by Coparcenary not parted, tho' it be by diverſe Deſcents, yet joint Præcipe lies. Ibid.

Præcipe quod reddat ſhall be brought againſt 2 Coparceners jointly. Br. Joinder in Action, pl. 40. cites 9 E. 4. 14.

5. Detinue ſhall *not* be brought *againſt an Abbot and Monk, but againſt a Monk only*; Quod Nota. Br. Detinue de biens, pl. 15. cites 2 H. 4. 21.

Thel. Dig. 48. lib. 5. cap. 18. (bis) S. 3. cites S. C. & P.

6. A Man *bail'd Goods to two*, and the *one kept the Goods*, and he *brought Detinue againſt him alone*, and the other pleaded it to the Writ that the Bailment was to him and another in full Life, and the Writ abated; for both cannot keep the Goods, but Thirn was in a contrary Opinion. Br Detinue de biens, pl. 16. cites 7 H. 4. 6.

Br. Dett. pl. 69 cites S. C. —— *Debt againſt 3 by joint*

7. Where 4 *are bound* by Obligation *conjunctim & diviſim*, a Man ſhall not have Debt upon it againſt 2, but againſt all, or againſt one alone. Br. Obligation, pl. 24. cites 12 H. 4. 21.

Præcipe, and *Proceſs iſſued* till the *one was outlaw'd and got Pardon*, and demanded Judgment of the Writ, inaſmuch as 5 *were bound by Obligation and* 2 *are omitted*; Norton ſaid, the 5 are bound, and every one in the whole, by which the Writ was abated. Brooke ſays the Reaſon ſeems to be inaſmuch as *all ought to be ſued if he will have joint Præcipe, and every one by himſelf may be ſued by ſeveral Præcipe.* Br. Several Præcipe, pl. 7. cites 12 H. 4. 18.

Br. Obligation, pl. 26. cites 14 H. 4. 30. 33. S.C. & S. P. and that the ſame Law is of a Monk bound with another Perſon.

8. In Debt, if *A. and a Feme Covert are bound* in 10 l. or A. an Infant, the Writ is well brought againſt A. leaving out the Feme and the Infant, and if it be pleaded to the Writ the other ſhall maintain his Writ by ſhewing that the one was a Feme Covert, or an Infant at the time &c. Br. Dette, pl. 205. cites 14 H. 4. 32.

Debt upon an Obligation by the Abbot of D. which Obligation was to him and to J. N. and he ſaid that J. N. was his Commoign at the Time &c. and therefore well; per Cur. For there is *a Diverſity where an Obligation appears void, and where not*; for where *an Infant and a Man of full Age* are *bound*, or a *Feme Covert by a ſtrange Name*, there the Action ſhall be brought againſt both, and they ſhall have Advantage by way of Plea of the Non-age, Coverture and Profeſſion, *but where ſhe is named Feme Covert*, or Commoign in the Obligation, there it is otherwiſe; For in the firſt Caſe the Infant may admit the Obligation, and ſo may the Feme after the Death of her Husband, and the Commoign after his Deraignment. Br. Dette, pl. 190. cites 32 H. 6. 30.

9. It was adjudg'd that *Writ of Meſne* ought to be *brought againſt all the Parceners Lords before Partition*, but otherwiſe it is after Partition. Thel. Dig. 44. lib. 5. cap. 1. S. 5. cites Paſch. 3 H. 6. 43.

Fitzh. Admeaſurement, pl. 1. cites S. C. and the Defendant was awarded to anſwer.

10. In *Admeaſurement of Paſture*, Ellerker ſaid *J. N. is ſeiſed of* 20 *Acres of Land to which he has Common there*, and is not named, Judgment of the Writ, & non allocatur. Br. Joinder in Action, pl. 32. cites 8 H. 6. 26.

For in Monſtraverunt, all the Tenants ſhall be named by Way of making Plaint, but here none ſhall be named as Defendant but he who did the Tort, and yet in Action brought againſt the one all the Tenants ſhall be admeaſured.

11. It was held that if a Man *recovers* in Writ of *Treſpaſs againſt two* or ſeveral, and *does not ſue Execution*, and be to bring a new Writ for the ſame Treſpaſs, he ought to name all thoſe againſt whom he had recover'd before. But it was agreed there that it is no Plea to ſay that the Treſpaſs

Treſpaſs was done by the Defendants and others not named &c. without pleading Releaſe made to one of them, or ſomething to that Purpoſe. Thel. Dig. 48. lib. 5. cap. 18. S. 2. cites Mich. 20 H. 6. 12.

12. *And* where 2 Coparceners are, and *the one takes Baron, and has Iſſue and dies*, Præcipe quod reddat ſhall be brought againſt the other, and the *Tenant by the Curteſy*; for they continue the Eſtate by Coparceny. Br. Joinder in Action, pl. 40. cites 9 E. 4. 14.

13. Writ of *Debt* brought *upon a Contract* was abated becauſe another was Party to the Contract not named. Thel. Dig. 48. lib. 5. cap. 18. (bis) S. 4. cites Trin. 9 E. 4. 25. and Mich. 20 H. 6. 12.

14. In Treſpaſs for *entring his Houſe and carrying away his Goods*; the Defendant *pleaded that the Treſpaſs was done by him and J. S.* and *that the Plaintiff had brought his Action againſt J. S. and recover'd againſt him, and had Execution and is ſatisfied.* Wray conceived it reaſonable that this was a Diſcharge; but Gawdy contra; for the Treſpaſs is always in itſelf ſeveral. Clench ſaid, If *one commands three to do a Treſpaſs*, who do it, and a *Recovery is had againſt him and he* being in Execution *ſatisfies the Plaintiff*; this diſcharges the others; for the Commander was the Principal Treſpaſſer, and the others did it only as his Servants, which Gawdy ſeem'd to agree. Et adjornatur. Cro. E. 30. pl. 3. Trin. 26 Eliz. B. R. Morton's Caſe

15. *Two were bound in a Bond, & Quilibet eorum Conjunctim.* An Action is not maintainable againſt one alone by Reaſon of the Word Conjunctim. Goldsb. 83. pl. 3. Paſch 30 Eliz. Wrightman v. Chartman.

If *Covenant* be with ſeveral *Conjunctim & diviſim*, if the Intereſt upon which the Covenant is founded or dependent be joint, the Covenant is alſo joint; but if *the Intereſt be ſeveral* the Covenant is ſeveral. Per Cur. Mo. 849. pl. 1154. Paſch. 14 Jac. B. R.—— Show. 8. Spencer v. Durant S P.

Covenant in a Charter Party was between A. of the one Part, and B. and C. of the other Part, *and quemlibet eorum* an Action brought by A. againſt B. only was held good; for it being between them, and quemlibet eorum is joint and ſeveral of every Part. 2 Lev. 56. Trin. 24 Car. 2. B. R. Bolton v. Lee.

16. *Aſſumpſit by three, one dies* the Survivors ſhall be charged, but if they are alive the Action ſhall be brought againſt them all. Noy. 135. Breereton & Ux. v. . . . .

17. A. the Maſter of a Ship, by Charter-Party indented, *covenanted with B. and C. to go a Voyage with Goods to Cales*, and B. and C. *jointly and ſeverally covenanted with A.* that if the Ship went the intended Voyage, A. ſhould have ſo much for the Freight. A. brought Action of Covenant againſt B. only, and declared that B. did not pay; and it was objected that the Declaration ſhould be, that neither B. nor C. had paid. But per Cur. The Difference is, if the Action had been brought againſt B. and C. then the Non-payment ſhould be alleged as to both; but when the Action is brought againſt one only, it is ſufficient to ſay that he has not paid; and if any other had paid, the Defendant ought properly to plead it; and after Argument it was adjudged for the Plaintiff. Lat. 49. Trin. 2 Car. Conſtable v. Clobery.

Palm. 397. S. C. and Lat. ſeems to be taken from it, only Palm. mentions not any Judgment. —In this Caſe Action lies againſt B. alone, tho' C. be named in the Indenture. Poph. 161.

S. C.—— Noy. 75. S. C. accordingly —— A. and B. *covenant* to receive Rents due to C. and D. and covenant likewiſe that *they and each of them* would pay a Moiety thereof *to each of them*, viz. C. and D. C. alone brings Action againſt A. alone, and counts that neither the Defendant A. nor the other Covenantor, viz. B. had paid the Moiety to Plaintiff. It was objected that C. and D. ought to have join'd in the Action; but adjudg'd that the Action is ſever'd by the ſubſequent Covenant, by the apparent Intention of the Parties, but had it not been for that After-Covenant, the Action muſt have been joint. 8 Mod. 166. Trin. 9 Geo. Lilly v. Hodges.

It was held in Caſe of *Condition of a Bond* that a Releaſe to one was alſo to the other *Obligor*; but Holt Ch. J. ſaid, they did not determine, that on *Covenant, where the Joint Remedy failed*, there could not be a ſeveral Remedy. 2 Salk. 574 in Caſe of Clayton v. Kinaſton.

18. Where Merchants *covenant jointly and ſeperately to pay according to the Quantity of their Wares*, an Action of Covenant may be brought againſt

one alone; for the *Deed is ſeveral.* Per Doderidge J. Poph. 161. in Caſe of Conſtable v. Clobery.

S. C. cited by Holt Ch. J. Skin. 281.

19. Debt againſt a *Joint-Leſſee* for not ſetting out of Tithes, it was held that the Action does not lie; but becauſe it was found that he *only only occupied the Land*, it was held that the Action well lay. Hutt. 121. Mich. 8 Car. Cole v. Wilkes.

Show. 79. S C. but S. P. does not clearly appear —— 1 Salk. 137. pl. 1. S. C. but S. P. as to the perſonal Tort by one does not appear. —— Comb 163. Coleman v. Sherman

20. An Action of *Covenant by Leſſee* was brought *on a Covenant in Law* by the Word (Granted) in a Demiſe made *by three Leſſors, A. B and C.* Per Holt Ch. J. this Covenant, implied by Law, ought regularly to be joint. But per Cur. where *one of the Leſſors* (as in the principal Caſe) had actually done Wrong, by having *enter'd on the Leſſee without the Aſſent of the others.* The Covenantin Law ſhall not be taken to be joint, ſo as to charge the others with this *perſonal Wrong of their Companion*; for the Innocent ought not to be puniſh'd with the Guilty. So as to ſuch Breach by Entry of one, the Action is well brought againſt him alone; But as to other Breaches, where there is no particular perſonal Tort done by one more than another, the Covenant in Law is joint and not ſeveral. Carth. 97. 98. Mich. 1 W. & M. in B. R. Coleman v. Sherwin.

S. C. and S. P. accordingly by Gould, to which Holt Ch. J agreed.

As in *Debt on the Statute for carrying away Corn, not ſetting out the Tithes,*

21. Where an Action is *founded on a Tort* done by ſeveral Perſons, tho' in one Capacity it may be either joint or ſeveral at the Election of the Party, as in Treſpaſs &c. Carth. 171. Hill. 2 & 3 W. & M. in B. R. in Caſe of Rich v. Pilkington.

and tho' the Action is againſt three, and only one is found Guilty, and the other two acquitted, yet this does not abate the Action. Carth. 361. Mich. 7 W. 3. C. B. Baſtard v. Hancock —— Where an Action is founded *on a Tort merely*, it is ſeverable in its Nature; Reſolved. Carth. 295 Hill. 5 W. & M. in B. R. in Caſe of Child v. Sands.

In all Caſes where the Action is *founded* upon Matter *Ex quaſi Contractu*, it ought to be joint againſt all Parties; ſaid per Cur. to be a Rule in Law. Carth. 62. Trin. 1 W. & M. in Caſe of Boſon v. Sandford. —— S. C. cited and S. P. per Cur. Carth. 295. Hill. 5 W. & M. in B. R.

22. A. brought a Special Action on the Caſe for a *falſe Return of a Mandamus*, directed to the Bailiff, Aldermen, and Burgeſſes of R. and avers that the Defendant was an Alderman at that Time, and that it belonged to him to ſwear the Plaintiff; but *that he* (the Defendant) *in Nomine of the Bailiff, Aldermen, and Burgeſſes* of the ſaid Borough, *cauſed a falſe Return to be made* thereto, viz. &c. It was urged for the Defendant, that it being *by Conſent of ſix other of the Corporation*, the Action ought to be joint, and not ſeveral. Sed non allocatur, becauſe he could not *prove that this Conſent was in a legal Council, or that others of the Corporation were ſummon'd thereto.* Carth. 229. Paſch. 4 & 5 W. & M. in B. R. Vaughan v. Lewis.

23. *Action on a joint Bond* was brought *againſt one*, and a Verdict was for the Plaintiff; on Motion in Arreſt of Judgment, that tho' this might have been pleaded in Abatement, yet ſince it appears on the Face of the Record that the Plaintiff had no Right againſt one alone, he cannot have Judgment. The Court was of Opinion that it did not *appear of Record that the other* ſign'd, ſeal'd, or deliver'd this Bond; but admitting that he *ſign'd and ſeal'd it*, yet if it appear'd *not that he deliver'd it*, it is the Bond of Defendant alone tho' another is named in it with him; for it is not his Deed without the Delivery. 8 Mod. 242. Paſch. 10 Geo. Cloud v. Nicholſon.

(E. d) Where

(E. d) Where for ſeveral Duties there ſhall be ſeveral Actions, or only one; and when to be brought.

1. *Appeal of Death*, the *Defendant render'd himſelf at the Exigent, and after eſcaped out of the Marſhalſea*, and per omnes Juſticiarios Exigent de novo ſhall iſſue, and he *was in Ward at two ſeveral Suits*, and yet per omnes Juſticiarios the Marſhal was charged but of one Eſcape. Br. Eſcape, pl. 20. cites 26 Aſſ. 51. Br. Eſcape, pl. 51. cites S. C.

2. A Man cannot *demand one intire Debt by Parcels*, as to demand *Parcel of 20 l. due by one Obligation, or of Rent payable at a Day by one Writ* or Præcipe, *and another Parcel by another Writ* or Præcipe. Thel. Dig. 108. lib. 10. cap. 16. S. 6. cites Trin. 1 H. 5. 7. Where *Rent is reſerved quarterly*, every Quarter's Rent is a ſeveral Debt, and diſtinct Actions may be brought for *each Quarter's Rent*, and ſo not like Debt brought for Part of the Money upon a Bond or Contract; and if there are ſeveral Quarters Rent due, an Action of Debt brought for the laſt Quarter's Rent only is good. 2 Vent. 129. Hill. 1 & 2 W. & M. in C. B. Welbie v. Philips.

But where he demands only one Quarter, he *muſt not ſhew that any more is due*, as was done in * Baily and Offord's Caſe, without ſhewing that he was ſatisfied of the Reſidue. 2 Vent. 129. in Caſe of Welbie v. Phillips.

The Plaintiff brought ſeveral Actions for *different Arrears of Rent upon the ſame Leaſe*; upon which the Defendant moved, that the Plaintiff might join them in one. Reynolds J. ſaid, if there were ſeveral *Actions upon different Notes*, he thought the Court would make him join them in one; and the Court did ſo in the preſent Caſe. Barnard. Rep. in B. R. 114. Hill. 2 Geo. 2. 1728. Jones v. Maſon.

* Cro. C. 137. pl. 11. Mich. 4 Car. B. R. in Caſe of Baily v. Hughes, S. P. and this was held per Cur. to be an incurable Fault.

3. Treſpaſs was done by 2. Per Hank. the Plaintiff may have ſeveral Actions *of Treſpaſs, and recover the intire Damages againſt each of them.* Br. Treſpaſs, pl. 103. cites 14 H. 4. 21.

4. For *Damage feaſant by ſeveral Horſes*, the Owner of the Land may have a Several Action of Treſpaſs for every Horſe; for every one of them did Treſpaſs. Cro. E. 8. pl. 6. Trin. 24 Eliz. C. B. per Manwood, in Tunbridge's Caſe.

5. A. in Conſideration of a Marriage of his Daughter to B.'s Son, promiſed to give 700 *l.* and *to pay* 100 *l. every Year till all the Sum is paid*; and it was held clearly, that a Several Action may be brought for 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 Debt till the laſt Year expired. Owen. 42. Hill. 30 Eliz. Hunt's Caſe, alias Hunt v. Torney. A. is indebted to B. in 4 l. lent. A. *aſſumes* upon this Loan *to pay* the ſaid 4 l. by 5 s. *per Month.* Afterwards A. *makes Default of Payment the firſt Month.* The Plaintiff *counts upon this Aſſumpſit*, and that the Defendant has not paid him the ſaid 4 l. nor any Part of it, *to the* Plaintiff's *Damage of* 6 *l.* The Defendant pleads Non Aſſumpſit; it is found againſt him, and *Damages given to* 4 *l.* and judged the Action lies, and affirmed in Error. The Jury in this Caſe, where the Action was brought before all the Months expired, after the Aſſumpſit, had an *Election either to find the whole Sum in Damages, or for the Time of Non-payment only*; and if the Verdict be for the whole Sum, and a Judgment thereupon, this ſhall be a *Bar in another Action* upon the ſaid Aſſumpſit, for Default of Payment of the ſaid 5 s. any Month afterwards. In this Caſe the Plaintiff may count for his Damage as it really is, and have a *new Action* upon the Caſe *upon every Default*. The Plaintiff has his Election. It is otherwiſe in an Action of Debt upon a Contract, or a Bill to pay at ſeveral Days, where the Contract or Bill is for an intire Sum, diſtributed into ſeveral Payments at ſeveral Times. In the principal Caſe, the Aſſumpſit is in the Nature of a Covenant Judged and affirmed in Error. Jenk. 333. pl. 68.——Nota ex hoc, That where a Man brings ſuch an Action for Breach of an Aſſumpſit upon the firſt Day, it is beſt to count of Damages for the intire Debt; for he cannot have a new Action. Cro. J. 505. pl. 16. Mich. 16 Jac. B. R. Beckwith v. Nott, S. C.

6. If

6. If I covanant with you *to build you* 20 *Houſes*, the Covenantee ſhall ſhall have a Several Action for each Default; per Anderſon. Owen. 42. Hill 30 Eliz. in Caſe of Hunt v. Torney.

7. *B. and C. Treſpaſſors, enter'd* and occupied for Half a Year the Land of A. and then *A. re-enter'd* and occupied for a Time. Afterwards *B. enter'd again, and A. re-enter'd again*, and *B. enter'd again*, and held in. The Queſtion was if the Entries by A. were not ſuch an Interruption of the Treſpaſs that he ſhould be forced for every Treſpaſs to have ſeveral Actions. It was held that one Action with a *Continuando* would ſerve for all, and that it would well lie with a Continuando. And tho' the Jury might ſafely find both B. and C. guilty of the Treſpaſs, yet the beſt way would be to find C. guilty only of the firſt Entry. Cro. E. 182. pl. 2. Paſch. 32 Eliz. B. R. Willoughby and Sacheverel v. Sacheverel.

See Tit. Waſte, (P.a) pl. 11. 12. S. C. more at large.

8. A. and B. *Coparceners* of a Houſe. A. leaſes her Part to M.——B. leaſes her Part to N.——M. and N. leaſe their Parts to J. S.——A. ſells her Reverſion to B. and then Waſte is committed. B. alone brought Action of Waſte. It was aſſigned for Error, becauſe one Action only was brought, there being ſeveral Demiſes by ſeveral Leſſors. But Gawdy and Popham held it well. Ow. 11. Mich. 33 & 34 Eliz. B. Wardford's Caſe.

9. *I do owe to A. B.* 50 *l. to be paid* 10 *l.* at ſuch a Day, and ſo *at 5 ſeveral Days* 10 l. till 50 l. be paid, and for Payment whereof *I bind me in* 10 *l. Penalty*; after all the 5 Days are paſs'd, A. brought Debt for the 50 l. and per 3 Juſtices the Action lies; for it is a *ſeveral Bill* for the 50 l. and a Bill alſo for the 10 l. and he may have two Actions thereupon. But Walmſley J. held it to be one intire Bill, and cannot be ſaid to be ſeveral Bills, being all by one ſame Deed; but if he had wrote in one Deed, Be it known that I owe 10 l. and in cujus Rei Teſtimonium &c. and had *repeated*, Be it known alſo that I owe 10 l. in Cujus Rei Teſtimonium &c. and put his Seal thereto, this had been ſeveral Bills. Whereto the other Juſtices agreed, and ſaid that ſo it was here &c. Cro. E. 771. pl. 14. Trin. 42 Eliz. C. B. Anon.

Brownl. 82. Wherwood v. Shaw, S. C. ruled accordingly. —Yelv. 23.

10. A. *deliver'd* 40 *l. to B. to be deliver'd to C. and B. to be divided between them.* They bring two ſeveral Actions of Debt for their reſpective 20 l. Adjudged that this is well, and affirm'd in Error. Jenk. 263. Mich. 44 Eliz. C. B. Wherinwood v. Shaw.

Whorwood v. Shaw, S. C. adjudg'd accordingly in C. B. and affirm'd in Error.——Mo. 667. pl. 914. Shaw v. Norwood, S. C. accordingly.——Ow. 127. S. C. accordingly.——Cro. E. 729. pl. 66. S. C. accordingly.

Brownl. 68. Hill. 14 Jac. S. C. accordingly.——S. C. cited Arg. 5 Mod. 213.——S. P. Arg. Cro. E. 623.

11. A Man may have one Action of Debt *upon ſeveral Obligations.* Hob. 178. pl. 205. Andrews v. Delahay.

(F. d) Where, for the ſame Fact or Thing, the ſame Perſon may have ſeveral Actions at the ſame Time againſt the ſame Defendant.

1. A Man brought *Appeal of Mayhem and Action of Treſpaſs*, and *counted in the one and the other at one and the ſame Day and Place*; and the *Mayhem was in the Arm, and was cut in the Head*; and yet, per Cur. becauſe he is to *recover Damages twice*, as here, *for one and the ſame Treſpaſs*, therefore he held him to the one, viz. to the Appeal, and was nonſuited in the Treſpaſs; for if he had done otherwiſe, the one Writ and the other had abated. Br. Brief, pl. 305 cites 41 Aſſ. 16.

2 *Bill of Debt* was brought *in C. B.* upon Eſcape of a Man condemn'd in Account of 200 l. Kirton ſaid, the Plaintiff has a *Bill in the Exchequer of the ſame Debt* againſt us, Judgment of the Bill; & non allocatur. Br. Brief, pl. 306. cites 41 Aſſ. 11.

3. If *A. libels againſt B. for three Things* by one Libel, B. may have *one or more Prohibitions*. Noy 131. Anon.

(G. d) Joinder in Actions againſt ſeveral. Where one ſhall anſwer without the other.

1. PER *quæ Servitia againſt* 3, *two appear'd*, and were put to anſwer; and yet the Writ and the Note ſuppoſed their Tenancy in common. Br. Reſponder, pl. 46. cites 21 E. 3. 48.

2. *Replevin againſt* 2, the *one appear'd*, and the other made Default; he who appear'd may anſwer for both, and ſave his Companion. Quod nota. Br. Reſponder, pl 60. cites 21 E. 3. 20.

3. *Quid Juris Clamat againſt* 2. The *one appear'd*, and the *other not*. He ſhall not anſwer without the other; but 'tis ſaid that the one may attorn alone; and he who appear'd, pleaded that he was Tenant of the Whole the Day of the Note levied, and was not permitted to anſwer without the other. Br. Reſponder, pl. 44. cites 38 E. 3. 28.

4. *Quare Impedit; at the Pone the Sheriff did not return the Writ*, yet he ſhall anſwer well enough, becauſe he *has Day by the Roll*; Quod Nota. Br. Reſponder, pl. 45. cites 38 E. 3. 35.

5. *Waſte againſt* 2, the *one appeared at the grand Diſtreſs, and the other not*, and therefore he who appeared was compelled to anſwer alone; for the *Proceſs is determined againſt the other*; Quod Nota bene. Br. Reſponder, pl. 25. cites 39 E. 3. 15.

The one ſhall not anſwer without the other; per Hanke, which Thirne agreed. Br. Reſponder, pl. 42. cites 14 H. 4. 37.

6. Account againſt 2, *who were adjudged to account*, and *Capias ad Computandum awarded, and Proceſs till the Exigent*, and *the one was outlawed*, and the *other appeared*, and becauſe the Proceſs is determined againſt the one, the other was compell'd to anſwer alone. Br. Reſponder, pl. 5. cites 41 E. 3. 3.

So if the *one dies*; for the *Receipt of the one is the Receipt of the other*. Quod nota. Br. Reſponder, pl. 5. cites 41 E. 3. 3.

Præcipe quod reddat against A and B. who made Default, by which grand Cape iſſued, and A. appeared, and B. not, and A. ſaid that B. had nothing in the Land the Day of the Writ purchaſed, and tender'd his Law of Non-ſummons; Perſey ſaid they were Tenants as the Writ ſuppoſed; Priſt; and the other econtra; quære of this Plea *before the Default ſaved.* Br. Reſponder, pl. 55 cites 47 E. 3. 14.

7. Note, that *in* * *Præcipe quod reddat, or* † *Debt againſt ſeveral,* which are *joint Actions*, there the one ſhall not anſwer without the others, or till the *Proceſs be ended* againſt the others, neither *can the one confeſs the Action, nor plead in Bar againſt the other, nor take the intire Tenancy, nor plead ſeveral Tenancy by himſelf* without the others. Br. Reſponder, pl. 54. cites ‡ 46 Aſſ. 13.

† *Debt againſt* 2 *upon Obligation*, the *one came*, and the *other not*, and he was not compell'd to anſwer, notwithſtanding that the *Obligation was that each was bound in toto without the other*, becauſe it was by a *joint Præcipe*, and therefore he ſhall have *idem dies* by Mainpriſe, becauſe he came by the Capias and Proceſs againſt the other; Quod Nota. Br. Reſponder, pl 6. cites 48 E. 3. 1.

‡ All the Editions of Brooke are as here, viz. 46 Aſſ. 13. but there is no ſuch Plea in that Year, nor do I obſerve S. P. in that Year.

Quare Impedit againſt Patron and Incumbent who appeared at the Diſtreſs, and

8. *Contra in Treſpaſs* &c. againſt ſeveral *which is ſeveral* in itſelf, *and in Quare Impedit* againſt ſeveral where ſome appear and plead to the Iſſue before the others appear, and Proceſs iſſued againſt them who made Default, returnable with the Venire facias; Quod Nota bene. Br. Reſponder, pl. 54. cites * 46 Aſſ. 13.

ſaid that the *Pone is not ſerved againſt the Incumbent*, and yet becauſe they appear'd they were compell'd to anſwer. Br. Reſponder, pl. 16. cites 9 H. 5. 3. and 3 H. 6. 7. accordingly.

* See at pl. ſupra. ‡

9. It was ſaid, that in *real Actions* againſt 2 or more, the one ſhall not anſwer without the other, or till the Proceſs be determined againſt the others. Br. Reſponder, pl. 59. cites 46 E. 3. 23.

Debt againſt 2, Proceſs continued till the *one was outlaw'd*, the other anſwer'd alone, for the *Proceſs againſt the other is determined*

10. Debt was brought againſt 5 upon Obligation, and 2 *appeared, and Proceſs continued againſt* 3 *till the Exigent*, and *the* 2 *pleaded to Iſſue*, and it was *upon Obligation wherein every one was bound in the whole*, but it was upon a *joint Præcipe*, and therefore after the Iſſue was rejected, and the *Jury diſcharged*, and *idem dies* given to them *till the Exigent be returned*, for the two ought not to have anſwer'd without the others; Quod Nota; But it ſeems, that *if the* 3 *had been outlaw'd*, ſo that the Proceſs had been determin'd, *the* 2 *might might have anſwer'd.* Br. Reſponder, pl. 7. cites 48 E. 3. 21.

Br. Reſponder, pl. 13. cites 12 H. 4. 18.

So in Writ of *Ward of Land and Body againſt* 4. Br Reſponder, pl 57. cites 49 E. 3. 26.

11. In *Dower* the *Tenant vouch'd the Heir in the Cuſtody of* 3 *Guardians* quia infra ætatem, and upon Proceſs the *one of the Guardians* [*appear'd*,] and the others not, he ſhall not be compell'd to anſwer, but ſhall have *idem dies* upon Proceſs againſt the others *till the others appear, or that the Proceſs be ended*; but quære where there are *ſeveral Guardians, and by ſeveral Titles*, if the one cannot enter into the Warranty for his Portion, becauſe not adjudged. Br. Reſponder, pl. 41. cites 48 E. 3. 5.

12. A Man was *outlaw'd at the Suit of* 2 *Executors*, and *got Charter of Pardon*, and ſued *Sci. fa. againſt them*, and the one appeared, and the other not, and he who appeared was compell'd to anſwer alone. Br. Reſponder, pl. 39. cites 3 H. 4. 10.

13. *Treſpaſs againſt* 2, the *one caſt Superſedeas of Privilege* of the Chancery which is allow'd, quære if the other ſhall anſwer; for it is ſaid there, that where the *one caſts Protection* the other ſhall anſwer. and the ſame it ſeems here, and Brook ſays it ſeems that both ſhall anſwer, becauſe it was purchas'd jointly. Br. Reſponder, pl. 14. cites 14 H. 4. 21.

Br. Charters de terre, pl. 21 cites 14 H. 4. 23, 24. 27. & 21 H. 6. 1.

14. Where *Detinue of Charters* was brought *againſt* 4 *Executors*, and 3 *appeared at the Diſtreſs*, and the 4th was return'd Nihil, and made Default, and the 3 were compelled to anſwer againſt the Opinion of ſeveral. Br. Reſponder, pl. 15. cites 14 H. 4.

15. *Ward*

15. *Ward againſt* 3, and *at the grand Diſtreſs the one appear'd and the others not*, and the *Plaintiff pray'd Diſtreſs with Proclamation* againſt them; Per Hank. you ſhall not have it; for the one ſhall not anſwer without the other, nor the Body of the Ward cannot be divided. Br. Reſponder, pl. 42. cites 14 H. 4. 37.

16. *So* by him *in Writ of Meſne againſt* 3, which Thirn agreed, and ſo it ſeems that he ſhall have only *Diſtreſs infinite as at Common Law.* Ibid.

17. Where the *Action was founded on the Tort of the Defendants*, as in Conſpiracy againſt 2, the one appear'd and the other not, he ſhall anſwer alone, and ſhall not ſtay the coming of his Companion; for *the Tort of the one is not the Tort of the other.* Br. Reſponder, pl. 63.

So in Treſpaſs, Maintenance, Attachment upon Prohibition &c. Br. Reſponder, pl. 63.

(H. d) Where ſeveral Defendants may join or ſever in Pleas to the Writ.

1. IN *Debt againſt two upon an Obligation*, the one Defendant *pleaded that the Plaintiff was Covert Baron* the Day of the Writ purchas'd, and the *other conſeſs'd the Deed*, upon which the Plaintiff recovered the Moiety of the Debt againſt him. Thel. Dig. 214. lib. 15. cap. 2. S. 13. cites It. 4 E. 2. Eſtoppel 229.

2. In *Dower againſt A. and B. B. pleaded that he held Parcel of the Tenements as Guardian*, by reaſon of the Nonage of A. who is within Age &c. Judgment of the Writ, not named Guardian &c. And *A. pleaded that he and B. held all in common, except the ſame Parcel; and* he *pleaded the ſame Plea to the Writ that B. had pleaded*, and were received. Thel. Dig. 213. lib. 15. cap. 2. S. 1. cites Trin. 11 E. 3. Brief 475.

3. In Writ *againſt W. and Margaret his Feme, and one Margaret Meux*, Margaret who was named as Feme, *ſaid that ſhe is the ſame Perſon who is named Margaret Meux, and that ſhe is Sole*; Judgment of the Writ; and the *Baron for him and for Margaret pleaded Not Guilty*, but ſhe would not paſs this Plea; upon which Iſſue was taken that ſhe was Covert. Thel. Dig. 213. lib. 15. cap. 2. S. 2. cites Trin. 14 E. 3. Brief 281.

4. In Writ againſt 2, the *one may plead Tenancy in Common to the Writ, and the other* may plead *to the Action*, and the Demandant ſhall reply to both. Thel. Dig. 213. lib. 15. cap. 2. S. 3. cites Paſch. 17 E. 3. 24.

5. In Writ againſt ſeveral, if the *one demands the View*, the *others cannot plead Miſnomer of the Vill* in Abatement of the Writ. Thel. Dig. 213. lib. 15. cap. 2. S. 4. cites Hill. 21 E. 3. 10.

6. But if the *one pleads to the Writ*, and the *others to the Count*, they ſhall be compell'd to join &c. Thel. Dig. 213. lib. 15. cap. 2. S. 4. cites Paſch. 42 E. 3. 17.

7. But in *Writ of Entry* the *one may falſify* the Entry, *and the other* may *plead in Bar.* Ibid.

8. In *Treſpaſs* againſt ſeveral, if the *Plaintiff counts againſt the one* who appears where the other makes Default, *and after he counts againſt another*, when he appears *the one ſhall not take Exception to the Count againſt his Companion*, tho' they are join'd in Action. Br. Joinder in Action, pl. 91. cites 46 E. 3. 26.

9. In *Formedon againſt* 3, the *one took the intire Tenancy, abſque hoc* &c. *and pleaded Omiſſion of one in the Deſcent, in Abatement* of the Writ &c. and the *others ſaid that they are Tenants, as is ſuppoſed* by the Writ, and *pleaded*

pleaded the ſame Plea to the Writ &c. and the Demandant replied to both. Thel. Dig. 214. lib. 15. cap. 2. S. 12. cites Mich. 2 R. 2. Eſtoppel 210.

10. In Writ *againſt the Lord and his Villein*, where *the Lord has not Seiſin of the Land*, if they *vary in Plea*, the Plea of the Lord ſhall be received. But otherwiſe it is of the Tenant in Fact, and the Parnour of the Profits in Aſſiſe; for there the Plea of the Tenant ſhall be received. Thel. Dig. 213. lib. 15 cap. 2. S. 5. cites Mich. 21 R. 2. Brief 788.

11. In Writ againſt 2, the *one pleaded Outlawry in one of the Demandants*, and the *other took the intire Tenancy, and pleaded to the Action*, and were received. But if *both take the Tenancy* according to the Writ, there they *ſhall join in Dilatories*. Thel. Dig. 213. lib. 15. cap. 2. S. 7. cites Mich. 18 H. 6. 20.

12. In Writ againſt 2, the *one pleaded Parcenary with one E. not named, in Abatement* of the Writ, and the *other ſaid to the Writ, that he had nothing in the Tenements, but only as Baron in Right of the ſaid E. his Feme, who is in full Life, not named* &c. and were received to the two Pleas. Thel. Dig. 213. lib. 15. cap. 2. S. 8. cites Mich. 22 H. 6. 19. without pleading each for that which to him belongs.

13. In Debt againſt Executors *one may plead Outlawry or Excommunication* in the Plaintiff, and *the other* other *Plea*. Thel. Dig. 213. lib. 15. cap. 2. S. 9. cites it as ſaid Paſch. 7 E. 4. 8.

In Treſpaſs of *Battery* againſt 2, the one juſtifies of the *Aſſault of the Plaintiff*, and the other the like, and a good Anſwer. Br. Treſpaſs, pl. 427. cites 11 H. 7. 6. 7. Per Keble, Huſſey, and Brian.

14. Treſpaſs of Battery againſt 2, *who pleaded jointly of the Aſſault of the Plaintiff in their Defence*. It was moved, that they ſhall not join in Plea; for their Matter is ſeveral in itſelf; but it was agreed that it was a good Plea, and that they *may join* in the Plea. Br. Treſpaſs, pl. 324. cites 12 E. 4. 6.

15. *So* to ſay *that they were Servants to N upon whom the Plaintiff made an Aſſault*, and they in Defence of their Maſter beat him. Br. Treſpaſs, pl. 324. cites 12 E. 4. 6.

16. *So* where *2 juſtifies for arreſting a Man by joint Warrant*. Br. Treſpaſs, pl. 324. cites 12 E. 4. 6.

17. In *Scire Facias by three out of a Recovery had by four*, of whom *one was Dead before the Scire Facias purchaſed* againſt two. The *one of the Defendants pleaded the Death of one of the three*, and the *other pleaded that the four were in full Life* &c. and durſt not demur, but were adviſed to join in Plea. Thel. Dig. 213. lib. 15. cap. 2. S. 10. cites Mich. 7 H. 7. 6.

In Treſpaſs of 2 *Horſes* and *the one juſtifies for the one and the other for the other*, each ſhall plead another Plea of the Horſe which he did not take; for *this Treſpaſs is of ſeveral Things*, contrary of Graſs ſpoil'd as above; for this is *one Treſpaſs* in itſelf. Per Keble, Huſſey and Brian, to which Fairfax agreed. Br. Treſpaſs, pl. 427. cites 11 H. 7. 6. 7

18. Treſpaſs againſt 2 of *Graſs ſpoil'd, they ſaid ſeparately that the Lord of D. had Common there for his Tenants at Will, by which the one Tenant at Will put in his Cattle, and the other as Tenant at Will to the ſaid D. put in his Cattle*; and a good Plea, per Keble, Brian, and Huſſey, for *it is all one Treſpaſs*. But Jay contra, inaſmuch as the one does not juſtify for the Cattle of the other, and the other for his Cattle the like. Br. Treſpaſs, pl. 427. cites 11 H. 7. 6. 7.

Where *Treſpaſs* is brought *againſt ſeveral for breaking a Cloſe*, and *every one of them has Common there*, in this Caſe they *ought to juſtify ſeverally, and not jointly*, and if *one juſtifies as their Servant*, this ought to be ſeverally, and not jointly. Br. Juſtification, pl. 8. cites 15 H. 7. 10.——Br. Double, pl. 59. cites S. C.

19. In

19. In Treſpaſs, if *the one juſtifies for a Way for himſelf*, and the *other for a Way* there *for himſelf*, this is a good Anſwer, per Fairfax. Br. Treſpaſs, pl. 427. cites 11 H. 7. 6. 7.

So if the one pleads a *Licence* for himſelf, and the other a Licence for himſelf. Per Fairfax. Br. Treſpaſs, pl. 427. cites 11 H. 7. 6. 7.

20. If A. brings Treſpaſs againſt B. *of Goods carried away*, and B. *ſays that the Property was in C. who made D. his Executor, and died, and the Ordinary ſequeſter'd and committed the Adminiſtration to A. and A. adminiſter'd*, and *after D. proved the Will, and adminiſter'd*; Judgment &c. This is a good Plea without making Title to B. And the ſame in Debt by Executor, to ſay that the Teſtator died outlaw'd, without making Title. Br. Treſpaſs, pl. 347. cites 21 E. 4. 5. per Brian Ch. J.

21. Where a Man *juſtifies* in Treſpaſs *for Diſtreſs for Rent, which he recover'd of a Stranger iſſuing out of the ſame Land*, it *is no good Juſtification to plead the Recovery only*, but ought to ſhew Title alſo; for if he has no Title the Ter-tenant, who is a Stranger, is not bound by it. Per Moyle and Billing. Br. Judgment, pl. 7. cites 35 H. 6. 10.

But ſee 39 H. 6. thereof; for by them Avowry is in the Poſſeſſion, and Seiſin ought to be alleged, and not the Recovery only. Ibid.

For more of Actions in General, See **Account, Conſpiracy, Covenant, Debt, Detinue**, and other proper Titles.

Additions.

(A) By the Common Law and Statute of H. 5.

1. 1 H. 5. cap. 5. *ORdains that every * original Writ of Actions Perſonals, Appeals and Indictments, and in which the Exigent ſhall be awarded in the Names of the Defendants in ſuch Writs Original, Appeals and Indictments*

It was ſufficient before the making of the Statute of 1 H. 5. 5. that every Perſon ſhould be ſued by Writ *by* his *Name of Baptiſm and Surname*, *or* his Name of *Dignity*, *or* by *both with the Name of Baptiſm*, or by *Name of Baptiſm and other Words equivalent to the Surname*, As *ſuch a one the Feme of* her Baron, ſuch a one *Son or Daughter of* their Father, ſuch a one *Commoign of* his Abbot &c. And ſometimes he muſt *add his Name of Office* or Miniſtry; and ſometimes to put other Diverſities of *Age*, *or* of the *Place* where there were divers of the ſame Name and Surname Thel. Dig. 49. lib. 6. cap. 1. S. 2.——S P. But if he had a *Name of inferior Dignity* (as *Knight*, *or Bannaret*) he ought to be named by his Chriſtian and Surname, and by the Addition of his Name of Dignity, by the Common Law, which is implied in theſe Words (viz. in the Names of the Defendants.) 2 Inſt. 666

The Miſchief at Common Law was that one was oftentimes outlaw'd for another; and therefore this Statute was made that it might appear that he was the Party ſued; but if the Party appears and pleads, he ſhews that he is the Party; Per tot. Cur. 2 Roll Rep. 225. Hill. 18 Jac. B. R.——2 Inſt. 670. S. P

Lord Coke ſays, that for any thing that he had read, and remember'd in the Reign of H. 4. or ever before, Gentlemen of Name or Blood had very rarely the Addition of Generoſus, or Armiger, as of a State or Degree; but were diſtinguiſh'd from Yeomen, who ſerve by the Plow, by their Service, viz. for in-

forinſecum ſervitium, but in the Reign of H. 5. and ever ſince they have had the Addition of Gentlemen, or Eſquires, and the Reaſon thereof is the Statute of 1 H. 5. 2 Inſt. 595.

This Statute binds the King as to an Indictment &c. Br. Additions, pl. 50. cites 5 E. 4. 32.

* See (B)

Names of Dignity, as *Duke, Earl, Knight,‡ Serjeant at Law* &c. are *contain'd within* this Word, *Degree*; for it ſeems that Gradus contains Statum in it ſelf, and not e contra. And the Eſtate of a Man is as Gentleman, Eſquire, Yeoman, Widow, Single Woman, and the like. And the Art or Craft of a Man is his Miſtery, by the Lord Brooke in his Abridgment of the Caſe of 14 H. 6. 15. Thel. Dig. lib. 6. cap. 15. S. 9.

*Additions ſhall be made of their ‖Eſtate or Degree, or * Miſtery, and of the † Towns or Hamlets, or Places and Counties, of which they were or be, or in which they be or were converſant;*

‡ For the Writ by which he is called, is, viz. Statum & Gradum Servientis ad Legem Suſcepturus. Br. Noſme, pl. 33. cites S. C

The Words ‖ (*State*) and (*Degree*) in legal Underſtanding are of one Signification, and *extend to* Perſons of Nobility of Dignity, and under the Degree of Nobility and Dignity, as Yeoman &c. and as well to the Clergy as to the Temporalty, and to Graduates and Degrees in Univerſities in any Kind of Profeſſion. And (Degree) is applied to all, as well Women as Men. 2 Inſt. 666.

Some are *Names of Dignities*, as Knights of all Sorts, and Baronets; and ſome *of Worſhip*, as Eſquires and Gentlemen. 2 Inſt 666. ——*Names of Dignities* are Marks of Diſtinction impoſed by publick Authority, and they always *make the very Name of the Perſon* to whom they are given; *but Names of Worſhip*, ſuch as Eſquire, Gentleman, and Yeoman, ſince they are only Names of Diſtinction given in popular Uſe, not given by the public Authority of the ſupreme Power, the Law does not account them Parcel of the Name, and ſo they were not neceſſary at Common Law, in Declarations and Pleadings. G. Hiſt. of C. B. 190, 191 ——But by this Statute the Name of Worſhip was made equally neceſſary in perſonal Actions, Appeals, and Indictments, as the Name of Dignity was before; but it does *not extend to the Names of the Plaintiffs*; for they were in no Miſchief or Danger of being miſtaken. G. Hiſt. of C. B 193.

In Quare Impedit, it was adjudg'd that *Provoſt, Abbot and Prior*, are Names of Dignity, quod *quære of Provoſt*; for *it ſeems to be a Name of Office, as Parſon, Archdeacon* &c. and yet he ought to be named by this Name when any thing is in Demand belonging to it. Br Noſme, pl. 25 cites 24 E. 3.

Maſter of an Hoſpital is a Name of Dignity. Thel Dig. 50 pl. 6 cap. 3. S. 3. cites Hill. 2 E. 3. 47.

Gentleman, or *Eſquire*, is no Name of Dignity but *of Worſhip*. Thel. Dig. 50. lib. 6. cap. 3. S. 9. cites 14 H. 6. 15.——S. P. but *Knight is a Name of Dignity*. Thel. Dig. 57. lib. 6. cap. 15. S. 6. cites 14 H. 6 15. per Newton, and ſays ſee 5 E. 4. 33. accordingly.

* It ſeems that a *Miſtery is the Craft or Occupation by which a Man gets his Living*; for *Husbandman* and *Labourer*, are good Additions, and therefore Miſteries. For the Statute is that he ſhall be named of his Eſtate, Degree, or Miſtery, and *Miller is no Eſtate*, as Gent. Yeomen, Eſquire &c. *nor* is it any *Degree*, for *Gradus eſt quaſi Dignitas*, and *therefore it is a Miſtery*, and the ſame it ſeems of a *Shepherd*. Br. Additions, pl. 39. cites 22 H. 6. 53.

Miſtery is a large Word, and *includes all lawful Arts, Trades, and Occupations*. 2 Inſt. 668.

† See (H)

See (M) —— See Tit. Utlawry (G. b) pl. 18. and the Notes there.——See Tit. Error (D)

And if the Proceſs upon the ſaid Original Writs, Appeals or Indictments, in the which the ſaid Additions be omitted, any Outlawries be pronounced, that they be void, fruſtrate, and holden for none;

Debt againſt J. S. Citizen of York, he *pleaded to the Iſſue*, which paſſed againſt him by Niſi Prius, returnable 15 Mich. and the *Defendant pleaded in Arreſt of Judgment*, becauſe *he ought to be named of what Vill he is*, for Citizen of York may dwell at B. And by Judgment the Plaintiff recover'd, becauſe *the Statute is that the Writ ſhall abate by Exception of the Party*, and he did not take Exception; *but if he was outlaw'd*, it was a good Exception; contra here, becauſe he appear'd and pleaded other Matter, and did not take Exception; quod nota. Br. Additions, pl. 13. cites 35 H. 6. 12.——S. P. 2 Inſt. 670.

And that before the Outlawries pronounced, the ſaid Writs and Indictments ſhall be abated by the Exception of the Party, wherein the ſame the ſaid Additions be omitted.

If the Addition preſcribed by this Act had varied from the Record

Provided always, that tho' the ſaid Writs of Additions Perſonals be not according to the Records and Deeds, by the Surpluſage of the Additions aforeſaid, that for that Cauſe they be not abated. And that the Clerks of the Chancery, under whoſe Names ſuch Writs ſhall go forth written, ſhall not leave out or make Omiſſion of the ſaid Additions as is aforeſaid, upon Pain to be puniſh'd,

mon'd, and to make a Fine to the King by the Diſcretion of the Chancellor. or Deed, yet being join'd by

Act of Parliament to be contain'd in the Writ &c ſuch Variance ſhould not have abated this Writ, tho' this Clauſe had been omitted; but an Act of Parliament cannot be made too plain. 2 Inſt 270.

(B) Given or neceſſary, in what Caſes.

1. IN Aſſiſe, if the *Diſſeiſin* be found with Force and Arms, Capias and Exigent lies for the King pro Fine, and no Addition is requiſite; for it is a real Writ. Thel. Dig. 57. lib. 6. cap. 16. S. 2. cites 9 Aſſ. 1. 9 E. 3. 449. Paſch. 7 H. 4. 39. 2 Inſt. 665. S. P. cites ſame Caſes. In all Actions *where Proceſs of Outlawry lies*, the Name and Surname of the Defendant, and the Addition of his *Quality* or *Trade*, and the *Place* of his Habitation then, or lately, ought to be in the Original Writ; otherwiſe the Writ ſhall abate. And an Outlawry upon ſuch faulty Writ is reverſible. And the Addition ought to be as above, *before any Alias Dictus*; for the Alias Dictus is only Reputation, and is not the Truth. Per the Juſtices of both Benches. Jenk. 119 pl. 44. cites 4 E. 4. 10.

2. *Eſtrepement upon Writ of Entry at Common Law*, the *Writ of Eſtrepement was J. B. of K. the Younger*, and the *Writ of Entry was J. B. of K. only*, without Addition, and the *Defendant pleaded this to the Writ*, that the Writ of Entry is brought againſt J. B. of K. only, abſque hoc that there is any ſuch Writ againſt J. B. of K. the Younger; and becauſe *Proceſs of Outlawry does not lie* in this Action, therefore, per Cur. this Plea is not to the Purpoſe; Quod nota; But it was agreed there, that where the Party *appears by Guardian*, he ſhall have Plea contra to the Warrant after that the Guardian is admitted, per Cur. *Contra of Attorneys*; for this is the Act of the Party himſelf. And after he ſaid that where he is ſuppoſed to be of K. he is, and was the Day of the Writ purchaſed of H. and not of K. Judgment of the Writ, & non allocatur, for the Reaſon aforeſaid. Br. Additions, pl. 2. cites 3 H. 6. 16.

3. Note that where *Plaint of Replevin is removed out of C. B. by Writ of Recordare*, there the Party may be outlaw'd without Error, tho' it be *not named of what County, Vill, Miſtery, or Degree* he be, for the Statute thereof is only *in Indictments and Suits by Writ*, and *not* Suits *by Plaint*. Br. Additions, pl. 4. cites 3 H. 6. 30. S. P. Br. Additions, pl. 45. cites S. C. and 14 H. 6. 21.—Thel. Dig. 57 lib. 6. cap. 16. S. 2 cites ſame Caſes.—2 Inſt. 665. S P.———S. P. Br. Exigent, pl. 4. cites S. C. But contra in Writ of Debt &c. which is by Writ and not by Plaint. So if Recordare or Pone is ſued to remove Plaint in Replevin out of a Baſe Court into C B. the Writ is good, tho' it has no Vill nor Addition of the Defendant, for the Writ is warranted by the Plaint, and ſhall agree with the Plaint, and Exigent will lie thereupon. Per June and Newton. Br. Exigent, pl. 39. cites 14 H. 6. 21.

4. It was agreed that in *Præmunire* Addition ought to be given; for he may have Proceſs by Proclamation as well as by Exigent; and therefore becauſe Exigent may be awarded Addition ſhall be given. Br. Additions, pl. 41. cites 9 E. 4. 2. Br Proceſs, pl. 80. cites S. C.

5. In *Debt*, a Man may have Capias in infinitum, and yet Addition ought to be forgiven; for he may have Exigent if he will. Ibid.

6. Note, that *Mainpernor* need *not* have Addition, for Name and Surname ſuffices, and yet Exigent lies, and he ſhall be outlawed for the Non-appearance of the Party, becauſe he took it upon himſelf. Br. Exigent, pl. 49. cites 10 E. 4. 16. Thel. Dig. 57. lib. 6. cap. 16 S. 4. cites S. C. and Paſch. 13 H. 7. 21.

7. If

Br. Exigent, pl 50. cites S. C. —— Ibid. pl. 65. cites S. C.— Thel. Dig. 57. lib. 6. cap. 16 S. 3. cites S. C.

7. If *Exigent* be awarded *upon Withernam* he ſhall not have Addition, unleſs Addition were in the Plaint, for they *cannot vary from the Original*, and *the Statute ſpeaks of Writs and not of Plaints.* Br. Additions, pl. 57. cites 18 E. 4. 9.

S.P. Br. Noſme, pl. 66.——S. P. Br. Additions, pl. 58. cites 21 E. 4. 71. *So* where he *releaſes to J. S. Yeoman, who is Gent.* for where Addition is given where it need not by the Law, and which is not any Dignity, it is void.

8. In Appeal note for Law, that if a Man *recovers againſt J. S. Yeoman*, where he is a *Gentleman*, and enters, the Recovery is good, and the Addition void; for it is *given where the Law does not require* Addition; Contra of Dignity, for this is Parcel of his Name. Br. Judgment, pl. 84. cites 21 E. 4. 72.

S. P. for the *Statute* of Additions *ſpeaks only of Writs original in which Proceſs of Outlawry lies* to have Addition. Br. Additions, pl. 49. cites 10 E. 4 16 ——S. P. Ibid. pl. 65. cites 10 E. 4. 15.—— Thel. Dig. 57. lib. 6. cap 16. S. 4. cites S. C. and Paſch. 13 H. - 21.

9. *Reſcous returned againſt J. S.* is a good Return, tho' no Addition of J. S. be returned. Br. Additions, pl. 67. cites 13 H. 7. 21.

And if he be returned of B. and the Defendant ſays that there were Over B. and Nether B. and none without Addition in this County, it is no Plea by the Opinion of the Court. Br. Addition, pl. 67. cites 13 H. 7. 21.——2 Inſt. 665. S. P. and cites S. C. and 10 E. 4. 16. and 10 H. 7. 21.

10. An *Indictment* of one indicted for *refuſing to ſerve in the Office of a Headborough* was quaſh'd, becauſe it did not ſhew that he was choſen to the Office, and becauſe the Party indicted wanted an Addition. Sty. 394. Mich. 1653. B. R. Anon.

11. In all Actions of Treſpaſs, and other Actions ſued by Original where the Cauſe of Action is alleged to be *Vi & Armis, or againſt the Peace of the King*, a true Addition of Degree, Quality or Miſtery, and the true and certain Place of the Abode of every Defendant muſt be put in at the Peril of the Plaintiff's Attorney. L. P. R. 35 cites 15 Car. 2. per Cur. and ſays the Reaſon of making this Order was, that before the Act which was made for the taking away of Fines for Capiaturs, the Clerks of the Crown-Office uſed to take from the Judgment Rolls all the Judgments which were entered with a Capiatur, and then they did thereupon ſue out Proceſs of Outlawry, and becauſe, if the Addition was not there, they could not tell certainly who was the Defendant, nor where he lived.

12. There ought to be inſerted into all *Affidavits*, the Additions and Habitations of the Parties who make them. L. P. R. 35. cites Mich. 15 Car. 2. per Cur.

13. A Suit was *by Bill againſt T. P. Eſq;* it is no Plea in Abatement that the Defendant is a *Gentleman, and not an Eſquire*, becauſe the Suit being by Bill the Addition was only a Deſcription of the Perſon, and common Reputation is ſufficient for it. But it ſhould be *otherwiſe upon Original*, on which Proceſs of Outlawry lies; becauſe the Statute of H. 5. requires an Addition in ſuch Caſe; Per Holt Ch. J. and Judgment that Defendant anſwer over. 2 Ld. Raym. Rep. 849. Mich. 1 Annæ B. R. Bennet v. Purcel.

14. 27 *Eliz. cap.* 7. *S.* 2. *No Sheriff or other Perſon ſhall* return any Juror dwelling out of any Liberty, *without the Addition of the Place of his Abode at the Time of the Return, or within one Year next before, or ſome other Addition by which the Party may be known*; nor any Juror within any Liberty, *with other Addition than ſhall be delivered to him by the Bailiff of the Liberty; nor any Bailiff of Liberty ſhall return any Juror, or deliver to the Sheriff the Names of any Perſons to be returned, without the Addi-*

tion

tion of the Place of Abode &c. and no Extract of Iſſues againſt any Juror *ſhall be delivered out without ſuch Addition as is put in the original Panel or Tales wherein ſuch Juror ſhall be returned; and no Under-Sheriff, Bailiff, or other Perſon, ſhall* levy any Iſſues *of any other Perſons than of ſuch as by the ſaid Eſtreat is of right charged with the ſaid Iſſues, upon Pain that every Clerk that ſhall write or deliver any ſuch Eſtreat, and every other Perſon offending contrary to this Act, ſhall forfeit to the Queen five Marks, and to the Party grieved five Marks.*

15. In a *Homine Replegiando* the want of Addition in the Pluries of the Place was pleaded in Abatement, and upon Demurrer it was adjudg'd, that the original Replevin in this Caſe *is Vicontiel, and* therefore *needs no Addition* within the Stat. of 1 H. 5. and where the firſt is without Addition it cannot be neceſſary in the ſecond; but the ſecond would thereby be vitiated. 1 Salk. 5. pl. 13. Mich. 2 Ann. B. R. Banbury (Earl of) v. Wood. 6 Mod. 84. S. C.

(C) Good. And given. How, as to

Clergymen

1. IT was held that Writ of *Treſpaſs* lies *againſt a Dean, without naming him Dean*; but otherwiſe it is if Land be demanded againſt him. Thel. Dig. 50. lib. 6. cap. 3. S. 1. cites Paſch. 5 E. 2. Brief 80.

2. One ſhall not be ſued by Name of *Biſhop before* that *he be conſecrated*, but by Name of ſuch a one elect. Thel. Dig. 50. lib. 6. cap. 3. S. 1. cites Paſch. 5 E. 2. Brief 80.

3. Treſpaſs againſt N. P. the Defendant demanded Judgment of the Writ, becauſe he is a Prieſt, not named Clerk; Per Thirn, *every Prieſt is not a Clerk*, by which he ſaid that he was *Parſon* of B. not named Parſon; & non allocatur; but the Defendant was compell'd to anſwer, per Cur. Br Additions, pl. 20. cites 11 H. 4. 40.

4. If a *Biſhop* or an Abbot be *depoſed* he loſes his Name of Dignity, and is not Biſhop nor Abbot after, by the Opinion of Paſton. Thel. Dig. 36. lib. 3. cap. 3. S. 16. cites Mich. 21 H. 6. 3. So in the Caſe of Bp. Bonner, after his Deprivation he was named *Theologiæ* Doctor *& in ſacris Ordinibus conſtitutus* and was held a good Addition in an Indictment. Jenk 228. pl. 92. Biſhop Bonner's Caſe.—*Doctor* is no Addition, tho' he be Doctor in Divinity, but the Word *Clerk* is ſufficient Addition. Jenk 223. pl. 79. ——— Thel. Dig. 57. lib. 6. cap. 15 S. 12. cites it as held, that a Man may ſue a Doctor of Divinity by the Addition of Clerk.——It ſeems that Doctor is no Name of Dignity. Br. Noſme, pl. 5 cites 35 H. 6. 55.

5. *Archdeacon* is no Name of Dignity. Thel. Dig. 36. lib. 3. cap. 3. S. 17. cites Mich. 27 H. 6. 5. and that ſo agrees that he need not name him Archdeacon, Paſch. & Trin. 25 E. 3. fol. 41. 44. In Bill of Præmunire *againſt J. C. Clerk*, he *pleaded* to the Bill, becauſe *he was an Archdeacon*, not named Archdeacon, Judgment of the Bill; & non allocatur; for it is no Name of Dignity. Br. Noſme, pl. 4. cites 27 H. 6. 5. & P. 25 E. 3. 41.

6. It was agreed, that *Biſhop of D. in Ireland* is a good Addition. Thel. Dig. 57. lib. 6. cap. 15. S. 8. cites 22 E. 4. 13.

Nobility.

7. If a Man be an *Earl in England, and a Duke in France*, he may be ſued in England by Name of Earl only. Thel. Dig. 36. lib. 3. cap. 3. S. 7. cites Paſch. 11 E. 3. Brief 473. and Trin. 20 E. 4. 6. agreeing, where it was ſaid that if Writ be brought *againſt E. Baliol*, being *King of Scotland*, it is not good if he be not named King of Scotland.

Thel Dig. 36. lib. 3. cap. 3. S. 8. cites 39 H. 6. 46. But in Debt, per Littleton J. *Earl* or *Duke of Scotland, or of France, who comes here by safe Conduct* of the King, may bring an Action here by Name of Knight, and well; for he is no Earl nor Duke in England. Br. Nosme, pl. 49. cites 20 E. 4. 6.

8. Ravishment of Ward *against Gilbert Umfreyvile*, and it was abated because he *was not named Earl of Angus*; and yet this is *out of the Realm*, but he *comes by Summons by such Name to the Parliament of England*, and therefore it seems that he is the Earl of Angus in Scotland; and so see that the Scots were Subjects to England. Br. Nosme, pl. 29. cites 39 E. 3. 35.

Note that a *Baron* shall not plead, nor be impleaded by Name of Baron, but by Name of Knight or Squire, and yet he shall be amerced in the Exchequer as a Baron; quod nota; quod conceditur in Debt there; for a *Baron* is no Name of Dignity Br. Amercement, pl. 52. cites 32 H. 6. 30.

9. A *Baron or Lord of Parliament, who is not an Earl, Marquess, or Duke*, may sue Writ without naming himself Baron or Lord; but if he name himself Lord or Baron, the Writ shall not abate; for it is only Surplusage. Thel. Dig. 36. lib. 3. cap. 3. S. 15. cites Mich. 8 H. 6. 10. and Hill. 32 H. 6. 35. Plowd. 225. and adds Quære, How a Viscount, and by what Name he shall sue.

Duke, Marquess, Count, Viscount are suable by the said Names, and *Baron* by the Name of *Dominus*, and *not by* the Name *of Baron*; for there are Barons of London, Barons of the Cinque Ports, and of the Exchequer. *Judge, Bishop, Baronet, Knight*, are all *Names of Dignity*; Writs by them or against them ought to name them so. If a *Duke* &c. *be a Knight*, the naming him Duke &c. is sufficient; for the greater Dignity comprehends in it Knight. Grant made to them ought to be by these Names. Jenk. 209. pl. 42. cites 9 Rep. 47. [Trin. 8 Jac.] The Earl of Shrewsbury's Case.

Baron is not a Name either of Dignity or Addition. Dav. Rep 60. cites 8 H. 6. 10. a. Ld. Lovell's Case.

10. If a Man be a Duke, a Marquess, Earl, Viscount, and Baron, all these Dignities stand distinctly in him, and the *greater drowneth not the lesser*; yet shall he be *named* in original Writs &c. *by the worthier Dignity*, viz. by the Name of a Duke only, within this Act. 2 Inst. 669. cites 27 H. 6. 4. 4 E. 4. 10. 5 E. 4. 142. 35 H. 6. 12.

11. All *Dukes*, Marquesses, Earls, Viscounts, and Barons *of other Nations*, or which are *not Lords of the Parliament of England*, are *named Armigeri*, if they be no Knights; and if Knights, then are they named Milites. 2 Inst. 667.

12. In Writ of Entry the Defendant was *named A. Viscount M.* and did *not name him Knight*. The Writ was held good; for Viscount is a more high Dignity than Lord or Baron. Dal. 42. pl. 23. 4 Eliz. Ld. Mountacute's Case.

Bishop of &c. in Ireland, is a good Addition; but not any *Irish Temporal Dignity*. 2 Hawk. Pl. C. cap. 23. S. 108.——S. P. Br. Additions, pl. 32. cites 21 H. 6. 3.

13. A Count Palatine of Nova Albion, or a *Count of Ireland*, are not Additions in England; per Roll Ch. J. Sti. 173. Mich. 1649. Weston v. Plowden.

Wives and Widows of Noblemen.

14. A Grant to a *Duke's eldest Son by the Name of a Marquess*, or to the eldest Son of a Marquess by the Name of an Earl, (& sic de similibus) would be good, because of the common Curtesy of England, and their Places in Heraldry; per Holt Ch. J. Carth. 440. Hill. 9 W. 3. B. R. The King v. Bishop of Chester.

Note if a *Dutchess, or other such State, marries with a Gentleman* or Esquire, she by this *shall lose her Dignity and Name*, as in Case of the Lady Powis and Dutchess of Suffolk;

15. Debt *against a Man and his Wife, Countess of B.* Martin said, that in this Case *she has lost her Name of Countess by the taking of the Baron*; for by the taking of the Baron, all the Names which she had before are lost, which Paston affirm'd. Br. Nosme, pl. 31. cites 14 H. [6.] 2.

Suffolk; the one married Howard, and the other Adryan Stokes; for *quando mulier nobilis nupserit ignobili desinit esse nobilis.*——— Br. Nosmes, pl. 69. cites Tempore, M 1.———But see Anno 14 H. 6. 18. where it is admitted clearly in such Case, that she shall not lose any Dignity. Ibid.——Br. N. C. 5 M. pl. 490. cites 14 H. 6. 2.——Thel. Dig 36 pl 11. cites S C.

A *Writ against Thomas Earl of A and M. his Wife, is* good; for this *implies* Countess; per Cur. Br. Nosme, pl. 2 cites 2 H 6. 11.—Br. Brief, pl. 6. cites S. C.

One who had married the Countess of Northumberland brought Debt against J. S. and she was *named Countess in the Writ*, and it did not abate. D 202. pl. 69. Marg. cites Pasch. 36 El. Rot. 501. Felton & Countess of Northumberland, his Wife, v. Burrough.

16. The Lady who *was Feme to an Earl sued* Writ of Dower, and of Cui in Vita, *by Name of such a one who was the Feme of such an Earl*, and not by Name of Countess; and so she shall be named in *Writ of Waste brought against her of Land* which she holds *in Dower*; but if she holds for her Life, and *in Assise*, she shall be *named Countess*. Thel. Dig. 36. lib. 3. cap. 3. S. 8. cites Hill. 12 E. 3. Brief 254. and Trin. 2 H. 6. 11. and 22 Ass. 24.

Note that in every Suit the Party ought to be named by his Name of Dignity, if he be of Dignity, or otherwise

the Writ shall abate, but where the Writ of Waste was *against M. late Wife of Thomas late Earl of A. deceased*, and she *was not named Countess*; and yet well, because it is *tantamount*; for she cannot be late Wife of Thomas Earl &c but she shall be Countess, if Special Matter be not shewn to the contrary. Br. Nosme, pl. 2. cites 2 H 6. 11.

17. But a Writ of *Scire Facias* was maintain'd *against Constance*, who was the *Wife of Thomas Earl Marshal*, by this Name, *without the Name of Countess*, because it appear'd by the Writ that she was *joint Feoffee with her said late Baron* &c. Thel. Dig. 36. lib. 3. cap. 3. S. 10. cites Mich. 8 H 4. 19. But says it was held there clearly, that after the Death of the Earl she ought not to change the Name of Countess.

18. In Præcipe quod reddat, if the *Feme of a Baron, who is neither a Dutchess nor Countess*, be *named Lady E. of M.* this is only *Surplusage*, and the Writ shall not abate by it; quod nota by Award. Br. Nugation, pl. 13. cites 8 H. 6. 10.

The Wife of a Duke, Earl or Baron, in all Writings shall be named *Ladies*; but the Wives of *Knights* shall be named *Dames*; per Cur. Het. 88. Pasch. 4 Car. C. B. Anon.

19. A *Countess Dowager* peradventure ought to be named *Comitissa Dotissa*, otherwise the Writ will abate; per Pemberton Ch. J. Mich. 33 Car. 2. B. R. Skin. 15. in pl. 16.

Knights &c.

20. *Knight cannot be omitted in any Suit or Grant*; but *contra of Gentleman and Esquire*; for these need not be *express'd*, but in Suits where Process of Outlawry lies by the Statute of 1 H 5. which wills, that there a Man shall be named by the Degree, State, or Mystery that he is of. Br. Nosme, pl. 33. cites 14 H. 6. 15.

In every Writ *for or against a Knight*, he ought to be named Knight &c.

Thel. Dig. 36. lib. 3. cap. 3. S. 14. cites Hill. 11 H. 4. 198. and 7 H. 6. 15. and Hill. 14 H. 4. 21. 14 H. 6. 15. Mich. 15 E. 4. 14.

21. A Writ of Error was brought to remove a Record between *G. S. Knight and Baronet*, and the Truth was that Sir *G. S. is not*, neither was named *Knight* in all the Record. And per Cur. The Word Knight is Part of the Name, and so no Record was removed; and is so material, that the *Addition* where there is none, [where he is not] or the *Omission* where he is Knight, makes it no such Record. Hutt. 41. Mich. 18 Jac. Sherley v. Underhill.

Hob. 327. pl. 400. S. C. but S. P. does not appear —— Cro. J 633. pl. 5. cites S. C that Sir G. S. never was

a Knight, but a Baronet only; and it was held a manifest Variance, and that the Record was not removed.

Knight

Knight is not an Addition, but Part of a Man's Name; for it being a Name of Dignity, it becomes as much a Part of a Man's Name as his Name of Baptiſm; per Holt Ch. J. Carth. 440. Hill. 9 W. 3. B. R. The King v Biſhop of Cheſter. ——5 Mod. 302. S. C. & S. P.

Noy. 87. S. C. ſays, that Mr. Holbourn ſaid it was reſolved in C. B [in ſome other Caſe,] that in an Action brought againſt a Baronet, he ought to be named Baronet, and that there is a Clauſe in the Patent that they ſhall be impleaded by ſuch Name, and the Indictment in the principal Caſe was quaſh'd, becauſe it did not ſhew of what Place the Defendant was Inhabitant.——Lat. 169. S. P.

22. A Knight and *Baronet* was indicted for not repairing a Highway, and named only *Knight*, and good, becauſe Baronet is a Title ſince the Statute of Additions. Lat. 169. Trin. 2 Car. Sir Richard Lucy's Caſe.

Jo. 346. S. C accordingly, and that the Warrant to arreſt him was not good.——Cro. C. 371. pl. 6. Sir Henry Ferrer's Caſe, S. C. accordingly.

23. Sir William Ferrers *Baronet*, *was arreſted* upon Debt *by the Name* of William Ferrers *Knight and Baronet*, and one of the Serjeants was kill'd, upon which he was indicted Trin. 10 Car. in B. R. and reſolv'd per Cur. that it was not Murder, becauſe the Capias was miſawarded. D. 88. Marg. pl. 107.

24. Treſpaſs againſt A. B. *Baronet*; he pleads in Abatement that he is a *Knight and Baronet*, and good. Carth. 14. Mich. 3 Jac. 2. B. R. Jeffries v. Snow.

2 Ld. Raym. Rep. 859. Lapiere v. German, S. C. ſays he was ſu'd by the Title of Bart. only, and Defendant pleaded he was Knt and Bart. and Iſſue was joined thereupon, and the Court would not make a Rule for Amendment. It was then mov'd, that the Latitat was Knt. only, and therefore mov'd to make the Declaration agreeable to the Latitat, for that the Omiſſion of Bart. in this Caſe being a Suit by Bill was not material, becauſe *Bart is not Part of the Name as Knt is*, and Suits by Bill are not within the Statute of Additions; and Powel J. ſeemed to be of that Opinion, ſaying that the Books warrant ſuch a Difference, and cites the 36 H. 6. 30. a that a *Baron needs only be named as a Knt. or Eſq; in a Writ*; and Holt Ch. J. agreed the ſaid Caſe, but ſaid the Reaſon of it was, that then Barons were ſo by Tenure, and were ſummoned to Parliament by Right, and were not then created by Letters Patent, as at this Day; but that then the Law was otherwiſe of Titles of Dignity, as of Earl, which was Part of the Name, and now it is otherwiſe of Barons, when they are created by Letters Patent, for now it is a Title of Dignity, and Parcel of the Name, the ſame Law of Bart. which is made a Title of Dignity by LettersPatent, and therefore a Baronet ought to be named ſo in all judicial Proceedings, otherwiſe they will abate, and it is no Objection that it is a new Title, for ſo is Viſcount, begun in the Time of H 6. Marqueſs in the Time of R. 2. and Duke in E. 3. and though they are new Titles they ſhall be named ſo in all Proceedings againſt them.

25. Aſſumpſit by *Bill againſt Sir J. G. Knt.* The Defendant pleaded in Abatement that he was *Knt. and Bart.* It was moved to amend upon Payment of Coſts, and inſiſted that the Action being by Bill the Additi-on was not material, not being within the Statute of Additions; but it was denied to amend, there being nothing to amend by, and the Defendant had taken Advantage of the Fault. 1 Salk. 50. pl. 12. Paſch. 2 Ann. B. R. Lepara v. Germain.

26. J. S. *Miles*, and J. S. *Dominus*, are to be intended two different Perſons. In *Records and legal Proceedings the whole Name is to be ſet forth*, and therefore in ſuch Caſe J. S. Mil. muſt be intended of ſuch an one Mil. who was no Lord. 10 Mod. 284. Hill. 1 Geo. 1. B. R. Nutton v. Crow.

Eſquires and Gentlemen.

27. If a Gentleman will occupy any *Trade*, he may be called and written by the Name of his Trade, and not *Gentleman*. Cro. E. 884. pl. 20. Paſch. 44 Eliz. C. B. Devent v. Popham.

28. The *Sons of* all the *Peers and Lords of Parliament* in the Life of their Fathers, are in Law Eſqs. and ſo to be named. By this Statute the eldeſt Son of a Knt. is an Eſq; 2 Inſt. 667.

29. A

29. A Man may have an Addition of Gentleman within this Statute, if he be a *Gentleman by Office*, (tho' he be not by Birth) as many of the King's Houſhold and of other Lords be, and Clerks being Officers in the King's Courts of Record; and if they be *out of their Office they are but Yeomen*, and yet as long as they continue in their Office they ought to be named Gentlemen as their due Addition. 2 Inſt. 668. cites 28 H. 6. 4. a. 5 E. 4. 33 accordingly. 14 H. 6. 15.

A *Gentleman by Reputation*, that is neither Gent. by Birth, nor by Office, nor by Creation, but *commonly called* Gentleman, *and known by that Name*, is a ſufficient Addition within this Act; and ſo it was adjudg'd in Cater's Caſe, Hill. 25 Eliz. C. B. but if he be named Yeoman he cannot abate the Writ. 2 Inſt 668. ——A *Mathematick Maſter* being offered for Bail by the Name of *Gentleman*, Holt ſaid he was one by his Profeſſion. 12 Mod. 249. Mich. 10 W. 3. White v. Mullony.

30. And *Generoſus* & *Generoſa* are good Additions, and if a *Gentlewoman* be * *named Spinſter* in any original Writ &c. Appeal or Indictment, ſhe may abate and quaſh the ſame; for ſhe hath as good Right to that Addition as Baroneſs, Viſcounteſs, Marchioneſs, or Dutcheſs, have to theirs. 2 Inſt. 668.

* D. 88. a. b. pl. 107. Trin. 7 E. 6 S. P.

31. There is ſmall *Difference between an Eſquire and a Gentleman*; for every Eſquire is a Gentleman, and every Gentleman is arma gerens. 2 Inſt. 668.

Since the making of this Statute, *Eſquire* and *Gentleman* were more frequently by Force of this Act uſed, as Additions in Originals &c. and afterwards were commonly uſed in Deeds and other Specialties. 2 Inſt. 668. cites 35 H. 6. 55. b.

32. Where *J. S. Gentleman of D. was outlaw'd*, and J. S. of D. was taken on the Capias Utlagatum, it was held that he may plead this, and if on the Scire facias he be found Yeoman and not Gentleman, he ſhall be diſcharged; for the Outlawry remains in Force againſt J. S. of D. Gentleman. Jenk. 116. pl. 29.

Ad libitum.

33. The Additions of *Yeoman or Gentleman* are Additions ad Placitum. Per Roll. Ch. J. Sty. 153. Mich. 24 Car. in Tyſon's Caſe.

34. A Man may have *one Addition at one Day and in one Place*, and yet may have another different Addition *at another* Day, and in another Place, Mich. 22 Car. B. R. for ſome Additions, viz. of Eſquire, Gentleman, Yeoman &c. are no Part of the Name, but Additions ad libitum, and as People pleaſe to call them; but the Title of *Knight* or *Baronet* is *part of the Party's Name*, and it is material to be rightly uſed in Pleading, but the Titles of *Gentlemen or Yeomen are Additions ad Placitum* to be uſed or not uſed, or to be varied. L. P. R. 34. cites Mich. 24 Car. B. R.

Againſt Law

35. Addition of a *Thing againſt Law* is not good, as *Maintainer* &c. Thel. Dig. 56. lib. 6. cap. 15 S. 3. cites 22 E. 4. 1. Or *Vagabond*, 2 R. 3. 2.

Br. Additions, pl. S. cites 9 H. 6. 65. S. P. —— *Chepchurch* is adjudg'd a good Addition. Thel. Dig. 56. lib. 6. cap. 15. S. 3. cites Hill. 9 H. 6. 65.—Br. Additions, pl. 8. cites S. C. and S. P accordingly; for it is a Thing permitted by the Law.

Thief is not a good Addition, becauſe it is a Thing puniſhable by the Law. Br. Additions, pl. 8. cites 9 H. 6. 65.

Vagabond, *Heretick*, nor *Extortioner* are not good Additions, for he ought to give lawful Addition, and theſe Additions *are not lawful*. Br. Additions, pl. 60. cites 22 E. 4 1 —— S. P. and ſo of *Abettor*. 2 Inſt. 688.

As to other Matters,

36. *Broker* is a good Addition; for it is a Thing permitted by the Law. Br. Additions, pl. 8. cites 9 H. 6. 65.

Thel. Dig. 56. lib. 6. cap. 15. S. 3. cites S. C. and that it was ſaid there,

37. *Burgeſs* is not a good Addition. 2 Hawk. Pl. C. 188. cap. 23. S. 111

2 Inſt. 668. S. P. For it is not an Addition of any Myſtery or Occupation.

38. *Butler* is no Addition; for it is only an Office. Br. Additions, pl. 50. cites 5 E. 4. 32.

——Thel. Dig. 57. lib. 6. cap. 5. S. 10. cites Paſch. 5 E. 4. 32.

Br Additions, pl 15. cites 35 H 6. 55. S. P.

93. *Carpenter* is a good Addition in Debt. Br. Additions, pl. 39. cites 22 H. 6. 53. ſays it appears in a Note there.

S. P. For it is not an Addition of any Myſtery or Occupation.

40. *Chamberlain* is no Addition; for it *is only an Office.* Per Markham Ch. J. Br. Additions, pl. 50. cites 5 E. 4. 32.

2 Inſt. 668.——Thel. Dig. 57. lib. 6. cap. 15. S. 10. cites Paſch. 5 E. 4. 32.

Præcipe [J. S.] Civi & Pannario de London &c. is not good.

41. *Citizens and Burgeſſes* (tho' they are *ſuch as are call'd to Parliament*) are not ſufficient Additions within this Act, as being too general. 2 Inſt. 668. cites 27 H. 6. 4. 4 E. 4. 10. 5 E. 4. 142. 1 H. 5. 3, 35 H. 6. 12.

Thel. Dig. lib 6. cap. 14. S. 8. cites Mich. 35 H. 6. 12.

Thel. Dig. 76. lib 6. cap. 15. cites S. C. & S. P. that it is not good.——

42. Treſpaſs againſt J. N. of B. in the County of N. *Farmer.* Moyle demanded Judgment of the Writ; for here is no Addition certain; for Knight, Gentleman, and Poor Man, each of them may be Farmer, and ſo it *is no Condition, Degree, nor Myſtery*, as the Statute wills. Quære. Br. Additions, pl. 10. cites 28 H. 6. 4.

S. P. 2 Inſt. 668. that it is not good, becauſe it is not of any Myſtery.

S P. 2 Inſt. 668. that it is no Addition within the Statute of H. 5. becauſe it is not any Myſtery.

43. *Groome* is admitted to be good Addition, and the ſame Law of *Page*; and note that Name of Dignity is Parcel of his Name. Contra of Eſquire, Page &c. which are not, but Addition. Br. Additions, pl. 58. cites 21 E. 4. 71.

44. Indictment by the Name of P. W. *Hoſpes*, without an Anglice, or if it had been Anglice *an Hoſt*, it is no good Addition. Sid. 247 pl. 11. Paſch. 17 Car. 2. B R. The King v. Warren.

2 Inſt. 668. S. P.

45. *Husbandman* is a good Addition. Br. Additions, pl. 39. cites 22 H. 6. 53.

Br. Additions, pl 39. cites 22 H. 6 53 S. P. ——2 Inſt. 668. S. P.

46. *Labourer* is a good Addition; per Cur. Thel. Dig. 56. lib. 6. cap. 15 S. 1. cites Hill. 3 H. 6. 31. and that ſo it is agreed Paſch. 5 E. 4. 33.

——But Labourer is *not* a good Addition *for a Woman.* 2 Ld. Raym. Rep. 1169. Powel J. cited it as Paſch. 5 Annæ, B. R. The Queen v. Maddox.——2 Salk. 613. pl. 7. S. C. but S P. does not appear.

Thel. Dig. 57. lib. 6. cap. 15 S. 11. S. P. cites Hill. 21 E 4. * 92

47. Note that *Litter-man* was admitted a good Addition in Detinue. Quære what Myſtery this is? Br. Additions, pl. 59. cites 21 E. 4. 77.

——The Year-Book ſays, Quære of this Addition; for it is a marvellous Myſtery &c.——[But Quære if it be not Lighterman, or perhaps Hoſtler.]

* This ſeems miſprinted, there not being ſo many Folio's.

48 *Mercer* is a good Addition. Thel. Dig. 56. lib. 6. cap. 15. S. 2. cites Trin. 4 H. 6. 26. and Trin. 5 E. 4. 33.

50. *Merchant*

49. *Merchant* is a good Addition; per tot. Cur. Thel. Dig. 56. lib. 6. cap. 15. S. 2 cites Trin. 4 H. 6. 26. and Trin. * 5 E. 4. 33. Br. Addition, pl. 56. cites 10 H. 6. 21. S. P. ——In Debt against J. N. of B *Merchant*, Rolfe demanded Judgment of the Writ: for it is no Myſtery certain; for Merchants are of ſeveral Myſteries; & non allocatur; for per tot. Cur. it is a good Addition. Br Additions, pl. 40. cites 4 H. 6. 26.

* Br. Additions, pl. 50. S P. cites 5 E. 4. 32. S. C.

50. *Miller* is a good Addition in Debt. Br. Additions, pl. 39. cites 22 H. 6. 53. and ſays it appears in a Note there.

51. *Pantler* is no Addition; for it is no Miſtery or Occupation. 2 Inſt. 668.

52. *Schoolmaſter* is a good Addition, for it is a Miſtery; Per Cur. 2 Le. 186. pl. 232. Mich. 32 Eliz. B. R. Farnam's Caſe.

53. *Treſpaſs againſt R. S.* of B. Yeoman, *and A. B. his Servant*, and it was demanded Judgment of the Writ, becauſe A. B. had not ſufficient Addition; and by the Opinion of Babbington and others there, *Servant* is a good Addition as Labourer is, by which Rolfe paſſed over; quære, for Concord' lib. Intr' fo. 25. But contra 9 E. 4. 48. Br. Additions, pl. 5. cites 3 H. 6. 31. Thel. Dig. 56. lib. 6. cap. 4. S. 1. cites S. C. accordingly, by Babington. —— In Debt, or Treſpaſs, or Action in which Proceſs of Outlawry lies, *Servant* is no good Addition upon the 1 H. 5. for every Man is Servant to the Law and to the King. Jenk. 126. pl. 57. cites 7 E. 4. 10.

54. A Man was indicted by Name of J. B. of S. Servant, and all the Juſtices, *Servant* is no Addition; *for every one who is in Service is a Servant, be he Knight, Eſquire, Gent. Yeoman, Groome, Widow, Damſel, Prieſt, Friar* &c. Br. Additions, pl. 50. cites 5 E. 4. 32. S. P. per tot. Cur. Br. Additions, pl. 55. cites 7 E. 4. 10. ——Indictment againſt *W. N. Servant to J. S. late of C. in the County of N.* is not good; for Servant is no Addition, and theſe Words, *late of C* ſhall be intended of the Maſter, and not of the Servant. Br. Indictment. pl. 49. cites 9 E. 4. 48.

Where the Defendant was indicted by the Name of A. B. *Servant*, it was objected not to be a good Addition within the Statute; but per Holt Ch. J. and Cur. it is a good Addition; for it is certain. 2 Ld. Raym. Rep. 968. Trin. 2 Annæ, Anon.

So where a Servant was indicted for a Treſpaſs done by him by the Command of his Maſter, by the Name of *A. B. Servant to J. S.* Holt Ch. J. held that (Servant to J. S.) is a good Addition. 6 Mod. 58. Mich. 2 Annæ, B. R. the Queen v. Hoskins.

55. Some held that *Servant* was a good Addition. Br. Additions, pl. 56. cites 14 E. 4. 7. But Brooke ſays Quære; for Servant is no Addition by the Common Law, as it is ſaid there. Servant *generally* is no good Addition. Thel. Dig 56. lib. 6. cap. 15. S. 1. cites 5 E. 4. 33. and Trin. 7 E. 4. 10. and Hill. * 9 E. 4. 50. —— * S. C. cited D. 46. b. pl. 2. —— Servant is no Addition within the Statute H. 5. becauſe it is not any Myſtery. 2 Inſt. 668.

56. *Smith* is a good Addition in Debt. Br. Additions, pl. 39. cites 22 H. 6. 53. and ſays it appears in a Note there.

57. It is ſaid that *Single-woman* is a good Addition of one that is no Virgin, Wife, nor Widow. Br. Additions, pl. 56. cites 14 E. 4. 7. Br. Additions, pl. 64. cites S. C. and S. P. —— Br. Additions, pl. 64. cites 10 H. 6. 21. S. P.

58. *Spinſter* is an Addition indifferent to a Man as well as to a Woman; for per Spilman, there are divers Men in Norfolk that are Worſted-Spinſters. D. 47. a. pl. 5. Paſch. 31 & 32 Eliz. S. P. per Cur. obiter. Sid. 247. Paſch. 17 Car. 2. B. R. in pl. 11.

59. *Taylor* is a good Addition. Br. Additions, pl. 15. cites 35 H. 6. 55. Br. Additions, pl. 30. cites 22 H. 6. 53. and ſays it appears in a Note there that it is a good Addition in Debt.—2 Inſt. 668. S. P.

He that hath taken any any *Degree in either Univerſity*, may be named by that Degree without Queſtion, being within the direct Letter and Meaning of this Act; and if he hath taken any Degree in Divinity, he may have the Addition *of Clerk*. 2 Inſt. 668. cites 35 H. 6. 55 b.

70. Quære of *Degrees of Doctors*, *Maſters*, and ſuch like *of the Univerſities* Thel. Dig. 57. lib. 6. cap. 15. S. 13.

Br. Additions, pl. 66. cites S. C. and S P.

71. *Widow* is a good Addition; quod nota. Br. Additions, pl. 64. cites 10 H. 6. 21.——Thel. Dig. 56. lib. 6. cap. 15 S. 4. cites S. C. and S. P. and 14 E. 4. 8.

72. *Wife* is a good Addition; Per Cur. 2 Le. 183. Mich. 32. Eliz. B. R. in pl. 226.

Yeoman is a good Addition within the Statute H. 5.

73. *Yeoman* can't be *outlaw'd by the Addition of Husbandman*, and upon pleading that he was Yeoman Iſſue was join'd, and it was tried by a Jury. Jenk. 127. pl. 59.

and is applied only to the Man and not to the Woman. 2 Inſt. 668. cites 10 E. 4. 16.

(D) Where there are ſeveral of the ſame Name, How they are to be diſtinguiſh'd.

1. IN *Account*, one who had the ſame Name with the Defendant profered himſelf ready to anſwer if &c. And the Plaintiff *replied that he was not the ſame Perſon* againſt whom &c. And becauſe he *did not put* a Diverſity of the Names, as *Elder or Younger*, the Writ was abated. Thel. Dig. 54. lib. 6. cap. 13. S. 1. cites Hill. 18 E. 2. Brief 834. and that ſo agrees Paſch. 14 E. 3. Brief 271. and Mich 22 E. 3. 14.

In *Præcipe quod reddat* againſt W. de M. The Tenant ſaid that there were 2 *W.'s de M.* in the ſame Vill, viz. *the Son of W. and the Son of H.* yet the Writ did not abate. Thel. Dig. 54. lib. 6. cap. 13. S. 2. cites Mich. 20 E. 2. Brief 850. and that it was ſo agreed in Dower, Paſch. 1 E. 3. 9. For he who appears may diſclaim if he be not Tenant.

3. In *Treſpaſs* brought *againſt one W. and J. his Son*, the Opinion was that the Writ ſhould abate, becauſe he *had 2 Sons named J.* and no Diverſity put &c. becauſe it is in Action where a Man ſhall be outlawed. Thel. Dig. 54. lib. 6. cap. 13. S. 3. cites Mich. 5 E. 3. 230. 241.

4. In *Account* againſt Jo. *B.* it is no Plea to ſay that there is *Jo. B. the Father, and Jo. B. the Son, and that he is the Father* &c. For the Father ſhall not change his Name for the Son. Thel. Dig. 54. lib. 6. cap. 13. S 4. cites 8 E. 3. Brief 449. Paſch. 20 E. 3. Brief 683. And that ſo it is adjudged Paſch. 7 H. 4. 14. and Hill. 21 H. 6. 29. Trin. 33 H. 6. 33. and Mich. 33 H. 6. 53. and Hill. 39 H. 6. 48.

5. He need not give Addition for Diverſity of the *Name of the Plaintiff*. Thel. Dig. 55. lib 6. cap. 13. S. 10. cites Hill. 18 E. 3. 4. and ſays ſee Hill. 32 H. 6. 33.

6. *But in Aſſiſe* againſt Jo. de Ma. it was pleaded that there were 2 Jo.'s de Ma. the Elder and Younger. Thel. Dig. 54. lib. 6. cap. 13. S. 2. cites 22 Aſſ. 14.

7. But *in Account* againſt W. de W. one ſaid that there were 2 W.'s de W. the Elder and the Younger, and that he was the Younger, by which the Writ abated. Thel. Dig. 54. lib. 6. cap. 13. S. 3. cites Trin. 4 E. 3. 145. and 28 E. 3. 94.

8 If

8. If there be *J. S. the Father, and J. S. the Son,* and the *Father is impleaded* by Action of Treſpaſs, he ſhall not have the Addition of Elder; for the *Father ſhall not change his Name for the Son*; but it is ſaid elſewhere that the Son ſhall be named the Younger, where he is impleaded by Treſpaſs. Note a Diverſity. Br. Miſnomer, pl. 65. cites 21 H. 6. 26, 27. and * 7 H. 4. 11.

Where the *Father and Son, or the elder Brother and younger are of one and the ſame Name*, the Elder or the Father ſhall not change his Name for the Younger or for the Son; but the Son or the younger Brother ſhall be named J. C. the Younger. Br. Noſme, pl. 30. cites † 37 H. 6. 29.

Treſpaſs upon 5 R. 2. The Defendant ſaid that there are 2 *of his Name in the ſame Vill, Elder and Younger*, and it is not expreſſed which of them he is; & non allocatur, becauſe he is the ſame Perſon; and it is ſaid there, that the Younger ſhall have Addition, but not the Elder, and eſpecially in Caſe of the Father and his Son; for the Son ſhall give place to his Father, and ſhall have Addition; e contra of the Father. Br. Addition, pl. 12. cites 33 H. 6. 53 & 54.

* Br. Additions, pl 18. & pl. 34. cites S. C. in Exigent.

† Br. Additions, pl. 43. cites S. C.

9. No Addition ſhall be put to differ the Names in *Indictment*; for this ſhall change the Indictment, which cannot be without the Jurors. Thel. Dig. 55. lib. 6. cap. 13. S. 6. cites Mich. 9 H. 4. 3.

10. Debt againſt *J. S. of B. Yeoman.* The Defendant ſaid that there are 2 J. S.'s of B. Yeomen, viz. he and his Father, and becauſe he is not named Younger, Judgment of the Writ; and by ſeveral, the *Son ſhall change his Name for the Father*, but *not the Father for the Son, nor one Couſin for another, nor a Stranger, nor a Neighbour for another*, but between Father and Son only; and per Priſot, the *Addition ſhall not be younger, but J. S. Son of J. S.* Quod nota. Br. Additions, pl. 47. cites 39 H. 6. 46.

11. *But* by him and Aſhton J. becauſe it was *J. S. Yeoman, Executor of the Teſtament of W. N. it is a ſufficient* Declaration what J. S. is impleaded, *without the Word Younger or Son.* Ibid.

Where there is any *Matter diſtinguiſhing the Perſon*, it makes the Addition of *Senior and Junior* not neceſſary; as where the Action was againſt A. B. in Cuſtodia Mareſchalli; there if you would take Advantage of the Want of Addition, you muſt ſhew that there is A. B. the Father &c. in Cuſtodia Mareſchalli too. 1 Salk. 7. pl. 16. Hill. 2 Annæ, B. R. Lepiot v. Brown.

12. *Debt upon a Leaſe* for Years *againſt J. E.* and one J. E. came to the Bar, and pray'd the Court to mark him; for he ſaid that there are 2 *J. E.'s in the ſame Vill*, viz. the *Father and the Son*, and *the Son* is he who now *appears* at the Exigent, *and pray'd that the Plaintiff declare againſt him, who did ſo; to which he ſaid that the Plaintiff did not leaſe to this J. E.* who now appears &c. prout &c. Per Jenney, This is no Plea; for he ought to *ſay that he did not leaſe generally*; for *by his *Appearance he has affirm'd that he is the ſame Perſon.* And the Court in a manner agreed, that he who is impleaded ſhall be intended the Father, becauſe he is impleaded without Addition, and ſo it *ſhall be intended that he who appear'd is the Father, becauſe he appear'd generally*, and did not ſhew the Leaſe made to him where he is Son, in which Caſe he ſhall be named Junior; and after it was held by the Court that it is a good Plea for the Defendant, quod non dimiſit, prout &c. to the aforeſaid J. E. and therefore it ſeems the Plaintiff might have ſaid, that he who appear'd is not the ſame Perſon, but other of the ſame Name, with Addition &c. Br. Miſnomer, pl. 49. cites 5 E. 4. 57.

* See (P.)

13. But in *Præcipe quod reddat* it was held, that he need not to put Addition of Elder or Younger, but where there is Father and Son. Thel. Dig. 55. lib. 6. cap. 13. S. 9. cites Mich 33 H. 6. 53. and ſays ſee 9 H. 7. 21. agreeing. And that ſo it is held Hill. 39 H. 6. 48. where it was granted alſo for Law, that *when he who appears is the ſame* Perſon *who is ſued, he need not give Addition for Diverſity*; but when another of

the ſame Name and Surname appears, who is not ſued, then the Plaintiff ought to give Diverſity; and that ſo agrees Paſch. 27 H. 8. 1.

14. Treſpaſs againſt *J. S. of D.* The *Defendant ſaid that there are 2 J. S.'s in D. the Eldeſt and the Youngeſt, and this is the Youngeſt*; Judgment of the Writ for Default of this Addition; and becauſe he is not outlaw'd, nor ever appear'd, nor at any Miſchief, this Addition was entered in the Roll, and the Writ awarded good. Br. Brief, pl. 471. [468.] cites 44 E. 3. 34.

(E) Good. Without Surname.

1. BUT Writ brought againſt *William Melton, Archbiſhop of York*, was adjudged good. Thel. Dig. 35. lib. 3. cap. 3. S 5. cites Hill. 12 E. 3. Brief 480.

But Ibid. S 13. ſays the contrary is adjudged in the Caſe of a *Proveſt*,

2. Writ was brought againſt the *Maſter of an Hoſpital*, by his *Name of Baptiſm and* Name of *Dignity in the Commencement* of the Writ, and after *in other Places* of the Writ *by his Name of Baptiſm only*, and adjudged good. Thel. Dig. 51. lib. 6. cap. 3. S. 12. cites Hill. 7 E. 3. 309.

Mich. 24 E. 3. 31. where it was ſaid that he ought always to name him by his Name of Dignity only, and in the other Places of the Writ, 22 E. 3. 5 and that ſo agrees 26 Aſſ. 11. and Mich. 7 H. 6. 14. But ſays Quære in a Writ *againſt a Knight and Serjeant at Law.*

And ſo of a *Parſon* or *Vicar*; for they ſhall both be named. Ibid.

3. Plaint in Replevin was, that *Johannes Capellanus Cantariæ Beatæ Mariæ de D.* queritur &c. and becauſe *no Surname was expreſſed*, the Plaint was abated, and Return awarded; notwithſtanding it may be intended, by Priſot, that he is incorporated by ſuch Name. Br. Noſme, pl. 3. cites 27 H. 6. 3.

But if a Mayor by Name of *Jo. Mayor* of ſuch a City, *brings Writ, and pending the Writ another is made Mayor*, the Writ ſhall abate; but it is *otherwiſe* if he be named *Jo. Stile Mayor* &c per Priſot. Thel. Dig. 186. lib. 12. cap. 16. S. 8. cites 32 H 6. 35. for he has now ſuch Name by which he may be ſued; but in the firſt Caſe by the making of the new Mayor his Surname is gone.

4. *But* it was agreed, that *J. Abbot*, or *J. Mayor* &c. is good without Surname. Br. Noſme, pl. 3. cites 27 H. 6. 3.

Martin was of Opinion, that in Treſpaſs an *Earl ſhould have a Surname*, as

5. It is ſufficient for *Men of Dignity* to name themſelves by their Names of Baptiſm and of Dignity without any other Surname, as *John Duke of A.* John *Earl of A.* Richard *Biſhop of A.* William *Abbot of W.* &c. Thel. Dig. 35. lib. 3. cap. 3. S. 5. cites Hill. 7 E. 4. Brief 163.

John Holland Earl of Huntingdon. Thel. Dig. 35. lib. 3. cap. 3. S. 5. cites 7 H. 6. 29. but adds quære, for Fitzh. does not abridge it ſo.

A *Duke &c.* by the Common Law might be named by his Chriſtian Name and Name of Dignity, which ſtands in lieu of his Surname. 2 Inſt. 666.

6. It was ſaid, that Writ brought againſt one by Name of *J. Filio R. Stile* is not good, becauſe there is no Surname before this Word (Filio.) Thel. Dig. 50. lib. 6. cap. 2. (bis) S. 2. cites Trin. 10 E. 4. 12.

(F) With

(F) With a Nuper.

1. A Writ of *Debt* was adjudg'd good *againſt one who had been Clerk of the Works &c. of the King* for Things ſold to the Uſe of the King whereof the Defendant was allow'd in the Exchequer, *without naming him nuper Clericum of the Works* &c. Thel. Dig. 51. lib. 6. cap. 4. S. 2. cites Mich. 11. H. 4. 28.

2. Debt againſt *A. B. of S. late of A.* and the *Defendant anſwered to both*, the *Plaintiff ſhall maintain but the one only*; nota; but Brooke ſays it ſeems it ſhall not be ſuffer'd at this Day. Br. Additions, pl. 31. cites 19 H. 6. 66. Br. Brief, pl. 436. cites S. C.

3. Debt was Præcipe *W. B. late Biſhop of Landaffe*, alias dictus *late Prior of C.* and becauſe he did *not ſhew of what Degree he is the Day of the Writ purchaſed*, therefore the Writ was abated. Br. Additions, pl. 32. cites 21 H. 6. 3.

4. Where a Man is impleaded by Name of R. S. of L. Merchant, late Attorney for N. *that which comes after the Nuper is void, unleſs in ſpecial Caſes*, as where he is impleaded by Name of R. S of L. Eſq; *late Sheriff or Eſcheator* of ſuch a County, and *counts of an Act done by Reaſon of his Office*, and contra where he counts of a Thing which does not come by reaſon of his Office. Br. Additions, pl. 48. cites 38 H. 6. 24. S. P. Br. Brief, pl. 252. cites S. C. and S. P.—Thel. Dig. 57. lib. 6. cap. 17. S. 3. cites 38 H. 6. 28. Brief 139.———Br. Noſme, pl. 34. cites S. C. and that which comes after the Nuper is not Parcel of his Name.

5. In Præmunire the Defendant was named *late Monk of B.* and it was held, that a Man *ought to be named* by the Statute *of what Myſtery he is at the Time of the Writ* &c. *preciſely*, and *not of what* Myſtery *he was*; *but as to the Vill* he *may ſay Nuper of ſuch a Vill*; Note a Diverſity. Br. Additions, pl. 41. cites 9 E. 4. 2. S. P. and ſo of Eſtate or Degree, and not Nuper Biſhop &c. Thel. Dig. 57. lib. 6. cap. 15. S. 8. cites S. C. and 21 H. 6. 3.———2 Inſt. 670. S. P. and cites S. C. but a Nuper may be of the Town &c. becauſe Men often change their Habitation; and this Diſtinction appears by the Act itſelf by the Words relating to Towns and Hamlets (viz. where they were, or are)

Where *a Perſon makes a Writing by Name of Parſon of D.* and *after is made Parſon of S.* the Writ ſhall be *Parſon of S. late Parſon of D* Br. Variance, pl. 35. cites 12 H. 4. 5.———Br. Brief, pl. 126. cites S. C.

So of Biſhop of L. *tranſlated* to W the Writ ſhall be Biſhop of W. late Biſhop of L. per Hank. Ibid.——Br. Brief, pl. 126. cites S. C.

And a Writ was brought againſt one by Name of *A. D. of Shene* in the County of Middleſex, *Nuper de Acton*, and it was held good by Newton, and that the Plaintiff may maintain the one or the other. Thel. Dig. 56. lib. 6 cap. 14. S. 17. cites Paſch. 19 H. 6. 16. But it was ſaid there that the nuper is void.

6 Where one has Cauſe to have *Action againſt any who was* * *Sheriff or Collector by reaſon of his Office*, he ought to name him nuper Sheriff, or nuper Collector in his Writ. Thel. Dig. 51. lib. 6. cap. 4. S. 4. cites Trin. 15 E. 4. 27. where it was ſaid that a Collector ſhall not remain Collector but only till the Day which he has to pay the Money into the Receipt, and that his Authority is determined after this Day. * Br. Noſme, pl. 56. S. P. accordingly, and ſays it appears often.

7. Treſpaſs againſt J N. of B. *late Pariſh Clerk*; per Mordant, Addition ought to be certain, and it may be that he was Pariſh Clerk, and is not ſo now; per Fairfax, late of B. is good, but late Pariſh Clerk is not good; per Huſſey, *late Yeoman* is not good, and ſo here, and ſo was the Opinion of the Court. Br. Additions, pl. 62. cites 22 E. 4. 13.

(G) Names

(G) Names of Office.

But it was adjudged, that a Writ of *Scire facias out of a Fine of a Manor*

1. IT was held, that *Maſter of an Hoſpital* is a Name of Dignity, and *where Land is demanded againſt him*, he ought to be named by Name of his Dignity. Thel. Dig. 50. lib. 6. cap. 3. S. 3. cites Hill. 2 E. 3. 47.

ſhould be good notwithſtanding that the Tenant ſaid that he was Maſter of an Hoſpital not named &c. becauſe *the Thing named Hoſpital was the ſame Manor*, and the Intent of the Plaintiff was to defeat all the Eſtate of the Tenant. Thel. Dig. 50. lib. 6. cap. 3. S. 3. cites Hill. 2 E. 3. 47. and 7 E. 3. 328.

Warden of a Chaple who *brings Aſſiſe againſt him who has no Colour of Title*, ſhall have Aſſiſe

2. If a *Man has a Name of Dignity*, and be *ouſted by him who has Colour* to ouſt him of his Dignity, as by the Ordinary, *tho' it be by Privation not duly made*, there he ought to ſue to have Reſtitution of his Dignity before that he name himſelf by his Name of Dignity &c. otherwiſe it is if he be ouſted by other &c. Thel. Dig. 51. lib. 6. cap. 3. S. 15. cites 13 Aſſ. 2. per Parning.

by the Name of Warden, and contra againſt him who ouſts him by Colour, as the Ordinary by Deprivation. Br. Noſme, pl. 37. cites 13 Aſſ. 2.

3. In *Action real* brought *by a Prebendary* of Land of his Prebend, he ought to name himſelf Prebendary in his Writ, otherwiſe it ſhall abate. Thel. Dig. 36. lib. 3. cap. 5. S. 1. cites Mich. 13 E. 3. Brief 675.

Aſſiſe is brought *againſt J. S. without naming him Cuſtos of the Chapple of D* and well tho' it be *of the Land of the Chaple*;

4. But in *Aſſiſe by a Chaplain* brought by one *who holds it of the Collation of the King*, the Writ ſhall not abate notwithſtanding that he was *not named* by Name of Parſon, or Maſter, or *Chaplain* &c becauſe the Writ [is] for all the Groſs of the Chapel, and becauſe it did not appear that there had been any Inſtitution. Thel. Dig. 36. lib. 3. cap. 5. S. 2. cites Trin. 13 E. 3. Brief 265. 13 Aſſ. 2.

for the *Action is to diſprove his Intereſt*. Br. Noſme, pl. 68. cites 10 H. 7. 18, 19.

5. Aſſiſe by J. S. who was at Iſſue, and the *Aſſiſe found that the Land was of the Prebend of the Plaintiff he not named Prebendary*, and therefore the Writ was abated, tho' it was not pleaded; and ſo ſee that *where the Title ariſes by the Name as Prebendary*, Prior, Parſon, Biſhop &c. *he ſhall be named by the ſame Name* &c. Br. Noſme, pl. 52. cites 13 Aſſ. 11.

Br Error, pl. 111. cites S. C.

6. *Warden of a Chapel in Aſſiſe was not named Warden*, but he pending the Aſſiſe *reſign'd*, and the Plaintiff recover'd. The Succeſſor reverſed the Judgment by Writ of Error, becauſe his Predeceſſor was not named Warden; quod nota. Br. Noſme, pl. 38. cites 15 Aſſ. 8.

7. Writ may be brought *againſt* one who is *Provoſt without naming him Provoſt, where nothing is demanded in Right of his Provoſtry*. Thel. Dig. 51. lib. cap. 3. S. 14. cites Hill. 17 E. 3. 1.

8. Thel. Dig. 37. lib. 3. cap. 5. S. 4. Says it ſeems by the Opinion of Trin. 2 H. 4. 23. that a *Chaplain of a Chantery* may maintain Writ of Treſpaſs de Parco Fracto and Aſſault &c. *without naming himſelf Chaplain* of the Chantery *where he had diſtrain'd for Services due by Reaſon of his Chantery*.

Thel. Dig. 50. lib. 6. cap. 3. cites S. C.

9. Where *Quare Impedit* &c. is brought *againſt a Prior or Parſon*, he ſhall not compel the Plaintiff to name him Prior or Parſon, becauſe by this *Suit he is to defeat the Name for ever*. Br. Noſme, pl. 16. cites 14 H. 4. 36.

10. It

10. It was ſaid that the *Treaſurer*, nor the *Chancellor*, nor no Officer ſhall be named by his Name of Office &c. Thel. Dig. 36. lib. 3. cap. 4. S. 1. cites Mich. 7 H. 6. 16. Br. Brief, pl. 158. cites 7 H. 6. 34. S. P. accordingly. But ibid. cites 23 E. 3. contra as ſaid there in Quare Impedit, and 25 E 3. in Præcipe quod reddat.

11. Writ brought by Name of Jo. *Magiſtri ſive Cuſtodis de B.* is good. Thel. Dig. 38. lib. 3. cap. 9. S. 8. cites Mich. * 8 E. 4. 19. and that ſo agrees 7 H. 6. 14. * Br. Noſme, pl 53. cites S. C. accordingly.—But it ſeems that this is miſprinted and ſhould be 8 E. 18 b. pl. 26. where the Writ was to anſwer the Maſter or Warden of B. [in the Disjunctive] It was objected that the Plaintiff ought to elect one of the ſaid Names; for that he cannot have both &c. Sed non allocatur. For per Cur. all the Words made only his Name.

12. For an *Annuity iſſuing out of the Prebend of Ovington*, being *annex'd to the Precentor* in the Cathedral Church of E. the Writ of Annuity may be brought againſt him by Name of Prebendary, *without naming him Precentor*; for this is no Dignity per Opinionem. Thel Dig. 50. lib. 6. cap. 3. S. 8. cites 14 H. 6. 14.

13. Per Paſton and Newton, *King's Serjeant*, *Cook* &c. who *are Eſquires* there, *may be named Eſquires*, *or by their Miſteries*, *as Cook* &c. and the one and the other ſhall be ſufficient. Br. Additions, pl. 14 H. 6. 15. Thel. Dig. 57. lib. 6. cap 15. cites S. C. and S. P. accordingly.

14. Where a *Precentor in a Cathedral Church* has a Prebend annexed to his Precentorſhip, if he be to *bring Quare Impedit* of his Prebend, he ought to *name himſelf Precentor*. Thel. Dig. 37. lib. 3. cap. 5. S. 5. cites 14 H. 6. 14.

15. It was adjudg'd that a Writ of *Debt* brought *againſt* one being *Warden of the Fleet*, *for letting a Priſoner go* at large without naming him Warden ſhould be good. Thel. Dig. 51. lib. 6. cap. 4 S. 1. cites Mich. 11 E. 2. Dette 172. And that ſo agrees Mich. 18 E. 3. 35. But ſays ſee that the contrary is ſaid Paſch. 21 E. 4. 27. and Mich. 22 H. 6. 25. alſo. Debt was maintainable againſt a Warden without naming him Warden.

Br. Noſme, pl. 56. cites Fitzh. Debt. 173.

16. A Man ſhall have Writ of *Debt againſt* one who is *Ordinary* without naming him Ordinary in the Writ; but it ſuffices to ſay, Ad cujus manus bona &c. devenerunt. Thel. Dig. 51. lib. 6. cap. 4. S. 3. cites Hill. 35 H. 6. 42. It appears often that where Action is brought *againſt an Ordinary* &c. *by his Office*, that he ſhall be ſo named in the Action againſt him. Br. Noſme, pl. 56.

17. Bill brought *againſt the Cuſtos Brevium in C. B. by the Name of Cuſtodis Brevium in Banco Regis* is good, and not to ſay in Communi Banco. Thel. Diſt. 51. lib. 6. cap. 4. S. 5. cites 39 H. 6. Brief 141.

18. An *Attorney of the Common Pleas by General Writ of Debt* may ſue for Money paid by him in the Suit of the Defendant without naming him Attorney. *But if* he ſues a Bill *by Privilege* of the Place, he ought to name himſelf Attorney. Thel. Dig. 36. lib. 3. cap. 4. S. 2. cites Mich. 3 E. 4. 29. In Writ of Debt by Attorney or Servant, he need not be named Attorney or Servant in the Writ, but may *declare it in the Declaration*. Br. Noſme, pl. 44. cites 3 E. 4 29

19. And ſo *it* ſhall be *of the Warden of the Fleet*. Thel. Dig. 36. lib. 3. cap. 4. S. 2. cites Mich. 9 E. 4. 43.

20. Note, where *Mayor, Steward, or* ſuch like, *is Coroner*, and *takes Indictment before* J. B. *Mayor or Steward*, upon View of the Body, *and does not ſay Coroner*, it is Error; for there is no Authority. Br. Noſme, pl. 50. cites 22 E. 4. 12.

21. If a *Deanry* be *diſſolved* by Act of Parliament, and *Writ* is brought after *againſt the late Dean by Name of Dean*, the Writ ſhall abate. Thel. Dig. 50. lib. 6. cap. 3. S. 10. cites Paſch. 4 H. 7. 6. Per Brian.

22. In Writ of *Reſcous* brought *by one Wells, Knt.* it was *pleaded that he was Sheriff, not named Sheriff* &c. and it was held a good Plea. Thel. Dig. 36. lib. 3. cap. 4. S. 4. cites Hill. 6 H. 7. 14.

23. D. being *indicted for ſtriking in a Church-yard*, pleaded that he was by the Queen's Patent created Garter King of Arms, and demands Judgment, becauſe he is not ſo named; and becauſe it was a Name, Parcel of his Dignity, and not of his Office only; for the Patent is, Creamus, Coronamus & Nomen imponimus de Garter Rex Heraldorum, and therefore in all Suits againſt him, he is to be named by this Name. For this Cauſe he was diſcharged of the Indictment. Cro. E. 224 pl. 7. Paſch. 33 Eliz. B. R. Dethick's Caſe.

Cro. E. 542. pl. 8. Popham and Gawdy held, that the Suit being againſt him as a private Perſon, it was ſufficient to name him by his proper Name; but Fenner contra. Et adjornatur.

24. In an Action againſt D. by the Name of *D. alias Garter*, the Defendant demanded Judgment of the Writ, becauſe he *was created Principalis Rex Armorum*, and ought to have been ſo ſtiled. The Court were divided whether the Writ ſhould abate or not; ſome being of Opinion, that when an Office is granted to one by Patent, there, for any Thing concerning the ſame, he ought to be named as in the Patent; but if he is *ſued in his Natural Capacity*, he may be called by his proper Name; but others held, that this being a Name of Dignity it is become Parcel of his Name, and ſo muſt be uſed in all Actions. Adjornatur. Ow. 61. Hill. 29 Eliz. Clarentius v. Dethick.

25. Bill in the Star-Chamber abated, becauſe it was brought againſt Sir G. Crook only, *without Addition of his Office, and Dignity of Judge.* Mar. 77. pl 119. cited by Jones, Trin. 16 Car. to have been adjudged in a Bill in the Star-Chamber, in Juſtice Crooke's Caſe.

(H) As to Town-Hamlet, Pariſh &c.

1. APpeal was brought *of an Act done in the Pariſh of St. Martin* at Charing-Croſs in Middleſex, and there it is agreed, *that if the Place be in a Vill, it ſhall be expreſſed in the Vill, without mention of the Pariſh; and if it be in a Pariſh or Foreſt*, as Sherwood &c. which are *out of any Vill*, then *it ſhall be expreſſed of the Pariſh or Vill.* Quod nota. Br. Additions, pl. 19 cites 7 H. 4 27.

Thel. Dig. 56. lib. 6. cap. 14 S. 23. cites S.C. accordingly; and alſo cites 7 H. 6. 5. 8. 19 H. 6. 35. 10 H. 6. 27.

2. Debt *againſt J. S. of Gate*, Executor of W. P. . The *Defendant ſaid, that there is Eaſt-Gate and Weſt-Gate* within the ſame County, *abſque hoc that there is Gate only*; and per Martin, and the beſt Opinion, he may ſay that No ſuch Vill within the ſame County; for Parcel of the Name is not the whole Name, as Ingle and Inglewood &c. Quære. Br. Additions, pl. 1. cites 3 H. 6. 8.

21 E. 4. 37. and 10 H. 7. 4.——A. gives *Bond* to B. *by the Name of A. of Dale*, without Addition.

Addition. B. ſues A. upon this Bond. A. ſhall not be received to plead Over-Dale and Nether-Dale, and that there is no Dale without Addition; for the Bond is otherwiſe; and A. ſhall not be received to deny his own Deed, but ſhall be *eſtopp'd* by it. Jenk. 163. pl. 12. cites 2 R. 3. Fitzh. Eſtoppel 181.

3. In *Writ* brought *againſt a Baron and his Feme, or* againſt an *Abbot and his Commoign*, he need not ſhew of what Vill or Place the Feme or Commoign are; for the Feme is ſuppoſed and intended to be of the ſame Place as the Baron is, and ſo of the Commoign. Thel. Dig. 55. lib. 6. cap. 14. S. 6. cites Hill. 3 H. 6. 31. 2 Inſt. 669. S. P. and cites S. C.

4. Where one is *ſuppoſed to be of Dale*, it is no Plea for him to ſay, that at the Day of the Writ purchaſed he was *converſant at another Vill, without ſaying and not at Dale* &c. Thel. Dig. 56. lib. 6. cap. 14. S. 11. cites Mich. 4 H. 6. 4. and that then the Plea is good, and cites Hill. 8 H. 6. 26. Mich. 10 H. 6. 5. and Mich. 19 H. 6. 1.

5. Indictment of Treſpaſs againſt J. N. of B. It ſeems that he was outlaw'd, upon which a Writ of Error was brought, and aſſigned for Error, That there is in the ſame County *B. Magna and B Parva, and none without Addition.* Per Hales, If there be ſuch Vill as B. with Addition, then there is ſuch a Vill as B. But the Opinion of the Court was, that it ſhall be reverſed. Br. Additions, pl. 23. cites 7 H. 6. 39. 2 Inſt. 669. S. P. and cites S. C. that he cannot be nam'd of B. only; for there is no ſuch Town.

6. In Writ brought *againſt a Parſon*, it is a good Addition to ſay *Præcipe J K. Rectori eccleſiæ de T.* in ſuch a County, *without ſaying of what Place he is, notwithſtanding that he be Parſon of 2 ſeveral Churches in the ſame County*; for he ſhall be intended and adjudged Reſident in both. Thel. Dig. 55. lib. 6 cap. 14. S. 7. cites Mich. 7 H. 6. 1. and Mich. 10 H. 6. 8. But *otherwiſe* it is *of a Lord of 2 Manors.* 2 Inſt. 669. S. P. and cites S. C.

7. *Maintenance* againſt J. N. of B. who ſaid that the Day of the Writ purchaſed he was dwelling at S. &c. and no Plea; for Proceſs of Outlawry does not lie in this Caſe. Br. Additions, pl. 28. cites 8 H. 6. 36. 37.

8. And it was held by Strange, that it is ſufficient to *traverſe that he was not there converſant the Day of the Writ purchaſed*, without ſaying Nor ever after; but Martin held the contrary. Thel. Dig. 56. lib. 6. cap. 14. S. 12. cites Mich. 8 H. 6. 9. and that ſo agrees Mich. 2 E. 4. 15.

9. Such a Writ was adjudged good, *Præcipe T. Chace Cancellario Univerſitatis Oxon' in Comitat' Oxon* &c. without ſaying *de Oxonia*, becauſe he ſhall be intended abiding at Oxon. Thel. Dig. 56. lib. 6. cap. 14. S. 13. cites 8 H. 6. 38. 2 Inſt. 669. S. P. accordingly.

10. Debt *againſt J. S. Parſon of D.* who *ſaid that he was abiding 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.

11. Debt *againſt J. N. of C.* if he *ſays* that he was and is *abiding at H. and not at C.* it is a good *Replication that H. is a Hamlet*; for then it is ſufficient to name him 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.

12. Maintenance *againſt J. S. of D.* who *ſaid that he was never abiding at D.* and *did not ſhew of what Vill he was*; and a good Plea, and yet *Exigent does not lie in this Action*; but where the Defendant is ſo named, he may plead as above for Miſnomer by the Common Law. Quod nota. Br. Brief, pl. 403. cites 11 H. 6. 11.

13. Where one was *ſuppoſed* to be *of Catesby*, he *ſaid* that he was abiding at *Catesby-Corbet, and not at Catesby*, without Addition; and held a good Plea, without ſaying that Catesby is a Vill by itſelf, and Catesby-Corbet

Corbet another Vill by itſelf. Thel. Dig. 56. lib. 6. cap. 14. S. 14. cites 14 H. 6. 24.

14. Where a Man is impleaded by Name of *J. B. of C.* which is *a Vill in Wales*, it is good. Br. Additions, pl. 32. cites 21 H. 6. 3.

Br. Nugation, pl. 14. cites 21 H. 6. 52. S P. by Newton. and Paſton.

15. Decies tantum *againſt J. N. of B.* who *ſaid, that* the Day of the Writ purchaſed, and always after he *was* converſant and dwelling *at S. and not at B.* Judgment of the Writ; Per Moyle, Proceſs of Outlawry does not lie in this Action, therefore no Plea; but Newton and Paſton J. to the contrary, and that it is commonly done at Common Law; for there a Man was not compell'd to give Addition, but if he gives falſe Addition the Parties ſhall have Exception to it; Moile bid them maintain the Writ; Quod Nota. Br. Additions, pl. 36. cites 21 H. 6. 54.

16. Where one is named *J. S. of Dale*, and *is abiding at Sale*, the Writ ſhall be brought againſt him by Name of *J. S. of Dale of Sale* &c. per Aſcue. Thel. Dig. 56. lib. 6. cap. 14. S. 18. cites Trin. 21 H. 6. 59.

2 Inſt. 669. S. P. and cites S. C. — Debt againſt W. C. *of the Pariſh* of St. Clements in the County of Middleſex, Executor of the Teſtament of C. B. and ſo ſee that of the Pariſh *is a good Addition where there is no Vill.* Br. Additions, pl. 52. cites 1. E. 4. 2.

17. Debt *againſt J. B. of C. in the Pariſh of S.* Arderne demanded Judgment of the Writ; for *in the ſame Pariſh are 2 Vills, viz. C. and B.* and that the Day of the Writ purchaſed *he was* converſant and *dwelling at B. and not at C.* Judgment of the Writ, and a good Plea by Award. Aſhton ſaid, all which is in one Pariſh is not but Hamlets to the principal Vill, which all the Court denied; for in one and the ſame Pariſh are 2 Vills in ſeveral Places. And per Mark. & Port. J. * *where no Vill is in a Pariſh*, there the Writ is good, Præcipe J. N. of ſuch a Pariſh &c. For *the Statute is, that he ſhall be named of the Vills, Hamlets, Places, or County where they inhabit, or were converſant.* Br. Additions, pl. 38. cites 22 H. 6. 41.

* Where the Pariſh is a Vill by itſelf, the Addition of Pariſh is good Thel. Dig. 56. lib 6. cap. 14 S. 20. cites Mich. 4 E. 4. 41. Paſch. 5 E. 4. 20. 125. Paſch. 22 E. 4 2. and Hill. 22 H. 6. 47.

But if there be but one Vill in the Pariſh, and it is known by the Name of the Vill, and of Pariſh, there it is ſufficient to name him of the Vill, or of the Pariſh, at his Will. Br. Brief, pl. 334, (337.) cites 5 E. 4. 125.

Contra where there are 2 *or more Vills* in the Pariſh. Ibid.

Addition of a Hundred or *Soken*, which have divers Vills, is not a good Addition.

18. Debt. A Man ſhall *not be named of a Hundred*, nor of *Wapentake or Riding*, but of a Vill, nor of the Pariſh where divers Vills are, but of a Vill there. Br. Brief, pl. 476. cites 22 H. 41, 42.

Thel. Dig. 56. lib. 6. cap. 14. S. 20. cites Mich. 4 E. 4. 41. Paſch. 5 E. 4. 20. 125. Paſch. 22 E. 4. 2. and Hill. 22 H. 6. 47.

19. It was agreed that *againſt Perſons* who are *of a City which is a County of itſelf*, as London, Briſtol &c. it ſuffices to ſay, Præcipe tali Pannario de London, *without ſaying of what Ward, Pariſh or Street* he is. And note there that the Addition of *Miſtery is before the County.* Thel. Dig. 55. lib. 6. cap. 14. S. 8. cites 27 H. 6. 4. 4 E. 4. 10. and 5 E. 4. 142.

S. P per Newton Ch. J. Br. Brief, pl 173. cites 19 H. 6 1. *So* of the *Judges* —

20. Note, in Deceit it was ſaid by Danby, that if *a Man has Houſe in 2 Places, he ſhall be taken as dwelling in both Places*; and per Litt. the *Serjeants who come to the Term* ſhall be adjudged to be dwelling at London and in their Country alſo. Br. Additions, pl. 11. cites 33 H. 6. 9.

And where a Man dwells *at D. and his Wife at S.* he may be *named of the one or of the other.* Ibid.— *And* where a Man *removes from one Vill to another, and goes through ſeveral Vills*, he may be named of any of the Vills by the Way till he comes where he would be, and when he is there the Plaintiff may name him *late of* the Vill where he firſt dwelt, or of the Vill where he now dwells. Ibid.—Thel. Dig 56. lib 6 cap. 14 S. 14 cites S. C. by Newton, who held it for Law, that where *one was abiding at Dale, and* after *removed his* Habitation and *Family to Sale, leaving ſome of his Infants at* his Houſe at *Dale to be nurſed*

nurſed, he ſhall be ſaid abiding at Sale, and *ſo* it ſhall be *if he leaves his Bailiff to occupy his Houſe to his Uſe at Dale*; but if he *has a Houſe in one Vill with menial Servants and Family, and* has *his Feme with a Family abiding in another* Houſe of his in another Vill, he may be ſuppoſed abiding in the one Vill or the other, at the Will of the Plaintiff; and where he has *removed his Habitation intirely* from one Vill to another, the Plaintiff may chuſe to ſuppoſe him *of the firſt Vill with a Nuper, or of the other without Nuper*, and cites 33 H. 6 9.

22. *Treſpaſs* was brought *againſt J. S. of the Pariſh of S. in the County of Cornwall*, and the beſt Opinion was that the Writ is not good, for *in one Pariſh may be diverſe Vills*; but it is agreed there, that *Debt* brought in a Vill or Hamlet is good; for the Stat. 1 H. 5. ſpeaks of Vills, Hamlets, Place, and County; Quod Nota. Br. Additions, pl. 14. cites 35 H. 6. 30.

23. But Addition of a *great Place containing in it diverſe Vills* is not good Thel. Dig. 56. lib. 6. cap. 14. S. 21. in the ſhort Report.

24. Where one is abiding in the *Tower of London*, Writ brought againſt him by the Name of ſuch a one of London, Gent. is not good, becauſe the Tower is *not within the Franchiſe or County of London*. Thel. Dig. 56. cap. 14. S. 21. cites Paſch. 4 E. 4. 17.

25. Treſpaſs *againſt T. of the Pariſh of A. in the County of T.* Yeoman, who ſaid that the Vill of B. was, and is within the ſame Pariſh, and he is, and was, of B. abſque hoc that he was of the Pariſh of A. & non allocatur; becauſe he ſaid that B. is in the Pariſh of A. by which he *ſaid he was of B. in the Pariſh of A.* and therefore ſhould be named of the Vill, and not of the Pariſh, Judgment of the Writ; & non allocatur; for it ſhall be intended that the Pariſh of A. is the Vill of A. by which he *ſaid, that in this Pariſh there are 2 Vills, viz. B. and S. and the Defendant is, and was, dwelling at B.* Judgment of the Writ; by which the Plaintiff imparled, for it was held a good Plea where he alleges 2 Vills in the Pariſh. Br. Additions pl. 49. cites 5 E. 4. 20.

2 Inſt 669. S. P. and cites S. C for Non præſumitur Pluralitas. ——— Br. Brief pl. 334. (337). cites 5 E. 4. 125. S. P. — Addition of a *Pariſh* is not good if there are *more Vills than one* in the ſame Pariſh. Thel. Dig. 56. lib. 6 cap. 14 S. 20. cites Mich. 35 H 6. 30

26. Where one is ſuppoſed to be of *Dale*, where in Fact there is *not any ſuch Vill*, Hamlet, or Place known &c. the Defendant *may ſay* that *No ſuch Vill* generally &c. *or that He was abiding at Sale, and not at Dale.* Thel. Dig. 50. lib 6. cap. 14. S. 22. cites Paſch. 8 E. 4. 5.

If one is abiding at a Hamlet of another Vill, it is at the Plaintiff's Election to ſuppoſe him to be of the Vill or of the Hamlet. Thel. Dig. 56. lib. 6. cap. 14. S. 14. ſays it was agreed 14 H. 6. 24. and cites alſo Mich. 35 H. 6. 30. But ſays ſee 21 E. 4. 89. contra.

27. In *Præcipe quod reddat of Land* againſt John Bury de Kingsbury, it is no Plea for him to *ſay that he is abiding at another Place, and not at* Kingsbury &c. per Opinionem Curiæ. Thel. Dig. 57. lib. 6. cap. 17. S. 5. cites Mich. 12 H. 6. 16. and Mich. 21 E 4. 86.

28. Debt upon an *Obligation*, which *was J. D. of B.* and the Writ was *J. D. of B. Underhill*, and ſo a Variance, and becauſe a Man *ought to expreſs Vill or Addition in the Writ* by the Statute in Action, in which Proceſs of Outlawry lies; and alſo if there are 2 B's, he ought to give Addition *notwithſtanding the Obligation*, and therefore well. Br. Variance, pl. 78. cites 21 E. 4 79. 80.

29. Debt againſt J. S. *of the Pariſh of J.* and becauſe the Statute is that he ſhall be named of the Vill, and in one Pariſh may be three Vills, therefore ill, and the Writ abated; quod nota; for he ſhall be named of the Vill. Br. Additions, pl. 61. cites 22 E. 4. 2.

30. Where one is *ſuppoſed* to be *of London*, it is ſufficient for him to *ſay* that *he was abiding at another Place, and not at London, the Day of the*

Writ purchaſed &c without ſaying *Or ever after.* Thel. Dig. 56. lib. 6. cap. 14. S. 24. cites Hill. 22 E. 4. Briet 944.

31. In Debt upon *Bond*, in which the *Plaintiff was named J. T. of F. in the County of N. Eſq*; but in the *Count* he *was* named *J. T. Eſq*, only; whereupon the Defendant demanded Judgment of the Bill. But per Cur. the Addition is not material, the *Plaintiff* being well named in his proper Name and Surname; but otherwiſe had it been of the Part of the *Defendant.* Cro. E. 312. pl. 1. Hill. 36 Eliz. B. R. Thornaigh v. Diſney.

32. The Defendant was named in the Indictment and Exigent *W. R. de Com' Midd' &c. without ſaying of what Place* in Com' Midd' and for that Cauſe the Outlawry was reverſed. Cro. J. 616. pl. 2. Trin. 19 Jac. B. R. Sir William Read's Caſe.

(I) Good, in reſpect of the Place of its Inſertion.

2 Inſt. 669. S. P. ſays, that in Caſe of the leſſer Nobility, and all others under them, the Town and County are nam'd before the Addition; as Th. C. nuper de D in Com. M. Miles. Jo C. nuper de D. in Com. M. Armiger. N. C. nuper de D. in Com. M. Merchant &c. But that in Caſe of Appeals &c. of Treaſon &c. againſt the greater Nobility, the Order of the Statute is purſued. And ſays that ſo it is when any other Perſon is named *of a City and County of itſelf*, the like Order is obſerved; as J. S. Pannareus de London in Com. Civitatis London.

1. NOtwithſtanding that the Additions of Eſtate, Degree, and Miſtery to be added to the Names are wrote in the Statute before the Additions of Places and Counties, yet it has been uſed always after the making of the ſaid Statute, to *put the Additions of Eſtate, Degree, and Miſtery after the Places and Counties* in all Writs, Appeals, and Indictments againſt common Perſons. Thel. Dig. 55. lib. 6. cap. 14. S. 3.

2. *But* the Uſe is *otherwiſe in Appeals and Indictments of Treaſon or Felony againſt Dukes, Marqueſſes, and Earls*; for their Names of Dignity are in ſuch Caſes put before the Additions of Places and Counties, as Charles Earl of Weſtmoreland, late of Branſpeth in the County of Durham. Thel. Dig. 55. lib. 6. cap. 14. S. 4.

3 In Writ brought againſt a Feme in ſuch a Manner, viz. *Præcipe Margeriæ, who was Wife of T. Green of Norton-Davy* &c. It was held that the Addition is good, and that this Vill of Norton ſhall be referr'd to the Defendant, and not to T. Green. Thel. Dig. 55. lib. 6. cap. 14. S. 9. cites Mich. 4 H. 6. 4.

4. *In Action againſt Heir or Executor*, by Name of W. S. theſe Words *Heir or Executor ought to be put in the Premiſſes of the Addition, and not in the Alias dictus*; for if it be otherwiſe, the Writ ſhall abate by Award. Quod nota Br. Additions, pl. 65. cites 30 H. 6. 5.

2 Inſt. 669. S. P. and cites S. C. For the proper Uſe of an Alias dictus is to agree with the Record or Specialty on which the Writ is grounded.——S. P. For the Alias dictus is only Reputation, and is not the Truth. Jenk. 119. pl. 40.

5. The Additions by the Statute 1 H. 5. 5. *ſhall be always put to the firſt Name*, and *not to the Alias dictus* of the Defendant. Thel. Dig. 56. lib. 6. cap. 14. S. 19. cites Hill. 32 H. 6. 33. and 36 H. 6. 30. For no Part of the Alias dictus is traverſable. Ibid. and Trin. 30 H. 6. 6. Mich. 5 E. 4. 42. and Hill. 21 E. 4. 18. and 1 E. 1. Paſch. 4 E. 4. 10.

In an Indictment for breaking a Houſe, the Addition, (viz. Yeoman) was after the Alias dictus, and therefore ruled to be ill. Cro. E. 583. pl. 12. Mich. 39 & 40 Eliz. B. R. Fuſſe's Caſe.

Debt was brought *in an inferior Court againſt R. P. of &c. in Com. N. Husbandman*, and Judgment for the

the Plaintiff. It was aſſigned for Error, That the Addition was in the Alias, and ſo not good; but per Cur. The Court of N. had no Authority to outlaw any Man, ſo that an Addition is not requiſite, and therefore it is no Error; and Judgment was affirm'd. Ow 58. Hill. 38 Eliz. Hund v. Preſton.——— Mo 354. pl. 478. S. C. adjudg'd accordingly.

The Addition in an Indictment was J. L. alias S. of D. and held ill, it not being before the Alias dictus. Cro. E. 249. pl. 11. Mich. 33 & 34 Eliz. B. R. Lutk's Caſe; and ſays it was ſo ruled in Grimes's Caſe, although *both the Names were not recited in the Alias.*

Where one is ſued by a Name with an Alias, the Addition muſt be expreſs'd after the firſt Name. Vent. 13. Paſch. 21 Car. 2. B. R. a Nota there.

6. *Appeal againſt J. C. alias dictus J. M. late of B. in the County of E. Yeoman*, and the beſt Opinion was that the Writ is good; for *all that enſues the alias dictus ſhall have relation to the firſt proper Name and Surname*, and it was ſaid, that in the Time of Priſot, * in Debt præcipe A. C. Clerk alias dictus A. C. late of B. in the County &c. Clerk, was abated, becauſe Addition of no Vill was before the alias dictus; but per Nedham J. it was reverſed after by Writ of Error in B. R. before Forteſcue, which Brook ſays ſeems not to be Law. Br. Additions, pl. 51. cites 5 E. 4. 141. Thel. Dig. 57. lib. 6. cap. 15. S. 14 cites S. C. & S. P. accordingly.——* Debt againſt J. S. *Panner of London, alias dictus* J. S. of London, *Draper*, and the Writ was abated by Judgment; for he may be Panner of London, and dwell at York, and the Alias dictus in the Addition is not good, but to agree with Specialty; for the Addition ought to be in the Premiſſes, and not in the Subſequent. Br. Additions, pl. 46. cites 36 H. 6. 28.

9 *But* where one was indicted by Name of *J. S. Servant to Jo. at Noke, in the County of M. Butcher*, it was held that the Addition was not good, becauſe Butcher ſhall be referr'd to Jo. at Noke. Thel. Dig. 55. lib. 6. cap. 14. S. 10. cites Hill. 9 E. 4. 50. So where one was indicted by Name of *Jo. Hind, Son of Jo. Hind of &c. Baker*, becauſe Baker ſhall be referr'd to the Father; but ſays that thoſe Caſes vary from the ſaid Caſe of 4 H. 6. For there it cannot be intended but that the Baron is dead; and in the other Caſes the Maſter and Father ſhall be intended to be alive. Thel. Dig. 55. lib. 6. cap. 14. S. 10. cites it as adjudg'd Mich. 6 E. 4. 3.

10. A Man was *indicted* by Name of J. S. *Servant of J. N. alias Dictus J. H. of B. in the County of Middleſex, Butcher, and* becauſe Servant is no Addition, and Butcher ſhall be referr'd to J. H. and not to J. S. who was indicted, therefore the Defendant was put Sine Die. Br. Additions, pl. 42. cites 9 E. 4. 48. A. was indicted for the Murder of M. his Wife; for that the ſaid M. was in Pace Domini Regis quouſque the aforeſaid *A. Husband of the aforeſaid M. of H. aforeſaid, in the County aforeſaid, Yeoman* &c. It was a Doubt whether the Additions of the Vill and the Word Yeoman ſhall refer to A. or M. becauſe Ad ultimum antecedens fiat Relatio But the better Opinion was, that the Indictment was good enough, and could not be intended to refer to M. but to the Husband. D. 46. b. pl. 2. Paſch. 31 & 32 H. 8. Guyer's Caſe.

11. H. was *indicted upon the Statute of* 8 *H.* 6. of forcible Entry, and Exception was taken to the Indictment in Default of Addition of the Place &c. becauſe in this Caſe *the Addition was after the alias dictus*, and ſo there is no Addition; and therefore the Party was diſcharged. 2 Le. 183. pl. 224. Mich. 32 Eliz. B. R. Hooper's Caſe. Cro. E. 198. pl. 15. S. C. the Indictment was held void, becauſe the Addition was after the Alias Dictus.

12. An *Indictment* was for a Riot *againſt A. B. C. D. E. &c. and J. S. of H. Yeoman.* It was objected that there was no Addition of the Place, where the Parties indicted did dwell, for that the Place of *H. is only for J. S.* the laſt Party named, but no Addition of any Place for the reſt, and therefore pray'd that the Indictment might be quaſh'd. Williams J. held that the Word (Yeoman) goes to all, reddendo ſingula ſingulis, but that the Place here named of H. doth not go to all, but to the laſt Man named; and for this Default the Indictment was quaſh'd. Bulſt. 183. Paſch. 10 Jac. the King v. Haſtings.

(K) Writ

(K) Where a Perſon has two or more Additions, which of them he muſt be named by.

1. A Man may ſue a Prieſt who is *Dean* in a Writ of *Treſpaſs*, without naming him Dean; but otherwiſe it is in a *Præcipe quod reddat*. Thel. Dig. 36. lib. 3. cap. 3. S. 6. cites Paſch. 5 E. 3. Brief 800. and 5 E. 4. 106. and where the Action is by Reaſon that he is Dean, cites 14 H. 6. 14.

But ſuch a Caſe was left in Doubt. 22 E. 4. 43. Ibid.

2. *Debt by a Prior againſt an Abbot* who was *Parſon Imparſonee upon Compoſition had between their Predeceſſors that the Abbot ſhall have the Tithes of B. and ſhall pay an Annuity of* 10 *l. per Annum* to the Prior and his Succeſſors, and the *Abbot was not named Parſon*; and yet well by the Opinion of the Court, inaſmuch as it *ariſes by the ſaid Compoſition of later Time*. Br. Noſme, pl. 54. cites 14 E. 4. 4.

3. Where *the ſame Perſon is both a Biſhop and Dean*, yet in all Caſes *which concern the Lands of the Dean*, he ſhall be ſtiled Dean in Actions. Per Doderidge J. Lat. 235. cites 19 E. 3. Fitzh. Trial, 57.

Aſſiſe by a Prior, and *made Title to Corn as Parſon of R* and becauſe he was *not named Parſon of R.* the Writ ſhall abate; Per Opinionem. Br. Noſme, pl. 13. cites 12 H. 4. 20.

4. It was adjudg'd that a *Prior* being *Parſon of a Church*, may *maintain Writ of Account without naming himſelf Parſon, againſt his Bailiff*, of the Profits of this Church. Thel. Dig. 36. lib. 3. cap. 5. S. 3. cites Hill. 30 E. 3. 1.

5. A *Prior* being *Parſon of another Church* cannot ſue Aſſiſe of a thing appertaining to this Church without *naming himſelf Parſon*. Thel. Dig. 37. lib. 3. cap. 5. S. cites Paſch. 12 H. 4. 20. And ſays that ſo it ſeems to be agreed in Writ of *Waſte*, Mich. 10 H. 7. 5. And that ſo it is in *Annuity*, Mich. 18 E. 4. 17.

6. Quare Impedit by the King *againſt the Biſhop of N. and J. E Monk*, who *ſaid that he is Prior* of W. *not named Prior*; Judgment of the Writ, and becauſe the *Action is of Preſentation to this ſame Priory*, and ſo to defeat it, therefore no Plea. Br. Brief, pl. 427 (430.) cites 14 H. 4. 37.

7. *So of a Parſon*, where the Action is *of his Parſonage*. Ibid.

(L) New Additions pending the Writ. The Effect thereof.

If the *Dignity of Earl deſcends to the Plaintiff pending the Writ*, his Writ ſhall not abate. Thel. Dig. 185. lib. 12. cap. 16. S. 6. cites Hill. 32 H. 6. 34.

1. IN Writ againſt an *Earl*, he ought to be named Earl notwithſtanding that he be *not held or known for an Earl the Day of the Writ purchaſed*, if in Truth he be an Earl. Thel. Dig. 50. lib. 6. cap. 3. S. 6. cites Trin. 5 E. 3. 199. and ſays ſee 22 Aſſ. 24.

And ibid. S. 13. ſays that ſo agrees Paſch.

2. A Writ by one W. *Clynton and A. his Feme*, was not abated notwithſtanding that the *Baron was made* an *Earl after the Writ purchaſed*, and the Suit was for a Thing in Right of the Feme, and not in Right of the

the Earl &c. Thel. Dig. 36. lib. 3. cap. 3. S. 12. cites Paſch. 13 E. 3. Brief 259. 19 E. 3. procedendo 2. And that his Writ ſhall not abate, if he *becomes an Earl by Deſcent* pending &c. 32 H. 6. 35.

And where an *Earl is made a Duke pending the Writ*, the Writ ſhall not abate, but he ſhall Proceed and ſhall count by Name of Earl. Thel. Dig. 36. lib. 3 cap. 3. S. 13. cites Paſch. 25 E. 3. 39. And that ſo agrees Mich 22. R. 2. Brief 936. and Paſch. 24 E. 3. 14.

3. In Writ of Annuity by W. E. *Maſter of ſuch a Houſe*, the Defendant ſaid, that *after the laſt Continuance* the Plaintiff was choſe and *confirm'd Biſhop of W.* &c, without ſaying that he is Biſhop by Creation, yet the Writ was not abated. Thel. Dig. 185. lib. 12. cap. 16. S. 2. cites Hill. 26 E. 3. Brief. 250. and ſays ſee 24 E. 3. 17, 26. 19 E. 3. Procedendo 2 & 9 H 5. 13. and Mich. 4 H. 4. 2.

4. But in Writ of *Aſſiſe by a Prior* it was pleaded that he was *made Abbot of the ſame Place*, at his own Suit, by the Pope and the King pending the Writ, by which the Intent of the Court was to abate the Writ. Thel. Dig. 185. lib. 12. cap. 16. S. 3. cites Mich. 22 R. 2. Brief 936. and 2 R. 3. 20, and 4 H. 4. 2.

5. Debt *againſt E. Executor of the Teſtament of J. N. Eſq*; Exception was taken that the ſaid *J. N. was a Knight the Day of his Death*, and therefore *it ought to be Executor of the Teſtament of J. N. Knight*; Judgment of the Writ; and therefore the Writ was abated, and yet the *Obligation was Eſq*; alſo; Quod Nota. Br. Brief, pl. 517. cites 7 H. 4. 7. Br. Noſme, pl. 10. cites S. C. and S. P. accordingly, and ſays that a Man may be named a Knight as ſoon as he is baptized, and then he never ſhall be Eſquire. ——Br. Additions, pl. 17. cites S. C accordingly, and yet it was the Name of the Teſtator and not of the Defendant. Thel. Dig. 50. lib. 6. cap. 5 S. 7. cites S. C. and S. P. accordingly.

6. *Two* Men *recover'd Damage in Aſſiſe*, and the *one is a Knight and the other not*, and *after the other is made a Knight*, and *both brought Scire Facias to execute* the Recovery, *by Name of A. B. Miles, and T. B. modo Miles*; and it was held that it ought to be which A. Miles and T. modo Miles by Name of A. B. Militis, and T. B. recover'd; quod tota Cur. conceſſit. Br. Pleadings, pl. 169. cites 11 H. 7. 25.

7. In Treſpaſs, the Defendant was *Knight* the Day of the Writ purchaſed, not named Knight, and therefore by Exception of the Party the Writ abated. Br. Noſme, pl. 15. cites 14 H. 4. 21.

8. J. E. was *indicted of Felony by the Name of J. E. Yeoman*, and the *King pardoned him, by the Name of J. E. Gentleman*, all manner of Felonies. This Pardon may be pleaded, with Averment that J. E. Yeoman, and J. E. Gentleman, are one and the ſame Perſon; for at the Time of the Indictment he might be Yeoman, and afterwards be made Gentleman by the King, or by reaſon of his Office. Kelw. 58. a. pl. 1. Hill. 20 H. 7. Eaton's Caſe.

9. If the *Plaintiff* be made a *Knight after the laſt Continuance*, the Writ ſhall abate by Judgment. Thel. Dig. 185. lib. 12. cap. 16. S. 4. cites 7 H. 6. 15. 40.

10. In Debt the Defendant was *outlawed by Name of Gentleman*, and was taken by Capias Utlagatum, and ſaid that at the Time of the Outlawry he was *Merchant, and not Gentleman*; to which the Plaintiff, upon Scire Facias, came and pleaded his Obligation for Eſtopple, in which he was *bound by Name of Gentleman*. To which it was ſaid, that it is no Eſtopple; for it may be that he was Gentleman at the Time of the Obligation made, *by reaſon of his Office*, and at the Time of the Suit was out of the Office; therefore Quære. Br. Eſtopple, pl. 11. cites 28 H. 6. and ſee 9 E. 4. 29.

11. If the *Archbiſhop of York* brings Writ, and is *made Archbiſhop of Canterbury after the laſt Continuance*, the Writ ſhall abate. Thel. Dig. 185. lib. 12. cap. 16. S. 5. cites Mich 32 H. 6. 12.

Br. Variance, pl. 16. cites S. C. and that the Parol was fine Die by Demiſe of the King, and

12. *Replevin was without Day after Iſſue tried* by Nili Prius, and the *Defendant, for whom the Verdict paſſed, was made Knight after, and* then *ſued Scire Facias to have Judgment* and *Return upon the Verdict, which agreed with the firſt Record, and did not name himſelf Knight*; and yet well by ſeveral, becauſe it is only to revive the firſt Suit. Br. Noſme, pl. 42. cites 5 E. 4. 15.

afterwards he was made a Knight; and held that he need not name himſelf Knight, for the Reaſon here given; and the Plea and Judgment ſhall be upon that, and upon the firſt Record, and not upon the Scire Facias, eſpecially where it is brought by the Defendant; for making the Defendant Knight ſhall not abate the Writ. Contra of the Plaintiff.———Br. Brief, pl. 327. cites S. C. but ſays it was ſaid by ſome that in Replevin, Quare Impedit, and Detinue upon Garniſhment, the Defendants and Garniſhee are Actors, and therefore if they are made Knights pending the Suit, and before their bringing Writ to revive, or Scire Facias, they ſhall be named Knights. Et adjornatur.

Where one *recovers by Name of J. S. Eſq*; and *after is made a Knight*, he ought to ſue Scire Facias by Name of Knight. Thel. Dig. 36. lib. 3. cap. 3. S. 18. cites Paſch. 5 E. 4. 19.

13. In Writ brought by an Officer, and by Name of Officer, it is a good Plea for the Defendant to ſay that he was *not Officer at the Time* &c. Thel. Dig. 36. lib. 3. cap. 4. S. 3. cites Mich. 12 E. 4. 8. and 4 E. 4. 6. & 10.

In Debt on Bond, the Defendant pleaded, that puisdarreign Continuance the Plaintiff was made a *Baronet*.

14. 1 *E.* 6. *cap.* 7. *S.* 3. *Albeit any Demandant or Plaintiff ſhall be made Duke, Archbiſhop, Marqueſs, Earl, Viſcount, Baron, Biſhop, Knight, Juſtice of the one Bench, or the other, or Serjeant at Law, depending the Action, yet no Writ or Suit ſhall, for ſuch Cauſe, be abateable.*

If this were a Dignity known at the time of making the Statute, then the Court held it to be out of the Statute, it not being therein mentioned; but they doubted whether if it were a Dignity created after the Statute, the Statute ſhould in Equity extend to it. But the ſame being only pleaded in Abatement of the Writ, and ſo it would only be a Reſpondeas Ouſter if adjudg'd for the Plaintiff, it was agreed to bring a new Original; and ſo no Judgment as to this Point. Cro. C. 104, pl. 5. Hill. 3 Car. C. B. Bennet's Caſe———Litt. Rep. 81. Bennet v. Lawrence S. C. and Richardſon ſaid, that admitting it a notorious Dignity at the making the Statute, and it be not named, it will not be within it; and tho' it be nam'd in ſeveral Places before, yet that was occaſioned by miſprinting of Baronets for Barons, quod alii Juſticiarii conceſſerunt, and if reciting particular Dignities would exclude Dignities known, a fortiori it would exclude Dignities made afterwards, and Crooke demanded if *Viſcounteſs* or *Baroneſs* were within the Statute, to which the others anſwered that they were not; and all the Court ſaid, that it [Baronet] was not within the Statute, nor was any new Dignity &c.

A *Knight of the Bath* was held to be within this Statute, and that ſo are all other Knights, but a Baronet is not unleſs he be Knight alſo. Sid 40. pl. 4. Paſch. 13 Car. 2. B. R. Heath v Paget.

Note, Where any ſuch Creation is made pending the Action, there muſt be an Entry on the Roll, with a *poſt ultimam continuationem, viz.* ſuch a Day the King by his Letters Patents under the Great Seal of *Great Britain*, bearing Date the ſame Day &c. and ſo ſet forth the Patent with a *Profert in Curia* of it, and a *quod prædictus* the Defendant *hoc non dedicit*. L. P. R. 2.

Noy 86. S. C. accordingly, and ſays it was ſo adjudg'd 35 H. 6.

15. If I make J. S. my *Attorney*, and (the Warrant of Attorney ſtill continuing) he is *made a Knight*, yet is not the Warrant of Attorney determined, altho' the Word (Knight) which is now Part of his Name, be not in the Warrant; per Brown. Ow. 31. Mich. 1 & 2 Eliz.

So if Commiſſion of *Niſi Prius be directed to J. S. Eſq*; and before the Trial he is made Knight, the Return may be Coram J. S. Milite, and of the Juſtices &c. Lat. 161. Petty v. Hobſon.—For both the Additions are become *conſiſtent*, by reaſon of the Difference of Times. 10 Mod. 285. in Caſe of Nutton v. Crow.

The Declaration in ſuch Caſe ſhall be againſt J. S. Eſq; alias dictus J. S. Miles. Bulſt. 216. per Yelverton J. Trin. 10 Jac.———S. P. and S. C. cited G. Hiſt. of C. B. 179. for the Declaration, as is ſaid, muſt ſhew the Cauſe of Complaint as it is, and therefore muſt in all Things follow

16. George Greiſly enter'd into a *Statute Merchant, by* the Name of *George Greiſley, Eſq*; and was *afterwards created a Baronet*; and a Capias was iſſued out againſt him by the Name of George Greiſley, Eſq; as named in the Statute; but the Court adviſed him to ſue a new Writ thus, *Capias Corpus Georgii Greiſley, Mil' & Baronetti qui per nomen G. G. Ar' Recognovit &c.* Hob. 129. pl. 168. Greiſley's Caſe.

low the Obligation, and the Intent of the alias is only to ſhew he has been differently called from the Name in the Obligation, and therefore if one obliges himſelf by the Name of J. S. Eſq; and afterwards he is made a Knight, the Plaintiff cannot declare againſt J. S. Knt. alias J. S. Eſq;

(M) Want of Addition. The Effect thereof.

1. IN *Aſſiſe againſt J. N. Clerk*, the Aſſiſe *found that he was a Prebendary not named Prebendary, and this Land is in Right of the Prebend*, where it *was not pleaded*; and for this the Aſſiſe abated. Br. Verdict, pl. 72. cites 13 Aſſ. 12.

2. If the Addition be *ill, or left out in the Original*, it is not good; *And* where Addition is not good, and the *Party appears and pleads*, or is outlaw'd, yet the Original is not good, and this and the Outlawry ſhall be reverſed; Per Markham and other Juſtices. Br. Additions, pl. 50. cites 5 E. 4. 3. 2. Where the Defendant is *taken by Capias Utlagatum*, and has *not his true Addition*, and this is pleaded, a *Scire facias* ſhall be awarded againſt the Plaintiff *to maintain the Addition* in the Writ, and if it be found with the Defendant he ſhall be diſcharged; for the Outlawry remains in Force againſt him who is ſo named in the Original. Jenk. 128. pl. 59. cites 21 H. 7. 19.

3. In Treſpaſs againſt J. Mylles, the *Defendant ſaid that one J. Mylles was ſeiſed, and infeoffed N. which N. infeoffed J. Mylles, and after* the ſaid *J. Mylles died, by which the Land deſcended to the ſaid J. Mylles the Defendant, who enter'd* and gave Colour. Wood ſaid the Plea is not good; for there *are diverſe J. Mylles's, and he does not give Addition to any of them*; but per Vaviſor, the Plea is good without Queſtion; by which Wood paſs'd over. Br. Barre, pl. 75. cites 9 H. 7. 22.

4. In a *Preſentment before a Coroner*, That J. S. had certain Goods of a Felo de ſe, and upon Proceſs iſſued againſt him he was *outlawed*; *but* in the Outlawry there was *no Addition given to J. S.* But the whole Court agreed, that as to this Purpoſe *the Preſentment* ſhould be *accounted in Law as an Indictment*; and afterwards the Outlawry was reverſed. 2 Le. 200. pl. 201. Mich. 26 Eliz. B. R. French's Caſe.

5. Where the Husband and Wife are indicted, and the *Husband is indicted of ſuch a Place*, but the *Wife has no Addition*, yet the ſame is good enough. 2 Le. 183. in pl. 224. ſays it was ſo held Mich. 32 Eliz. B. R. Cro. E. 198. pl. 15. S. P. in S. C. Gawdy J. held that it was no good; but Clench and Fenner e contra.——2 Inſt. 669. S. P.

6. It is not *the Courſe to have* Additions either in *Informations* or in Return of *Reſcous*. Cro. J. 531. pl. 11. 17 Jac. B. R. Garrard v. the King.

7. An Indictment of *Forcible Entry* wanted the Addition of the *County where the Party dwells that made it, and alſo* of the County *where the Vill lies in which* the Force was committed; and upon theſe Exceptions it was quaſh'd. Sty. 26. Trin. 23 Car. B. R. Anon.

8. *Indictment quaſh'd* for Want of an Addition; for the Court ſaid no Proceſs ought to go thereupon, becauſe the Party cannot be outlaw'd. Vent. Paſch. 31 Car. 2. B. R. Anon. Lat. 109. S. P. —— 4 Le. 121. pl. 243. Trin. 32 Eliz. B. R. Keene's Caſe S. P.

9. Whether an *Excommunicato Capiendo* againſt one be void without a ſufficient Addition? Shew. 16. Paſch. 1 W. & M. the King. v. Johnſon.

10. It

9. It was lately adjudg'd Paſch. 3 Geo. 1. in an *Appeal of Death* between * Reeve and Trundel, that the Want of an Addition of the Appellee was a good Plea in Abatement; and the Writ of Appeal was abated by ſuch Plea. 2 Hawk. Pl. C. 190. cap. 23. S. 123.

* Comyns's Rep. 257. pl. 142. Paſch 3 Geo 1. S C. and the Court quaſhed all Proceedings upon the Writ of Appeal. —— The Indictment was by the Addition of Labourer, the Jury found him guilty of the Murder, but found that he was not Labourer. MS. Rep. S. C.

(N) Proceedings and Pleadings.

1. WHERE *J. N. was ſued* in Account *of his own Receipt by Name of J. N. of G. Company of M.* it is no *Plea that he is not of the Company of M.* Br. Noſme, pl. 17. cites 38 E. 3. 34.

Thel. Dig. 57. lib. 6. cap. 17 S. 1. cites S. C. and ſays the Plea was, that he never was of the Company, and ill.

2. *So of a Parſon.* Ibid.

3. *Contra where they are ſued, by Reaſon of this Name.* Ibid.

4. One *John Baſton Clerk*, is outlaw'd, who comes in by Capias Utlagatum; it is no Plea for him to *ſay that he is not Clerk.* Per Cur. Thel. Dig. 57. lib. 6. cap. 17. S. 4. cites Hill. 5 R. 2. Utlarie 43.

5. In Writ of Entry it was held that Writ brought by Name of *John, Chaplain of the Chantery of our Lady of C.* &c. ſhall be good, without ſhewing in what Church the Chantery was. Thel. Dig. 37. lib. 3. cap. 5. S. 7. cites Paſch. 12 H. 4. 19.

6. A Man was *outlaw'd by Name of J. P. Dyer*, and *came by Capias Utlagatum*, and *ſaid that he was a Brewer and not a Dyer*, and Writ iſſued to inquire it, and by ſome he ſhall be drove to his Charter of Pardon, becauſe he *is the ſame Perſon.* Br. Utlagary, pl. 15. cites 5 H. 5. 7. 8.

7. It was held that in Writ brought *againſt* one by Name of *J. Page of Pole*, it was a good Plea at the Common Law to *ſay that he Never was of Pole.* Thel Dig. 57. lib. 6. cap. 17. S. 2. cites Mich. 11 H. 6 13. and 19 H. 6. 58. *But* ſays that in this Caſe it was held Trin. 21 H. 6. 59. that the Pleading is to ſay *that his Name is John Page of Dale, and not John Page of Pole.* Where it was ſaid alſo, that *at the Common Law in Writ againſt one by Name of J. D. Smith*, it is *a good Plea* to ſay *that he is Carpenter and Not Smith.*

8. *Iſſue* may be taken *upon Eſtate, Degree, and Myſtery.* Thel. Dig. 57. lib. 6. cap. 15. S. 16. cites Mich. 11 H. 6. 13. and in ſeveral other Books.

9. Debt againſt J. N. *Husband-man*, it is a good *Plea that he is Gentleman and not Husband-man*, but it ſeems there, that *if a Gentleman be alſo a Husband-man or Craftſman, he may be named by the one Addition or the other*, and the Statute is there well ſerved, which ſays that he ſhall be named of the Degree, State, or Myſtery of which he is, therefore he may be named the one or the other, and well; but per Strange, he ſhall be named by the moſt high Name, which is Gent. but Brooke makes a Quære thereof; for it ſeems the one or the other will ſerve the Statute. Br. Additions, pl. 44. cites 14 H. 6. 15.

2 Inſt. 668, 669. S. P. according to the Opinion of Strange. —— Thel. Dig. pl. 56 lib. 6. cap. 15. S. 5. cites 14 H. 6. 15. ——

But Br. Additions, pl. 50. cites 5 E. 4. 32. contra that he ſhall be named Gentleman, and not Husband-man. Per the Juſtices.

10. In Detinue of Charters againſt John Selby, Fiſhmonger, he ſaid that he was *Gentleman and not Fiſhmonger*; and held a good Plea. Per Paſton. Thel. Dig. 57. lib. 6. cap. 17. S. 7. cites Hill. 19 H. 6. 51.

12. In

11. In Writ brought againſt one by Addition of *Husbandman*, he ſaid that he was *Servant to Maſter Forteſcue in the Office of Clerk, abſque hoc* that he was of the Myſtery of Husbandry. Thel. Dig. 57. lib. 6. cap. 15. S. 7. cites Paſch 20 H. 6. 33. where it was ſaid that *ſuch Clerk ſhould be named Gentleman*. Quære.

12. Priſot ſaid, that he never ſaw a Writ abated for want of theſe Words, Younger, or Son, but *by Surmiſe of the Plaintiff*, or of another of the ſame Name [and] *for his Indemnity Addition has been put*, and not otherwiſe, but no Writ ſhall abate for this Default. Br. Additions, pl. 47. cites 39 H. 6 46.

13. A. B. of C. is impleaded by Name of A. B. of C. in the County of S. *Brewer*, and is outlaw'd and taken by Capias Utlagatum, and ſaid that the Day of the Writ purchas'd he was *Yeoman, and not Brewer, and* Exception was taken, becauſe he *pleaded* it thus, viz. *and the aforeſaid A. B.* &c. where, per Littleton, by this Word *aforeſaid* he *affirms all the Name*, and therefore cannot ſay that he is Yeoman, and therefore he *ought to have pleaded* thus, viz. *and** the aforeſaid *A.B. who is taken* &c. *ſays* ut ſupra &c. and not [have ſaid] the aforeſaid; but the Plea good, notwithſtanding this Word aforeſaid; for by it he *affirms part of the Name, and not all*. Quære of Proper Name if he pleads Miſnoſmer of it by this Form, viz. aforeſaid A. B. Br. Miſnoſmer, pl. 52. cites † 1 E. 4. 2.

* It ſeems that theſe Words (the aforeſaid) ſhould be omitted in this Place, and ſo the Objection is in the Year Book.

† 1 E. 4. 2. b. 3.

14. Bill, the *Defendant ſaid, that the Plaintiff by Name of J. S. of L. Gent. was Mainpernor for W. N. and after was outlaw'd for the not coming of the ſaid W. N. upon Capias pro Fine*; Judgment if he ſhall be anſwered; the *Plaintiff ſaid, that the Mainpernor was J. S. of L. Gentleman*, but this Plaintiff at the Time of the Mainpriſe, and always after, was *Yeoman, and not Gentleman*, and no Plea; per Cur. For he *ſhall ſay abſque hoc that he is the ſame Perſon*. Br. Traverſe per &c. pl. 236. cites 10 E. 4. 16.

Br. Exigent. pl. 49. cites S. C. & S. P. accordingly, becauſe he took the Mainpernorſhip upon himſelf. — Br. Nonability, pl. 50. cites S. C. & S P. accordingly; for Gentleman may be outlaw'd by the Name of Yeoman. — But Br. Nonability, pl. 50 cites 7 E. 4. 1. That in Replevin *after Iſſue, the Defendant pleaded Outlawry in the Plaintiff after the laſt Continuance by Name of J. S. of D. Yeoman*, and the other *ſaid that he was Gentleman, and not Yeoman*, and the Iſſue received; for now it ſeems that he is not the ſame Perſon, Br. Nonability, pl. 50. cites 7 E. 4. 1.

15. In Reſcous, the *Attorney ſaid that his Maſter was a Sheriff*, which is a Name of Dignity, not named Sheriff; Judgment of the Writ, and a good Plea; for it is not contrary to his Warrant of Attorney. Br. Brief, pl. 321. cites 6 H. 7. 14.

16. In *Debt againſt B. in the County of S.* the Defendant was outlaw'd, and no Addition was put to B. in the Writ, but upon pleading this Matter the Outlawry was reverſed upon the Statute of 1 H. 5. And. 36. pl. 92. Mich. 8 & 9 Eliz. Collins v. Blagrove.

Bendl. 153. pl. 212. S. C. & S. P.

17. *Judgment was revers'd* for Error in *changing* the Defendant's Addition to Eſq; whereas throughout all the meſne Proceſs it was Alderman. Brownl. 99. Hill. 1. Jac. C. B. Markham v. Mollineux.

Yelv. 120. Hill. 5 Jac. B. R. the S. C. and Brownl. ſeems only a Tranſlation of Yelv.

18. It was aſſigned for Error to reverſe an Outlawry, that he was indicted by the Name of *J S, of the Pariſh of Aldgate*, but does *not ſhew in what County Aldgate is*; and for this Reaſon it was reverſed, tho' *Middleſex was in the Margin*; for an Indictment ſhall not be taken by Intendment, and the County in the Margin ſhall be referred to the Place where the Offence was committed, and not to the Habitation of the Party. Cro. J. 167. pl. 7. Trin. 5 Jac B. R. Leech's Caſe.

S. C. cited Arg. 3 Mod. 139.

19. In Debt againſt Sir W. H. by the Stile of Knight and Baronet, he *pleaded* in Abatement *that he was never Knighted*. It was moved to amend; for that he had put in Bail by the Name of Knight and Baronet, and

2 Keb. 824. pl. 43. S. C. adjudged for the Defendant.

and ſo could not allege this Matter, which the Court agreed if it were ſo; but it was found entered for W. H. Baronet only; ſo they ſaid they could not permit any Amendment. But the Plaintiff muſt of Neceſſity arreſt him over again. Vent. 154. Mich. 23 Car. 2. B. R. Sir William Hick's Caſe.

Action was brought by Bill againſt T. P. Eſq; he pleaded that he was a Gentleman, and not Eſquire.

20. Caſe *by Bill* for Goods ſold, againſt Francis Gell, Eſq; who *pleaded that he was not* F. Gell, *Eſq; but Merchant*, whereon the Plaintiff demurr'd, and Judgment to anſwer over, becauſe the Statute of Additions extends only to Proceſs where Outlawry lies, and no Outlawry lies on a Bill. 12 Mod. 211. Mich. 10 W. 3. Martin v. Gell.

The Plaintiff *replied* that the Defendant *habitus & reputatus fuit, as well an Eſquire as a Gentleman*; and ſets forth that he was Eſquire, tam ratione Dignitatis ſuæ & parentelæ, ſed præſertim digniſſimæ Occupationis &c. Upon Demurrer it was argued, that the Plaintiff ſhould have *replied poſitively* that the Defendant was an Eſquire, and not a Gentleman, and that the alleging it with a Habitus & Reputatus fuit was not good, becauſe the Addition ought to be the true one, and not maintain'd with a Habitus & Reputatus &c. only; and Powell J. ſeemed to be of that Opinion; but the *Suit being by* * *Bill*, a Reſpondeas ouſter was awarded. 2 Ld. Raym. Rep. 849. Mich. 1 Annæ, Bennet v. Powel.

* See (B) pl. 13. S. C.

21. Wrong Addition, or Omiſſion of Knight, is void *in Pleadings and Grants*, tho' not in a *Conveyance*. 5 Mod. 302. Mich. 8 W. 3. per Cur. in Caſe of the King v. the Biſhop of Cheſter and Pierce.

22. An *Indictment of Treaſon* is not to be quaſh'd by the Statute for want of Addition, unleſs the Perſon indicted takes Advantage of it. Per Holt Ch. J. 12 Mod. 198. Trin. 10 W. 3. the King v. Sir Henry Bond.

6 Mod. 80. Mich. 2 Ann. B. R. Battersby v. Marſh, S. C. & S. P. where the Plaintiff in his Bill declared and called himſelf Gentleman, and held accordingly, but it being after general Imparlance they put him to anſwer over.

23. In Debt upon a Bond, the Plaintiff declares by the Name of Edward Naſh Generoſi. The Defendant pleads in Abatement, that the Plaintiff is no *Gentleman*, to which the *Plaintiff demurr'd*, which was ill; for it amounts to a Confeſſion that he is no Gentleman, and then not the ſame Perſon named in the Count; but he *ſhould have replied, that he is a Gentleman*. Judgment was given that the Writ ſhould abate. 2 Ld. Raym. 986. Trin. 2 Ann. Naſh v. Battersby.

S C. cited by the Name of Maſon v. Ruſſel as Paſch 8 Geo. B. R. 2 Ld. Raym. Rep. 1541. —— And ibid. ſays the S. P was adjudged Trin. 9 Geo. 1. B. R. Horſpoole v. Harriſon.

25. In Action againſt *A. B. late of H. &c. Yeoman*, the Defendant *pleaded* in Abatement, *that he was a Horner*. It was inſiſted that this was good; for if the Defendant be not a Gentleman he muſt be a Yeoman, and that a Horner may be a Yeoman, viz. an Ordinary or common Perſon, and ſo the Plaintiff may name him either by his Degree or Trade; the Plea was adjudg'd ill, and the Defendant ruled to anſwer over. 8 Mod. 52. Trin. 7 Geo. Maſon v. Buſhell.

26. The Defendant was ſu'd by Original, by the *Name of Gentleman*, and *pleaded that he was and is a Merchant &c.* and *traverſed his being or having been a Gentleman*; but was ordered to anſwer over, becauſe by the Statute H. 5. Plaintiff may ſue the Defendant either according to his Addition of Degree, or Myſtery, and this *Writ being brought by the Addition of his Degree, he ought to have ſhewn what Degree he was of, to ſhew the Plaintiff might have a better Writ*. 2 Ld. Raym. Rep. 1541. Mich. 2 Geo. 2. B. R. Smith v. Maſon.

27. In Qua. Imp. againſt J. H. and J. B. the Defendant *pleaded* in Abatement that there are 2 *Perſons in the ſame County nam'd J. B. ſen. Clerk, and J. B. jun. Clerk, and that there is no Diſtinction* made; but the

the Court held the Plea repugnant. Comyns's Rep. 260, 261. Paſch. 3 Geo. 1. C. B. Hulley v. Hulley.

(O) Abated by the Surpluſage of Addition.

1. DEBT *by J. N. Adminiſtrator of the Goods and Chattles* of N. P. and *counted that the Adminiſtration was committed to him by the Ordinary, and* counted *of a Duty due to himſelf* by which the *Defendant ſaid that W. P. made Executor, who proved the Teſtament after the Adminiſtration committed*, and ſo the Name of Adminiſtrator determined *Judgment of the Writ.* And the beſt Opinion was that *it is only Surpluſage*, which is no Matter of the Part of the Plaintiff; for it is only Addition, As if J. N. of D. brings Action and names himſelf Carpenter, where he is not Carpenter; contra of Addition of the Part of the Defendant. Br. Dette, pl. 78. cites 9 H. 5. Br. Nugation, pl. 11. cites S. C.

2. Præcipe *J. N. Knight, and Lady A.* &c. Rolf demanded Judgment of the Writ; for *A. need not be named Lady.* But per Babbington, it is not material if it be in the Writ or out, for it is only *Surpluſage*, wherefore Anſwer, Nota. Br. Brief, pl. 168. cites 8 H. 6. 9. 10.

3. In Writ againſt *ſuch a one Knight, Domino de A.* &c. The Writ is good enough; for Domino is only Surpluſage. Thel. Dig. 96. lib. 10. cap. 7. S. 15. cites Mich. 8 H. 6. 10. Or Dominæ. Ibid.

4. Notwithſtanding that a Man gives *Addition* of Place and Myſtery to the Tenant *in Plea of Land*, the Writ ſhall not abate; for it *is only Surpluſage*, and *ſo* it is of *Alias dictus*. Thel. Dig. 97. lib. 10. cap. 7. S. 16. cites Mich. 35 H. 6. 12. Brief 121. and 30 H. 6. 5. Brief 111.

5. And *ſo* is *that which comes after the Nuper in the Name of the Defendant*, if it be not a thing material. Thel. Dig. 97. lib. 10. cap. 7. S. 16. cites Hill. 38 H. 6. 28.

6. Writ of Annuity was maintain'd upon Title of Preſcription againſt an Abbot by Name of *Jo. Abbot of C. alias dictus Lord Abbot of C.* notwithſtanding that Lord may be omitted in the Writ. Thel. Dig. 51. lib. 6. cap. 3. S. 11. cites Mich. 35 H. 6. 12.

(P) Want of Addition, cured by what.

1. TReſpaſs againſt J. S. who ſaid that in the ſame Vill is J. S. elder and J. S. younger, and this Defendant is J. S. younger, not ſo named, and demanded Judgment of the Writ, and becauſe the Defendant *appear'd and had given Diverſity of Names*, it was enter'd in the Roll, and the Writ awarded good. Br. Additions, pl. 16. cites 44 E. 3. 34.

2. In *Treſpaſs* againſt 2 who ſaid that in the ſame County there were other 2 of the ſame Name and Surname, who are Elder, and the Defendants Younger, yet the Writ did not abate, and the Plaintiff was received to put a Diverſity of Names by Addition of *Younger*; *enter'd into the Roll.* Thel. Dig. 55. lib. 6. cap. 13. S. 8. cites Hill. 44 E. 3. 34.

3. It

3. It was held in *Treſpaſs*, that if one of the ſame Name and Surname with the Defendant, *comes in at the Exigent*, and the Plaintiff ſays that he is not the ſame Perſon whom he ſues, that the Plaintiff may put Addition and have *Exigent de Novo* Thel. Dig. 55. lib. 6. cap. 13. S. 7. cites Hill. 14 H. 4. 27. But ſays, Quære what ſhall be done after Outlawry in this Caſe, and cites 21 E. 3. 41. 5 E. 4. 25. 12 H. 6. 8. and 39 E. 3. 6.

The Defendant in an Appeal of Murder purchaſed a *Superſedeas by the ſame Name ſhe was called by in the Appeal*, and afterwards

4. In Debt, at the Capias the Defendant named *J. S. of B. appear'd* and demanded Judgment of the Writ, for he *ſaid that there is B. upon M. and B. upon P. abſque hoc that there is any B. without Addition.* Port. ſaid to this he ſhall not be received, for he has *purchaſed Superſedeas by the ſame Name*; and becauſe this Allegation ſtands with and was not contra, therefore no Eſtoppel; the ſame Law of Attorney who has Warrant, he ſhall not plead that No ſuch Vill as B. nor here, for this is contra &c. Contra of that which may ſtand with &c. Br. Additions, pl. 30. cites 19 H. 6. 35, 36.

pleaded that ſhe was named by a wrong Addition, for that ſhe was named Spinſter, whereas ſhe was Gentlewoman. The Plaintiff replied and demanded Judgment if ſhe ſhould be admitted to ſuch Plea contrary to the Superſedeas &c. The Defendant demurr'd, but at length waived the Demurrer propter Opinionem Curiæ, and pleaded Not Guilty &c. D. 88. a. b. pl. 107, 108. Trin. 7 E. 6. Allington v. Oldcaſtle.

If the Defendant has not ſuch Addition as the Statute requires, yet if he *appears upon Proceſs and pleads*,

5. If a Man *appears and pleads* and is condemned, he cannot aſſign it for Error afterwards, as it ſeems; for as to Matter of Fact he ought to plead it if he appears; but contra where he is outlaw'd or loſes by Default. Br. Error, pl. 96. cites 7 H. 6. 39. and ſays note the Diverſity ut videtur; but as to this Point 35 H. 6. and 5 E. 4. varies

without taking Advantage thereof by Exception, he has loſt the Benefit of this Statute. 2 Inſt. 670.

If an *Appellee*, who is named with an inſufficient Addition, or without any, *appears and pleads* to the Appeal, he cannot afterwards take Advantage of the Defect of the Addition, becauſe by his Appearance and Plea he admits himſelf to be the Perſon intended. And ſome have holden that the Party by his bare Appearance ſalves the Want of an Addition, or a bad one; but this ſeems contrary to almoſt all the Authorities cited in Relation to this Matter, which ſeem to admit that the Party before other Matter pleaded may take Advantage either of the Want of an Addition or of a bad one. 2 Hawk. Pl. C. 190. cap. 23. S. 123.

2 Roll Rep. 225 S. C. and S. P. by Doderidge J. for by the Appearing and Pleading,

6. When a Party indicted *appears and* does not take Exceptions, but *pleads to Iſſue*, and it is found againſt him, he admits it, and has paſſed by the Advantage, and cannot now take Exceptions for Want of Addition; Per Cur. Cro. J. 610. pl. 5. Hill. 18 Jac. B. R. in Johnſon's Caſe.

it appears that he is the ſame Party.——Sid. 247. Paſch. 17 Car. 2. B. R. in pl. 11. ſays it was affirm'd by Keeling J. that the Law is and has been adjudg'd to be, that ill Addition or no Addition is cured by the Appearance of the Party.——[But, as I have been inform'd, this was denied Hill. 11 Geo. 2. in B. R. in the Caſe of the King v. Haddock.]

7. Want of Addition is cured by the Appearance of the Parties, and ſo is *a bad one* in the Caſe of an *Indictment for keeping an unlawful Game* of Nine-pins, and ſo being of a ſmall Offence it was quaſh'd; but had the Offence been *Riot, Oppreſſion &c.* this is no Cauſe to quaſh it. 1 Keb. 885. pl. 46. Paſch. 17 Car. 2. B. R. the King v. Warren.

8. The Defendant being ſerved with Proceſs by the Name of Dubois, the *Plaintiff enter'd an Appearance* for him, and *obtained Judgment by Default.* It was moved to ſet aſide the Judgment upon an Affidavit that his Name was Davois, but the Court refuſed it, and ſaid that ſuch kind of Motions would deſtroy all Pleas in Abatement, ſince the late *Act enabling the Plaintiff to appear for the Defendant*, and that his Appearance by the Name of Dubois is the ſame as if it was enter'd by the Defendant himſelf.

himself. 3 New Abr. 634. cites Pasch. 7 Geo. 2. B. R. Halcock v. Dubois.

For more of Additions in general, See **Abatement, Amendment, Grants, Misnomer, Names, Utlawry,** and other proper Titles.

Adjournment.

(A) Adjournment of the *Term.*

Fol. 130.

1. IF the Term of St. Michael be adjourned in Octabis Mich. till mense Mich. (as it was in 3 Jac.) there can be no Continuance from Octabis Mich. to Octabis Hill. without a Continuance to Mense Mich. but this will be a Discontinuance, for in as much as the Term was adjourned in Octab. Mich. to Mense, no Continuance can be to Octabis, for all Appearances and Continuances were adjourned to Mense Mich. and then in as much as no Continuance was to Mense this is discontinued. Mich. 15 Jac. B. R. between *Osborn and Huntly*, per Curiam, a Judgment reversed for this Cause. By Reports, * 10 Jac. 11 Jac. the same Case. Cro. J. 445, 446. pl. 24. Anon. S. C. but no Resolution as to the Discontinuance. * The Reports of those Years are not printed.

2 Upon such an Adjournment in Octabis &c. an Infant that comes to be inspected upon a Writ of Error upon a Fine, who will be of Age before the time, to which it is adjourned, cannot be inspected, because all Appearances also are adjourned, Sir *Robert Poyne's* Case, this was a great Question, but he was inspected by Consent, and Errors released. Cro. J. 230. 231. pl. 9. S. C. Mich. 7 Jac. B. R. this was ended by Composition. But at the End

of the Case it is said, viz. Note, afterwards Fleming said, that upon Conference with the Justices it was resolved that this Inspection was good, notwithstanding the Adjournment. ——— 2 Brownl. 278, 279. S C. but no Resolution. ——— Jenk. 317. pl 8. says he may be inspected at this Day on which the Adjournment is made; by all the Justices of England; for if after the Day of Adjournment, and before the Day to which it is made, he attains his full Age, the Inspection will fail; and quod Necessarium est, licitum est.

3. If the Writ of Adjournment of the Term be ab Octabis Mich. to Mense Mich. the Adjournment ought not to be made till the Morrow after the 4th Day. 21 Ed. 4. 37. Br. Exposition, pl. 47. cites S. C accordingly. — Ibid. pl. 19. cites S C. accordingly. ——— Br. Adjournment, pl 28. cites S. C.

4. If the Adjournment be de Octabis Mich. to Mense Mich. there ought to be Appearances at Octabis, for this is not adjourned, but this is taken exclusive. Mich. 15 Jac. B. R. between *Osburn and Huntley*, agreed per Curiam, and Houghton said he once knew it so. 21 E. 4. 37. And if they do not appear at the Day they will be condemned. Br. Adjournment, pl. 28. cites S. C.

Br. Expoſition, pl. 47. cites S. C. accordingly. —Ibid. pl. 19. cites S. C accordingly. the firſt Day.

5. But otherwiſe it is where the Adjournment is in Octabis to Menſe. 21 Ed. 4. 37. D. 225. [Mich.] 5. 6. Eliz. S. 35. for there the Eſſoigns cannot be kept at Octabis; for the return of Octabis cannot begin, and be held, and be adjourned the ſame Day alſo.

But if the Writ of Adjournment had been (*in & ab Octabis &c.*) then it might be done

Br. Adjournment, pl. 27. cites S. C. & S. P. accordingly, As where a Bill which was at Iſſue in

6. If the Adjournment be of all Writs, Pleas, &c. from one common Return to another common Return, as de Octabis Mich. ad 15 Mich. and ſuch like, this will not adjourn Pleas by Bill in Banco Regis; for upon theſe Pleas the Continuances are to certain Days, and not to common Returns, and therefore upon ſuch Adjournment all the Pleas upon Bills are diſcontinued. * 4 Ed. 4. 40.

B. R. had Day to *Monday the 2d. of July*, and not a common Day, and therefore it was diſcontinued.

* See infra pl. 11. S. C.

Br. Brief, pl. 349 S. P cites S. C.

8. When Adjournment of the Term comes, *the Chancery is not adjourned*; for this Court is always open. Br. Juriſdiction, pl. 74. cites 4 E. 4. 21.

Fitzh. Dette, pl. 75 cites S. C. the Juſtices bid him to keep his Day at 15 Mich. and then he would ſave his Surety well enough; for by this Adjournment the Day of Octab. and the Day of 15 Mich. are as one and the ſame Day.

9. Note, when a Man is taken by Capias returnable Octab. Trin. and is bound *to the Sheriff in* 40 *l. to appear at the ſame Day to ſave him harmleſs*, and this Term at the Day, and all the *Returns in it, are adjourned to* 15 *Mich.* there his Appearance ſhall not be recorded Octab. Trin. but at 15 Mich. and this ſhall ſave his Bond and diſcharge him; for no Appearance, Eſſoign, nor Default, nor other Things ſhall be entered at the Term adjourned, for no Roll is made of it, but only of the Writ of Adjournment, and all Things which ſhould be done at theſe Days adjourned, ſhall be done at the Day to which the Term is adjourned, and this ſhall ſerve for all. Br. Conditions, pl. 142. cites 4 E. 4. 21.

In Debt upon *Obligation* to a Sheriff *to appear at Weſtminſter ſuch a Day to anſwer &c.* the Defendant *pleaded, that before the Day of the Return of the Writ the Term was adjourned to Hertford, and he appeared there.* It was held, that the Obligation ſhall always relate to the Day and Place compriz'd in the Writ, for that ſhall not have regard to the Adjournment, and he ought to appear in B. R. or ſhall forfeit his Bond, as * 9 E. 4. is, and that ſo are diverſe Precedents; and that tho' he does appear, yet if his Appearance be not entered of Record he forfeits his Obligation, and he ought to conclude prout patet de Recordo; and of that Opinion was all the Court. Cro. E. 466. pl. 16. Hill. 38 Eliz. B. R. Corbet v. Cook.——Mo 430 pl. 601. Corbet v. Downing, S. C the Party had not forfeited his Bond. But quære if he had appeared at Weſtminſter and not at St. Albans? and Popham thought the Word *Weſtminſter* in the Condition made the Obligation void by the Statute 23 H. 6. becauſe there is not any ſuch Name in the Writ for Appearance.

* This ſeems miſprinted for 4 E. 4. 21.

10. By the Writ of Adjournment *nothing can be done at that Day but to adjourn* the Term to the Day appointed, and no Appearance can be made on any thing done but only to read the Writ of Adjournment, and to adjourn all Appearances, and all Matters and Proceedings, and Jurors, unto the Day appointed by the Writ of Adjournment. Arg. Cro. J. 446. in pl. 24. cites 4 E. 4. 20 & 41. 21 E. 4. 37. and Mich. 7 Jac. Sir R. Points's Caſe.

Br. Amendment, pl. 70. cites 4 E. 4. 41. S. C.—Br. Parliament, pl. 3. 54. cites S. C. ——

11. *Trinity Term was adjourn'd*, and the *Writ of Adjournment made Mention only of Actions, Suits, Pleas &c. Octabis Trinitatis*, 15 *Trin. Craſtino Johannis*, and ſo of common Day only *that they ſhould be adjourned to* 15 *Michaelis*, and there was a Bill between two Parties who were at Iſſue, and had ſpecial Day, as Die Lunæ &c. and this paſſed for the Plaintiff, and he demanded Judgment, and it was alleged in Arreſt of Judg-

Judgment that this was a Diſcontinuance, & verum eſt, per Cur. and it cannot be amended, and therefore it was ſhewn to the Parliament, and *by ſpecial Act of Parliament the Writ of Adjournment and the Roll thereof was amended*, and extended as well to ſpecial Days as to common Days; Quod Nota. Br. Diſcontinuance de Proceſs, pl. 36. cites 4 E. 4. 40. The ſmaller Editions of Brooke cite this at Tit. Diſcontinuance of Proceſs, pl. 36. as 4 E. 3 40. but are miſprinted and ſhould be 4 E. 4. 40. ——Fitzh. Diſcontinuance, pl. 27. cites S. C. accordingly.

12. *Three Proclamations ſhall be made*, when the Writ of Adjournment of the Term ſhall be read. Br. Proclamation, pl. 6. cites 21 E. 4. 37. Br. Adjournment, pl. 28 cites S. C. that 3 Proclamations were made, and then the Term was adjourn'd, and the Filacers made out Writs to the Sheriff to return the Writs at the Days mentioned in the Adjournment.

7. Memorandum that the Feaſt of the *Nativity of St. John Baptiſt*, 1556, *fell upon the Wedneſday* which ought to have been the laſt Day of Trin. Term that Year, and therefore was *adjourned in the Vigil to the Thurſday next*, becauſe the Day of this Feaſt is not dies Juridicus, and therefore the Juſtices ſhall ſit Thurſday, and ſhall not loſe the Day. Br. Adjournment, pl. 35.

13. A Writ of Adjournment from Menſe Mich. to Craſtino Animarum *contained, that all Pleas, Writs &c. to be held or pleadable at any Return before the ſaid Return of Craſtino Animarum, (naming the Returns ſpecially) ſhall be adjourn'd to the ſaid Return* of Craſt. Anim. and therefore the Juſtices upon View thereof thought, that as to Writs, and Pleas &c. pleadable or returnable the ſaid Mich. Term after the ſaid Return of Craſt. Anim. there ought to be new Writs, authorizing them to adjourn all the Writs and Pleas returnable after the ſaid Return of Craſt. Anim. as well as thoſe before, and new Writs were iſſued accordingly. And. 278, 279. pl. 286. Mich. 34 & 35 Eliz.

14. If the Adjournment of a Term be to be made in *Octab. Trin.* it ſhall be made *in every Court of B. R. and C. B. and Exchequer, the very firſt Day of Octabis.* D. 225. Marg. pl. 35. cites Trin. 35 Eliz. Poph. 33. Trin. 35 Eliz. accordingly.—— But if it be adjourned *to Octab. Trin.* then the Juſtices held, that it ſhall [not] be adjourned till the Riſing of the Court upon the 4th Day of the ſaid Octabis. D. 225. b. Marg. pl 35. cites Trin. 35 Eliz.——Poph 33. pl. 2. Trin 35 Eliz. S. P. but ſays that the Juſtices held, that the Adjournment ought not to have been made until the ſitting of the Court the 4th Day from Octabis.

And becauſe the Writs were, That *at the ſaid Tres Trin. the Term ſhall be holden thereafter, as if no Adjournment had been*, the Juſtices held that they ought to ſit the firſt Day of the ſaid tres Trin. and ſo from hence every Day until the End of the Term, and for all Cauſes, as if no Adjournment had been; and ſo they did accordingly, ſaving, by Aſſent, ſome of the Juſtices did not come thither, by reaſon of their far Diſtance from London at the End of the Term upon the laſt Adjournment; but they held, that if it had not been for the ſpecial Words in the Writ, which were, that it ſhall be then holden as if no Adjournment had been, the Eſſoigns had been the firſt Day of Tres Trin. and the full Term had not been until the 4th Day, which was the laſt Day of the Term; Quod Nota; and ſo it was of the Adjournment which happened firſt at Weſtminſter, and afterwards at Hertford from Michaelmas Term now laſt paſt. Poph. 33 pl 2.

15. Mich. Term was adjourn'd from Octab. Mich. till Menſe Mich. and at Menſe Mich. it was adjourn'd till Craſt. Anim. The Juſtices held that the *Quarto die poſt is the Day of ſitting after Adjournment*, as it is where the Term begins without Adjournment. Cro. C. 13, 14. pl. 1. 3. Mich. 1 Car.

16. The 2 firſt Returns were adjourn'd *to Tres Michaelis, which was Wedneſday*; the full Term did not commence till the Saturday after, which was the Quarto Die poſt. D. 225. b. Marg. pl. 35. cites Mich. 6 Car.

17. *Entry of an Appearance, as of the firſt Return*, when the Term was adjourned to another, is a Diſcontinuance; per Curiam. Keb. 273 pl. 61 Paſch. 14 Car. 2. B. R. Anon.

18. An Adjournment was *from Weſtminſter to Oxford, from the 1ſt Day of the Return to Octab. Martini*, and a Proclamation appointing all Perſons to keep their Days then and there. And a *Judge of every Court came the 1ſt Day to Weſtminſter, and there held the Eſſoigns, and read the Writ of Adjournment*, and adjourned the Courts to Octab. Martini at Oxford, and at the Eſſoign-Day there they only held the Eſſoigns, and *did not ſit in open Court till the Quarto Die poſt.* And by the Proclamation all judicial Hearings in Chancery, Exchequer, and Dutchy, and all *Decrees were ſtay'd*; and in B. R. in C. B. and Exchequer, no Trial by Jury, nor Judgments upon Special Verdict or Demurrer, were to be given. Lev. 176. Mich. 17 Car. 2.

19. A Term was *adjourned, except only the 2 laſt Returns, to Windſor.* Thoſe two laſt Returns cannot be held at Weſtminſter by Re-adjournment, becauſe by the firſt Adjournment the Day in Court is the Quarto Die poſt, and ſo only Part of the Return would be adjourned, which muſt not be; and it was held that it could not. And therefore upon the Quarto Die poſt Craſt' Pur' which was 6 Feb. the Courts ſate at Windſor, and heard ſome Motions, and then read Writs of Adjournment of the laſt Return to Weſtminſter; and accordingly the Courts ſate at Weſtminſter Octab. Pur. For it was ſaid that it is not requiſite to wait till the Quarto Die poſt upon the 2d Adjournment; and ſhould it be ſo in this Caſe, the Term would be ended before that Day. Sid. 276. pl. 2. Hill. 17 & 18 Car. 2.

(B) Adjournment. Trial of a *Foreign Plea.*

See (E) pl. 1. 2. S. C. In a Franchiſe ſuch Plea does

1. IN Real Actions in London, **if a Foreign Plea be pleaded, it** ſhall be ſent into the Common Pleas **to be tried.** 3 Hen. 4. 12.

2. **But** otherwiſe **it is** in Perſonal Actions. 3 H. 4. 12.

not go to the Juriſdiction in Real Actions; tho' otherwiſe it is of ſuch Plea in Perſonal Actions. Br. Juriſdiction, pl. 81. cites S. C. that it was ſo ſaid there.——Br. Cauſe de Remover Plee &c. pl. 41. cites 3 H. 4. 15. that ſuch Plea in Debt in London goes to the Juriſdiction; but upon *Foreign Voucher in Plea Real*, the Plea ſhall be removed in Banco by the Statute to try the Warranty, and afterwards be remanded. Contra in Action Perſonal; but at Common Law it was all one.——S. C. cited 2 Le. 37. in pl. 49.——S. C. cited Arg. Saund. 98.——[But for this ſee Tit. Voucher, (B. b. 2) per totum.]—If Foreign Plea be pleaded in London, Lancaſter, or the like, it ſhall be removed by Certiorari out of Chancery, and ſent into Bank by Mittimus to be tried, and this by the Equity of the Statute of Glouceſter, cap. 13. Br. Cauſe de Remover Plee &c. pl. 42. cites 22 H. 6. 58. 59.

(C) At

(C) At what *Time* it ſhall be made.

Fol. 131.

1. IN an Aſſiſe againſt divers, if they ſeverally take the intire Tenancy upon them, and plead ſeveral Bars and Matter of Difficulty, the Aſſiſe ſhall not be adjourned till it is inquired which of them is Tenant. 35 Aſſ. 2, 3. per Curiam. See (G) pl. 21. S. P. and *becauſe they did not do ſo,* but adjourn'd in Bank, therefore *it was remanded from the Bank to inquire of the Tenancy.* Br. Aſſiſe, pl. 339. cites 35 Aſſ. 2.

(D) What ſhall be a *good Cauſe* of Adjournment of a *Foreign Plea.*

1. AFter Verdict againſt the Plaintiff in an Aſſiſe, if the Parties are adjourned to another Day, at that Day the Plaintiff may be nonſuit. 47 Edw. 3. 2. Br. Aſſiſe, pl 32. cites 47 E. 3. 1. 2. —Br. Nonſuit, pl. 6. cites S. C. ——Fitzh. Nonſuit, pl. 12. cites S. C. ——But the Law is otherwiſe now by the Statute 2 H. 4. cap. 7. which ſee at Tit. Nonſuit (D) pl. 14. and the Notes there.

2. In an Aſſiſe for Rent-Charge, if Iſſue be taken that he did not charge by the Deed, which bears Date in another County, the Aſſiſe ſhall not be adjourned; for the Deed is not denied. 47 Edw. 3. 2. Br. Aſſiſe, pl. 260. (259) cites 26 Aſſ. 3. ——Fitzh. Viſne, pl. 44. cites S. C.

3. But otherwiſe it is if the Aſſiſe be brought againſt an Infant, and he ſays he did not charge by the Deed; for there the Deed is in Queſtion, as it ſeems. 26 Aſſ. * 2. Adjudged. S. P. Br. Aſſiſe, pl. 260. cites 26 Aſſ. 3.— Br. Viſne, pl. 96. cites S. C. that the Viſne was of the Foreign County, as if he had pleaded Non eſt factum.—— Br. Re-attachment, pl. 31. cites S. C.

* It ſhould be 26 Aſſ. pl. (3.)

4. If in an Aſſiſe the Releaſe of the Plaintiff, bearing Date in a Foreign County, is pleaded in Bar and denied, this is a good Cauſe of Adjournment in Banco; for they cannot try it where the Aſſiſe is brought. 22 Edw. 3. 12. b. 29 Aſſ. 70. 37 Aſſ. 16. Adjudged 6 Aſſ. [4.] S. P. Br. Aſſiſe, pl. 133. cites 8 Aſſ. 15. —S. P. Br. Aſſiſe, pl. 119. cites 6 Aſſ. 4. ——Br. Damages, pl. 155. cites S. C.

5. In an Aſſiſe [by 3 ſeveral Summons's] if the Tenant, as to 2 of the Summons's, pleads 2 ſeveral Iſſues triable where the Aſſiſe is brought, and as to the third Summons vouches in a Foreign County, the whole Aſſiſe ſhall be adjourned, becauſe it ſhall not be taken by Parcels. 17 Edw. 3. 28. b. [pl. 26.] Fitzh. Tit. Mortdanceſtor, pl. 5. S. C.

6. In a Mortdanceſtor, if the Tenant vouches two, and prays that one may be ſummoned in the ſame County, and the other in a Foreign County, becauſe he had nothing in the ſame County, this is a good Cauſe Br. Mortdanceſtor, pl. 37 cites S. C.

See 2 Inſt. 325. 326. Cauſe of Adjournment, becauſe otherwiſe both ſhould not be ſummoned. 29 Aſſ. 48. Adjudged.

The Demandant reply'd that all lay in the Guildable; and by all the Juſtices upon Adjournment, this may well be try'd by thoſe of the Guildable. Br Trial, pl. 76. cites S. C. and ſays the Reaſon ſeems to be, that tho' the Place be a Franchiſe, yet it *lies in and is Parcel of the ſame County*, and the Jurors can take Conuſance throughout all their County.

7. If in an Aſſiſe it be pleaded that Part of the Land is in a Franchiſe, which ought not to be tried by Foreigners, this is no Cauſe of Adjournment; for it may be tried by the Aſſiſe. 30 Aſſ. 13. Adjudged.

Br. Aſſiſe, pl. 301. (300) cites S. C. by Thorpe and Knivet.

8. In an Aſſiſe, if it be pleaded that the Land is in another County, the Aſſiſe ſhall not be adjourned upon this, but this ſhall be inquired by the Aſſiſe. 29 Aſſ. 51.

Br. Aſſiſe, pl. 301. (300)

9. If in an Aſſiſe the Iſſue be, whether the Land in Demand was put in View in another Aſſiſe, the Record of which is pleaded in Bar, and the Sheriff returns the Venire Facias againſt the firſt Jurors, that they have nothing to be ſummoned by, upon which one of the Parties ſays they have Aſſets in a Foreign County, this is not any Cauſe of Adjournment of the Aſſiſe to try it. 29 Aſſ. 70. adjudged; for the Aſſiſe is to be taken in the proper County.

* Br. Aſſiſe, pl. 118. [117] S. C. *Releaſe of the Plaintiff was pleaded and denied*, and becauſe the *Witneſſes were in another County*, the Aſſiſe was ſent into Bank by Adjournment; and after, at the Grand Diſtreſs return'd againſt the Witneſſes, they came not; whereupon the Aſſiſe was in Point to be remanded And ‡ Herle was in Doubt by whom he ſhould ſend the Releaſe, and to have a ſure Meſſenger. Br. Aſſiſe, pl. 118. [117] cites 5 Aſſ. pl 7.

10. In an Aſſiſe, if the Deed bears Date in the ſame County where the Aſſiſe is brought, and the Witneſſes live in a Foreign County, yet this is not any Cauſe of Adjournment; for the Aſſiſe is to be taken in the proper County. 29 Aſſ. 70. * 5 Aſſ. 7. Adjudged † 6 Aſſ. 4.

‡ The Book of 5 Aſſ. pl. 7 is, viz. Herle then ſaid, that he knew not why they ſhould remand it, inaſmuch as it was pleaded againſt him, and the Tenant has ſhewed it before, and he would not find a Meſſenger.——Br. Teſtmoignes, pl. 24. cites S. C. that the Aſſiſe ſhall be remanded.

† Br. Aſſiſe, pl. 119. [118] cites S. C.

Br. Trial, pl. 79. cites S. C. and both the ſame Points. —See Tit. Trial, (E. 2) per totum.

11. In an Aſſiſe by A. S. who was the Wife of J. S. if the Tenant ſays that J. S. is living in another County, this is no good Cauſe of Adjournment; for this ſhall be tried by Witneſſes. 36 Aſſ. 5. Curia. But in this Caſe, if the Writ ſhould be brought by the Name of A. without ſuppoſing the Coverture before, * it would be otherways. 36 Aſſ. 5. It ſeems to be intended that he alleged Coverture in another County.

* Fol. 132.

Br. Trial, pl. 79. cites S. C.

12. In an Aſſiſe, if the Deed of the Anceſtor with Warranty be pleadged [pleaded] in Bar, and the Demandant ſays that the Anceſtor is living beyond the Seas, or in another County, this ſhall be tried by the Aſſiſe, and ſhall not be adjourned. 36 Aſſ. 5. (It ſeems the Life cannot be tried by Aſſiſe.

13. Aſſiſe in the County of C. a *foreign Releaſe was pleaded in the County of N.* and they were adjourned into Bank for Difficulty, and after the *Deed was denied*, and *Venire facias awarded to the Sheriff of N.* and had Day over, at which Day the *Tenant made Default*, upon which the Aſſiſe was *remanded*. Br. Aſſiſe, pl. 97. cites 39 E. 3. 10.

(E) *What* ſhall be ſaid to be *a Foreign Plea*, for which it ſhall be ſent in Banco. Trial of a Foreign Plea. See Tit. Foreign Plea.

1. IN a Formedon in London, if a Releaſe with Warranty be pleaded, dated in a Foreign County, if the Deed be denied, it ſhall be ſent in Banco. 3 H. 4. 12. See (B) pl. 1. S. C. and the Notes there.

2. So if a Warranty and Aſſets be pleaded in a Foreign County, and the Aſſets denied, it ſhall be ſent in Banco. 3 H. 4. 12. See (B) pl. 1. —3 H. 4. 15 a. pl. 4.

It was ſaid by Horton, Arg. That if in a Formedon the Tenant pleads the Warranty with Deſcent in the County of Cheſter, the Court will ſend to the Juſtices there to inquire; and ſo if he pleads a Releaſe which bears Date there.

3. In an Aſſiſe, if a Releaſe be pleaded in a Foreign County, the Aſſiſe ſhall be adjourned in Banco, to try the Releaſe. 13 H. 4. 3. b. 22 Edw. 3. 4. b. Fitzh. Aſſiſe, pl 125. cites S. C.

4. In Dower, if the Tenant vouches another to Warranty, and prays that he be ſummoned in the County of York, and Durham, which is a County Palatine, yet becauſe the Summons in York is ſufficient, the Voucher ſhall ſtand. 10 Hen. 6. 20. Fitzh. Tit. Voucher, pl. 39. cites 13 H. 4. S. P accordingly; and cites 18 E. 3 a like Caſe —— Ibid pl. 49. cites Paſch 36 H 6. S. P. where the Prayer was to ſummon him in the County of Wilts, Somerſet, and Cheſter Prior ſaid, that if the Sheriff returns that he has Aſſets in either County, it is ſufficient, and the Whole is ſerved. —— 4 Inſt. 219. S. P.

5. If a Man be vouched in Banco, and it is pray'd that the Vouchee be ſummoned in a County Palatine, the Common Pleas ſhall immediately award Proceſs to them there. 19 Hen. 6. 12. 52. Br. Cinke Ports, pl. 8. cites S. C. —S P. and the like of all Things which ariſe in the County Palatine. Br. Trials, pl. 39. cites 9 H. 6. 12. S C.

If the Tenant *vouches two, one within the County Palatine* of Durham, *and the other at the Common Law*, Summons ſhall be awarded to the Lord of the County Palatine, commanding him to ſummon the Vouchee to be at a certain Day before the Juſtices here to try the Warranty; in this Caſe, if the *Tenant recovers in Value*, the Juſtices ſhall write to the Lord of the County Palatine to render in Value. 4 Inſt. 219. cap. 38. cites 19 H. 6. 52. —— S. C. cited Fitzh. Tit. Trial, pl. 7. by Paſton, as a Precedent of a Caſe ſo held

6. If a Cauſe be removed out of a County Palatine into the Common Pleas, and the Plea is put without Day by Protection, and after a Reſummons is ſued, the Reſummons ſhall be directed to the Sheriff of the County within which the County Palatine is, or [and not] to the Biſhop of Durham; for he ſhall not have Juriſdiction again, being once diſabled. 17 Edw. 3. 36.

7. If there be a Recovery in Value in Banco againſt a Vouchee that is within the County Palatine, the Common Pleas ſhall award Proceſs there to execute it. 19 Hen. 6. 52. b. See pl. 5. S. C. and the Notes there.

8. In an Aſſiſe, if the Tenant vouches J. S. in the ſame County, and the Sheriff returns that he hath not Aſſets in this County, and it is averr'd that he hath Aſſets in another County, the Aſſiſe ſhall be adjourned in Banco, to have him ſummoned in the County alleged. 36 Aſſ. 6.

(F) *By*

See Tit. Cinque Ports. ——Courts, (R. a) (S. a) —Tit. Trial, (N. b. 6)—— Tit. Wales (B)

(F) *By whom* a Foreign Plea may be *tried.*

1. IF there be an Iſſue, whether a Man was at large at B. at Cheſter at the Time of the Outlawry pronounced, it ſhall not be ſent to Cheſter to be tried, becauſe the King's Writ does not run there. 3 Hen. 4. 15.

Fitzh. Aſſiſe, pl. 125. cites S. C.— This was only a Caſe

2. In an Aſſiſe at York, if a Releaſe be pleaded, dated at Lancaſter, yet ſhall the Deed be tried by the Juſtices and thoſe of York. 3 H. 4. 15.

cited by Gaſcoigne, 3 H. 4. 15. in pl. 4. a. and ſays the Juſtices tried the Deed by thoſe of York &c.

4 Inſt. 205. cap. 36. Ld. Coke cites many Books as to this

3. In Debt upon a Leaſe for Years in B. if the Defendant pleads a Releaſe dated in Durham, this ſhall be tried in Banco. 11 Hen. 4. 40. Quære.

Point in Marg. and ſays that in ſuch Variety of Opinions he holds the Law to be that the Statute 9 E. 3 extends not to Caſes when any other Iſſue is join'd triable in the County Palatine, but only of a Deed pleaded in Bar in any Court at Weſtminſter; and that he grounds his Opinion on the Reſolution of all the Judges of England in the Exchequer-Chamber in 32 H. 6. 25.

* Br. Juriſdiction, pl. 25. cites S. C. ——Br. Proceſs, pl. 134. cites S. C. but S. P. does not fully appear.

4. If an Iſſue be join'd in Banco which is to be tried in Durham or Lancaſter, as whether Land be Parcel of a Portion &c. there, the Record ſhall be ſent there to be tried, and when it is tried it ſhall be remanded in Banco. * 11 Hen. 4. 40. b. † 19 H. 6. 12. It ſhall be tried there and not in the County next adjoining; for theſe Places were derived out of the Crown.

——Br. Trial, pl. 27. cites S. C. by Hank and Culpepper ——Fitzh. Debt, pl. 112. cites S. C. ——S. C. cited Br. Cinque Ports, pl. 8. at the End of the Caſe.

† Br. Cinke Ports, pl. 8. cites S. C.——Br. Trial, pl. 30. cites S. C.

See pl. 4. S.C. and the Notes there.

5. If an Iſſue be join'd in Durham which cannot be tried there, this ſhall be ſent in B. and they ſhall try it. 11 Hen. 4. 40. b.

Fol. 133.

6. If Iſſue be join'd in B. of a thing triable in London, this ſhall not be tried in Banco, becauſe the Londoners have a Privilege not to come out of London. Quære 19 H. 6. 52. b.

7. But the Court may try it there by Niſi Prius. 19 H. 6. 52. b.

8. If there be a foreign Voucher upon a Plea in ancient Demeſne, this ſhall be tried in B. and after Trial remanded. 19 H. 6. 53.

See tit. Trial (I a) pl. 8. and the Notes there.

9. If an Iſſue be join'd in Banco of a Matter triable in Ireland, this ſhall be ſent into Ireland to be tried, and after Trial ſhall be remanded. 19 H. 6. 53. b.

Br. Trials, pl. 39. cites S. C.— Vaugh. 407. S. C. cited by Vaughan Ch. J. in the Caſe of Proceſs into Wales.

10. By the Common Law, all things alleged in Wales ſhall be tried by the Sheriff of the next County of England, for elſe there would be a Failure of Right; for the Court here cannot try this in Wales. 19 H. 6. 12. b.

——Ibid. 404. Vaughan Ch. J. ſays that ſuch Trial was firſt ordain'd in Parliament, tho' the Act be not now extant; nor that it is conceivable how it ſhould be otherwiſe, it being an empty Opinion that it was by the Common Law, as is touch'd in ſeveral Books, that knew the Practice but were Strangers to the Reaſons of it. For had the Law been that an Iſſue ariſing out of the Juriſdiction of the Courts of England ſhould be tried in the next County to the Place where the Iſſue did ariſe, not only any Iſſue ariſing in any the Dominions of England out of the Realm might by that Rule be tried in England, but any Iſſue ariſing in any foreign Parts, as France, Holland, Scotland,

Scotland, or elsewhere, that were not of the Dominions of England, might, pari ratione, be tried in the County next adjoining, whereof there is no Vestigium for the one or the other, nor does it take any Way with the rule of the Law. —— Besides Wales was made of the Dominion of England within Time of Memory, viz. 12 E. 1. and whatever Trial was at Common Law must be beyond all Memory; so that no such Trial for Land in Wales particularly, could be by the Common Law. Ibid. 424.

11. If an Issue be join'd in B. of a thing in Wales, which should be tried there, yet shall not the Record be sent thither to be tried; but it shall be tried in the next County of England next adjoining thereto, because Wales was a Realm of itself. 19 H. 6. 12.

12. So if a Man vouches another, and prays that he may be summon'd in Wales, the Process shall not issue into Wales, but to the Sheriff of the next County adjoining. 19 H. 6. 12. Br. Cinque Ports, pl. 8. cites S. C. per Fulthorpe.

13. If a Manor in Wales be in demand here the Writ shall issue to the Sheriff of the County adjoining, to summon him in the said Manor. 19 H. 6. 12. b. (It seems not to be intended that he shall enter into Wales and summon him there, but in his own County.) Br. Cinque Ports &c. pl. 8. cites S. C. and S. P. by Fulthorpe —— S. C.

cited by Vaughan Ch. J. and that it was of the Manor of Abergavenev, which was a Lordship Marcher, and held of the King in Capite. Vaugh. 407. in the Case of Process into Wales.

14. In a Writ of Dower in any Court real [Royal] in Wales, if they are at issue upon Ne unque accouple in lawful Matrimony, the Court there hath not Power to make out Process to the Bishop, but the King shall write to the Steward there, to send the Record here in Bancum, and here Process shall be awarded to the Bishop. 19 H. 6. 12. Br. Trials, pl. 39. cites S. C. —— Br. Cinque Ports, pl. 8. cites S. C. per Fortescue and Newton.

Newton.——S. C. cited by Vaughan Ch. J. Vaugh. 410. in the Case of Process into Wales; but says that this is against the Resolution of all the Judges in Cro. 2 Car. fol. 34. [But see this Case which is intended to be pl. 7.]

15. If in the Court of a Lord in Wales a Deed is pleaded bearing Date in another Seignory Royal, in this Case the one hath not Power to write to the other to try this Deed, and therefore it shall be sent into the Common Pleas to be tried. 19 H. 6. 12. Br. Trials, pl. 39. cites S. C. —— Br. Cinque Ports, pl. 8. cites S. C. per Newton.

16. In a *Formedon in Durham*, the *Tenant pleaded the Warranty of the Ancestor* of the Demandant *with Assets in a foreign County*, whereupon the *Court awarded that the Tenant should go quit without Day*. And the Demandant, upon this Judgment, sued a *Writ of Error before the Bishop*, and assign'd for Error, that the Justices awarded that the Tenant should go quit without Day, where they *ought to have continued the Plea by Adjournment until the Record had been removed*. And for this Error the Bishop reversed the Judgment, and Day given to the Parties before his Justices where the Plea was pleaded; at which Day the Tenant was essoign'd, and a Day given over, and at that Day a Writ came to *remove the Record into C. b.* and Day given to the Parties in C. B. And this Proceeding of the Bishop was according to the Usage there; and after by the Advice of the whole Court, a Venire Facias issued out of C. B. to try the Issue join'd at Durham. 4 Inst. 218. cites Mich. 14 E. 3. tit. Error, 6.

17. If a *Foreigner is vouch'd in Chester* this shall be sent and *tried there, and after shall be remanded*. But it is said elsewhere that it shall be brought to the Bank by Writ of the Chancery. See the Register thereof, &c. Br. Trials, pl. 130. cites 49 E. 3. 9. In *Formedon*, brought in *Chester*, the Tenant *vouch'd a Foreigner to Warranty* in S. and the Justice sent the Record to C. B. and when the Voucher was determined the

Court of C. B. ſent it back to the Juſtice, without writing to the Chamberlain; Per Dyer, who ſaid he had ſeen ſuch Record; And Harper agreed that this might well be in ſuch Caſe. Dal. 101. pl. 33. Anno 15 Eliz. in Caſe of Bidle v. Spencer

18. 34 & 35 *H.* 8. *cap.* 26. *S.* 88. *In Caſe any foreign Plea or Voucher be pleaded, or made before the Juſtices of* Wales *between Party and Party, triable in any other Shire without Wales, the Juſtices ſhall ſend the King's Writ, with a Tranſcript of the Record under Seal, unto the Juſtice of the County where the Matter is triable, commanding the ſaid Juſtice to proceed to the Trial thereof, which Trial he ſhall remand with the whole Record unto the Juſtice before whom the Plea or Voucher was pleaded.*

19. *S.* 89. *In Caſe the foreign Plea or Voucher be triable within England, the Juſtice ſhall proceed to Trial thereof within the Shire of Wales where the Matter was pleaded.*

20 In Debt on Bond for Non-performance of *Covenants* in *aſſuring Land in the County of Cheſter*, they were at *Iſſue upon the Value*, which was to be tried by the County Palatine, becauſe the Land lay there, but *before the Court had wrote to the County Palatine the Plaintiff pray'd to diſcontinue* the Suit, and it was granted; for it was ſaid that the Record cannot be demanded but at his Suit only. And Dyer ſaid that the Record ſhall be ſent to the *Juſtice* of Cheſter, and that the Court ſhall write to him as Officer immediate, and he ſhall thereupon make a Venire Facias to the Sheriff But Harper ſaid that the Writ ſhall be to the *Chamberlain*, and that he ſhall make a Venire Facias to the Sheriff. Dal. 101. pl. 33. Anno 15 Eliz. Bidle v. Spencer.

See Tit. Voucher (B. b. 2.)

(G) After Adjournment, what Plea may be pleaded.

* Br. Adjournment, pl. 1. cites 42 E. 3. 11. S. C.

1. WHEN a Plea is pleaded to a certain Point, and an Adjournment thereupon, the Party ſhall not plead a new Plea not purſuant to the firſt. * 42 E. 3. 12. 44 Aſſ. 28.

Aſſiſe was adjourned, *whether the Plaintiff ſhould have Aſſiſe of* 10 *l.* Rent, *or only of* 40 *s. Rent*, and it was *adjudged for the Plaintiff* upon the Adjournment, and that the Aſſiſe lies of the 10 l. Rent, and the *Tenant upon this would have pleaded in Bar*, and was not ſuffered, becauſe they were adjourned *upon a Point certain*; Quod Nota. Br. Adjournment, pl. 11. cites 8 Aſſ. 10.

* Br. Adjournment, pl. 2. cites S. C.——Br. Coverture and Infancy, pl 8. cites S. C.——Br. Garranty, pl. 10. cites S. C. but not S. P.——Fitzh. Aſſiſe, pl. 56. cites S. C. and S. P.

2. The ſame Law tho' it be pleaded by an Infant. * 44 E. 10. b. 44 Aſſ. 28.

* Br. Adjournment, pl. 1. cites S. C.——† Br. Adjournment, pl. 31. cites S. C.

3. But after Adjournment he may plead a new Plea purſuant and proving the firſt. * 42 E. 3. 12. †44 E. 3. 31. 42 Aſſ. 20.

Br. Adjournment, pl. 1. cites 42 E. 3. 11. S. C. which was Aſſiſe by W. and E. his Feme againſt H. who ſaid, that where E. claimed as Daughter and Heir to R. T. that he is Son to R. T. Judgment &c. The Plaintiff pleaded by way of Eſtoppel, that *in another Aſſiſe* by her againſt this ſame H. *he pleaded that R. T.* was ſeiſed in Fee, and *took M. to Wife*, who had Iſſue this ſame H.

4. As if an Aſſiſe was adjourned upon a Special Plea to prove the other a Baſtard, which is but Evidence to convey him to the Iſſue that he is a Baſtard, and therefore in Banco he may ſay that he is a Baſtard 42 E. 3. 12.

H *and after, during M's Life, took another Wife, and had Iſſue E. the Plaintiff*, and thereupon E. rejoin'd that H was a Baſtard, and ſo demanded Judgment, in as much as H. confeſſed, that during M.'s Life R. T took another Wife, and had Iſſue E. the Plaintiff in the Eſpouſals, whereby it ſhall be intended that a Divorce was had between R. T. and M. his firſt Wife, and that the Eſpouſals between R. T. and the ſecond Wife continued all their Lives; Judgment if he ſhall be received to claim as Heir, and thereupon they were adjourned to Weſtminſter; And at the Day it ſeemed to the Juſtices that the Eſtoppel was not good; For E the Plaintiff confeſſed that H. was Son of the firſt Wife, and did not ſhew Divorce between R. T. and the firſt Wife, and by the pleading the ſecond Eſpouſals *a Divorce ſhall not be intended unleſs alleged in Fact*, and therefore the Court was of Opinion againſt the Plaintiff; whereupon E. *ſaid that H. is a Baſtard*, to which he anſwered, that ſhe ſhall not plead this after Adjournment; For, per Kirton, where they are adjourned upon a Plea certain, they ſhall not afterwards plead a new Plea; quod Finch conceſſit if it be not purſuant to the firſt Matter; but here it is *as Evidence in Affirmance of the Baſtardy*, and thereupon Day was given till the Day after, at which Day the Plaintiff being demanded did not come, and Judgment quod nil capiat per Breve.

5. So if the Plaintiff ſays the Tenant was born before the Marriage, upon which they are adjourned whether he ſhall have the Plea without concluding fully that he is a Baſtard, he may in Banco ſay, that the Tenant pending this Action was certified a Baſtard by the Ordinary in an Action between him and another, and upon which Judgment is given. 18 E. 3. 33 b.

6. In an Aſſiſe againſt Baron and Feme, if the Aſſiſe be adjourned into Bank upon a ſpecial Point, and at the Day in Bank the Husband makes Default, and the Wife is there received, ſhe may plead the ſame Plea that was pleaded before. 3 H. 4. 18. Fol. 134. Kelw. 109. b. in pl. 30. Caſus incerti

temporis, Anon S. P. Arg.——Br. Adjournment, pl. 32. cites S. C. and ſays, Note, that upon Adjournment of a *foreign Releaſe* in Aſſiſe in Bank pleaded by Baron and Feme, [it was held] by ſome, if at the Day in Bank the *Baron made Default*, there *the Feme cannot be reſceived*; for their *Power is only to try the foreign Deed*, as in Caſe of a foreign Voucher in London, and yet the Feme was reſceived.

7. So ſhe may plead that the Releaſe before pleaded was made in another Place than was pleaded before. 3 H. 4. 18.

8. If an Aſſiſe be adjourned in Banco upon a * certain Point, ſcilicet, on a Challenge to a Plaint, if this be adjudged as Challenge, yet he may take another Challenge, and falſify the Plaint by as many Cauſes as he can. 17 E. 3. 34. b. * See pl. 27.

9. And the other may maintain the Plaint by as many Things as he can. 17 E. 3. 34. b.

10. In Aſſiſe, if the Tenant pleads Baſtardy in the Plaintiff, to which the Plaintiff ſays he was born during the Eſpouſals between his Father and Mother, upon which they are adjourned in Bank, whether the Plea be but Evidence that he is a Baſtard, the Tenant may ſay in Bank, that there was a Divorce &c. between the Father and Mother, for this is purſuant to his firſt Plea, ſcilicet, to prove him a Baſtard in the Court Chriſtian. 39 E. 3. 31. b. * 39 Aſſ. pl. 10. * Br. Adjournment, pl. 23. cites S. C. & S. P. accordingly, but if the new Matter had been contrariant to the firſt

Plea, it would be otherwiſe——Fitzh. Baſtardy, pl. 18. cites S. C.

11. In an Aſſiſe for a Rent, if the Plaintiff makes Title thereto, that A. was ſeiſed in Fee, and granted this to B. in Fee, who deviſed it in Fee, and the Parties demur, becauſe the Plaintiff hath not ſhewn forth the Deed of Grant made by A. to B. upon which they are adjourned before themſelves at Weſtminſter, the Plaintiff may there ſhew forth the Deed; for this is purſuant and enforcing the Matter alleged before 38 Aſſ. 28. adjudged. S. P. Br. Adjournment, pl. 21. cites S. C.——Br. Monſtrans de Faits, pl. 101. cites S. C. but not S. P.

12. In an Aſſiſe, if the Tenant pleads that he is Heir to J. S. who died ſeiſed, and the Demandant pleads a Matter to prove him a Baſtard, upon which they are adjourned in Bank, whether the Plea be but Evidence,

Evidence, (salvis partibus rationabilibus) the Demandant in Bank may say that the Tenant is a Bastard; for this is an Inforcement of his Plea before. 42 Ass. 20. adjudged.

* S. P. Br. Assise, pl. 41 cites 50 E. 3. 9. but it shou'd be [19.] But it was admitted that if he had pleaded a *Plea to the Bar by Bailiff, and so at Issue Nul tort, or if the Assise had been taken by Default*, there *he may at another Day come in Person, or by Attorney, and plead a Plea in Bar, upon which Certification of Assise lies*; but *not at the same Day that the Assise is awarded upon Plea of the Bailiff.* But where a Man *demurs in Law upon a Plea to the Writ, and it is adjourned upon Matter in Law*, which is *adjudged against the Tenant*, there *he may plead in Bar*; but *contra upon a Plea to the Writ, and Issue taken upon it, and it is adjourned* but to know how it shall be tried; for there the Parties were at Issue before.—Br. Trial, pl. 16. cites 50 E. 3. 19. S. C. but I do not observe the Point of the Bailiff there.

13. So if in an * Assise the Tenant pleads in Person, or by Attorney in Abatement, a Plea triable by the Assise, upon which it is adjourned, he cannot plead in Bar afterwards. 50 E. 3. 19. b. adjudg'd. But if the Party pleads a Matter of Record, or other Matter not triable by the Assise, and upon this it is adjourned, he may plead in Bar after. 50 E. 3. 20.

14. So if the Tenant in an Assise pleads by Bailiff, after Adjournment he may plead in Bar. 50 E. 3. 20.

Assise in Pais, if the *Parties are at Issue which arises in a Foreign County*, the Assise shall be adjourned into Bank to try the Issue, and if it be *Feoffail*, the *Parties shall replead there.* Quod nota. Br. Adjournment, pl. 7 cites 22 H. 6. 10.———Fitzh. Repleader, pl. 16. cites S. C. and it was awarded that they should replead without remanding the Assise, and that they need not replead all de Novo, but should commence the Plea where it was faulty &c.

15. If the Adjournment be for Difficulty upon the Issue, by what County the Issue shall be tried, if it appears to the Court that the Issue is mistaken, yet the Court hath not Power to make them replead. 14 H. 4. 10.

16. In an Assise, if the Tenant makes Title as Heir to J S and the Plaintiff says the Tenant was born before Marriage, upon which the Parties are adjourned, whether the Plaintiff ought to conclude fully that he is a Bastard, he may after plead a Release in Bar. 18 E. 3. 33. b.

The Defendant shall not plead *a Release* at the Day of Adjournment *upon another Point*, unless it was made *after the last Continuance* Br. Adjournment, pl. 18. cites 23 Ass 5.———S. P. For he might have pleaded it at first. Br. Assise, pl. 251. cites S. C. per Shard.

17. If an Assise for Difficulty be adjourned in Bank, the Defendant may plead the Release of the Plaintiff after.

18. So if an Assise be for Difficulty adjourned from one Session to another, the Defendant may plead the Release of the Plaintiff after. 21 E. 3. 23. 21 Ass. pl. 9.

Both the Cases cited are the same, and in totidem Verbis the one as the other.—

Fol. 135.

19. In an Assise, if it be pleaded that in an Assise by the Plaintiff he pleaded the Release of the Plaintiff, and the Plaintiff did deny his Deed, and it was found by Verdict his Deed, and after the Plaintiff was nonsuit; if this Plea be adjourned [to inquire] whether it be sufficient to bar the Plaintiff in this Assise to deny his Deed, the Defendant in B. may aver that this is the Deed of the Plaintiff, and waive the Estoppel. * 18 E. 3. 35. 17 Ass. 28. Adjudged.

Fitzh Estoppel, pl. 223. cites S. C. and per tot. Cur. the Plaintiff may have the Averment to deny the Deed, notwithstanding the Verdict, which was annull'd by the Nonsuit upon the Adjournment for Difficulty; and thereupon the Defendant said he would maintain that it was the Plaintiff's Deed, and the Court compell'd the Plaintiff to accept the Averment, tho' after a Demurrer.

It was objected that

20. In an Assise, if the Tenant pleads in Bar a Recovery against the Plaintiff, who makes Title before the Recovery, and the Tenant pleads a Mat-

a Matter to oust him from his general Title, without shewing how &c. upon which the Parties demur, and this is adjourned in Bank, the Plaintiff may make Title, and shew How &c. in Bank. 32 Ass. 9.

there was no true Reason why a Man should not be compell'd to

to shew How he came to a Title in Time before the Bar, as in Time after it. But Knivet said, that when one brings Assise of Novel Disseisin, and the Tenant pleads in bar, and the Plaintiff makes a Title to himself of Time subsequent, there, because the Law intends the Assise to be brought by Colour of this Possession, he shall not be received without shewing How, because he cannot come to it afterwards, unless it was of the Estate of him who recover'd, by which Recovery every Possession between the Disseisin and the Recovery is defeated; but when one makes Title of Time precedent, it shall be intended a Title of a Possession had a long Time before the Seisin of the Tenant. 32 Ass. 197. a. pl. 9.

21. In an Assise against two, if each takes upon himself the intire Tenancy, and pleads several bars, upon which the Plaintiff, without electing his Tenant, demurs upon the Pleas that they should not bar him; upon which the Justices of Assise adjourn them before themselves at Westminster, (not in Bank) the Plaintiff may there elect his Tenant; for upon this Adjournment they are as they were in the Country. * 22 E. 3. 5. b. † 23 Ass. 16. adjudged.

* Fitzh. Assise, pl. 126. cites S. C. † Br. Adjournment, pl. 19. cites S. C. Br. Assise, pl. 255. (254) cites S. C.

accordingly, per ‡ Thorpe, because they were *adjourned before the same Justices in the same Plight as they were in the Country.*

‡ This should be Shard.

22. And the Plaintiff may say after he hath elected one for his Tenant, that the others are named as Disseisors, and therefore he may pray to be discharged of their Pleas in Bar. 23 Ass. 16. adjudged.

Br. Assise, pl. 255. (254) cites S. C.

23. In an Assise, if the Tenant pleads the Release of the Ancestor of the Plaintiff with Warranty, to which the Plaintiff says that the Ancestor was seised for Life, the Remainder to the Plaintiff in Tail, the Remainder to the right Heirs of the Lessee, and after the Lessee granted all his Estate to the Tenant, and after released to him in Fee, with Warranty; upon which the Parties demur whether the Plaintiff shall be barr'd by this, and it is adjourned for Difficulty to Westminster; the Tenant cannot say there, that he to whom the Release was made was seised in Fee; for this is not an Inforcement of his first Plea. 44 Ass. 28. 44 E. 3. 10. b. adjudged.

Br. Adjournment, pl. 2. cites S. C. and that this was by the Opinion of both Benches; but because the Tenant was an Infant, the Assise was remanded &c. —— Br. Assise, pl. 21. cites S. C. accordingly, and that the Tenant being an Infant, nothing shall be held as not denied by him, and therefore the Assise to inquire of it. And Brooke says, Et sic videtur that the Assise shall be at large as well where the Defendant is Infant as where the Plaintiff is. ——— Br. Coverture & Infancy, pl. 8. cites S. C. accordingly. ——— Fitzh. Assise, pl. 56. cites S. C. accordingly. ——— Both the Year-Book and the Book of Assises report this Case in almost the very same Words.

24. If in an Assise it is pleaded, that Baron and Feme were seised by Force of a second Fine, and not by Force of a Fine before, shewing the Matter specially, upon which the Parties are adjourned to Westminster before themselves, he may there allege an Office to prove him to be in by the second Fine; for this is pursuing the first Plea, and inforcing it. 44 Ass. 35. 44 E. 3. 31. adjudged.

S. P. Br. Adjournment, pl. 24. cites 44 Ass. 35. And it is no new Matter nor Contrariant; for

he shall not have new Matter nor Contrariant at the Day of Adjournment ——— S. P. Ibid. pl. 31. cites 44 E. 3. 31.

25. In an Assise, if the Tenant pleads in Bar a Fine and Nonclaim, to which the Plaintiff says he was within Age at the Time of the Nonclaim; upon which the Tenant pleads a second Fine and Nonclaim when he was of full Age, upon which the Parties are adjourned whether this be a Departure, the Tenant in Bank may say that the Plaintiff

S. P. Br. Adjournment, pl. 8. cites 2 Ass. 6. The Question was whether he

should have the Plea or not, and it was received; and the Reason seems to be, because nothing was enter'd to maintain the second Answer. was of full Age at the Time of the first Fine, notwithstanding the Adjournment. 1 Aff. 6.

The Case in Lib. Aff. 1. pl. 6 is a D. P. but the 2 Aff. pl. 6. is S. P. so that it seems to be misprinted. —Br. Departure, pl. 17 cites S. C. that the Plea was not received, because it is a Departure —— Br. Continual Claim, pl. 5 cites S. C. that the Tenant cannot allege other Fine and Nonclaim at full Age; but that now this Nonclaim is ousted by the Statute of 34 E. 3.

S. P. Br. Adjournment, pl. 17. cites S. C.—— Br. Assise, pl. 250. [249] cites S. C.—

26. In an Assise against A. and B. if A. pleads in Abatement that B. is his Wife, and not named his Wife, and B. pleads in Bar, upon which Plea it is adjourned in Bank, A. the Husband may there relinquish his Plea in Abatement, and plead in Bar. 23 Aff. 4. adjudged per Curiam.

Br. Waiver de Choses, pl. 29 cites S. C.——S. C. cited in the Argument of the Judges. And. 231. Trin. 32 Eliz. in pl. 246.

Br. Peremptory, pl. 28. cites S. C. Brooke says so see that it is not peremptory. —S. P. Br. Adjournment, pl. 9. cites S. C. and M. 7 E. 3. accordingly.

27. In an Assise of his Freehold in E. if the Tenant pleads the Fine of the Ancestor of the Plaintiff, proving the Lands to be in C. in Abatement of the Writ, upon which Plea the Parties are adjourned into Bank, and adjudged no Plea in Abatement, the Tenant may after there plead in Bar, tho' the Adjournment was upon a * certain Point. 6 Aff. 1. adjudged.

* See pl. 8.

Fitzh. Barre, * Fol. 136. pl. 225. cites S. C. —— Upon a Verdict in Assise of Novel Disseisin the Parties were adjourned to Westminster in the Exchequer Chamber before themselves for Difficulty, and there, at the Day, adjourned the Parties into C. B. and sent all the Record of Assise thither, and the last Term one of the Defendants pleaded the Death of the other (who was found Jointenant with him) puis darrein Continuance &c. See D. 132. pl. 78. Mich. 2 & 3 P. & M. Grenefield v. Stretch.——Bendl. 42. pl. 74 S. C. the Opinion of the Court was, that he shall not have the Plea, but this Matter will aid him in Writ of Error if Judgment be given, because now by his Death the Writ is abated.——3 Le. 5. pl. 12. S. C. and says it was not allow'd, because the Parties had no Day in Court to plead it; but after Judgment Error lies.

28. If upon a foreign Plea the Paaties are adjourned into Bank, if the Tenant in Bank pleads a Plea in Abatement of the Writ puis darrain Continuance, the Court there hath not Power to abate the Writ, nor to put the Parties in Issue thereupon, because they have only Power to try the Issue &c. upon which the Record was sent there. 49 E. 21. b.

Fitzh. Barre, pl. 225. cites S. C.

29. But upon such new Plea pleaded, the Court either ought to continue the first Issue there, or otherwise, if they remand the Record, to shew the Cause, so that the darrain Continuance may appear there. 49 E. 3. 21. b.

30. In Assise an Infant *alleged Outlawry of Felony in Bar*, and at another Day he was suffered to plead the *Release of the Plaintiff*; Quod Nota. Br. Adjournment, pl. 13. cites 14 Ass. 15.

(H) When

(H) When the Plea is tried what ſhall be done. [*Remanded or not.*]

1. IF the Conuſance of a Plea be granted out of the Common Pleas to a Franchiſe, and there is a foreign Voucher, upon which a Reſummons is ſued in Bank; when the Voucher is there tried, this ſhall not be remanded to the Franchiſe, becauſe they have failed of right; for here the Conuſance was firſt granted upon Condition quod celeris fiat partibus Juſtitia, aliaquin revocant. 11 H. 4. 28. 87. S. P. They cannot do Right for want of Power, and therefore Re-ſummons lies. Br. Re-ſummons, pl. 9. cites 11 H. 4. 27.——Br Conuſans, pl. 16. cites S. C. ——Br. Voucher, pl. 161. cites S. C. & S. P. by Hanke and Hill; but if the Record had commenced in the Franchiſe, (viz Salop) or in London, and the Tenant vouches a Foreigner, it might be removed and tried in Bank, and remanded; but otherwiſe in the principal Caſe; but Thirne did not agree to this Opinion.

2. But if a Trial is in Bank upon a foreign Voucher in London, by the Statute of Glouceſter the Record ſhall be remanded. 11 H. 4. 28.

3. If the Tenant in an Aſſiſe vouches a Foreigner, upon which the Plea is adjourned in Bank, where the Vouchee demands the Lien, and the Deed of his Anceſtor being ſhewn to bind him to Warranty bears Date where the Land is, which is denied, yet this ſhall not be remanded till this Iſſue is tried, becauſe this is out of the Points of the Aſſiſe, to which Iſſue the Demandant is not Party. 17 Aſſ. 9. Br. Trial, pl. 71. cites S. C. but not exactly S.P.

4. An Aſſiſe againſt 2 in [one] County, *the one pleaded Releaſe made in another County, and Witneſſes in divers Counties, which was denied*, whereupon the Aſſiſe was adjourned into Bank, and tried there, and found Not his Deed. and the Plaintiff releaſed his Damages, and prayed Judgment of the Deed immediately, and had it, and the Defendant impriſoned for pleading a falſe Deed, and Mich. 5. and Paſch. 8. accordingly. Br. Aſſiſe, pl. 119. [118] cites 6 Aſſ. 4. Br. Damages, pl. 155. cites S. C. and Brooke ſays, that hereby it ſeems that the Damages ſhall be tried by the Jury of the County where the Land lies; for the foreign County cannot try the Damages.——Br. Adjournment, pl. 12. cites S. C. & S. P. accordingly.——Br. Aſſiſe, pl. 133. cites 8 Aſſ. 15. S. P. accordingly. And Brooke ſays, Et ſic vide, that where nothing reſts but the foreign Matter, there the Juſtices of C. B. may give Judgment immediately, but the Damages ſhall be inquired by the Aſſiſe, and that T. 7. and M. 15. is accordingly; Et ſic vide, That upon Releaſe pleaded and found againſt the Defendant, the Seiſin and Diſſeiſin ſhall not be inquired, but only the Damages; for the Releaſe implies Confeſſion of the Seiſin and Diſſeiſin.——Br. Adjournment, pl. 12. cites S. C. & S. P. but if the Plaintiff releaſes the Damages, C. B. may give Judgment immediately.——2 Le. 41. pl. 55. cites 6 Aſſ. 4. and 8 Aſſ. 15. accordingly, per Cur. But ſaid that this differs from the principal Caſe of Lucas v. Picroft, wherein Parcel of the Lands does remain not tried, which the Plaintiff cannot releaſe as he may the Damages.——3 Le. 137. pl. 186. S. C. of Lucas v. Picroft In much the ſame Words, only 6 Aſſ. 4. is miſprinted there, and made 6 E. 4.—— See the Caſe of Lucas v. Picroft in the Notes to the Plea next following.

5. Where the Aſſiſe is adjourned for Difficulty of Verdict, they may give Judgment here in C. B. 16 H. 7. 12. a. per Fineux. *Aſſiſe* was brought *of* 2 *Acres* in the County of N. and *as to one Acre* the *Defendant pleaded a Plea triable in a foreign County*, whereupon the Iſſue was adjourned into C. B. and thence into the foreign County, where it was *found for the Plaintiff*. Judgment was pray'd for the Plaintiff upon the 16 H. 7. 12. but the whole Court e contra, becauſe there is another Acre which muſt be tried before the Juſtices of Aſſiſe, before which no Judgment ſhall be given for the Acre tried. And the Aſſiſe is properly depending before the Juſtices of Aſſiſe, before whom the Plaintiff may diſcontinue the Aſſiſe, and the Verdict was remanded to the Juſtices of Aſſiſe 2 Le. 41. pl. 55. 30 Eliz. C. B. Lucas v Picroft.——3 Le. 137. pl. 186. Paſch. 28 Eliz. C. B. S. C. in much the ſame Words

(I) To

(I) To that Place it may be adjourned.

The Juſtices of Aſſiſe, if they have

1. THE Juſtices of Aſſiſe have Power to adjourn the Parties to Weſtminſter, or to other Place in itinere ſuo. 47 E. 3. 2. Writ of Si non omnes to them, or one of them, and one who is aſſociated to them hac vice, [if one of the Juſtices does not come, the other Juſtice and the Aſſociate] may adjourn the Aſſiſe in the Circuit for Difficulty, and thence to Weſtminſter if they will, and thence into C. B. and ſo they did, and this by the expreſs Words of the Statute, and by 21 Aſſ. 21. they may adjourn the Aſſiſe before them in another County &c. Br. Adjournment, pl. 4. cites 12 H. 4. 20.——S. P. and *in all theſe one after another.* Br Aſſiſe, pl. 59. cites S. C.——The Words (alibi & in itinere ſuo) in the Statute of Magna Charta, cap. 12. ſhall be taken largely and beneficially; for they may not only adjourn before the ſame Juſtices in their Circuit, but to Weſtminſter, or Serjeant's-Inn, or any other Place out of their Circuit, by the Equity of this Statute, and according as has been always uſed. 2 Inſt. 26.

S P. Br. Aſſiſe, pl. 386. cites 5 E. 4. 111. where it was ſo done.——

2. Juſtices of Aſſiſe may adjourn the Parties before themſelves *from Day to Day*, and *as well after Verdict as before*, and *from this County into another County, and to Weſtminſter.* Br. Adjournment, pl. 34. cites 48 E. 3. 7. and 47 Aſſ. 1. accordingly.

S. P. and at every Day they ſhall be demandable. Br. Aſſiſe, pl. 32. cites 47 E. 3. 1. 2. But Brooke ſays, this ſeems to be before Verdict, and contrary after Verdict.

3. *In general Aſſiſe* they ſhall be adjourned by Proclamation *till the next Aſſiſes.* Br. Aſſiſe, pl. 401. cites 32 H. 6. 10.

(K) In what Caſes.

1. IN *Attaint* Proceſs continued till they were adjourned before S. and T. at Cant. by Niſi Prius; Quod Nota. Br. Adjournment, pl. 10. cites 6 Aſſ. 7.

2. The *Jury appeared between the King and the Party* upon Iſſue, and becauſe the *King's Attorney was Sick*, the Court reſpited the Jury for 4 Days in B. R. Quod Nota; and this by Adjournment. Br. Adjournment, pl. 25. cites 4 H. 7, 8.

For more of Adjournment in general, ſee **Aſſiſe, Courts, Seſſions,** and other proper Titles.

(A) Ad

Admittance.

(A) Admittance in Pleadings. What is. And the Effect thereof.

1. IF a *Man diſtrains for my Rent and gets Seiſin*, and *I releaſe to him*, this is no Bar to me in Avowry upon the Ter-tenant for the ſame Rent; for the Releaſe is no Admiſſion of Diſſeiſin. Br. Avowry, pl. 134. cites 15 E. 4. 8. per Littleton.

2. *Contra if I bring Aſſiſe or other Action againſt the Pernor*; Per Littleton. Br. Avowry, pl. 134. 8.

3. Tho' the Party admits *an ill Writ*, yet the *Court ſhall abate it*, if they ſee it, as where the Original was Ex Aſſignatione where it ſhould be Ex Dimiſſione. Br. Error, pl. 105. cites 38 H. 6. 30. S. P. as Treſpaſs Vi & Armis againſt the Lord, and he admits it, yet the Court ſhall abate the Writ. Arg. Cro. E. 425. cites 10 E. 4. and 28 H. 8. 13.

4. *Attaint by* 2 upon Aſſiſe paſſed againſt them, *one of the Petit Jury pleaded Outlawry in the one of the Plaintiffs before the Date of the Aſſiſe*; and it was held that he *could not*; for it is dilatory, and the *Tenant ſhall not have the Plea, becauſe he did not plead it in the Aſſiſe*, but admitted both of the Plaintiffs to be able. Br. Nonability, pl. 27. cites 2 H. 7. 7.

5. The Admittance of the Party can *not give Juriſdiction to the Court* of Admiralty, *where of Right it has none*; for that will be an Incroachment upon the Common Law. Admitted per Cur. 12 Rep. 77.

6. *Non Denial* is only an Admiſſion *of things* which are *materially alleged*; Per Holt Ch. J. Skin. 690. Mich. 8 W. 3. B. R. in Caſe of the King v. the Biſhop of Cheſter.

7. An Admittance *by pleading to an Indictment* does not *make good* the Indictment, as it would a *Declaration*; per Holt Ch. J. 11 Mod. 227. 8 Annæ, B. R. in Caſe of Queen v. Jennings.

For more of Admittance in General, ſee **Copyhold**, and other Proper Titles.

(A) Ad Quod Damnum.

1. 27 E. 1. *Stat.* 2. *S.* 1. ORdains, that *ſuch as would purchaſe new Parks ſhall have Writs out of Chancery to inquire concerning the ſame.*

2. S. 3. *And Perſons dwelling beyond Sea that have Lands or Rents in England, and will purchaſe Letters of Protection, or to make general Attornies, they ſhall be ſent into the Exchequer, and there make Fines, and from thence ſhall be ſent unto his Chancellor or Lieutenant.*

3. S. 4. *In like Manner they ſhall do that will purchaſe any Fair, Market, Warren or other Liberty. Alſo ſuch as will purchaſe attorning of their Debts ſhall be ſent into the Exchequer.*

See F. N. B. 222. (A) to 226. (C)

4. This Writ ſhall iſſue where an *Abbot aliens in Mortmain.* Br. Ad quod damnum, pl. 1. cites F. N. B. 221.

See F. N. B. 224. (H) &c.

5. Writ of Ad quod Damnum *was uſed in ancient Time, where the Tenant of the King alien'd*, tho' he had Licence, and notwithſtanding that he retook Eſtate again. Ibid.

See F. N. B. 226. (C) to the End of (H)

6. *And it lies upon Grant of Liberties* made *by the King, and upon Pardon of Mortmain, and* upon Pardon *of Intruſion, and upon Office of Fee granted,* as Fofterſhip &c. *And* it lies *upon Aſſart of Wood, and upon Gift of waſte Land, and upon Leaſe for Years of it, or upon Grant of free Chaſe.* Ibid.

10 Rep. 142. a in Caſe of the Iſle of Ely S. C. cited per Cur and alſo the Regiſter fol. 252. in the Writ of Ad quod Damnum.

7. If there be an *ancient Trench or Ditch coming from the Sea*, by which Boats and Veſſels uſed to paſs the Town, if the ſame be *ſtopped* in any Part by Outragiouſneſs of the Sea, and a Man will *ſue to the King to make a new Trench, and to ſtop the ancient* Trench &c. they ought firſt to ſue a Writ of Ad quod damnum, to enquire what Damage it will be to the King or others. F. N. B. 225. (E)

8. And if the King will grant to any City the *Aſſiſe of Bread and Beer*, and the Keeping of Weights and Meaſures, an Ad quod damnum ſhall be firſt awarded, and when the ſame is certified &c. then to make the Grant. F. N. B. 225. (F)

9. The River *Thames is an Highway* and cannot be diverted without an Ad quod Damnum, and to do ſuch a Thing ought to be by Patent of the King. Noy. 105. Hind. v. Manfield.

Cro. C. 266. pl. 16. Mich. 8 Car. B. R. the S. C. accordingly.

10 If upon the *Return* of an Ad quod Damnum it appears to be *Ad damnum* vel Præjudicium *of no Man*, the King may then Licence the ſtopping up of an ancient Highway, or diverting a Water-Courſe, or part of it, for the Concern is then wholly his own; but without his *Licence* it can never be done, tho' a better way be ſet out, and ſo return'd upon an Ad quod damnum. Per Vaughan Ch. J. Vaugh. 341. cites Cro. C. 266. 267. the King v. Ward.

So if the King will, ex ſpeciali gratia licence a Mortmain, the Chancellor need not iſſue any Ad quod Damnum; for the King, without Words of Non obſtante, is ſufficiently appriſed by asking his Licence to do a thing which at Common Law might be done without it, that now it cannot be done without it.

11. If an Ad quod Damnum iſſues to enquire Ad quod Damnum vel præjudicium, a Licenſe for a Mortmain will be; One *Inquiry* is, Si Patria per donationem illam magis ſolito non oneretur &c. Tho' the Return be that by ſuch Licence Patria magis ſolito oneretur, yet the Licence if granted will be good which ſhews that Clauſe is for Information of the King, that he may not Licence that which he would not, and not for Reſtraint to hinder him to licence what he would. For by Fitz. F. N. B 222. (D) the uſual Licence is now with Et hoc abſque aliquo breve de Ad quod Damnum. And when the King can Licence without any Writ of Ad quod Damnum, he may, if he will, licence, whatever the Return of the Writ be. Tho' it be ſaid in the Caſe of Monopolies, that in the King's Grant it is always a Condition expreſſed or implied, Quod partria plus ſolito non oneretur, but that ſeems but gratis dictum. Per Vaughan Ch. J. Vaugh. 345.

And that is all the Uſe of a Non obſtante; per Vaughan Ch. J. Vaugh. 345.

3 Lev. 220. Trin. 1 Jac. 2. S. C. affirm'd in the Houſe of Lords

12. An Ad quod Damnum *fraudulently executed* (as where it was for a Market, and tho' the next Market-Town was within a Mile and an Half of it where the new Market was to be, yet the Writ was executed many Miles diſtant) is a Ground for a Scire Facias to repeal the Grant. 2 Vent. 344. in Canc. Hill. 31 & 32 Car. 2. the King v. Butler.

13.

13. 8 & 9 *W.* 3. *cap.* 16. *S.* 6. for enlarging common Highways, enacts, *That where any common Highway ſhall be encloſed after a Writ of Ad quod Damnum iſſued and executed, any Perſon injured or aggrieved by ſuch Incloſure may complain to the Juſtices at the Quarter-Seſſions next after ſuch Inquiſition, who may hear and finally determine the ſame &c. But if no ſuch Appeal be made, then the ſaid Inquiſition and Return, recorded by the Clerk of the Peace, to be for ever binding.*

An Ad quod Damnum was ſued out, and an *Ad nullius Damnum* return'd; and an Order thereupon made for the Incloſing ſuch an ancient Highway, and ſetting out a Place for another in ſuch a Place. *On Appeal* from this Order to the Seſſions, *the Incloſure is declared to be a great Nuſance* to the whole Country. Several Exceptions were taken to this Order. 1. That it did *not appear to have been at the next Quarter-Seſſ after the Order made* 2. An Exception was taken to the whole Purport of the Order; that it did *not appear by it, what the Way to be incloſed was, or what the New Way.* So that there was no Certainty what the Subject Matter of Appeal was; for this being a Method ordain'd by the Statute for making a final End of the Matter, it ought to appear very certain. It was held that this Clauſe does not alter the Nature of the Writ of Ad quod Damnum, nor the Proceedings thereupon; that the Writ when executed is to be return'd into Chancery, and the Sheriff is to return the Inquiſition indilate, and if the Queen thereby ſees that there is no Harm in the Incloſing, ſhe may grant Leave to do ſo, and in Order thereto the Inquiſition muſt find it Ad Damnum nullius, and there can be no Foundation of Incloſing without ſuch Return; and that tho' it be found and return'd Ad Damnum nullius, yet none can lawfully incloſe without Licenſe or Grant to incloſe the old Way; for the Authority is not from the Inquiſition, but from the Licence; And the Appeal muſt be brought at the next Seſſions after the Inquiſition taken, and it muſt be by ſome Perſon grieved; that in the preſent Caſe there being no Licence it is not by the Authority of the Statute, and therefore not ſuch as obliges the Party to appeal; and therefore, per tot. Cur. the Inquiſition was quaſh'd. 7 Mod. 45. Trin. 1 Ann. B. R. the Queen v. Ogden.

For more of Ad quod Damnum in General, See **Mortmain**, and other proper Titles.

Advowſon.

(A) What Words will paſs it.

1. ADvowſon will *paſs* by the Grant of the *Church*. Pl. C. 157. b. cites 7 E. 3. and in Marg cites 7 E. 3. 5. Quare Impedit 19. S. P. per Coke Ch. J. Roll Rep. 237. Mich. 13 Jac. B. R ——— Yelv. 61. cites 6 E. 3. S. P. (but the Reporter adds a Nota, that Herle there ſaid this was in ancient Time; Ergo, it is not ſo now; to which the Court ſeemed to agree.

2. *Advocatio Medietatis Eccleſiæ* is, when there are 2 ſeveral Patrons and 2 ſeveral Incumbents in one Church, one of one Moiety, and the other of the other, and one Part of the Church and Town allotted to the one, and the other Part to the other. But in the Caſe of Parceners agreeing to preſent by Turn, where there is only one Church and one Incumbent, it is *Medietatis Advocationis Eccleſiæ*. Co. Litt. 17. b. 18. The Moiety or 3d Part of the Church, is where Parceners or Jointenants *preſent jointly*, every one has a Part of the Church; but where two Churches are united and conſolidated, and the Patrons agree to preſent, the *one 2 Turns, and the other a 3d Turn*, there either of them has the intire Church for the Time. Cro. E. 686. pl. 22. Trin. 41 Eliz. C. B. Windſor v. Loveday & Fletcher.

3. *Appropriation*, nor the Advowſon of it, will not *paſs* under the Name of an Advowſon; but Advowſon will paſs by Name of *Tenement*; per

per Cur. Hob. 304. in Caſe of London v. Collegiate Church of Southwell, cites 33 E. 3. where the King granted Licence to purchaſe Lands and Tenements in Mortmain, to the Value of 100s. and allowed for Advowſons, and the Eſſoign is De placito tertæ.

4. It is contrary to the Nature of an Advowſon to be a Thing of Profit regularly, yet it may be yielded in Value on a *Voucher*, or may be *Aſſets* in the Hands of an Executor. Hob. 304. London v. Collegiate-Church of Southwell.

Advocatio *quartæ partis.* See D. 78. b. pl. 44. Mich 6 E. 6. Price v. Ld. Windſor.

5. He that has only the *4th Part of an Advowſon*, may levy a Fine per Nomen Advocationis Quartæ partis Eccleſiæ, per Thorp & Finch; but per Wich, it ſhall be De Tertia [Quarta] parte Advocationis Eccleſiæ. Br. Preſentation, pl. 7. cites 45 E. 3. 12.

——Dyer ſaid, that the beſt Pleading is to ſay that Fuit ſeiſitus de 2 *partibus Advocationis*, & J. S. de *tertia parte* Advocationis. D 299. b. pl. 32. Paſch. 13 Eliz. in Caſe of Eveleigh v. Turner.——It ſhould be *Advocatio Duarum partium* Eccleſiæ, and not Duæ partes Advocationis. 2 Le. 36. in pl 45. Mich. 30 & 31 Eliz. C. B per Cur. obiter.

S. C. cited Arg Bridgm. 95.——S. C. cited per Cur. Hob. 304. in pl. 382. Mich. 16 Jac.——S. P. agreed by Jones J.

6. A Leaſe was made of *all Hereditaments ſituate, lying, and being in B.* and the Queſtion was, whether the Advowſon of the Vicarage paſſed by that Word (Hereditament;) and the Court held that it did paſs; for tho' it does not lie in Livery, nor is it viſible or palpable, yet in *a Writ of Right of Advowſon the View ſhall be given in the Church.* D. 323. b. pl. 30. Paſch. 15 Eliz. Anon.

Arg. Mo. 176 pl. 310. Mich. 24 Eliz. in Robert's Caſe.——S. P. accordingly Jo. 23. Hill. 14 Jac cites D. 350. and 10 Rep. [65. b.] Whiſtler's Caſe.

Cro. E. 16. 163. pl. 4. Anon. S P. and ſeems to be S. C and held accordingly, becauſe the Vicarage is another Thing than the Advowſon, and every Thing muſt paſs by its proper Name.——S. C. cited D. 350. b. Marg. pl. 21. by Name of Denny v. Aſtill.

7. The King was *ſeiſed of the Rectory of D. and of the Advowſon of the Vicarage of D.* and granted the ſaid *Rectory with the Appurtenances, ac etiam Vicariam Eccleſiæ prædt'.* And per tot. Cur. the Advowſon of the Vicarage did not paſs by theſe Words in the Caſe of the King, nor even in the Caſe of a common Perſon; but Walmſley J. held that if he had granted *Eccleſiam ſuam de D.* it might have been otherwiſe. Le. 191. pl. 272. Mich. 31 & 32 Eliz. C. B. Aſhegell v. Dennis.

8. After the *taking a ſecond Benefice*, the firſt is ſo void that it cannot *paſs by the Name of* Advowſon; per Noy, Arg. Litt. Rep. 303.

(B) Grants of the next Avoidance. Good. And Pleadings.

1. GRANT *of the free Diſpoſition of the Church of B.* is a good Grant of the next Avoidance. Br. Quare Impedit, pl. 133. cites 14 E. 4. 2. per Littleton.

2. In Quare Impedit the *Plaintiff intitled himſelf by Grant* of a Stranger *de proximâ Advocatione cum acciderit*, and *did not ſhew* in his Count *that this was the next Avoidance*, by which &c. Brian [awarded the Defendant to] anſwer. Brooke ſays, Quod mirum; for at this Day the common Uſe is of Neceſſity to allege, that it is the next Avoidance. Quod nota. Br. Quare Impedit, pl. 135. cites 19 E. 4. 1.

3. In

3. In Quare Impedit, where the *Tenant of the King grants Proximam Præſentationem, and dies*, this ſhall hold Place againſt the King, and the Biſhop may preſent by Lapſe upon the King, before Office found; but when Office is found, the King ſhall have the Preſentment, and the Incumbent ſhall be removed. Br. Preſentation, pl. 24. cites 14 H. 7. 21.

4. A. *granted the 3d Preſentation to* an Advowſon, and died. His *Feme was endowed of the 3d Preſentment.* The Grantee ſhall have the 4th Preſentment; by Anderſon Ch. J. Cro. E. 791. pl. 33. cites 15 H. 7. 3. Cro. J. 691. Mich. 22 Jac. in pl. 4. Hutton J. denied this to be Law.

5. If a Man grants Proximam Præſentationem to A. and *after, before Avoidance, grants Proximam Præſentationem* of the ſame Church *to B.* the *ſecond Grant is void*; for it was granted over by the Grantor before, *and he ſhall not have the ſecond Preſentment*; for the Grant does not import it. Br. Preſentation, pl. 52. cites 20 H. 8. Jenk. 236. pl. 13 S. P. accordingly. —The Corporation of B. being ſeiſed of an Advowſon, *granted the firſt and next Preſentation to S.* and *afterwards granted Primam & proximam Advocationem to the Plaintiff*, the Church became void, and S. preſented his Clerk, who was admitted, inſtituted and inducted; and then the Church became void again, and the Plaintiff preſented &c. Reſolv'd by 3 Judges, the 2d Grant was void; for when the Patron had granted the firſt and next Preſentation to one, he cannot grant it to another, becauſe it is expreſsly contrary to his Grant; but perhaps if the 1ſt Deed had been loſt before any Benefit taken of it, and ſo as it could not be pleaded, the 2d Grant might have been good. But Anderſon held that the Preſentation ſhould paſs, and that ſo was the Intention of the Grantor, and that it may well ſtand with the Law; As where 2 Parceners make Compoſition to preſent by Turns, the Eldeſt firſt, and the Younger afterwards, if the Youngeſt grants Primam & proximam Advocationem, it is in Law but the 2d only, and yet the Grant is good enough; but by the Opinion of the other Juſtices it was adjudged for the Defendant. Cro. E. 790. 791. pl. 33. Mich. 42 & 43 Eliz. C. B. Williams v. the Biſhop of Lincoln.

6. *During an Avoidance* the Patron *granted Primam & proximam* Nominationem *Præſentationem* & Inſtitutionem, *cum primo & proxim' vacaverit.* It was held by Fitzherbert and Shelly, that the Grantee ſhall not have the Preſentation to this Avoidance, but to the next he ſhall. D. 26. a. pl. 165. Hill. 28 H. 8. Anon. Jenk. 236. pl. 13. S. P. & S. C.—— But where the Patron granted Primam & proximam Præſentationem & Advocationem Eccleſiæ de C. & Jus præſentandi ad eandem jam vacantem, ita quod licebit eidem the Grantee ad eandem Eccleſiam idoneam perſonam &c. hac unica vice tantum præſentare &c. Harper, Weſton, and Dyer held the Grant of the preſent Avoidance void, becauſe it is a mere perſonal Thing annex'd to the Perſon of him who was Patron in Expectancy ad tempus Vacationis; and likewiſe a Thing in Action, and in Effect the Fruit and Execution of the Advowſon, and not any Advowſon, and yet the Executors ſhall have it by Privity of the Law; and to this Opinion Catlyne Ch. J. and Carus, and Southcote J. agreed; but Weſtne, Saunders Ch. B. and Whiddon J. e contra; but all agreed that the Queen may make ſuch Grant, tho' it be a Thing in Action. D. 282 b. 283. a. pl. 28. 20. Paſch. 11 Eliz. Anon ——S. P. and held that when the Church is void, it is not grantable but is a Choſe en Action. Quære. And. 15. pl. 32. Agard v. the Biſhop of Peterburgh; and ſays that the like Caſe was adjudged Trin. 10 Eliz. in Caſe of Stephens v. Diſley.——Mo. 89. pl. 222. Trin. 10 Eliz. Stephens v. Clerk & Diſley, adjudged againſt the Plaintiff.——S. C. cited Bendl. 193. in Marg. pl. 230 ſays the Opinion of Weſton was, that the Words (jam Vacantem) were only to ſhew what Church was intended, and that Dyer held that thoſe Words were void [or Surpluſage.]

7. In a Quare Impedit the Plaintiff declared upon a Grant of the next Avoidance; and upon demanding Oyer of the Deed, the Plaintiff ſhew'd *to the Plaintiff's Father a Letter written by the Patron, that he had given his Son, the Plaintiff, the next Avoidance.* Adjudged that the Grant was not good without a Deed. Owen 47. Mich. 31 & 32 Eliz. Cripps v. Archbiſhop of Canterbury. Cro. E. 163. pl. 8. Criſp's Caſe, S. C. accordingly; and ruled clearly without Argument.

8. The *Dean and Chapter* of H. *granted the next Preſentation* of a Church *to B. B.* and the Queſtion was, whether this was a good Grant to *bind the Succeſſor* by the Statute 13 Eliz. And Walmſley and Owen held that it was not; for tho' it was not a Thing of which any Profit might be made, nor any Rent reſerved, yet it is an Hereditament, whereof S. C. cited 5 Rep. 15. a. as adjudged that Grant of a next Avoi-

dance of a Benefice, by the Dean and Chapter, was within the Purview of this Act

the Statute intends that no Grant ſhall be made; but Anderſon Ch. J. e contra: For the Statute intends not to reſtrain them, but for ſuch Things which are for Profit; and by reaſon thereof Prejudice may accrue to the Succeſſor, which cannot be in this Caſe. Beamond J. was abſent; & adjornatur. Cro. Eliz 440. pl. 2 Mich. 37 & 38 Eliz. C. B. Dean and Chapter of Hereford v. Ballard.

9. *Leſſee of a Rectory for 15 Years, to which the Advowſon of a Vicarage was appendant, granted the next Preſentation* to the Vicarage to B. *if it ſhould happen to be void during the ſaid Term of Years then in Eſſe*, and *died*; his *Adminiſtrator ſurrender'd the Term* to another, who accepted it. Reſolved, that tho' it was upon expreſs Limitation of the Vicarage's becoming void during the Term, and not during the Years, yet the Grant of the next Preſentation was good, becauſe the Grantor ſhall not derogate from his own Grant, and therefore the Term, in ſome Reſpect, ſhall be taken to continue for the Benefit of the Grantee. 8 Rep. 144. Trin. 8 Jac. Davenport's Caſe.

Jenk. 301. pl. 69. S. C. accordingly.

10. A. was ſeiſed of an Advowſon, and the Church being then full, granted Quod ipſe ad dictam Eccleſiam Clericum ſuum præſentare poſſit *Quandocunque & Quomodocunque Eccleſia vacare contigerit pro unica vice* tantum; *ac inſuper* voluit & *conceſſit, that this Grant ſhould remain in Force Quouſque Clericum &c. ſhall be admitted &c. by his Preſentment*, he muſt preſent upon the very next Avoidance, which, if he neglects, he hath loſt the Benefit of his Grant; and Judgment affirm'd in Error. Bulſt. 26. Trin. 8 Jac. Starkey v. Poole.

Brownl. 165. Wivel v. the Biſhop of Cheſter Paſch. 12. adjudg'd accordingly.

11. *Tenant in Tail* of an Advowſon, *and his Son and Heir joined in a Grant of the next Preſentation.* The *Tenant in Tail died.* Adjudged that the Grant was utterly void as to the Son and Heir, becauſe he had nothing in the Advowſon, neither in Poſſeſſion nor Right, nor in actual Poſſibility, at the Time that he joined with his Father in the Grant. Hob. 45. pl. 48. Sir Marmaduke Wivill's Caſe.

12. An *Incumbent* of a Church *purchaſed the Advowſon in Fee, and deviſed that his Executor ſhould preſent to it after his Death; and* then, by the ſame Will, he *deviſed the Inheritance in Fee to another.* The Queſtion was, whether this was a good Deviſe of the next Avoidance, becauſe inſtantly, upon the Death of the Incumbent, when this Will ſhould take Effect, the Church would be void, and ſo a Thing in Action, and not deviſable; but adjudged that it is good, according to the Intention of the Teſtator expreſs'd in his Will. Cro. J. 371. pl. 5. Paſch. 13 Jac. B. R. Pynchyn v. Harris.

13. 12 *Ann. Stat.* 2. *cap.* 12. Whereas ſome of the Clergy have procured Preferments for themſelves by buying Eccleſiaſtical Livings, and others have been thereby diſcouraged; Be it therefore Enacted by the Authority aforeſaid, That *if any Perſon*, from and after 29 Sept. 1714, *ſhall* or do *for* any Sum of Money, Reward, Gift, Profit, or Advantage, *directly or indirectly, or for or by* reaſon of any *Promiſe, Reward, Gift, Profit, or Benefit whatſoever, directly or indirectly, in his own Name*, or in the Name *of any other* Perſon or Perſons, *take, procure, or accept the next Avoidance of* or Preſentation to *any Benefice with Cure* of Souls, *Dignity, Prebend, or Living Eccleſiaſtical, and ſhall be preſented or collated* thereupon, that *then every ſuch Preſentation or Collation, and every Admiſſion, Inſtitution, Inveſtiture, and Induction* upon the ſame, *ſhall be utterly void*, fruſtrate *and* of no Effect in Law, *and ſuch Agreement ſhall be deemed* and taken to be a *Simoniacal* Contract; and in ſuch Caſe the Queen may preſent; and ſuch Perſon diſabled to enjoy the ſame, and to be ſubject to the Eccleſiaſtical Laws, as if ſuch Agreement had been during a Vacancy.

(C) Demanded

(C) Advowſon. Demanded by what Writ.

1. *Præcipe quod reddat* lies of an Advowſon. Thel. Dig. 67. lib. 8. cap. 5. S. 6. cites Mich. 34 E. 1. Brief 855. See Tit. Præcipe quod reddat, pl. 4. contra, and the Notes there.——A Man ſhall not have other Præcipe quod reddat of an Advowſon than Writ of *Right of Advowſon*; for a Man ſhall *not* have *Formedon* of an Advowſon. Thel. Dig. 67. lib. 8. cap. 5. S. 7. cites Mich. 4 E. 3. 162 and ſays ſee Brooke Præcipe quod reddat, 10 & 17. and that ſo it was affirm'd by Hank Hill 14 H. 4. 33. of an Advowſon in Groſs; but ſeveral Fines were levied of Advowſons, and cites the Regiſter 165.

2. But it ought to be of the Advowſon of *ſome Church, or of the 4th Part of the Tithes of ſome Church* at the leaſt &c. Thel. Dig. 67. lib. 8. cap. 5. S. 6. cites Mich. 18 E. 2. Brief 825. where Writ brought De Advocatione *decimarum unius carucatæ terræ* cum Pertinentiis was abated, and ſays ſee the Regiſter, Fol. 29.

3. It was ſaid that a Man ſhall have *Scire Facias* of an Advowſon, and alſo a *Ceſſavit*. Thel. Dig. 67. lib. 8. cap. 5. S. 8. cites Paſch. 43 E. 3. 15. Scire Facias of an Advowſon out of a Fine, was granted.

Thel. Dig. 67. lib. 8. cap. 5. S. 9. cites Paſch. 13 E. 3. Scire Facias 118. And out of Fines and other Records oftentimes in the Titles of Quare Impedit, and Scire Facias of Fitzh.

Writ of Dower was maintained of an Advowſon. Thel. Dig. 67. lib. 8. cap. 5. S. 9. cites Trin. 7 E. 3. 325. and Paſch. 13 E. 2. Dower 161. 163. Hill. 17 E. 2.

4. It was ſaid by Kirton, that Tenant for Life ſhall have *Quod ei deforceat* of an Advowſon, and that Writ of *Warrantia Chartæ* lies of an Advowſon. Thel. Dig. 67. lib. 8. cap. 5. S. 8. cites Mich. 43 E. 3. 25. And ſays ſee Trin. 5 H. 7. 37. of the Ceſſavit, and Formedon and Ceſſavit was maintained of an Advowſon, Hill. 22 E. 3. Ceſſavit 46. and Paſch. 32 E. 3. Ceſſavit 24.

Age.

(A) In what Actions merely, *without Plea*, the Parol ſhall demur.

1. IN a Formedon in Deſcender **the Parol ſhall not demur for the Non-age of the Demandant,** unleſs ſomething be pleaded to which he cannot be Party to try it during his Non-age. 17 E. 3. 59. **Age 8. 18 E. 3. Age 11. Co. 6 *Markall* 4. b. 13 E. 3. Age 96. adjudged, becauſe this is a Writ of Poſſeſſion.** * 2 E. 3. 59. b. But in a Formedon in the *Deſcender*, brought by an Infant, if the *Feoffment of his Anceſtor* be pleaded in Bar *with Warranty and Aſſets, or a collateral Warranty without Aſſets*, this Caſe is not within this Statute for two Cauſes. 1 That *is an Action Anceſtrel droiturel*, for nothing deſcended

ſcended but a Right, and therefore had not any Freehold and Inheritance at the Time of his Death, and therefore out of the Letter and meaning of this Act. 2. The Formedon in the Deſcender *is in Nature of his Writ of Right*; for the Iſſue in Tail can have no Writ of an higher Nature, and therefore not within the Statute of Glouc. for ſeeing that *Act gave the Infant a Trial* during his Minority, it gave it him *in ſuch Actions as he might be foreclofed of his Right*; *but* tho' he were barred in any of the ſaid Actions during his Minority, he *might at his full Age have Recourſe to his Writ of an higher Nature*, ſo as he ſhould not be remedileſs, or any final Judgment given againſt him during his Infancy. 2 Inſt. 291.

* See (D) pl. 1. S. C.

S. P. becauſe he demands Fee ſimple of the Seiſin of his Anceſtor, and there he ought to allege the Eſplees in the Donor. 6 Rep. 3. b. and ſays that with this agrees 18 E. 3. Age 11. and 12 E. 2. Age 145.

2. In a Formedon in Reverter brought by the Heir of the Donor, the Parol ſhall demur for the Non-age of the Demandant, becauſe he demanded a Fee, and this is a Writ of Right. 18 E. 3. Age 11. adjudged. Co. 6. *Markall.* 3. 48 E. 3. 33. b. * D. 3. 4. Mar. 137. 24. 12 E. 2. Age 145. adjudged.

* Per Dyer in Baſſet's Caſe.

But in Formedon in Remainder, tho' he *demands Fee-ſimple*, yet becauſe his Anceſtor, whoſe Heir he is, never had Seiſin, nor took any Eſplees, (ſo that in ſuch Caſe he ſhall allege Eſplees only in that particular Tenant that had the Eſtate, on which the Remainder depended) therefore the Tenant (without Plea) cannot pray that the Parol demur, the Remainder not having been in Poſſeſſion of any of his Anceſtors, and the Demandant himſelf was the firſt in whom it veſted. 6 Rep. 3. b. 4. a. in Markhal's Caſe, ſays this was the true Reaſon of the Judgment in the Caſe of Sands v. Bray.

3. [So] in a Formedon in the Remainder of a Remainder tailed to his Anceſtor, the Parol ſhall demur for the Non-age of the Demandant. 3 E. 3. Itinere Nottingham, Age 72. adjudged.

The chief *Reaſon* that the Parol ſhall not demur in Formedon in Remainder, *is, becauſe it is in a Suit to recover Seiſin and Poſſeſſion to him, where none of his Anceſtors, whoſe Heir he is, had it before* him. D. 138. pl. 28. Hill. 3 & 4 P. & M. in Baſſet's Caſe

In a *Formedon in Remainder* brought by an Infant, of a Remainder *limited to his Father and his Heirs*, (whoſe Heir he is) the Tenant, without any Plea pleaded, pray'd that the Parol might demur; but after great Deliberation the ſame was not allowed; for the granting the Parol to demur for Non-age of the Demandant is in his (the Infant's) Favour, and here it would be to his Prejudice, when upon the Death of his Anceſtor the Land deſcends to him, to keep him out of the Poſſeſſion thereof till his full Age. 6 Rep. 3. Paſch. 35 Eliz. C. B. Markal's Caſe.

See Mich. 2 E. 3. 36. a. pl. 33.

4. In a Sur Cui in Vita the Parol ſhall demur for the Non-age of the Demandant without any Plea pleaded. 2 E. 3. * 63. adjudged.

* This is miſprinted, there not being ſo many Pages.

See (D) pl. 7. S. C. that if Defendant denies the Deed, the Parol ſhall demur.

5. In a Writ of Warranty of Charters brought by an Infant the Parol ſhall not demur for his Non-age, tho' the Warranty was made to his Anceſtor. Temp. E. 1. Age 129.

The Heir ſhall not have his Age, but the Lord ſhall recover againſt him by the Statute of Marlebridge, cap. 6. 2 Inſt. 112. cites 18 E. 3 Covenant 7.

6. In a Writ of Right of Ward the Parol ſhall not demur for the Nonage of the Demandant, tho' it be a Writ of Right. Tempore E. 1. Age 128. adjudged.

S. C. cited 6 Rep. 3. b. in Markhal's Caſe. ——

7. In a Writ of Right of Poſſeſſion of the Demandant himſelf, the Parol ſhall not demur for the Non-age of the Demandant, becauſe it is brought of his own Poſſeſſion. 41 E. 3. Age 38. adjudged.

Entry ſur

Diſſeiſin by an Infant of his own Seiſin, the *Tenant pleaded a Feoffment of N. the Anceſtor of the Infant Plaintiff whoſe Heir he is, with Warranty*, and prayed that the Parol demur for the Non-age of the Plaintiff; and per Littleton, the Parol ſhall not demur; for *the Action is of the proper Seiſin of the Demandant*, and not as Heir, and this is at Common Law, and not within the Stat. of Glouceſter, which ſpeaks of

Writs

Writs of Aiel, Beſail, and of Coſinage, nor in Weſtm. 1. which ſpeaks of the Heir of the Diſſeiſee or Diſſeiſor. Quære. Br. Age, pl. 67. cites 12 E. 4. 17.

8. The Court *ex officio* put the Parol without Day *without Plea or Prayer* of any, where the Demandant was an Infant. Br. Age, pl. 71. cites 5 E. 3. It. Bed.

9. In Formedon in Deſcender in which the Demandant ſhall *not recover the mere Right, but a limited Eſtate per Formam Doni of the Seiſin of the Donee*, the Parol ſhall not demur by the Prayer of the Tenant, but he ſhall be anſwer'd within Age, unleſs any thing be pleaded againſt him to which he cannot be Party to try within Age. 6 Rep. 4. b. in Markal's Caſe, and ſays, that with this agrees 8 E. 3. 9. 12 E. 4. 17. 34 H. 6. 3. 40 E. 3. 42 E. 3. 13. E. 3. Formedon 96. 3 E. 2. ibid. 133.

10. *But* in *Aſſiſe and Aſſiſe of Mortdanceſtor* brought by Infant, there becauſe there is a Jury the firſt Day, and the Jury ſhall inquire of the Circumſtances, the Parol upon any Plea pleaded ſhall not demur. 6 Rep. 4. b. cites 8 E. 3. 36.

11. Where the Parol ought to demur for the Non-age of the Infant, the *Court ought to award* that it ſhall demur, *tho' the Tenant would anſwer*. 6 Rep. 5. in Markal's Caſe, cites 8 E. 3. 10.

12. If an *Infant aliens within Age, and dies within Age*, and his Heir Heir brings a *Dum fuit infra Ætatem*, the Tenant may pray that the Parol demur, and yet the *Action did not deſcend*. for it lies not for him who alien'd, becauſe he died within Age, and the Writ ſays Dum fuit Ætatem. 6 Rep. 4. a. in Markal's Caſe [by the Reporter, as it ſeems.] See S. P. admitted. D. 204 pl. 10. Mich 1 & 2 P. & M. in Caſe of Anderſon v. Ward.

13. *So* if the Heir brings Writ of *Non Compos Mentis*, the Tenant may pray that the Parol demur, and yet a naked Right, and no Action, deſcends 6 Rep 4. a. in Markal's Caſe, by the Reporter, as it ſeems.

14. If Infant has a *Seigniory by Deſcent*, and the *Tenant ceaſes or diſclaims in Avowry made of his own Seiſin*, or if he *is Baſtard*, or *Attaint of Felony*, or *dies without Heir*, he ſhall have Ceſſavit, Right upon Diſclaimer, and Writ of Eſcheat to demand the Land in lieu of the Services; and the Parol ſhall not demur, becauſe no Right anceſtrel deſcends to him for the Land, and it is but reaſon that he have the Services paid to him, or the Land in Recompence &c. D. 137. b. pl. 25. Hill. 3 & 4 P. & M. in Batlet's Caſe. 6 Rep. 3. b. S. P. accordingly, in Markhal's Caſe, obiter.

15. In *Sci. fa. to execute a Fine, limiting a Remainder to the Plaintiff's Grandmother, whoſe Heir* &c. The *Plaintiff appeared by Guardian, being within Age*, and therefore the Defendant pray'd that the Parol ſhould demur, but was ordered to anſwer over, becauſe he did *not plead the Deed of his Anceſtor*. And. 24. pl. 52. Paſch. 4 Eliz. Sands v. Bray. Dal. 37. pl. 4. Saunders v. Bray, S C and Dyer and Weſton held, that the Parol ſhould not demur for Non-age of the Demandant, but where he demands of the Seiſin of his Anceſtor, as in Writ of Aiel, Coſinage, or Entry ſur Diſſeiſin, whereas here it appears that no Poſſeſſion ever was in the Demandant's Anceſtor; beſides, he demands not any Land, but only the Execution of a Fine, whereas the *Parol ſhall demur in no Caſe but where Land is demanded*; and Defendant was awarded to anſwer.——Kelw. 204 b. pl. 5. S. C. in totidem Verbis——D. 210. b. pl. 26. S. C. but S. P. does not appear.——D 215. b pl. 53. S. C. but S.P. does not appear——Mo. 16. pl. 59. Anon. but ſeems to be S. C and S. P. accordingly, tho' the Infant had the Remainder by Deſcent, and tho' the particular Eſtate was determined in the Time of the Infant's Father; but that if the Defendant had pleaded the Deed of the Anceſtor of the Infant in Bar, the Parol ſhould demur.——Bendl. 121. pl. 152. S. C. that the Sci. fa. was brought by the Remainder-man in Fee of a Remainder in Tail to his Grandmother, ſo that the Plaintiff is in a Manner a Purchaſor; For the Eſtate Tail on which this Remainder depended was determined in the Time of the Plaintiff's Father, and not before, and the Defendant not pleading any Warranty of the Plaintiff's Anceſtor with Aſſets, he was ordered to anſwer over.——Mo. 35 pl. 114 S. C in the ſame Words with Dal. 37 pl. 4.——6 Rep. 3 a b. cites S. C. as adjudg'd accordingly after ſeveral Arguments and great Deliberation, and that the Record of the Judgment was ſhewn. And for the better apprehending the true Reaſon of this Judgment, the Rules of the Common Law are firſt to be obſerved, and then the Alterations made by Statute. And as to the firſt, every *Real Action* is either *Poſſeſſory*, viz. of his own Seiſin or Poſſeſſion, or *Anceſtrel*, viz. of the Seiſin or Poſſeſſion of his Anceſtor. And generally in all Real Actions poſſeſſory, tho' he has the Land by Deſcent, and the Tenant *pleads the Deed of his Anceſtor with Warranty*, he

the Parol ſhall not demur for his Non-age ; For the Law preſumes the granting it where the Demandant is an Infant, is for his Benefit, leaſt for want of knowing his Eſtate, and the Truth of the Matter; he may be prejudiced in his Right deſcended to him from his Anceſtor. But when the Anceſtor dies ſeiſed, and the Land deſcends, and he takes the Profits, it will be prejudicial to the Infant to loſe his Poſſeſſion, and be kept out till his full Age. But when a Naked Right only deſcends, he is at no ſuch Prejudice.

It is not called Action Anceſtrel Droitural becauſe the Action deſcends, but becauſe the Right deſcends from the Anceſtor, for which Action of the Seiſin of the Anceſtor is given to the Heir. 6 Rep. 4. a. in S. C. ——And therefore if an Infant aliens within Age, and dies within Age, and his Heir brings a Writ of *Dum fuit infra Ætatem*, the Tenant may pray that the Parol demur, and yet the Action does not deſcend; for it does not lie for the Alienor, becauſe he died within Age, and the Writ was Dum fuit infra Ætatem. So if the Heir within Age brings Writ of *Non Compos Mentis*, the Tenant may pray that the Parol demur, and yet a Naked Right, and no Action deſcends. 6 Rep. 4. a. in Markhal's Caſe.

16. Actions *Anceſtrel* are of two Sorts, viz. one is called Anceſtrel *Droiturel*, becauſe nothing deſcends from the Anceſtor but a naked Right; and the other is called Anceſtrel *Poſſeſſory*, becauſe the Anceſtor died ſeiſed in Poſſeſſion, and the ſame Land deſcended. 6 Rep. 3. b. Paſch. 35 Eliz. in Markhal's Caſe obiter.

17. *As* if Infant brings a *Writ of Right as Heir* to his Anceſtor, and *lays the Eſplees in his Anceſtor*, the Tenant (without any Plea) may pray that the Parol demur. 6 Rep. 3. b. in Markhal's Caſe obiter.

18. In all Caſes when a *naked Right in Fee ſimple deſcends from any Anceſtor (who was once in Poſſeſſion) to an Infant*, there *in any Action Anceſtrel* brought by him, the Tenant without any Plea pleaded may pray that the Parol may demur. 6 Rep. 3. b. Paſch. 35 Eliz. C. B. in Markhal's Caſe.

(A. 2) Age. By Statute of Glouceſter.

1. *Stat. Glouceſter*, 6 E. 1. cap. 2. *IF a Child within Age be holden from his Heritage after the Death of* * *his Father, Couſin, Grandfather, or Great Grandfather, whereby he is driven to his Writ,*

* In *Mortdanceſtor of the Seiſin of his Father*, a *Releaſe of his Uncle with Warranty was pleaded in Bar*, and prayed that the Parol demur, and the other ſaid that this Statute is, that in Favour of an Infant the Inqueſt ſhall be taken immediately, and it was anſwered, that the Statute is in Writs of Aiel, Beſaile, and Coſinage only. But note, that the Statute is, that if an Infant be held out of his Heritage after the Death of his Father, Grandfather, or Great Grandfather &c. Quod Nota. Br. Parol Demur, pl. 15. cites 8 Aſſ. 12.

Some MS. of this Chapter before Printing came to us *omitted* theſe Words (his Father) which being ſhewed to the Judges in 8 E. 3. they were of Opinion that a Writ of *Mortdanceſtor* was not within this Law, and Fleta following that Error rehearſing this Chapter, ſaith, Apud Gloc' proviſum fuit, ſi Hæres infra Ætatem petat ſeiſinam Conſanguinei, Avi ſui, vel proavi, & excipitur contra eum &c. omitting Patris ſui; but in the Print the former Error is amended, and accords with our later Books. 2 Inſt. 290.

And it is not to be thought, that the Wiſdom of the Parliament would provide for the Seiſins of them that were ſo far remote, as in the Writ of Beſail and Coſinage, and leaves unprovided the Seiſin that was in the Father, the next Anceſtor of all &c. 2 Inſt. 290.

By the Words (*after the Death of his Father*) is neceſſarily implied the Aſſiſe of Mortdanceſtor, and the Caſe of the *Fathes* is here put for an Example, for it *extends to the* Caſes of the *Mother, Brother, Sifter, Uncle, or Aunt, Nephew or Niece*, after the dying ſeiſed, of all which Perſons a Writ of Mortdanceſtor does lie, for all the ſaid Caſes are in equal Miſchief with the Caſe of the Father, and therefore are within the ſame Remedy. 2 Inſt. 291.

At Common Law in *Writs of Right, Entry ſur Diſſeiſin, Formedon in Reverter and Deſcender, Dum fuit infra Ætatem, and Non Compos Mentis, and all other Actions Real founded on a Right deſcended to an Heir within Age in which Seiſin and Eſplees ought to be laid in the Anceſtor whoſe Heir &c.* the Tenant by Exception to the Perſon of the Demandant ſo being within Age, ſhall ſtay the Parol until &c without any Plea pleaded in Bar; but the Writ ought not to abate as the Stat. Weſtm. 1. cap 46. ſuppoſes; and therefore Bracton lib. 5. ſays, that Minor ante tempus agere non poteſt infra Ætatem, maxime in Cauſa

Cauſa Proprietatis, nec etiam convenire, ſed differetur uſque Ætatem, ſed non cadet Breve. Per Dyer. D. 137. a. pl 22, 23. Hill. 3 & 4 P. & M. in Baſſet's Caſe.

But at the Common Law it ſeems, that *in Actions Anceſtrel poſſeſſory*, as *Aiel, Beſail, and Coſinage founded on a Dying ſeiſed of the Anceſtor where he needs not lay any Eſplees*, there the Tenant cannot pray that the Parol ſhall demur for Nonage of the Demandant, without pleading a Feoffment or other Thing to which the Demandant by reaſon of the Tenderneſs of his Age cannot join Iſſue, nor ſhall the Circumſtances of Things which would avoid the Deed be inquired by the Jury, as it ſhould be in Aſſiſe of Novel Diſſeiſin or Mordanceſtor; and therefore the Parol ſhall demur which is not remedied now by the Statute, and the Inqueſt ſhall be taken as of another Man of full Age. D. 137. a. pl. 25. Hill. 3 & 4 P. & M. in Baſſet's Caſe.

Note, that it was ſaid for Law in a Formedon, and not denied, that *Formedon in Reverter Dum fuit infra Ætatem, Dum non fuit Compos Mentis, Cui in Vita, Ingreſſu in Caſu Proviſo, & in Conſimili Caſu*, and *all other Writs of Poſſeſſion are aided by this Statute*, that if the Demandant be within Age, and a *Feoffment of the Anceſtor* &c. *is pleaded*, they ſhall proceed as if the Demandant was of full Age, and yet the Statute does not ſpeak but of Actions taken after the Death of the Father or Grandfather, and therefore Equity &c. Br. Age, pl. 5. cites 34 H. 6. 3.——Br. Parol Demur, pl. 4. cites S. C. accordingly; but Brooke ſays Quære Legem inde; for it ſeems that *no Action* can be taken *by the Equity but thoſe where the Anceſtor died ſeiſed*.——2 Inſt 291. ſays, that thoſe Actions, and all Actions of like Nature, are neither within the Miſchief, nor within the Letter or Meaning of this Act, for that none of them are Actions Anceſtrel Poſſeſſory as has been ſaid. 2 Inſt. 291.

In *Formedon in Deſcender* brought *by an Infant*, it is no *Plea to ſay that the Demand is within Age*, and pray that the Parol might demur; *but* if he *pleads Warranty of the Anceſtor with Aſſets, and prays* that the Parol demur, there it ſhall demur; for he *cannot try a Deed nor Aſſets of his Anceſtor within Age*. Ibid.——Br. Age, pl. 44. cites 18 E. 4. 23. S. P. for in Writs of Right (as this Writ is) theſe *are at Common Law*, and out of the Caſe of the Statute; for *this Statute does not give Remedy but in Writs of Aiel, Beſail, or Coſinage*, viz. *Writs in Poſſeſſion, that there the Circumſtances ſhall be inquired*, contra in Writs of Right, as here.

Before the making this Act, albeit the *Anceſtor died ſeiſed*, ſo as a *Freehold in Law was caſt upon the Heir*, yet if an *Eſtranger abated*, the Tenant in a Mordanceſtor, Aiel, Beſail, or Coſinage, might have ſhewn that the Demandant was within Age, and have prayed that the Parol might demur until the Age of the Heir, as he may do when the Action is Anceſtrel Droiturel, that is, when the Anceſtor has a Right only, and no Poſſeſſion, that is, no Freehold and Inheritance at his Death, ſo as no Freehold and Inheritance deſcend to the Heir, but a bare Right, and no Poſſeſſion; and ſo note a *Diverſity between* an *Action Anceſtrel Droiturel*, and an Action Anceſtrel *Poſſeſſory*. But at the Common Law, if in a Mordanceſtor, Aiel, Beſail, or Coſinage, the Tenant *pleaded a Feoffment*, or a *Releaſe from a collateral Anceſtor with Warranty* in Bar &c. there leſt the Infant for want of Intelligence might receive Prejudice by Trial thereof during his Infancy, the Law in his Favour at the firſt gave him the Benefit of his Age, which when it was uſed for Delay to his Prejudice, this Act was made for his Relief therein. 2 Inſt. 291.

*And his Adverſary cometh into Court, and for his Anſwer alleged a Feoffment, or pleadeth ſome other thing * whereby the Juſtices award an Inqueſt there, † whereas the full Inqueſt was deferr'd to the full Age of the Infant, now the Inqueſt ſhall paſs as well as if he were of full Age.*

A *Feoffment with Warranty from the ſame Anceſtor is* a Bar to the Aſſiſe, and *no Bar in* the Aſſiſe of *Mordanceſtor*; and therefore this is to be *intended of a Feoffment of a collateral Anceſtor with Warranty*, or a *Releaſe with Warranty* from ſuch an Anceſtor, *or ſuch other Matter, whereunto the Infant, during his Minority could not anſwer*, as hath been ſaid *at the Common Law*; And the Rule of Glanvile is good, Generaliter verum eſt, quod de nullo placito tenetur reſpondere is, qui infra ætatem eſt, per quod poſſit exhæredari; nec ipſi minori ſuper Recto reſpondebit donec Plenam habuerit ætatem; And ſo is that of Bracton, Quod minor ante tempus &c. 2 Inſt. 291, 292.

* This Error continueth ſtill in the Print; the Words of the Record are (whereby the Juſtices *award the Age*) and inſtead of the Age, the *Print is* (*Inqueſt*) which is Oppoſitum in Subjecto, for in the Writ of Aiel, Beſaiel, and Coſinage, there could be no Inqueſt awarded before an Iſſue joined; neither could any Inqueſt in thoſe Writs inquire of Circumſtances (as in the Aſſiſe of Mordanceſtor, or Aſſiſe) but of the Iſſue join'd only; and this alſo may well be collected by our Books. 2 Inſt. 290.

† Theſe Words (whereas the full Inqueſt was deferr'd to the full Age of the Infant) are to be *referr'd to the Mordanceſtor only*; becauſe in that Writ there appeareth a Jury the firſt Day, as in the Aſſiſe of Novel Diſſeiſin; but ſo it is not in the Aiel, Beſaiel, or Coſinage, unleſs you will take Inqueſt for Trial, and the *Senſe is where Trial is delayed until the Age* of the Infant, and then it may *have Reference to all the Writs named in this Chapter*. So as now ſuch pleading Trials and Proceedings, ſhall be in theſe four Actions as if the Plaintiff were of full Age. 2 Inſt. 291, 292.

(A. 3) Age. By Statute of Weſtminſter 1.

The *Miſchief* before this Act was, 3 *E.* 1. *Stat. Weſtm.* 1. *cap* 47. *IF any from henceforth purchaſe a Writ of Novel Diſſeiſin,*

that if a Man had been diſſeiſed, and *either the Diſſeiſee or Diſſeiſor had died*, their *Heir being within Age*, in a Writ of Entry Sur Diſſeiſin brought by the Heir of the Diſſeiſee, being within Age, or by the Diſſeiſee or his Heir againſt the Heir of the Diſſeiſor, being within Age, the Parol had demurr'd until the full Age of the Heir reſpectively, which was a great Delay, and is remedied on both Parts by this Act. 2 Inſt. 257.

This Statute is to be *taken ſtrictly*. 6 Rep. 5. a. in Markal's Caſe.

Albeit the *Diſſeiſee purchaſed no Writ of Aſſiſe* of Novel Diſſeiſin, yet the Heir or Heirs of the Diſſeiſor are within this Statute; for ſeeing in this Caſe here put by the Makers of this Law, true it is, that notwithſtanding the Purchaſe of the Writ of Entre ſur diſſeiſin brought by the Diſſeiſee againſt the Heir of the Diſſeiſor, the Heir ſhould have had his Age to the great Delay of the Demandant, this is ſhewed for a Miſchief in this particular Caſe, to perſwade that the Law might be general, tho' no Writ was brought as by the Body of the Act appeareth. 2 Inſt. 257. *And he againſt whom the Writ was brought as principal Diſſeiſor dieth before the Aſſiſe be paſſed,*

This is to underſtood of a Writ of Entry *in the Per*, and *not in the Poſt*, for the Words of the Statute be (Sur le Heir le Diſſeiſor) which is a Writ of Entry in the Per, and therefore if the *Heir of the Diſſeiſor make a Feoffment in Fee*, and the *Feoffee dieth, his Heir within Age*, in a Writ of Entry againſt the Heir, he ſhall have his Age, for this Act *extends but to the Heir of the Diſſeiſor*, who ſitteth in his Father's Seat, and cometh to the Land without Conſideration; but *otherwiſe* it is *of him that purchaſeth the Land of the Heir*, for he and his Heirs are out of the Letter and Meaning of this Act; the ſame Law is of the *Vouchee and Price in Aid within Age* 2 Inſt 257. *Then the Plaintiff ſhall have his Writ of Entry upon Diſſeiſin againſt the Heir or Heirs of the Diſſeiſor or Diſſeiſors (of what Age ſoever they be.)*

If the *Feme, Heir of the Diſſeiſor, taketh Husband, and hath Iſſue within Age and dieth*, the *Diſſeiſee brings a Writ of Entry* againſt the *Tenant by the Curteſie*, and he *prays in Aid of her within Age*, he ſhall have his Age; for this is a Writ of *Entry in the Poſt* being brought againſt the Tenant by the Curteſy, and ſo out of the Statute. 2 Inſt. 257.

If there be *two Brothers and a Siſter*, the *elder Brother diſſeiſeth one and dieth*, and the Land deſcendeth to *his Brother*, and he *enters and dieth ſeiſed*, and the Land deſcendeth to the *Siſter within Age*; in a Writ of Entry by the Diſſeiſee againſt the Siſter, ſhe ſhall be ouſted of her Age by this Statute, wherein three things are to be obſerved. 1. That the *Mediate Heir on the Part of the Diſſeiſor* is within the Statute. 2. That tho' the Siſter is to make herſelf Siſter and Heir to the younger Brother, and not to be Diſſeiſor, for that her younger Brother enter'd, yet is *ſhe Heir within the Meaning of this Statute to the Diſſeiſor*, and therefore to be ouſted of her Age. 3. That a Writ of Entry in the Per & Cui in this ſpecial Caſe is within this Act. 2 Inſt. 257, 258.

Special *Heirs*, as *in Gavelkind, Borough Engliſh*, and the *Siſter of the whole Blood* are on both Sides *within the Statute*; for tho' they be not Heirs by the Common Law, yet are they Heirs within the Intention of this Law, which is to be taken benignly, being made for Expedition of Juſtice, and to ouſt Delay. 2 Inſt. 258.

Writ of *Entry ſur Diſſeiſin*, the *Writ ſuppoſed that the Tenant diſſeiſed the Couſin of the Plaintiff, and made himſelf Heir of J. Son of P. Son of B. Brother to him who was diſſeiſed.* The Tenant pleaded that the Demandant is within Age, and pray'd that the Parol demur; for the Statute is intended Son and Heir, that by his Nonage the Parol ſhall not demur, and this Demandant is Couſin and Heir, therefore out of the Statute; and alſo J. and P. who ſurvived the Diſſeiſee were of full Age, to whom this Action was given; Judgment per Stone, The Statute *is general, where the Heir of the Diſſeiſee brings the Action againſt him who does the Wrong*, that the Parol ſhall not demur for his Nonage, wherefore Anſwer, by which he ſaid that he did not diſſeiſe, priſt &c. Br. Age, pl. 18. cites 21 E. 3. 27. *In the ſame wiſe the Heir or Heirs of the Diſſeiſee ſhall have their Writs of Entry againſt the Diſſeiſors, or their Heirs, of what Age ſoever they be, if peradventure the Diſſeiſee die before that he hath purchaſed his Writ.*

This is to be *underſtood* as well *of the Mediate as of the Immediate Heir of the Diſſeiſor*, and therefore if there be Grand-father, Father, and Son, and the Grand-father is diſſeiſed and dieth, and the Father of full Age, likewiſe dieth, the Son is within Age, and brings his Writ of Entry againſt the Diſſeiſor, he is an Heir within this Statute; for he maketh himſelf Heir to the Grand-father, who was the Diſſeiſee. 2 Inſt. 258.

*So that for the Non-ages of the Heirs of the one Party nor of the other, the Writ shall not be * abated, nor the Plea delay'd but as much as a Man can without offending the Law, it must be hasted to make † fresh Suit after the Disseisin;*

Entry in the Per & Cui, The Case was, *Disseisor had Issue a Son and a Daughter*, and *died seised*, and the *Son enter'd*, and *died seised without Issue*, and the *Daughter enter'd as Heir*, against whom the Writ was brought, and she pray'd her Age upon this Matter, where this Statute is that by the Non-age of the Heir of the Disseisee, nor of the Heir of the Disseisor, the Parol shall not demur where fresh Suit is made, and because it was shewn how the Demandant made fresh Suit as well against the Brother, whose Heir the Tenant is, as otherwise, she was ousted of her Age by Award; for she was also Heir to the Disseisor, tho' she was not Immediate Heir to him; quod nota. Br. Age, pl. 22. cites 24 E. 3. 25.

Writ of Entry within the Degrees upon Disseisin, the *Tenant vouch'd J.* and pray'd that the Parol demur, and the Demandant said, because this Writ of Entry is within the Degrees, and he is Heir to the Disseisor, and this Statute wills that for the Non-age of the one nor the other, after the Disseisin, the Parol shall not demur &c. and the other demurr'd because this Statute says, where the Action is brought against the Heir of the Disseisor as Tenant, and this Action is brought *against another, and the Heir is vouch'd*, so that he is vouchee and not Tenant, and therefore out of the Case of the Statute. Quære. Br. Parol Demur, pl. 3. cites 27 H. 6. 1.

This Statute takes away the Age as well of the Part of the Tenant as of the Demandant in Writ of *Entry sur Disseisin to the Ancestor*, if fresh Suit was made, as is adjudg'd in 24 E. 3. 46. For in such Case because a naked Right descends to the Heir at the Common Law, the Parol shall demur for his Infancy; but the said Act is taken strictly, and extends not to any other Action than Writ of Entry sur Disseisin. 6 Rep. 4. b. cites 46 E. 3. tit. Age 76.

But at the Common Law, if the Grand-father was disseised and brought Assise, and died pending the Writ, and afterwards the Father brought Writ of Entry sur Disseisin, and died pending the Writ; in this Case in Writ of Entry brought by the Son of the Disseisin down to his Grand-father, the Parol should not demur for the Non-age of the Son, by Reason of the speedy and fresh Pursuit which had been made. 6 Rep. 4. b. and says that with this accords 10 E. 3. 58.

* Here (Abatement) is *taken for putting off the Writ and Plea without Day until full Age, but the Writ is not abated.*

† This (fresh Suit) is not to be *understood between the Disseisor and the Disseisee, altho' the Disseisor continue in Possession 30 or 40 Years* &c. But when the Disseisor dies, then is the fresh Suit to be made, and that is regularly *within a Year and a Day after the Death of the Disseisor*; for within that Time continual Claim may be made, which is in Law Recens & Continuum Clameum, and within that Time an Appeal of Death may be brought, which is Recens Insecutio, & sic in multis aliis similibus. 2 Inst. 258.

And in like Manner this shall be observed in all Points for the Right of Prelates, Men of Religion, and other, to whom Lands and Tenements can in no wise descend after others Death, whether they be Disseisees or Disseisors;

This Clause is to be understood of ecclesiastical Persons, that be *Regular, and not* Ecclesiastical Persons, that be *Secular*, for the Regular are Dead Persons in Law, to whom no Lands (as this Statute speaketh) can descend after the Death of any other; but to the Secular, as to Bishops, Parsons, Vicars, and the like Lands may descend, and therefore they are not within this Clause, but within the former Branches of this Act for such Lands as they are seised of to them and their Heirs in their natural Capacity. 2 Inst. 258.

And if the Parties in Pleading come to an Inquest, and it passeth against the Heir within Age, and namely against the Heir of the Disseisee, that in such Case he shall have an Attaint of the King's special Grace, without giving any thing.

(B) In what Actions he shall have his Age.

1. IN Writ of Dower the Parol ought not to demur for Favour of Dower, and because peradventure the Feme will die before his full Age. * 5 H. 5. 13. Curia. † 17 E. 3. 59. 12 E. 4. 12. Trin. 4 Jac. B. R. between *Epps and* || *Epps* adjudged. Skene Quon.

* S. P. but if he had been *in Ward of the King*, it seems he

should have had his Age. See Br. Age, pl. 1. cites S. C. Quon. Attachiamenta, cap. 90 and 99. The Law of Scotland is accordingly.

——Fitzh. Age, pl. 19. cites S. C. ——Mo. 847. pl. 1148. cites Pasch. 35 Eliz. that Feme brought Dower, and all the Tenants made Default, and thereupon Judgment was given, and Error was brought and assigned, because one of the Tenants was within Age; but adjudged no Error.——Mo. 848. pl. 1149. Trin. 41 Eliz. Harvey's Case, adjudged in Error accordingly, where it was assign'd that the Tenant was within Age, and cites Fleta, lib. 6 cap 42. [43] That Hæres Minor Annis 20. [21] non respondebit nisi in Casu Dotis; and Bracton, fol. 252. and Britt. cap. 101. fol. 217. —Same Books cited by Coke Ch. J. 3 Bulst. 145.——3 Bulst. 135. Jones cited 44 E. 3. that in Dower the Heir shall not have his Age, to which Coke Ch. J. agreed, and said it was very clear.——If Dower be settled the Heir shall not have his Age; cited by Doderidge J. 3 Bulst. 142. as adjudged in 44 E. 3.——S. P. admitted by Coke Ch. J. 3 Bulst. 136.——In Dower, if the Tenant vouches the Heir within Age, there in Favour of Dower he ought to shew a Deed. 6 Rep. 5. a. cites 11 E. 3. Voucher 13. 40 E. 3. 5. 50 E. 3. 25. 10 E. 3. 31.

† Fitzh. Age, pl. 49. cites S. C.

3 Bulst. 141. Doderidge J. says that 2 Reasons are given in the old Books, and admitted of in the later Books, why Age shall not be admitted in Dower; 1st, because *Dower is much favoured* in Law; and 2dly, because this is *a speedy Suit*, and therefore no Delay to be admitted in it; and no Mischief shall hereby come to the Heir, because she shall *recover a particular Estate* only for her Life, and *to be attendant upon the Heir, and* she is to be *in of the Estate of her Husband*; and if she shall have this Favour in Law when her Dower is settled, she shall have this Favour also in the Means to come to it. ——Dower is demandable against an Infant, and he shall not have his Age; per Williams & Tanfield, being only in Court. Cro. J. 111. pl. 8. Hill. 3 Jac. in Case of Smith v. Smith.

‖ See Tit. Error, (G. c) pl. 30. S. C.

In Writ of Dower, if Infant be not Tertenant, he shall not have his Age; but otherwise if he be Tertenant. Roll Rep. 325. Hill. 13 Jac. B. R. in Case of Herbert v. Binion.

See (D) pl. 1, 2, 3. 5, 6.

Fitzh. Age, pl. 38. cites S. C. —— S. C. cited by Doderidge J. 3 Bulst. 141. as ruled that the Heir shall not have his Age in this Action, it being only to restore her to her Dower.——S. P. accordingly, because the Title of Dower is materially in Question; per Haughton; Roll Rep. 323. pl. 31. cites S. C. ——S. C. cited, and S. P. agreed, per Cur. Roll. Rep. 251. Mich. 13 Jac. B. R ——S. C. cited by Haughton J. 3 Bulst. 138. and says that so is Fitzh. Dower 181. 6 H. 3. and 16 E. 3. Ibid. pl. 56.——S. C. cited by Coke Ch. J. Crooke and Haughton J. Cro. J. 393.

2. If a Feme brings Quod ei Deforceat upon Recovery had of Land which she claims to hold in Dower, the Parol shall not demur, because it is of the Nature of Writ of Dower. 44 E. 3. 43.

3. But if Tenant in Dower be disseised, and Disseisor dies seised, the Heir shall have his Age against the Feme. 44 E. 3. 43.

* Fitzh Age, pl. 16. cites S. C. —— Br. Age, pl. 3. cites S. C. —— Ibid. pl. 9. cites 47 E. 3. 7. S. P. per omnes, tho' he be Tenant and in by Descent.——S. C. cited 6 Rep. 4. b. ——S. P. by Haughton J. because the Jurors may all die. 3 Bulst. 135. 137. and S. P. by Doderidge J. Ibid. 140. and says that in this all our Books agree ——Ibid. 145. S. P. admitted by Coke Ch. J.—— S. P. by Haughton J. Roll Rep. 251. and Ibid 323 S. P. by Haughton, and cited the Books in the principal Case, and the same was agreed to per Curiam, and Coke Ch. J. and Crooke added this further Reason, because it was pro Bono Publico, and to punish a false Verdict.

4. In Attaint against the Heir of him who recover'd in the first Action the Parol shall not demur for the Non-age of the Defendant for the Mischief of the Death of the Petit Jury before his full Age 47 Ass. 4. Curia. 47 E. 3. 9. * H. 6. 46. Curia.

Br. Age, pl. 9. cites S. C. that in Attaint, notwithstanding the Heir be Tenant, and in by Descent, yet he shall not have his Age; per omnes.——Fitzh. Age, pl. 43. cites Sir Richard Walgrave's Case, S. C. but S. P. does not appear.

If the next Heir of the Dead be within Age, he must bring his *Appeal of Death* within the Year and the Day, according to this Act; but it hath been holden in many Books, that the Parol should demur until his full Age; and the Reason yielded therefore is, that the Defendant cannot wage Battle &c. But it hath been often adjudged, and approved by continual Experience of latter Times, that it *shall proceed during his Minority*, and the Reason of Failer of Battle is of no Force; for that a Man above 70 Years of Age shall have an Appeal &c. and yet the Defendant shall be ousted of Battle, and so if the Plaintiff in an Appeal be mayhem'd &c. the Defendant shall be ousted of Battle, and yet the Appeal shall proceed. 2 Inst. 320.

* Br. Age, pl. 3. cites S. C. —— 5. In Attaint against the Heir of a Feoffee, the Parol shall not Demur for Non-age of the Defendant, for the Mischief of the Petit Jury

Jury before his full Age. 47 E. 3. 9. Curia. 9 H. 9. 46. Curia. † 47 Ass. 4. Curia. Fitzh. Age, pl. 16. cites S. C.

† Br. Age, pl. 60. cites S. C. and S. P. per omnes.

6. The same Law in Attaint against Tenant in Dower within Age, who was the Feme of the Recoveror, and is endow'd of his Possession. 40 Ass. 20. adjudged. Fol. 138. For she has not her

Dower by Descent. Br. Age, pl. 38. cites S. C.

7. In a Quare Impedit the Parol shall not demur for Non-age of the Patron Defendant, because the Lapse may incur during his Non-age. 43 Ass. 21. Br. Age, pl. 40. cites S.C. ——Fitzh. Age, pl. 75. cites S. C. —

3 Bulst. 141, 142 S. P. by Doderidge J. cites 43 Ass. pl. 22.——Ibid. 142. S. P. by Croke J. and ibid 145. S. P. by Coke Ch. J.——Ibid. 145. per Coke Ch. J. accordingly; for there a Wrong is done, and it is a personal Action.

8. So if the King presents, in Right of the Heir in Ward, to the Church of which another is Patron of the Grant of the Father of the Ward with Warranty of the Land to which this is appendant, who left Assets to the Ward, and the Patron sues by Petition to the King to repeal his Presentment, shewing the Matter, the Parol shall not demur for the Non-age of the Ward; for the Mischief of the Lapse, and this Suit is in Nature of Quare Impedit. 43 Ass. 21. Adjudged. S. P. nor the Age shall not be granted; for Age does not lie in Quare Impedit for the Lapse, and also the Heir is not Party. Br. Age, pl.

40. cites S C.——Fitzh. Age, pl. 75. cites S. C.——Roll Rep. 324. cites S. C.

9. In a Writ of Estrepement against an Infant, he shall not have his Age, because this Action is in Nature of a Trespass, and it is done by himself. 3 H. 6. 16. Br. Age, pl. 1. cites S. C. —Fitzh. Age, pl. 14. cites S. C.—

S. C. cited D 104. b. pl. 13.——2 Inst. 328. S. P. and cites S. C.

10. In Affise the Tenant shall not have his Age, because it is De son tort Demesne, and there should not be any Delays in this Writ. 38 E. 3. 27. Adjudged. The Parol shall not demur for the Nonage neither of the

Plaintiff nor of the Defendant; by the Reporter. 3 Rep. 50. a.——2 Inst. 411. S. P.

11. In a Cessavit of his own Cesser, the Tenant shall have his Age, being in by Descent, because he cannot know what Arrears to tender. * 28 E. 3. 99. b. adjudged. Co. 9. *Conny's Case*, 85. † 2 E. 2. Age 132. adjudged. 30 E. 1. But otherwise it is if he be in by Purchase. Dubitatur 28 E. 3. 99. b. Contra 31 E. 3. Age ‡ 55. adjudged. *Fitzh. Age, pl. 169. cites S. C. accordingly by Wilby; but Fitzh. Ibid. says the con-

trary was adjudg'd, 31 E. 3.——Ibid. pl. 88. Mich. 14 E. 3. which seems accordingly.——2 Inst. 401. S P. accordingly.—— S. P. admitted 3 Mod. 222.

† 4 Rep. 4. b. cites S. C.

‡ This is misprinted, and should be pl. 54.

Where an Infant claims *by Purchase*, a Cessavit shall lie against him. Co. Litt. 380. b. cites Pl. C. 355, &c. Stoel's Case; and says that some have said, that if he has the Tenancy *by Descent, and he himself cesses*, a Cessavit lies, and he shall not have his Age, because it is of his own Cesser, and cites 31 E. 3. Age 54. but says that other Books (as some conceive them) are e contra; and cites 9 E 3. 50. 28 E. 3. 99. 14 E 3. Age 88. 2 E. 2. Age 132. and others, which Books do not prove that the Cessavit lies not in that Case, but the contrary that he shall have his Age, to the End that he may at his full Age certainly know what to plead, or what Arrears to tender; for the Land was originally charged with the Seigniory and Services.——6 Rep. 4. b cites the same Cases ——See (C) pl. 12.

12. In

In a Writ of *Partition* an Infant ſhall not have his Age. Br. Age, pl 53. cites 9 H. 6. 6 8 E 3. and Fitzh. Age, 115 ——Co. Litt. 171. a b. S. P. accordingly.

12. In Writ of Partition between Coparceners, the Age does not lie for the Defendant; for nothing is demanded but a Partition. 9 * H. 6. a. 8 H. 37 El. B. per Curiam. Contra 10 H. 4. 5.

* Quære whether this ſhould not be 9 H. 6 6. b. which is according to Brooke, where nothing is mentioned of Coparceners.

Hob 179. pl. 214. S. C.

13. The ſame Law is of a Partition between Jointenants and Tenants in Common by the Statute, H. 37 El. B. Curia. Hob. Rep. 242. between *Points and Gibſon.*

* It ſeems this ſhould be 9 H 6. 6. ——Br. Attornment, pl. 41. S. P. cites 37 H. 8.—— † 2 Brownl. 84. S. P. per Cur. and S. C. by the Name of Crane v. Colepit.——Co. Litt. 315. a (d) S. P. accordingly, whether he has the Land by Purchaſe or Deſcent.

14. In Per quæ Servicia, Defendant ſhall not have his Age, but ſhall be compell'd to attorn; for he is not prejudiced by his Attornment; for when he comes to full Age he may diſclaim to hold of him, or [ſay] that he holds by leſs Services, notwithſtanding this Attornment. 42 E. 3. Age 33. * 9 H. 6. b. Co. 9. † *Conny* 85. 32 E. 3. Age 80. adjudged, the Infant being a Purchaſor.

Reſolved that in a Per quæ Servicia againſt an Infant, who has the Tenancy by Deſcent, he ſhall not have his Age, becauſe *at firſt the Lord departed with the Land in Conſideration of the Tenant's holding of him, and doing him Services, and paying to him Annual Rent*, and the Tenant is called in Law Tenant Paravail, becauſe the Law preſumes that he has Benefit and Availe over and above the Services that he does, and the Rent which he pays to the Lord, and ſo it would be againſt Reaſon and the Intent of the Creation of the Tenure, that when the Heir has the Tenancy Paravail by Deſcent, that he ſhall not pay the Annual Rent &c. reſerved on the creating the Tenancy, and that is the Reaſon that the Heir of the Tenant, who has the Tenancy by Deſcent, may be diſtrain'd for the Rent &c. Arrear, during his Minority, and therefore ſhall not have his Age. 9 Rep. 85. a. Mich. 9 Jac. C. B. in Conny's Caſe.

Co. Litt. 315. a. S. P. accordingly.

15. The ſame Law is in a Quid Juris clamat againſt an Infant. 42 E. 3. Age 33. per Belknap ſaid to be adjudged. Contra 2 E. 2. Age 78.

16. In a Per quæ Servicia, if the Tenant ſays that the Conuſor is dead, his Heir within Age, the Parol ſhall not demur for his Nonage, tho' it may be that the Conuſor was Tenant in Tail; for it ſeems that the Heir, if he was of full Age, cannot come to plead it; but the Tenant may plead it, if it be true. Contra 2 E. 2. Adjudged, 77 Age.

Br. Age, pl. 75. cites S. C that in Quid Juris clamat the Parol ſhall not demur for the Nonage of the Plaintiff.

17. In a Quid Juris clamat by him in Reverſion againſt Tenant in Dower, the Parol ſhall not demur for the Nonage of the Demandant; for he be of full Age, or within Age, he ought to warrant the Land to the Tenant in Dower, by reaſon of the Reverſion by Force of an Act in Law. 13 E. 2. Age 121. adjudged.

In Quid Juris clamat againſt Tenant for Life, who pleads that this was *leaſed to him without Impeachment of Waſte*, and if the Plaintiff will confeſs this, then he will attorn; but it was ſaid that rather than the Infant ſhall make ſuch Confeſſion, Age ſhall be allow'd him, and ſo it was; per Haughton J. 3 Bulſt. 137. cites 45 E 3. 5.——9 Rep. 85. b. S. C. cited by Coke Ch. J. —Roll Rep. 323. S. C. cited per Haughton.——Co. Litt. 320. b. S. P. accordingly.

18. But if an Infant in Reverſion brings Quid Juris clamat againſt Tenant for Life, the Parol ought to demur; for he has a Warranty againſt his Leſſor by Special Deed, to do which Thing the Plaintiff who is within Age cannot bind him. 13 E. 2. Age 121. Curia.

The Parol ſhall demur, becauſe the Plaintiff was an Infant and could not *confeſs a Deed of Leaſe for Life, without Impeachment of Waſte* pleaded in Quid Juris clamat. Br. Parol Demur, pl. 6. cites 45 E. 3.

19. In

19. In a Writ of Meſne brought by Baron and Feme, in Right of the Feme, the Parol ſhall not demur for the Non-age of the Feme. 21 E. 3. Age 85. Adjudged. See (E) pl. 3. S. C.

20. In a Writ of Meſne the Parol ſhall not demur for the Nonage of the Demandant, becauſe it is brought for the Tort, and Damage done to the Demandant himſelf. Temp. E. 1. Age 119. adjudged. 7 E. 3. Age 140. adjudged Contra. Temp. 1 E. 1. Age 120. admitted. Fol. 139. 6 Rep. 3. b. in Markhal's Caſe, cites S. C. accordingly; and Tempore E. 1. Age 119. and 7 E. 2. Age 140.——S. P. accordingly, becauſe it is not reaſonable that the Infant ſhall be diſtrain'd for the Services of the Meſne during his Nonage, and not have any Remedy till his full Age; but ſince his Nonage will not privilege him from Payment of the Rent during his Nonage, the Law will give him Remedy alſo during his Nonage. 11 Rep. 85. a. in Conny's Caſe, obiter, cites S. C

21. In Writ of Meſne brought by Tenant in Tail againſt him in Reverſion, if he binds himſelf to the Acquittal for Cauſe of the Reverſion, the Parol ſhall not demur for the Nonage of the Demandant. Temp. E. 1. Age 120.

22. In a Contributione Facienda by one Coparcener againſt another, the Parol ſhall not demur for the Nonage of the Tenant, tho' he ſaid that his Anceſtor died ſeiſed, and held ſine Contributione Facienda. 4 E. 2. Age 136. Adjudged. See (F) pl. 6. S. C.

23. In a Writ of Cuſtoms and Services the Parol ſhall demur for the Non-age of the Tenant being in by Deſcent. 6 H. 3. Age 148. See (C) pl. 11. S. C. —— 9 Rep. 85. a. S. C. cited per Cur. accordingly.

24. If a Man recovers againſt A. who dies, in Scire facias to execute it againſt his Heir within Age, he ſhall not have his Age. * 47 E. 3. 8. † 9 H. 6. 46. 18 E. 3. 33. ‡ 23 E. 3. 22. 47 Aſſ. 4 || 28 Aſſ. 17 per Thorpe. 15 E. 3. Age 95. adjudged 8 E. 2. Itinere Cant. Age 124. * S. P. Br. Age, pl. 3. cites S. C. for the Title is bound by the Recovery; *but* in this Caſe, if the Demandant had entered after the Recovery, and the Tenant had re-entered and died, and his Heir is within Age, he ſhall have his Age; for there the Judgment is executed.——Fitzh. Age, pl. 43. cites S. C ——S. C. cited by Haughton J. 3 Bulſt. 137.

† Br. Age, pl. 3 cites S. C.——Fitzh. Age, pl. 16. cites 9 H. 6. 47. but I do not obſerve the S. P. exactly.

‡ Fitzh. Age, pl. 99 cites S. C and takes a *Diverſity* where the Tenements *deſcend to* the Heir *from the ſame Anceſtor againſt whom the Recovery was*, and where *from another Anceſtor*, and that in the laſt Caſe he had his Age granted to him by Award, which ſhould not be if he claim'd from the ſame Anceſtor that was Party to the Judgment.

|| Fitzh. Age, pl. 267. cites S. C.——5 Bulſt. 141. S. P. by Doderidge J. and cites 18 E. 3. 34. 22 E. 3. 22. 27 E. 3. 88 47 E. 3. 13.

In a *Sci Fa. to execute a Judgment* the Heir ſhall not have his Age; for the Law adjudges that he cannot have Title, but that he is bound by the Judgment; per Doderidge J. Cro. J. 393. cites 18 E. 3. 34. and 22 E. 3.

In Recovery againſt the Anceſtor the Parol ſhall not demur for the Nonage of the Heir; for the *Heir and his Title are bound by the Judgment.* Br. Parol Demur, pl. 4. cites 34 H. 6. 3, 4.

25. The ſame Law in a Scire Facias to execute a Fine againſt the Heir of the Conuſor, he ſhall have his Age. * 22 E. 3. 9. adjudged. 15 E. 3. Age 95. Dubitatur 18 E. 3. 32. b. Sec 44 E. 3. Age 37. * Fitzh. Age, pl. 97. cites S. C. accordingly, where the Sci. Fa. was brought againſt a Tenant who was in by Deſcent ——

26. So it is if it be ſued againſt the Heir of a Stranger to the Fine. 24 E. 3. 29. adjudged. 21 E. 4. 19. b. 33 E. 3. Aid del Roy 109.

Br. Age, pl. 46. cites S. C. that he ſhall have his Age where he alleges a Title of Deſcent and Nonage in him; Quod Nota.—— —Fitzh. Age, pl. 21. cites S. C.

For the Title of the Feoffor was *bound by the Judgment.*

27. If a Man recovers in Præcipe quod reddat, in Scire facias against the Heir of the Alienee within Age to execute the Judgment, he shall not have his Age. 2 H. 4. 16. b.

Br. Age, pl. 11. cites S. C.——*So* where a Man *recovers against Baron and Feme*, and *she dies mean between Judgment and Execution* her Heir within Age, he shall not have his Age; for the Title of his Mother is bound by the Judgment. Ibid.——Br. Executions, pl. 24. cites S. C.

Delays are ousted in Scire Facias by the Statute, as *Essoign*, *Protection*, and *Voucher*, but he shall have his Age where he *alleges Title of Descent and Non-age* in himself; per Cur. Quod Nota. Br. Age, pl. 46. cites 21 E. 4. 19.

28. But if another than he against whom the Recovery was, died seised, and a Scire Facias is sued against his Heir, he shall have his Age. 18 E. 3. 33.

Br. Execution, pl. 24. cites S. C. ——If in Scire Facias upon Contra

29. If a Man recovers against an Abbot in Contra Formam Collationis, in Scire Facias against the Tertenant who prays in Aid of the Heir within Age, the Parol shall not demur. 2 H. 4. 16. b.

Formam Collationis *the Tenant says that this Land was allotted to his Feme in Partition* &c. *and she died seised* his Heir within Age, and prayed Aid of him, and that the Parol demur for his Nonage, some held that the Aid lies, but not the Age. Br. Age, pl. 11. cites S. C.——See (K) pl. 2. S. C.

So in Scire Facias upon a Recognizance *against the Heir*, who is in by

30. In a Scire Facias against the Heir of him against whom the Recovery was, if the Heir be in by Descent of another Ancestor than him against whom the Recovery was, he shall have his Age. * 23 E. 3. 22. adjudged. 15 E. 3. Age 95. admitted.

Descent, he may shew how he is in by Descent, and shall have his Age. Br. Age, pl. 9. cites 47 E. 3. 7.

* Fitzh. Age, pl. 99 cites S. C.

Fitzh. Age, pl. 99. cites S. C.

31. So tho' in this Case the Ancestor of whom the Heir claim'd by Descent was in by Descent from him against whom the Recovery was. 23 E. 3. 22. adjudged.

Fitzh. Age, pl. 22. cites S. C.

32. In a Scire Facias against the Heir of him who accepted a special Tail by the Fine being dead without special Issue, the Heir shall have his Age. 2 H. 5. 11. b. 12. admitted.

But if he is Tertenant, he shall for that reason have his Age. Br. Age, pl. 3. cites 9 H. 6. 46.

33. If a Man brings Writ of Error against the Heir of him who recovered being within Age, and in by Descent in the Land, the Parol shall not demur for his Non-age, tho' peradventure he has a Release or other Matter to bar the Plaintiff, the which he has not Knowledge to plead within Age. 47 Ass. 49. adjudged.

——*So* ibid. pl. 60. cites 47 Ass. 4. if he was *Tertenant and in by Descent*.——6 Rep. 4. b. S. P. cites 47 E. 3. 7.

Br. Age, pl. 3. cites 47 E. 3. 7. contra, that he shall *not* have his Age *unless he be Tertenant*, but *Scire Facias shall issue against the Tertenant*, and they shall proceed to Examination of Error.

34. [But] in Writ of Error against the Heir of the Recoveror in a Real Action, the Parol shall demur his Non-age, tho' he has nothing in the Land, but another is Tenant, because he cannot have Conusance of his Right, nor of that which is best for him. 9 H. 6. 46. a. b. per all the Justices. Contra 47 Ass. 4. adjudged.

——Writ of Error was brought against Tenant by the Curtesy, and the Heir could not have his Age, for the Writ was brought against him, but by Reason only of the Privity.——Ibid. pl. 9. cites S. C.——Ibid. pl. 60. cites 47 Ass. 4 accordingly.

* If the *Heir of the Recoveror is Tertenant* he shall have his Age; by all the Justices; but if he *brings* Writ of *Error against one, and Scire Facias against another*, as Tenant of all the Land, the Defendant shall not have his Age against him against whom the Writ of Error was brought. *But* if Writ of *Error* be brought *against one, and Scire Facias against another, as Tenant of the Moiety*, yet the Defendant in the Writ of Error shall have his Age for the Moiety; and after great Debate, adjudg'd that they shall immediately go to Examination of the Errors against the other &c. Fitzh. Age, pl. 16. cites 19 H. 6. [but it seems it should be 9 H. 6. a. pl. 29.]

35. If

35. If a Man in Writ of Error againſt him who was Privy to the Judgment reverſes the Judgment, and after ſues a Scire Facias againſt the Heir of the Alienee of the Land within Age, he ſhall have his Age. 47 Aſſ. 4 per Candiſh. Fol. 140.

36. So if a Man reverſes a Recovery in Writ of Diſceit, and after ſues a Scire Facias againſt the Heir of the Alienee of the Land within Age, he ſhall have his Age. Contra 47 Aſſ. 4. per Cauſh. An Infant ſhall not have his Age in a Writ of Diſceit ; per Doderidge J. 3 Bulſt. 136. cites S C. and 47 E. 3. 7. and ſays, that with this agrees 35 H 6. 44. where the Caſe is put of a Writ of Error and no Age to be allowed.——3 Bulſt. 141. Doderidge J. ſaid, that Error, Attaint, and Diſceit in not ſummoning the Party as he ought to do, are all of the ſame Nature. —— Roll. Rep. 326 in pl. 31. Coke Ch J. agreed, that Age lies not in Writ of Diſceit, and yet there is no Book to prove it, but in a Diſceit there is a Tort.——It was ſaid, that the Reaſon why it lies not in Diſceit, is, for doubt of the Death of the Summoners and Viewers. Cro. J. 392.

37. In a Scire Facias brought by an Infant, the Parol ſhall not demur for the Non-age of the Demandant. Temps E. 1. Age 119. per Berr.

38. If Baron and Feme levy a Fine of the Land of the Baron, and after the Baron dies, and the Conuſee dies his Heir within Age, againſt whom the Feme brings Writ of Error, being Tertenant, but the Feme pleads that ſhe claims only Dower of the Land, yet the Parol ſhall demur, becauſe the Feme may have other Title to the Land when this is reverſed, and the Dower is not demanded in this Action as in Quod ei deforceat. H. 13 Jac. B. R. between *Harbert and Binion*, dubitatur upon Demurrer ; but after the Parties ſtay'd till his full Age, and then ſued a Reſummons, ſcilicet, Mich. 10 Car. S. C. cited Arg 2 Ld. Raym. Rep. 1436.—— Cro. J. 392. pl. 5. Herbert v. Binion, S. C. adjudged by Coke Ch J. Crooke and Haughton J. that the Parol ſhall demur ; but Doderidge ſtrongly e contra.——3 Bulſt. 134, &c. S. C. adjudged accordingly, but Doderidge e contra ——Roll Rep. 250. pl. 19. S C. and Coke and Crooke thought the Age lies, but Doderidge and Haughton e contra, & adjornatur.——Ibid. 323. &c. pl. 31. Doderidge J. held this former Opinion, but Coke, Crooke, and Haughton, held that Age ought to be granted.—— Mo 857. pl. 1148. Herbert v. Bingham S. C. but nothing is mention'd as to the Plea of her claiming nothing but Dower ; but ſays that upon Argument at Bar and at Bench the Age was granted, becauſe he that pray'd it was Tertenant, whereas had he not been ſo, he ſhould not have had his Age in Error.

39. *Execution upon Statute Merchant* ſhall not be againſt the Heir during his Nonage. Br. Age, pl. 33. cites New Book of Entries, Fol. 118, 119. S. P. nor againſt the Feme of the Conuſor. Br. Age, pl. 49. cites 8 E. 1. and Fitzh. Aſſiſe, 417.—— *And* quære if the ſame Law be not of Statute Staple. Br Age, pl. 33. cites new Book of Entries, Fol. 118. 119.

40. If the *Diſſeiſor leaſes for Life, and dies*, and the *Leſſee is impleaded, and makes Default after Default*, upon which the *Heir of the Diſſeiſor prays to be received*, being within Age, he ſhall have his Age notwithſtanding the ſaid Statute, which ſhall be taken ſtrictly, becauſe it controls the Common Law, and charges the Inheritance of the Subject. 2 Le. 148. pl. 183. Arg. ſays it was ſo holden 9 E. 3.

41. In Writ of *Error upon a Recovery againſt Tenant in Dower*, the Age ſhall not be granted. Cited by Jones J. as 41 Eliz. Williams v. Williams ; quod fuit conceſſum per Coke, Doderidge, and Crooke. Mo 342. pl. 465. Hill. 35 Eliz. Williams's Caſe S. P. admitted —— Cro. E. 537. pl. 14. Paſch. 39 Eliz. S. C. and S. P. by Fenner, but not being the Point in Queſtion the other Juſtices ſaid nothing thereto —— Ibid. 561. pl 1. S. C. adjornatur.——S. C. cited Cro. J. 392. pl. 5. as to an Infant's ſuffering a Recovery by Default, that he ſhall not avoid it by Error for this Cauſe.

42. *Where the Action ſhall be loſt for ever*, the Parol ſhall not demur; as in the Caſe of a Quare Impedit; per Wich. Fitzh. Age, pl. 75. cites 43 Aſſ. 21.

43. In *Quid Juris clamat* an Infant cannot confeſs the Deed, if he be Tenant, by reaſon that he is an Infant. Br. Age, pl. 57. cites 43 E. 3. 5.

The Parol ſhall not demur, becauſe it was upon a Recovery in Aſſiſe.

44. In *Quod ei deforceat* againſt a Tenant, againſt whom the firſt Recovery did not paſs, he *vouched one as Heir*, and for his Nonage pray'd his Age, and had the Voucher, but not the Age. Br. Age, pl. 62. cites 44 E. 3. 43.

—Br. Parol Demur, pl. 8. cites S. C.

45. In *Præcipe quod reddat* againſt an Infant, he may confeſs the Action as to Part, and pray his Age for the Remnant, and ſhall have it; per Tank. Quod non negatur. Br. Age, pl. 9. cites 47 E. 3. 7.

S. P. Br. Age, pl. 66. cites 32 Aſſ. 8.——Ibid. pl. 68. cites 17 E. 4 2.

46. *Appeal* brought by an Infant within Age, and becauſe it *appear'd by Inſpection that he is within Age*, therefore it was awarded that the Parol demur till his full Age. Br. Age, pl. 16. cites * 11 H. 4. 94. H. 32 E. 3. and Fitzh. Age 57.

S. P. and the *Defendant ſhall remain in Priſon in the mean Time*; by the Juſtices.

* Br. Parol Demur, pl. 9 & 18. cites S. C.——*But* Ibid pl. 1. cites 27 H. 8. 11. ſays that an Infant may have *Appeal of Murder of his Anceſtor*, and it ſhall be *by Guardian*, and not by Attorney, and the Parol ſhall not demur at this Day, as was uſed in ancient Time.

47. If an *Infant be arraign'd*, the Juſtices may have Diſcretion of him if he be of 4 Years &c. Br. Age, pl. 55. cites 35 H. 6. 11.

48. If a Man *recovers in Writ of Right in a Caſe Court*, and the other brings Writ of *Falſe Judgment, and reverſes the* firſt Judgment, there the Heir of him who recover'd in the baſe Court ſhall not have his Age in *Scire Facias ſued to execute the Judgment in the Writ of Falſe Judgment*; per Chocke Arg. to which it was not anſwer'd. Br. Age, pl. 61. cites 8 E. 4. 19.

D. 136 pl. 17. S. C. accordingly.—S. C. cited as adjudged accordingly, quod Dyer conceſſit. Mo. 35. in pl. 114.——

49. In a Suit by *Petition to the King, in Nature of a Formedon in Remainder*, for Lands in the Hands of the King by Attainder of the Duke of Somerſet, *which* Right of Remainder *deſcended to him in Tail from an Anceſtor of the Petitioner then within Age.* Adjudged that the Parol demur as well as if it had been in a Formedon in Remainder or Reverter; but Sanders and the Ch. Baron were e contra. Dal. 22. pl. 4. Anno 3 & 4 P. & M. Baſſet's Caſe.

S. C. cited and agreed by Dyer accordingly. Dal. 37. in pl. 4.

50. In all *Real Actions at the Common Law*, if the Tenant was within Age, and in by Deſcent, he ſhould have his Age. Quod nota. 6 Rep. 4. b. and cites ſeveral Actions to that Purpoſe; and then adds, viz. So that the Law favours the Tenant within Age, that has the Poſſeſſion by Deſcent, more than the Demandant who has only a Right by Deſcent; but the Stat. of Weſtm. 1. takes away the Age of the Tenant in Writ of Entry ſur Diſſeiſin en le Per. 35 Eliz. C. B.

3 Bulſt. 145. cites S. C. per Coke. Quia reſpondere non poteſt.

51. In *Scire Facias* upon a Judgment in a Writ of *Falſe Judgment*, the Heir ſhall not have his Age. Roll Rep. 325. 326. Hill. 13 Jac. B. R. in Caſe of Herbert v. Binion, cites 8 E. 4. 19. b.

52. In *Caſes of Neceſſity*, and *pro Bono Publico*, no Age is to be granted; as in the Caſe of Preſentment, where Lapſe may incur before his full Age. 3 Bulſt. 142. Mich. 13 Jac. by Croke J. Arg.

53. In

53. *Where an Infant does a Thing en auter Droit*, as if he be *Officer* or *Executor*, in ſuch Caſes the Benefit of his Age being, only for Delay, ſhall not be allowed him; per Croke J. 3 Bulſt. 142.

54 If a Man has 2 *Fines*, and a Writ of *Error is brought to reverſe the firſt*, yet the Tertenant ſhall have his Age; per Coke Ch. J. Roll. Rep. 251. Mich. 13 Jac. in pl. 19

55. The Heir at Law ſhall be allowed his Non-age upon a Writ of *Error* brought *to reverſe a common Recovery ſuffered by his Anceſtors* to the Uſe of himſelf and his Heirs, and the Parol ſhall demur quouſque &c. for the Law takes Care to preſerve the Eſtates of Infants who cannot take Care of themſelves. L. P. R 47. cites the Ld. Jefferies and his Lady's Caſe. 5 W. & M. B. R.

56. *Debt* is brought againſt B. *upon* a *Bond* as Heir of A.—B. pleads *Riens per Diſſent præter a Reverſion* after the Death of C. The Plaintiff takes his *Judgment ſur Aſſets quando acciderit*; then B. dies, and afterwards C. dies, and the Plaintiff, ſetting forth all this Matter, brings his *Scire Facias* upon this Judgment againſt the Heir and Tertenants of B. The Heir appears and pleads, that he is infra Ætatem, viz. of the Age of 18 Years, and prays that the Parol may demur quouſque &c. The Plaintiff demurs, and the Court upon Argument were of Opinion, that he ſhould not have it, becauſe Judgment was recovered againſt his Father, and the Eſtate was bound thereby, quando acciderit, and that this Proſecution was only to have Execution of that Judgment. L. P. R. 47. cites Lee's Caſe, 2 Annæ B. R.

57. A Writ of *Error* was brought *in Ireland againſt an Infant to reverſe a Common Recovery*, and had *Judgment that the Parol ſhould demur*. Upon this Judgment *Error was brought in B. R. in England*, to which *the Infant pleaded his Age*. The Ch. J. and two other Juſtices (the 4th Juſtice being Plaintiff) held that this Plea could not hinder B. R. here from conſidering the Judgment given in B. R. in Ireland; that if ſuch Judgment there was good, it will be affirm'd, and the Errors in the Recovery cannot be looked into, and the Defendant will have the ſame Advantage as if this Plea had been allow'd; but if the Plea was not good, it would be ſtrange to allow it here only to make an ill Plea good, and thereby let the Party have the intire Benefit of an erroneous Judgment, and falls directly within the Rule of Non debet adduci Exceptio ejuſdem rei, cujus petitur Diſſolutio; If the Defendant had joined in the Aſſignment of Errors, it would not have waived the Benefit of his Nonage, becauſe that is adjudged to him by B. R. in Ireland; and Judgment that Defendant anſwer to the Errors aſſign'd. 2 Ld. Raym. Rep. 1433. Mich. 13 Geo. 1. Forteſcue Aland v. Maſon.

In this Caſe was cited the Caſe of Herbert v. Brown, [Binion] Cro. J. 392. as a Caſe which would govern this Caſe, but the Court held, that that Caſe came not up to this Caſe, becauſe that was upon a Plea of Non-age to the firſt Writ of Error, which was allowed, and well; but to bring it to this Caſe, it ſhould have been of the ſame Plea of Non-age to a Writ of Error brought upon the Judgment which allowed the Non-age in the firſt Writ of Error. Ibid. 1436, 1437.

(C) In what Actions *upon Plea pleaded* the Parol ſhall demur.

1. IN Replevin againſt an Infant, if he avows upon the Plaintiff, and Plaintiff ſhews forth the Releaſe of the Father of the Infant to hold by leſſer Services, yet the Parol ſhall not demur. 48 E. 3. 33. b.

2. In Treſpaſs Vi & Armis againſt an Infant who juſtifies for a Rent, or ſuch like, as Heir to his Father, if the other ſhews forth a Deed of

the Anceſtor in Diſcharge, yet the Parol ſhall not demur, but he ought to anſwer to the Deed immediately. 48 E. 3. 34.

S. P. and ſo in Aſſiſe of Mordancestor brought by him the Parol ſhall not demur upon any Plea pleaded, becauſe there is a Jury the firſt Day, and the Jury ſhall inquire of the Circumſtances. 6 Rep. 4 b. cites 8 E. 3. 36.——See (D) pl 10.

3. In Aſſiſe by Infant, the Parol ſhall not demur for the Warranty pleaded of his Anceſtor, becauſe all ſhall be inquired by the Aſſiſe. 48 E. 3. 33. b.

* Fitzh. Age, pl. 17. cites S. C. & S. P. by Green.—— † Br. Aid de Roy, pl. 105. cites S. C. but I do not obſerve S. P.———Fitzh. Age, pl. 17. cites S. C. but ſeems not to be S. P. But ſee (K) pl. 7 S. C.

4. In Writ of Debt againſt an Heir he ſhall have his Age, becauſe he may at full Age diſcharge himſelf by ſaying that he had Nothing by Deſcent. * 18 E. 3. 33. † 11 H. 6. 10. b. 411. 3 E. 3. Age 51. adjudged. 19 E. 2. Age 122. admitted by Iſſue. 8 E. 2. Itinere Cant. § 125. adjudged. H. 7 Jac. B. between *Vivian and Trelawnye*, per Coke.

‡ Fitzh. Age, pl. 125, cites It Cant. Mich. 20 E. 2.———S. P. admitted in the Caſe of Hawtree v. Auger. See (N) S. C.

2 Inſt. 89. cites 11 H. 7. 22. That if a Man by Obligation binds himſelf and his Heirs to pay him 100 l. at ſuch a Feaſt, and if he pay it not at that Feaſt, that then he and his Heirs ſhall pay 10 l. for every Quarter it ſhall behind, the *Obligee dies, and leaves Aſſets in Fee ſimple his Heir within Age*, he ſhall have his Age, and ſhall not pay this 10 l. incurr'd during his Minority after his full Age.

* Br. Aid del Roy, pl 105. cites S. C. —— Fitzh. Age, pl. 17. cites S. C.———See (K) pl. 7. S. C.

5. So in a Writ of Annuity againſt an Heir he ſhall have his Age, becauſe he may diſcharge himſelf by ſaying he had Nothing by Deſcent. Contra * 11 H. 6. 10. b.

In ſuch Caſe the Heir ſhall have his Age. Co. Litt. 290. a.

6. So if a Man ſues Execution upon a Statute Merchant againſt an Heir within Age, and ouſts him by it, an Aſſiſe lies for the Heir, for he ſhall have his Age. 23 E. 3. 21. b. Curia. 18 E. 3. 33. 47 Aſſ. 4.

———Br. Age, pl 33. S. P. cites New Book of Entries, 118, 119.———Ibid. pl. 49. cites 8 E. 1. and Fitzh Tit. Aſſiſe 417 ———An Audita Querela lies, becauſe there is an Exception in the Writ of Extent, that if Land be deſcended to an Infant, the Sheriff ſhall ſurceaſe to extend; and tho' the Writ iſſued againſt the Party himſelf who made the Conuſance, yet when it appears by the Return of the Sheriff that he is dead, the Infant ſhall be aided by Aud. Quer. or otherwiſe the Extent ſhall be void which is made upon the Poſſeſſion of the Infant; per Hutton J. Mich. 3 Car. C. B. Doyly's Caſe.

* Br. Age, pl. 36. cites S. C. —— Fitzh. Age, pl. 73. cites S. C.—— 2 Inſt. 89. S. P and ſo though the Recognizance be upon the Statute of 23 H. 8. for it is excepted in the Proceſs againſt the Heir.———See (N) pl. 7.

7. So if a Man ſues Execution upon a Recognizance againſt an Heir within Age, he ſhall have his Age tho' he be charged partly as Tertenant. Co. 3. *Sir William Harbert*, 13. 29 E. 3. 39. * 29 Aſſ. 37. adjudged. 11 E. 3. Age 4. adjudged. 12 E. 3. Execution 77. 15 E. 3. Age 95. per Thorpe, ſaid to be adjudged 1 E. 3. 3. per Herle, but Quære.

If A. acknowledges a Recognizance to B. of 20 l. to be paid at a certain Feaſt, and A. doth grant, that if the 20 l. be not paid at the Day, then he ſhall pay 10 s. a Week for every Week it ſhall be behind, and before the Feaſt A. dieth, ſeiſed of Fee-Simple Lands, his Heir within Age. In a *Scire Facias upon the Recognizance*, the Heir ſhall have his Age, by the Common Law; and after his full Age, he ſhall be freed of the 10 s. a Week by this Statute. 2 Inſt. 89. in the Notes on the Statute of Merton 20 H. 3. cap. 5. ———Cay's Abridgment of the Statute tit. Infant, Parag. 1. adds a Quære if this Statute be repeal'd by 37 H. 8. cap. 9.

S. P. Co. Litt. 290. a.

8. So if a Man recovers in Action of Debt againſt the Father, who dies, in a Scire Facias againſt the Heir upon this Judgment he ſhall have

have his Age. H. 7 Jac. B. between *Vivian and Trelawnye*, per Curiam. But the Clerk said, that the Presidents are contra. Contra H. 7 Jac. B. per Coke.

9. In a Scire Facias against a Tertenant to have Execution of Damages recovered against J. S. if the Tertenant be within Age, and in by Descent, he shall have his Age. 24 E. 3. 28. adjudged. S. P. notwithstanding that Delays, as Essoigns, Voucher &c. are ousted in Scire Facias. Br. Age, pl. 25. cites 24 E. 3. 29. S. C. —— Fitzh. Age, pl. 102 cites S. C. —— Co Litt. 290. a S. P. —— See (N) pl. 12.

10. Infant who has the Tenancy by Descent shall not have his Age in a Per quæ Servitia brought against him. Co. 9. *Conny* 85. resolved. Fol. 141. See (B) pl. 14. S. C. and the Notes there.

11. In Writ of Customs and Services, which is a Writ of Right in its Nature, and in which Judgment Final shall be given, an Infant in by Descent shall have his Age. 6 H. 3. Age 148. Co. 9. *Conny* 85. See (B) pl. 23. S. C.

12. In Cessavit against an Infant for his own Cesser, he shall have his Age, because he knows not what Arrears to render before Judgment, and this is a Writ of Right in its Nature. Co. 9. *Conny* 85. See (B) pl. 11. and the Notes there.

13. In *False Judgment* it was *alleged that the Tenant had shewed a Dying Seised, and Descent to him from his Father*, and that he being within Age pray'd the Parol might demur in the *Plea*, which *was in the Nature of a Writ of Ayel*; but it was denied, and for this the Judgment was reversed; for tho' the *Record supposed the Custom of the Court to be, that an Infant impleaded there, of the Age of* 16, *should be driven to answer*, without any Stay of the Plea, and that at that Age he might alien his Lands, yet since the Defendant had *not maintain'd this Custom in C. B.* which should be issuable and triable by the Country, the Court of C. B. would not regard this Custom, which is erroneous at the Common Law, yet he shall not thereby be drawn to answer to a *Præcipe quod reddat* at such Age. D. 262. b. pl. 32. 33. Trin. 9 Eliz. Anon.

(D) *Upon what Plea* the Parol shall demur.

1. In a Formedon in Descender, if the Tenant pleads the Feoffment of the Ancestor of the Demandant with Warranty and Assets, and the Demandant denies the Deed, the Parol shall demur for the Nonage of the Demandant. Dubitatur 2 E. 3. 59. b. *So* if the *Demandant pleads Nothing by Descent*, and the Tenant says that the *Demandant is within Age*, and prays that the Parol demur, and the Averment not receiv'd. Br. Parol Demur, pl. 5. cites 42 E. 3. 13. —— See (A) pl. 1. and the Notes there.

2. [So] in a Formedon in Descender brought by an Infant, if the Tenant pleads the Feoffment with Warranty and Assets of the Ancestor of the Plaintiff, the Parol shall demur. 38 E. 3. 24. b. 43 Ass. 21. 27 Ass. 74. 11 E. 3. Age 6. 16 E. 3. Age 45. adjudged. Contra 33 E. 3. Age 153. till the Deed be denied. 2 E. 3. 59. b. *And* if there are 2 *Demandants*, the *one within Age*, and the *Warranty of the Ancestor with Assets be pleaded*, the Parol shall demur for the Nonage of the one, quod nota; per Littleton, quia non negatur. Br. Parol Demur, pl. 4. cites 34 H. 6 3.

3. The

Fitzh. Age, pl. 18. cites Mich. 12 E. 4. 17. where it was held by Littleton, that if Lineal Warranty with Aſſets be pleaded in Bar, the Parol ſhall demur; but otherwiſe if Collateral Warranty be pleaded; for that is ſuch Matter to which he ought to anſwer, but others ſaid that the Parol ſhould demur in both Caſes &c.

3. The ſame Law if a Collateral Warranty be pleaded in Bar of this Action. 12 E. 4. * 12. b.

* See pl. 9. in the Notes.

See (B) pl. 7. and the References there.

4. In Quare Impedit, if the Feoffment of the Acre to which the Advowſon is appendant, with Warranty of the Anceſtor of the Defendant, be pleaded with Aſſets of the ſame Anceſtor, though the Defendant be within Age, yet the Parol ſhall not demur for the Miſchief of the incurring of the Lapſe in the mean Time. 43 Aſſ. 21. adjudged.

5. In a Formedon in Deſender, if the Tenant pleads the Feoffment of the Anceſtor of the Demandant to him, and J. S. with Warranty and Aſſets, the Parol ſhall demur for the Nonage of the Demandant, without ſhewing that he had the Eſtate of J. S. by which he alone may deraign the Warranty; for if the Demandant be of full Age, and ſhould plead this Plea, it would be an Acknowledgment of the Deed for a Moiety. 13 E. 3. Age 96 adjudged.

6. [So] In a Formedon in Deſcender, if the Tenant ſays that the Anceſtor of the Demandant did not die ſeiſed, the Parol ſhall demur for the Nonage of the Demandant; for if he did not die ſeiſed, he has not this Writ in Lieu of a Mortdanceſtor. 3 E. 2. Age 133.

See (A) pl. 5.

7. In a Writ of Warranty of Charters, upon a Warranty made to the Anceſtor of the Demandant, if the Defendant denies the Charter, the Parol ſhall demur for the Nonage of the Plaintiff. Temp. E. 1. Age 129. per Inge.

8. In an Action of the Poſſeſſion of the Infant himſelf, the Parol ſhall not demur upon any Plea pleaded. Co. 6. *Markall* 3. b.

Fitzh Age, pl. 18 cites 12 E. 4. 1. ——S. P. per Brian & Littleton J. and is not brought as Heir.

9. As in Writ of Entry of a Diſſeiſin done to himſelf, brought by an Infant, if the Tenant pleads the Feoffment of the Father of the Demandant with Warranty to him, yet the Parol ſhall not demur, becauſe it is brought of his own Poſſeſſion. 12 E. 4. 12. Co. 6. *Markall* 3. b.

But the Stat. of Glouceſter ſays that in Writ of Coſinage, Ayel, and Beſail, the Plea ſhall proceed; for theſe are Anceſtrel; but where he claims of his own Poſſeſſion, it ſhall not demur, but ſhall proceed by the Common Law. Br. Age, pl. 42. cites 12 E. 4. 17.——6 Rep. 3. b. in Markhal's Caſe, cites 12 E. 4. 17. S P.——And it ſeems that (12) in Roll is miſprinted for (17.)

See (C) pl. 3. S C and the Notes there.—— See (B) pl. 10 and the Note there.——

10. [So] In an Aſſiſe the Parol ſhall not demur for the Nonage of the Demaudant, tho' the Deed of his Anceſtor be pleaded in Bar, becauſe it is brought of his own Poſſeſſion, and the Circumſtances ſhould be inquired in it. 12 E. 4. 12.

——Fitzh. Age, pl. 18. cites Mich. 12 E. 4. 17. [And the laſt (12) here ſeems miſprinted.]

Fitzh. Age, pl 18 cites 12 E. 4. 17. and ſo it ſeems it ſhould be here.

11. So the Parol ſhall not demur in this Writ for the Nonage of the Demandant, if a Fine be pleaded in Bar, ſo that the Circumſtances ſhould not be inquired. 12 E. 4. 12.

Fol. 142.

12. So if a Foreign Releaſe be pleaded with Warranty, in which the Circumſtances ſhould not be inquired. 12 E. 4. 12.

13. In an Action Real, if the Tenant pleads in Bar the Feoffment of the Anceſtor of the Demandant with Warranty to J. S. and his Aſſigns, whoſe Aſſignee he is, and ſays that Aſſets deſcended to the Plaintiff, to which the Demandant ſaid that Nothing deſcended, in this Caſe the

the Parol shall demur, for tho' the Feoffment and the Warranty is not in Question, but only the Assets, the which the Infant may well try; yet if he takes this Issue, the Deed of the Ancestor shall be held to be controlled by him. 29 E. 3. 12. b. adjudged. 11 E. 3. Age 6. 16 E. 3. Age 45 adjudged. 33 E. 3. Age 153. Contra 23 E. 3. 22. b. adjudged.

14. So, for the same Reason, if in a Formedon in Descender the Tenant pleads a Feoffment by the Ancestor of the Demandant to A. and B. the Father and Mother of the Tenant, and to the Heirs of the Father with Warranty, and that they are dead, and avers that Assets are descended to the Demandant within Age, tho' the Demandant said that B. the Mother of the Tenant is yet alive, and so the Tenant has not this Warranty. 11 E. 3. Age 6. adjudged.

15. In Assise against an Infant, if the Issue be whether the Tenant be a Bastard or a Mulier, which is to be tried by the Bishop, by which his Blood is to be bound perpetually, yet the Parol shall not demur, because this is of his Tort, and there shall not be any Delay in this Writ. 38 E. 3. 27. adjudged,

16. But otherwise it is in a Formedon in Descender; for there, if the Issue be whether the Tenant be a Bastard, the Parol shall demur. 13 E. 3. Age 7.

17. But otherwise it is if the Issue be whether the Demandant be a Bastard. 13 E. 3. Age 7.

18. In *Nuper Obiit*, where Land was *descended to 2 Sisters*, and the *one released to the other and died*, and the *Heir of her who released brought Nuper Obiit against the other*, the Plaintiff being within Age, and the *Tenant pleaded the Release*, and the *Demandant denied it*, therefore the Tenant pray'd that the Parol demur for the Nonage of the Plaintiff, and so it did; quod nota. Br. Age, pl. 76 cites 6 E. 2.

19. In Quid Juris clamat brought *by an Infant*, *Defendant said that he held for Life of the Lease of the Ancestor of the Infant, without Impeachment of Waste, and saving to him the Advantage of the Deed, he is ready to attorn*; and because the Infant cannot take Conusance of the Deed, therefore it was awarded that he attend till his full Age. Br. Quid Juris clamat, pl. 2. cites 43 E. 3. 5.

20. In *Scire Facias* by an Infant, *a Deed inroll'd of his Ancestor was pleaded in Bar, with Warranty and Assets descended*, and he pray'd that the Parol demur, and so it did, and yet he shall not avoid it by Nonage, Durefs, &c. Quod nota, by Belknap J. in the End of the Case. Br. Age, pl. 63. cites 48 E. 3. 33. Br. Confession, pl. 8. cites S. C. The Infant pleaded *Riens per Descent*, and the Plea was not taken, but the Parol demurr'd.

21. If a *Deed with Warranty and Assets* be *pleaded in Formedon*, or *Præcipe quod reddat*, the Parol shall demur. Br. Confession, pl. 8. cites 48 E. 3. 33. * But if such Deed be pleaded against him in Assise, the Circumstances shall be inquir'd. Br. Coverture, pl. 66. cites F. N. B. Fitzh. Dum fuit infra Ætatem.

22. *Tenant in Tail alien'd by Fine*, and after he *leased to the Issue in Tail within Age for Term of his Life*, and *died*, the *Alienee brought Scire Facias to execute the Fine*, the Heir in Tail shew'd this Matter, and pray'd his Age, and had it; for it was adjudged a *Remitter* by the Nonage. Br. Remitter, pl. 38. cites 22 E. 4. 7.

(E) For Nonage *of what Perſon* the Parol ſhall demur.

One *vouch'd the King within Age*, and pray'd that the Parol demur, and ſhew'd that the King's Progenitor gave the Land to him, but becauſe he did *not ſhew Charter of the King*, he was ouſted of the Warranty; nor would he ſhew other Thing by which the King ought to warrant &c. Fitzh Age, pl. 149. cites Mich. 2 H. 3.

1. THE Parol ſhall not demur for Nonage of the King, becauſe the Law adjudges him of full Age. D. 3. 4. M. 137. 24. Contra 2 H. 3. Age 149. admitted.

In *Writ of Right* brought *by the King* of the Seiſin of his Anceſtor, the Defendant *pleaded that the King was within Age*, and demanded Judgment, if during his Non-age &c. But per Shard, the King is always either within Age or of full Age to his Advantage; and the Defendant was awarded to anſwer; and thereupon the Defendant demanded the View, and had it. Fitzh. Droit, pl. 24. cites Mich. 6 E. 3.

In Scire Facias, *the Gift of the King ſhall not be defeated by his Non-age*. Per Thorpe J. to which ſeveral of the Peers and Sages of the Realm agreed. Br. Age, pl. 34. cites 26 Aſſ. 54. and 6 E. 3. Fitzh. Age 89. accordingly.

Note that of *Land of the Dutchy of Lancaſter, and other Lands which the King has as Duke* &c. the Age is material, as in the Caſe of a common Perſon; for he has them as Duke, and not as King; but by the Statute of 1 E. 4. which is a private Act not printed, it is *annexed to the Crown*, but by another private Act in the time of *H. 7. it is diſannexed*, and made as in time of H. 4. Br. Age, pl. 52. cites 1 E. 6.—Ibid. pl. 78. cites S. C.

See (I) pl. 4.

2. In an Action brought by Baron and Feme for the Inheritance of the Feme, the Parol ſhall not demur for the Nonage of the Baron, becauſe in Right of the Feme. D. 3, 4. M. 137. 24.

See (B) pl. 19 S. C

3. In Writ of Meſne brought by Baron and Feme, in Right of the Feme, the Parol ſhall not demur for the Nonage of the Feme. 21 E. 3. Age 85 adjudged.

Br. Coverture, pl. 63. cites S. C.

4. In Detinue againſt an Executor upon a Bailment to the Teſtator, the Parol ſhall not demur for the Nonage of the Executor. 11 H. 6. 40. b.

5. In an Action of Debt brought againſt Baron and Feme, upon the Obligation of the Anceſtor of the Feme, the Parol ſhall demur for the Nonage of the Feme. 8 E. 2. Itinere Cant. Age 125. adjudged.

Fitzh. Age, pl. 13. cites Mich. 18 E. 3. 32. but I do not obſerve this very Point there.—See (I) pl. 4.

6. In a Præcipe quod reddat againſt Baron and Feme of the Land which the Feme has by Deſcent, the Parol ſhall demur for the Non-age of the Feme, tho' the Baron be of full Age. 18 E. 3. 33. Contra 24 E. 3. Age 134. per Shard.

Fitzh. Age pl. 13. cites Mich. 18 E. 3. 32. S. P. per Thorpe.

7. A Feme received for Default of the Baron ſhall have his Age, tho' the Baron was of full Age. 18 E. 3. 33.

But where a *Feme of full Age entered into an Obligation*, and *takes a Huſband within Age*, and in Deeles v. Nokes, and cites S. C.

8. In *Debt againſt Baron and Feme on a Bond by the Anceſtor of the Feme*, whereby he bound himſelf and his Heirs. They pleaded, that the *Feme was within Age* of 21, and pray'd that the Parol demur during her Non-age, and it was awarded accordingly. Fitzh. Age, pl. 125. cites 8 E. 2.

Debt brought upon the Bond they pray his Age, the Court denied it. Noy. 69.

9. If

9. If the *youngeſt Son enters, and is impleaded within Age*, the Parol ſhall not demur for his Age; for he cannot be Heir by Continuance of Poſſeſſion; contra of a Baſtard; for he may be Heir by Continuance of Poſſeſſion; per Thorp J. Br. Age, pl. 65. cites 21 E. 3. 49. S. P. per Thorp J. Br. Diſcent, pl. 10. cites 21 E. 3. 46.

10. In Debt it was agreed, that *of Corporations* it is no Plea that the * *Mayor* is within Age, the ſame Law of an *Abbot, King, and Biſhop*, as it is ſaid elſewhere, for they are Corporations &c. Per Briggs, an Infant who is made *Executor* may make a Releaſe of Debt &c. as well as he may bring Action as Executor; for if he may be Executor by the Law, then it is Reaſon that he may make a Diſcharge as Executor. Br. Age, pl. 45. cites 21 E. 4. 13, 14. * S P. And ſo of a *Dean, Maſter of an Hoſpital* &c. Br. Age, pl. 64. cites 20 E. 4. 8. —— Ibid. pl. 80. S. P. of Things touching their Benefice or Corporations, cites 4 M. 1.

11. Note, it was in a Manner agreed by all the Juſtices in C. B. in the Time of Queen Mary, that if a *Parſon, Prebendary* &c. be within Age of 21 Years, and *makes a Leaſe of his Benefice* within Age, yet *it ſhall bind him*; For where he is admitted by the Law of Holy Church to take it within Age, the Common Law makes him able to demiſe his Benefice within Age. Br. Age, pl. 80. cites 4 M. 1.

(F) For the Nonage of what Perſon *for a Collateral Reſpect* the Parol ſhall demur.

Fol. 143.

1. IN a Writ of Right where Baſtrel ſhall be join'd in Grand Aſſiſe, if the Tenant ſhews any Matter to have his Age, which makes him Heir to the ſame Perſon of whoſe Seiſin the Demandant has brought his Action, becauſe he claimed to be Heir to the ſame Perſon, he ſhall not have his Age. 32 E. 3. Age 81. per Thorpe.

2. So in a Formedon in Reverter, if the Demandant makes himſelf Heir to the Donor as Heir at Common Law, and the Tenant claims as youngeſt Son as Heir to the Donor by Cuſtom, and prays the Parol to demur for his Non-age, yet it ſhall not demur, becauſe both claims to be Heir to one and the ſame Perſon. 32 E. 3. Age 81. adjudg'd.

3. In a Nuper obiit by the Aunt againſt the Niece, and * demanded of the Seiſin of the Father of the Aunt, who was Grandfather to the Tenant, the Tenant who is in by Deſcent from her Mother ſhall not have her Age, becauſe they are one Heir, and of equal Condition as to Privity of Blood. 9 E. 2. Age 142 adjudged. 13 E. 2. Age 146. per Ber. where the common Anceſtor died laſt ſeiſed, as this Caſe before is to be intended, as it ſeems. * In Roli it is miſprinted (del Feme) but in Fitzh. it is (demanded.) —— *Nuper obiit by A. againſt B. of the Seiſin of their Grandfather*, the *Tenant ſaid that his Father was ſeiſed, and died ſeiſed, and he is in as Heir*, and prayed his Age. and was ouſted, becauſe they claimed all by one and the ſame Anceſtor. Br. Age, pl. 77. cites 3 E. 3. It. Canc. ——— S. P for this Writ is brought principally to try the Privity of the Blood. 6 Rep. 4. b. in a Nota by the Reporter, as it ſeems.

4. But if Land deſcend to A. B. Coparceners, and they enter, have Iſſue, and die ſeiſed, in a Nuper Obit by one of them againſt the other within Age, the Parol ſhall demur for the Non-age of the Tenant, becauſe their common Anceſtor did not die laſt ſeiſed. 13 E. 2. Age 146. adjudged. Contra 4 E. 2. Age 137. adjudged.

5. In a Rationabile Parte brought by one Coparcener againſt another

ther within Age, where they are of divers Venters, the Parol shall not demur for the Non-age of the Tenant. 13 E. 1. Itinere North. 155. adjudged.

6. In a Writ of Contributione Facienda by one Coparcener against another, the Parol shall not demur for the Non-age of the Tenant, tho' he says that his Ancestor died seised, and held without Contribution to be made. 4 E. 2. Age 136. adjudged.

(G) Who shall have it *in respect of Estate.*

If a Man *gives in Tail to his Son, and dies,* and the *Son is impleaded,* he shall not have his Age, for he has the Possession by Purchase. Br. Age. pl. 59. cites 40 E. 3. 13.

1. IF an Infant be in by Purchase he shall not have his Age. 47 E. 3. 8. b. 47 Ass. 4. 21 E. 4. 19. b. 41 E. 3. Age 39. 15 E. 3. Age 53.

But if he *vouches himself* to save the Tail, he shall have his Age, per Belknap J. Quære. Ibid. ——— Cro. E. 568. pl. 1. S. P. by Clench. ——— S P. Arg. Cart. 88. ——— See pl 12 ——— See (K) pl. 3.

S. P. per Cur. Br. Age, pl. 12. cites S. C. & S. P. The Name (Heir) makes him a Purchasor, per Cur.

2. [As] if a Lease for Life be, Remainder to the right Heirs of J. S. who is dead at the Time, his Heir within Age, he shall not have his Age when he comes in by Aid Prayer, for he has it by Purchase. 7 H. 4. 5.

* In *Præcipe quod reddat* the Tenant *pleaded that his Father died seised* of the same Tenements, *and he is in as Heir by Descent,* and prayed his Age. The Plaintiff *replied, That his Father did not die seised*; Prist. But Wilby said, that tho' his Father did not die seised, *yet if the Tenant was in as Heir, he shall have his Age.* It was then *urg'd, that the Father in his Life time infeoffed him, and he continued that Estate*; Prist. But Wilby said, that if he is his *Heir,* he *may,* after his Father's Death, *elect the one Estate or the other, tho' he infeoffed him in Fee* in his Life-time, and therefore the Plaintiff shall not have the Averment, and he had his Age by Award. Fitzh. Age, pl. 59. cites Mich. 30 E. 3. 17. and says, that 5 E. 3. it was adjudged accordingly.

3. If the Infant has an Estate in Possession sufficient to answer the Action, yet if he has the Residue of the Estate by Descent he shall not have his Age. 43 E. 3 36. * 30 E. 3. 17. 11 E. 2. Age 144. admitted.

* Fitzherb Age, pl. 59. cites S. C. which see at pl. 3. in the Note.

4. As if Father, and Son and Heir purchase to them and the Heirs of the Father, and after the Father dies, and a Real Action is brought against the Son, he shall [not] have his Age tho' he hath the Remainder in Fee by Descent. 43 E. 3. 36. * 30 E. 3. 17. adjudged. 39 E. 3. Age 26.

* In Dower, if the *Tenant in Dower leases* his Estate *to the Heir,* rendering Rent *for his Life,* the Heir shall have his Age in the Life of the Tenant in Dower; for it is *a Surrender,* and the Heir is in by the Ancestor. Br. Age, pl. 8. cites 45 E. 3. 13.

S. P. because he has the *Possession* by Surrender, which is a *Purchase.* Br. Age, pl. 59. cites 40 E. 3. 13.

Br. Age, pl. 8. cites S. C. and was of a *Lease by Tenant in Dower to the Heir, rendring Rent for* Term of *her Life.* And Finch held that the Heir should have his Age in the Life of Tenant in Dower; because this *is a Surrender,* and the Heir is in by the Ancestor.

5. If Lessee for Life surrenders to an Infant, who has the Reversion by Descent, he shall not have his Age. Contra * 45 E. 3. 13. ‡ 1 H. 6. 2. b. 22 E. 4. 7. b. 11 E. 2. Age 144. adjudged.

‡ Br. Age, pl. 30. cites 1 H. 6. 1. which is, *Assise against Tenant by the Curtesy and the Heir in Reversion,* and the *Tenant by the Curtesy surrender'd pending the Writ, and died pending the Writ*; Per Rolf, the Heir is in by Descent, which Paston agreed, and that if he be impleaded he shall have his Age &c. as if the Land had descended to him; Quod non negatur; but yet the Writ awarded good, because he came first

firſt to the Poſſeſſion by his own Act, which makes the Writ good that it ſhall not be avoided by the Death of the Tenant by the Curteſy after.——Br. Diſcent, pl. 17. cites S C. and S. P. by Paſton.

6. If an Infant be in by Abatement and not by Deſcent, he ſhall not have his Age. 2 H. 5. 11. b. 12. adjudged. 32 E. 3. Age 81. adjudged. Fitzh. Age, pl. 22. cites S. C.

7. If the Father enfeoffs his Son and Heir in Fee with Warranty, and dies, the Son ſhall have his Age, becauſe the Warranty is extinct, and therefore in Lieu of it he ſhall be adjudged in by Deſcent. * 30 E. 3. 17. b. adjudged. ‡ 24 E. 3. 36. b. Fol. 144. * Fitzh. Age, pl. 59. cites S. C. ——

Br. Age, pl. 26. cites 24 E 3. 77. contra; for the Fee deſcended determines the Franktenement.—*But* if a Man *leaſes to his Son within Age for Life*, and after *dies*, and the *Reverſion deſcends to the Son*, he ſhall have his Age. Ibid.——S P. ibid. pl. 59.——But ibid. pl. 27. cites 9 E. 4. 18. contra to this that he ſhall not have his Age; for he has his Poſſeſſion by Purchaſe.

‡ Fitzh. Age, pl. 105. cites S C.

8. So if he be enfeoffed by his Father without Warranty; for he may elect to be in of the one Eſtate or the other. 5 E. 3. Age 61. adjudged.

9. If the Heir of a Diſſeiſee enters he ſhall have his Age. 9 H. 4. 5. * 2 H. 5. 11. b. Fitzh. Age, pl. 22. cites S. C.——

S. P. by the beſt Opinion; for the *Statute does not ouſt the Ages but of the Heirs of the Diſſeiſee and Diſſeiſor, and not for the Age of the Heir of the Feoffee of the Diſſeiſor*, which ſee and quere. Br. Age, pl. 69. cites 21 E. 4. 15. and 50.

If the *Father Tenant in Tail is diſſeiſed*, and the *Iſſue enters within Age*, he ſhall have his Age. Fitzh Age, pl. 21. cites Trin. 2 H. 5 11.

10. If Tenant in Tail enfeoffs his Iſſue, and dies, the Iſſue ſhall have his Age, for he is * remitted, and to in by Deſcent. 11 E. 3. Age 5. ‡ 21 E 4. 19. b. Temps E. 1. Remitter 13. adjudged. So if he takes the Eſtate of the Diſcontinuee. * S. P. Br. Age, pl. 56. cites 44 E. 3. 43. and Fitzh. Age 31.—‡ Fitzh. Age, pl. 21. cites S. C. accordingly, tho' it was objected that the Iſſue was in by Purchaſe. ——S P. Br. Age, pl 48 cites 22 E. 4. 7. by Judgment. But per Catesby, where the Iſſue in Tail recovers by Formedon upon a dying ſeiſed of his Anceſtor, he ſhall have his Age, and e contra upon a Recovery in Formedon upon a Diſcontinuance, or by Cui in Vita. But per Brian, he ſhall have his Age in the one Caſe and the other; for he ſhall recover as Heir.

11. If an Infant be enabled by Cuſtom to have and to alien his Land at a certain Time, as at 15 Years of Age, or when he can meaſure a Yard of Cloth; after this Time and before his full Age of 21, he ſhall have his Age; for the Cuſtom does not extend to this collateral Thing. 11 H. 4. 36. 39 E. 3. 19. b. 31 E. 3. Age 54. adjudged. And Age ſhall be adjudg'd according to the *Common Law*. Br. Age, pl. 14. cites 11 H. 4. 29. ——Fitzh. Age, pl 24 cites S. C. and ſays the ſame was adjudg'd accordingly, 9 & 39 E. 3.——Br. Age, pl. 28. cites 39 E. 3. 10. S. P. accordingly.

12. If a Deviſe be to the Heir in Tail, and if he dies &c. that another ſhall ſell it, the Deviſee ſhall not have his Age, for he is in by Purchaſe of the Tail. Quere * 3 H. 6. 46. * So where the Remainder in Fee was deviſed over to another. Br. Age, pl. 2. cites S. C. but contra if the Deviſe had been in Fee to the Heir.——Fitzh. Age, pl. 15. cites S C.

13. If a Gift be to the Father for Life, the Remainder in Tail to the Son, the Remainder to the right Heirs of the Father, and after the Father dies, and the Fee deſcends upon the Son within Age, yet he ſhall not have his Age, becauſe he has the Eſtate Tail by Purchaſe. 24 E. 3. 36. adjudged. Fitzh. Age, pl. 105. cites S. C.

14. So if a Gift be to the Father for Life, the Remainder to a Stranger in Tail, the Remainder to the Son in Tail, the Remainder to the right Fitzh. Age, pl. 105. cites S. C.

Heirs of the Father, and after the Stranger dies without Iſſue, and after the Father dies, and the Fee deſcends upon the Son within Age, yet he ſhall not have his Age, becauſe he has the Tail by Purchaſe. 24 E. 3. 36. adjudged.

Eitzh. Age, pl. 105. cites S. C.

15. Land was given *to the Baron and Feme in Tail*, the *Remainder to the right Heirs of the Baron*, and after the *Baron and Feme die without Iſſue*, and *E. as Couſin and Heir of the Baron, brought Formedon in Remainder*, and the Tenant ſaid that the Demandant is within Age, and yet the Parol ſhall not demur, for the Demandant *is Purchaſor* by Reaſon that the Fee-Simple was not veſted till now. Br. Age, pl. 74. cites 3 E. 3. It. Not.

16. *Præcipe quod reddat*, the *Tenant ſaid that A. was ſeiſed and leaſed to him for Life, Remainder to B. in Tail*, Remainder over *to C. in Tail*, and pray'd Aid of B. and C. in the ſecond Tail, and of the ſame C. becauſe the Reverſion in Fee is deſcended to him within Age, and pray'd that the Parol demur; and it was held that the Parol ſhould demur; for tho'. the *Poſſeſſion be by Purchaſe*, yet the *Fee is by Deſcent*. Br. Parol Demur, pl. 17. cites 40 E. 3. 13.

17. A Man *leaſed for Life*, the *Remainder over in Fee*, and *he in Remainder has Iſſue and dies*, and after the *Tenant for Life dies*, the Iſſue ſhall have his Age; for the Remainder is deſcended to him, and yet the Poſſeſſion did not veſt till now, and he ſhall be in Ward. Br. Age, pl. 54. cites 33 H. 6. 5.

18. *Entry ſur Diſſeiſin by an Infant of his own Seiſin*, the *Tenant pleaded a Feoffment of N. O. the Anceſtor of the Infant Plaintiff, whoſe Heir he is with Warranty*, and pray'd that the Parol demur for the Non-age of the Plaintiff. And per Littleton, the Parol ſhall not demur; for *the Action is of the proper Seiſin of the Demandant*, and not as Heir; and this is at Common Law, and not within this Statute nor the Statute of Weſtminſter 1. Quære. Br. Age, pl. 67. cites 12 E. 4. 17.

Br. Age, pl. 47. cites S. C. per Chocke and others in C. B. *And*

19. If the *Diſſeiſor enfeoffs the Heir of the Diſſeiſee*, and the *Diſſeiſee dies, his Heir within Age*, he ſhall have his Age; for he is remitted. Br. Remitter, pl. 48. cites 21 E. 4. 78.

by him if he *appears by Guardian, and imparles* till another Term, he ſhall have his Age; and therefore it ſeems if he had appear'd *by Attorney and imparled*, that he ſhall not have his Age; for then it ſhall be Eſtoppel as it ſeems.—Br. Remitter, pl. 37. cites S. C. and S. P. per Choke.

(H) For what Thing.

Brooke ſays it ſeems he ſhall; but Quære, and if this *Heir who recover'd in Value* ſhall have his Age when he is impleaded of this Land; and ſee 10 E. 3. 57. Tit. Aid in Fitzh. 146. that the Aid lies in this Caſe; and Note, that in the Caſe of the Eſcheat the Age lies. Br. Age, pl. 51. cites S. C.

1. IF the Tenancy eſcheats to an Infant, who is in by Deſcent in the Seigniory, he ſhall have his Age of it. 6 H. 4. pl. 1. * 16 E. 3. Age 46. Per Curiam.

2. If a Man *recovers Rent* and Arrears by Aſſiſe, *or* if he recovers *Annuity and Arrears* of it in Writ of Annuity, and the Defendant dies, and the Plaintiff brings Scire Facias againſt the Heir, he ſhall not have his Age *of the Arrears*; for they are *Real, and Parcel of the Rent* or Annuity, and Debt does not lie of it; but if the Judgment be of the Arrears and Damages, then Debt lies againſt the Heir of the *Arrears and Damages*, and there he ſhall have his Age, and this ſeems to be *in Default of the Executor. Contra in Scire Facias againſt the Heir*. Br. Age, pl. 50. cites 23 H. 8. and 9 E. 3. Fitzh. Age 90.

3. A. *recovered in a Dum fuit infra Ætatem againſt* 3, *by Default after Default. Two of the Tenants were within Age*, and on a Writ of Error the Nonage was aſſigned for Error, without alleging the Dying Seiſed of their Anceſtor, and Deſcent to them. Sed non allocatur. D. 104. pl. 10. Mich. 1 & 2 P. & M. Anderſon & al' v. Ward.

4. W. *Tenant in Tail, in Conſideration of a Marriage with M. infeoffed J. S. and J. N. to the Uſe of himſelf and M. for their Lives, and after of W. and his Heirs, and died. M. by Fine granted* the Lands *to T. L. and his Heirs during the Life of M. He enter'd, and died ſeiſed*, and his Son *and Heir enter'd*, againſt whom the Son and *Heir of W. brought a Formedon. M. was ſtill living.* The Tenant pleaded Nonage, and pray'd that the Parol might demur; ſed non allocatur, becauſe he was but as an *Occupant* during the Life of M. 4 Le. 169. pl. 275. Hill. 16 Eliz. C. B. Waller's Caſe. Bendl. 232. pl. 265. Waller v. Lamb, S. C. adjudged.— And. 21. pl. 43. S. C. adjudged, becauſe he had not the Land by Deſcent, but as an Occupant, which is his own Act to enter into the Land, and not caſt upon him by the Act of God.— S. C. cited Arg. Cart. 88.

(I) Parol Demur. *Vouchee.*

1. IF 2 Coparceners in Gavelkind are vouched as one Heir, the Parol ſhall demur for the Nonage of the Youngeſt, if he be ſeiſed, yet he is vouched but for his Poſſeſſion. 43 E. 3. 19. Br. Voucher, pl. 23. cites S. C.— Contra if *Cauſe is not ſhewn*, whereupon it was ſhewn that the Anceſtor died ſeiſed of Gavelkind, which deſcended to them, and they enter'd as Heir &c. and the Demandant replied that the Youngeſt is not ſeiſed of any Land deſcended from the ſame Anceſtor. Br. Parol Demur, pl 7. cites S. C.— —Fitzh. Age, pl. 36. cites S. C. and that the Court received the Averment of the Demandant, and awarded the Vouchee to anſwer.

2. If one Coparcener be vouched, and has Aid of the other Coparcener, who is within Age, the Parol ought to demur. 43 E. 3. 23. b. Br. Aid, pl. 27. cites S. C.— Fitzh. Counterplea del Ayde, pl. 20. cites S. C.

3. If an Infant be vouched, and bound to Warranty by the Deed of his Anceſtor, the Parol ſhall demur for the Nonage of the Infant. 17 E. 3. 59. Fitzh. Age, pl. 49. cites S. C. in a Cui in Vita, and becauſe the Vouchee is yet within Age, and is not Heir of the Baron, and ſo not within the Statute &c. the Parol ſhall demur.

A Man ſhall have his Age, *tho' he has nothing in the Land, as* the *Vouchee*, the *Prayee* in Aid &c. Br. Age, pl. 3. cites 9 H. 6. 46.

4. If a Feme, Tenant in Dower, vouches the Heir of her Baron, and the Baron of the Heir, the Parol ſhall not demur for the Nonage of the Baron, his Feme being of full Age, becauſe the Baron is vouched only for the Heritage of the Feme. 28 E. 3. 99. b. adjudged. Fitzh. Age, pl. 110. cites S. C accordingly.

5. But the Parol ought to demur if both are within Age. * 28 E. 3. 99. b. But Quære. So it ſhould demur if the Feme † was within Age, tho' the Baron was of full Age. Contra 28 E. 3. 99. b. per Will. * Fitzh. Age, † Fol. 145. pl. 110. cites S. C.

6. If

Br. Parol Demur, pl. 12. cites S. C. per Thorpe.

6. If the youngeſt Son enters into the Heritage deſcended, the Parol ſhall not demur for his Nonage if he be vouched as Heir within Age, if the eldeſt Son be of full Age who is Heir in Right, becauſe he cannot be Heir by Continuance. 21 E. 3. 46.

* Br. Parol Demur, pl. 12. cites S. C. per Thorpe.— 8 Rep. 101. b. S. P. in a Nota by the Reporter, cites 20 E. 3. Voucher 129. —S. P. Co. Litt. 244. b.

7. If a Baſtard be vouched within Age by reaſon of his Poſſeſſion, the Parol ſhall demur for his Nonage, becauſe he may be Heir by Continuance all his Life without being reclaim'd. * 21 E. 3. 46. 11 E. 3. Age 3.

Fitzh. Age, pl 59. cites S. C.— See (G) 3. & 7 and the Notes there.

8. If an Infant be vouch'd by Leſſee for Life, by reaſon of the Reverſion, which he has by Deſcent, the Parol ſhall demur, tho' he has not the Frankhold by Deſcent. 30 E. 3. 17.

The *Miſchief* before the Statute *was*,

9. *Stat. W.* 2. 13 *E.* 1. *cap.* 40. *Where any doth alien the Right of his Wife*,

That when the Husband alien'd the Right of his Wife, this working a Diſcontinuance, and the Wife driven to her Cui in Vita, or her Heir to his Sur Cui in Vita, thoſe juſt Actions were delay'd often times, when the Purchaſer vouched the Heir of the Baron being within Age, until his full Age, which is remedied by this Act And this Act *reſtrains the Common Law*, and therefore it *is* taken *Strictî Juris*. 2 Inſt. 455.

This Suit of the Wife or her Heir *extends only to a Cui in Vita, or a Sur Cui in Vita*,

It is agreed that from henceforth the Suit of the Woman, or her Heir, after the Death of her Husband,

which are the proper Actions upon an Alienation made by the Baron of the Right of his Wife, the former Words being [*Cum quis alienat jus Uxoris* ſuæ;] for if the *Wife* be *Tenant in Tail*, and the Baron alien'd in Fee, and died, and the Wife died, *the Iſſue* in Tail cannot have a Sur Cui in Vita, but he muſt *have his Formedon* in the Deſcender by the Stat. of W. 2. cap. 1. and in this Action the *Purchaſor may vouch the Heir of the Baron*, and for this Nonage the Parol ſhall demur; for that Action is not of this Statute. 2 Inſt. 455.

This by the Context of this Act *extends only to the Heir of the Baron* who made the Alienation, and therefore the Heir of a Stranger is out of this Statute. 2 Inſt 455

Shall not be delay'd by the Nonage of the Heir, that ought to warranti/e,

If the *Vouchee who is Tenant in Law vouches the Heir of the Baron in a Cui in Vita*, the Parol ſhall demur by the Stat. of Weſtm. 2. cap. 40. For though the *Words* of the *Statute* are *General*, yet they are *intended when the Tenant in Deed* vouches the Heir of the Baron, and not when the Tenant in Law vouches him 1 Rep 15. Hill 32 Eliz in Sir W. Pelham's Caſe, cites 19 E 3. Age 2.

In Cui in Vita the *Tenant vouched to the Warranty one B.* who enter'd and *vouched one D. Son and Heir of one A.* and becauſe he is *within Age*, pray'd that the Parol demur, and ſo it did by Judgment, notwithſtanding this Stat. and therefore it ſeems that the Stat. is *intended only of the Nonage of him who is vouch'd by the Tenant, and not of him who is vouched by the firſt Vouchee*. Br. Age, pl. 43. cites 18 E. 4. 16

The *Baron aliens to A.* and *hath Iſſue* 2 *Daughters*, and dies; the Wife brings a Cui in Vita againſt *A.* who *vouched the Daughters* as Heirs to the Baron, whereof the *one only was within Age*, the Parol ſhall not demur; altho' all the Coparceners, which make but one Heir, are not within Age, and the Words are per Minorem Ætatem Hæredis, yet ſeeing by the Common Law the Parol for the Whole ſhould have demurr'd, Judgment ſhall be given for the Demandant, and the *Tenant ſhall attend for his Warranty in the Whole* in this Caſe, *until the full Age of the Coparcener*, that then is *within Age*. 2 Inſt. 455.

As the Actions wherein the Voucher ſhall be, and the Heir to be vouched are ſet down in certain, ſo the Perſon that is to vouch is alſo ſpecified, ſo as if any other vouch the Heir of the Husband, the Parol ſhall demur for his Nonage, and therefore the Purchaſor or Buyer of the Husband is only he, by reaſon of this Word (Emptor) that is bound by this Statute. 2 Inſt. 455.

But let the Purchaſor tarry, which ought not to have been ignorant that he bought the Right of another.

And therefore this Emptor muſt have 3 *Properties*; 1ſt. He muſt be Emptor, that is, *Purchaſor immediately from the Baron*, and therefore if this Emptor aliens in Fee, the *Alienee* is Emptor, that is, a Purchaſor; but becauſe he *is not the immediate Purchaſor* from the Baron (albeit he may vouch the Heir of the Baron as Aſſignee) yet is *not* he *bound by this Statute*. 2dly, He that is an Emptor within this Act, *muſt be the Tenant in Deed* againſt whom the Cui in Vita, or Sur cui in Vita is brought; and therefore in the Caſe before, if the 2d. *Alienee vouches him that was immediate Emptor*, yet if *he vouches the Heir of the Husband*, the Parol ſhall demur for his Non-age, and the Demandant ſhall not have Judgment maintenant, becauſe the Cui in Vita &c. was not brought againſt him that was immediate Emptor, as Tenant in Deed of the Land, but he came in as Vouchee; ſo it is if he that was *immediate Emptor cometh in by Receit upon Default of Tenant for Life*, he is not bound by this Act, Cauſa qua ſupra. 3dly, He muſt be *ipſe Emptor*, and not alter ipſe, and therefore if the immediate Emptor dies, albeit his Heir ſitteth in his Anceſtor's Seat, and is Alter idem, yet the *Heir is not bound* by this, becauſe he is not Ipſe idem. 2 Inſt. 456.

He that purchaſes *any Eſtate of Freehold*, be it in Fee-ſimple, Fee-tail, or for Life, he is an Emptor or Purchaſor within this Act, and yet the Words thereof be, Qui alienat jus Uxoris ſuæ. 2 Inſt. 456.

Alſo if Baron aliens, tho' it be for *no valuable Conſideration*, yet is he an Emptor, that is, a Purchaſor within this Stat. 2 Inſt. 456.

Until the Age of his Warrantor, to have his Warranty. And at the full Age of the Vouchee the Tenant ſhall ſue a Re-ſummons. 2 Inſt. 456.—See (P)

This Act extends as well *to a Warranty in Law* for Example in reſpect of a Reverſion &c. as to a Warranty in Deed. And albeit the *Stat. of* 32 *H.* 8. notwithſtanding the Alienation of the Husband &c. *gives to the Wife and her Heirs a Right to enter*, as by that Act appears, ſo as the Wife or her Heirs are not driven to their Action, as at the Time of the making of this Act they were; and therefore this Act may ſeem to ſome to be of no great Uſe, yet for divers Points of notable Learning, and for the diſcuſſing of like Caſes ſtanding upon like Reaſon, Ld. Coke ſays, he held it very profitable and neceſſary to be explained. 2 Inſt. 456.

10. In a Præcipe quod reddat the Tenant vouched, and the Sheriff afterwards *returned that the Vouchee was dead*. The Queſtion was, whether the Tenant might *revouch at large* one as Son and Heir, and ſo pray that the Parol might demur for the Nonage. It was clearly the Opinion of the Court, that if he was not under Age the Tenant might revouch at large, becauſe the firſt Vouchee never enter'd into the Warranty; but whether *one within Age* might be vouched, the Court would adviſe. D. 7. pl. 7. Trin. 28 H. 8. Anon.

11. In a Formedon the Tenant vouched one J. as Couſin and Heir to Sir R. T. and pray'd that for his Nonage the Parol might demur; but by C. B. he *ought to ſhew how* he is *Couſin*. D. 79. pl. 47. Hill. 6 & 7 E. 8. Colvil v. Huddleſton. S. C. cited 6 Rep. 5. a. in Markhal's Caſe, and alſo cites 16 E. 3. Tit. Age, and 15 E. 4. 46 E. 3. 25. and 31 E. 3. Tit. Voucher 54

(K) Parol demur. *Prayee.*

1. If in an Action againſt Tenant by the Curteſy he prays in Aid of the Heir within Age, the Parol ſhall demur. 43 E. 3. 36. S. P. Br. Age, pl. 59. cites 40 E. 3. 13. (b)—But if a Writ of Error be brought againſt a Tenant by the Curteſy, the Parol ſhall not demur for the Non age of him in Reverſion, ſaid by Haughton, and agreed by Coke, becauſe he is not Tenant. Roll Rep. 251.

2. But in Scire Facias againſt Tenant by the Curteſy to execute a Recovery in a Contra Formam Collationis againſt an Abbot, if he prays in Aid of the Heir within Age, the Parol ſhall not demur. 2 H. 4. 16. b. Br. Age, pl. 11. cites S. C. Aid lies but not Age.—See (B) pl. 29.

3. If S. C.

3. If Lessee for Life has Aid of the Remainder within Age, who is in by Descent, the Parol shall demur. 7 H. 4. 42 b. * 11 H. 4. 74. b. 24 E. 3. 32. b. † 27 E. 3. 87. But otherwise it is if he be in as right Heir to J. S. which is by Purchase. 7 H. 4. 5. adjudged. 11 H. 4. 74. 27 E. 3. 87.

* As Scire Facias upon a Fine, the Tenant said that the Fine was levied to him, the Remainder to the right Heirs of W. N. who was dead at the Time of the Fine, and J. is Heir to W. N. and prayed Aid of him, and that the Parol demur for his Non-age, and the Aid was granted, but the Opinion was that the Age does not lie, because he is Purchasor by Name of Heir, and shall not be in Ward, nor pay a Relief, and yet it was agreed that Bastardy was a good Plea. Br. Age, pl. 15. cites S. C. ——Fitzh. Age, pl. 25 cites S. C.

† Fitzh. Age, pl. 108. cites S. C.

4. [So] if Lessee for Life has Aid of him in Reversion within Age who is in by Descent, the Parol shall demur. * 11 H. 4. 30. † 11 H. 6. 10. b. ‡ 18 E. 3. 33. 30 E. 3. 17. 14 E. 3. Age 87. adjudged.

* Fitzh. Age, pl. 24. cites Mich. 11 H. 4. 29. and tho' it was objected that the Land was Gavelkind, and that the Custom is, that the Heir shall have his Land at 15, and may alien it at such Age, and that in this Case the Heir was more than 15; but the Court held, that as to the Prayer in Aid, they ought to adjudge according to the Common Law, and unless other Matter was shewn, the Parol should demur.

† Fitzh. Age, pl. 17. cites S. C.

‡ Fitzh. Age, pl. 13. cites S. C.

5. If Lessee for Life be, the Remainder to the right Heirs of J. S. who is dead, and after the right Heir dies, his Heir within Age, and Lessee has Aid of him, the Parol ought to demur, for he is in by Descent. 27 E. 3. 87.

Fitzh. Age, pl. 108. cites S. C.

6. So if J. S. at his Death has 2 Daughters and Heirs, and after the one dies, and her Part descends to her Daughter within Age, the Parol ought to demur for her Non-age, tho' the Aunt be in by Purchase. 27 E. 3. 87.

Fitzh. Age, pl. 108. cites S. C.

7. In Annuity against a Parson, if he has Aid of the Ordinary and Patron within Age, yet the Parol shall not demur for the Non-age of the Patron, for the Charge does not lie upon the Patron, but upon the Parson. * 11 H. 6. 10. b. † 21 H. 7. 41. 15 H. 7. Age 127. adjudged.

* The Age was denied, because he *did not pray it at first, nor* pray it *in Chancery, before Procedendo granted, and* also *the Loss is not to fall upon the Patron, but upon the Parson*; per Babbington. But Brooke says it seems to him that this is but a slender Reason; for by this the *Patronage is the worse*, which is the Cause that the Parson shall have Aid of the Patron. Br. Age, pl. 72. cites 11 H. 6. 11 ——Fitzh Age, pl. 17. cites S. C. ——Br. Aid del Roy, pl. 105 cites S. C.

† S.P. But Keble was of Opinion, that for the same Reason that the Parson shall have Aid of the Patron, the Patron shall have his Age. Br. Age, pl. 29. cites 21 H. 7. 41. and there is a Quere, whether when the Patron comes by Process, he may not have his Age, tho' the Parson cannot have it at his Prayer ——Fitzh. Age, pl. 127. cites S. C. —— S. C. cited by Haughton J. Roll Rep. 323.

8. If he in Reversion by Descent be received for Default of the Lessee, the Parol shall demur for his Non-age, tho' the Statute is Paratus petenti respondere. * 18 E. 3. 32. b. 19 E. 3. Age 1. adjudged, as I apprehend it. † 32 E. 3. Age 52, 53. adjudged. 2 E. 2. Age 79. adjudged. 14 E. 3. Age 86 adjudged. 9 E. 2. Age ‡ 142. adjudged. 13 E. 2. Age 147. adjudged. 30 E. 1. Itinere Cornub. Age 150. adjudged.

* Fitzh. Age, pl. 13. cites S. C. † Fitzh. Age, pl. 56. cites S. C. & S.P. in Formedon; and pl. (52 and 53) are printed by Mistake.

‡ This should be pl. 143. for tho' both Pleas are of the same Year, yet pl. 142. is of a different Term, and not S. P.

In *Scire Facias out of a Fine* the *Tenant pleaded to Issue, and* then *made Default*, whereupon *came one R. and said that the Tenant had but for Term of Life*, the *Reversion to him*, and pray'd to be received, *and was received, and pleaded to Issue, and* afterwards *died pending the Issue*; whereupon *came one S. and said that R. is dead, and that he is Son and Heir to R. and* that he *has the Reversion by Descent, and* pray'd to be received, and so he was, and said *that R. his Father died seised of the Reversion, which descended to*

him

him &c. *and that he is within Age*, and pray'd &c. But Herle bid him defend his Right now that he was received, or otherwise Seisin should be given of the Land; whereupon S. pleaded in Bar, and so to Issue. Fitzh. Age, pl. 112. cites Trin. 7 E. 3. 32 ——— S. C. cited D. 298. b. in pl. 28.

9. [8] If 2 in Reversion by Descent are received for Default of the Lessee, and the one is within Age, the Parol shall demur. 18 E. 3. 12. adjudged.

10. [9] If a Feme in by Descent be received by Default of her Baron, the Parol shall demur for her Nonage, tho' the * Statute be Paratus petenti respondere. † 18 E. 3. 33. 5 E. 3. Age 61. adjudged.

* 13 E. 1. cap. 3.

† Fitzh. Age, pl. 13. cites S. C.

11. [10] In an Avowry for a Rent-charge reserved upon a Purparty, if the Plaintiff, Lessee for Life, has Aid of him in Reversion within Age, who is in by Descent in the Reversion, yet the Parol shall not demur. 16 E. 3. Age 48. adjudged. It seems by this, that the Land is not in Demand. See the Book in Aid 131. This was in a second Deliverance, where the Father of the Prayee was summoned to join in Aid in the first Action, and made Default, but it seems that this does not alter the Case.

Fol. 146.

12. In *Præcipe quod reddat* the *Tenant made Default*, and *after Default came J. N. and pray'd to be received, inasmuch as W. S. was seised in Fee, and infeoffed the Tenant and the Father of the Prayee, and the Heirs of the Father of the Prayee, and his Father died, and he is within Age*, and pray'd to be received, and that the Parol demur for his Nonage, and it was admitted that the Parol should demur; but it is said there, that in an ancient Book it is adjudged that the *Heir upon Receipt* shall not have his Age; for the *Statute says that he shall be Paratus petenti Respondere*. Br. Age, pl. 70. cites 44 E. 3. 6.

(L) At what *Time* it ought to be demanded.

1. If a Man has Aid of an Infant, and of the King, because the Infant is in ward to him after a Procedendo, the Parol shall not demur upon Demand for the Nonage of the Ward, tho' it ought to have been granted if he had demanded it at the Time of the Aid Prayer; for the Procedendo commands the Judges to proceed, and he ought to have shewn it in Chancery, in Stay of the Procedendo. 11 H. 6. 10. b.

Br. Age, pl. 72. cites S. C. and it was denied, because he did not pray it at first.— Fitzh. Age, pl. 17. cites S. C. ———

See (K) pl. 7. S. C. and the Notes there.

(M) Counterplea. What shall be a good *Counterplea.*

1. If a Man says in an Action, in which the Age lies, that his Ancestor was seised in Fee, and died seised, and this descended to him within Age, and prays his Age, it is a good Counterplea that his Ancestor did not die seised. 29 E. 3. 6. b. But Quære.

In *Præcipe quod reddat* the *Tenant said that his Father was seised, and died seised*, and he is in as Heir, and pray'd his Age, and the *Demandant said that the Father* of the Tenant

nant *had nothing in Demeſne, in Reverſion, nor in Action.* Per Finch, This is no Plea; for you ought to *ſhew that he abated*, or the like; for otherwiſe it is only Argument; for it *may be that he recover'd as Heir*, or that he *enter'd by Reverſion deſcended* &c. wherefore Finch awarded that he ſhall have his Age. Br. Age, pl 7 cites 43 E. 3 18.

2. If an Infant, upon Default of the Tenant, prays to be received, becauſe the Tenant is Tenant by the Curteſy after the Death of his Mother, the Reverſion to him by Deſcent as Heir to his Mother, and prays the Parol to demur, it is a good Counterplea of the Age that the Land was given to the Mother and the firſt Baron in Special Tail, and the Baron died without Iſſue, and ſhe took the Tenant for her 2d Baron, ſo the 2d Baron in by Abatement. 32 E. 3. Age 55.

It ought not to be *by Argument.* Roll Rep. 325. per Crooke J. cites 43 E. 3. 18.——3 Bulſt. 144. S. P. by Coke Ch. J.

3. A Counterplea to bar another of a Right of Privilege, which he ought to have by the Law, as that of Age is, *ought to be full and certain*; per Crooke J. Roll Rep. 325. cites 3 E. 3. 49. 4 E. 3. 40.

4. It is a good Counterplea of Age of a Vouchee, *that he is dead*; per Crooke J. Roll Rep. 325. cites 7 E. 3. 27.

5. In *Præcipe quod reddat* the *Tenant alleged Deſcent, and that he is in as Heir, and within Age, and pray'd his Age*, it is a good *Counterplea that the Tenant and his Father purchaſed jointly, and he is in by the Survivor*, and traverſe the Deſcent. Br. Counterplee de Aid, pl. 30. cites 39 E. 3.

S. P. by Crooke J. Roll Rep. 325. cites 27 H. 6. 1. 4 E. 3. 41 E. 3. 28.——S. P. by Coke Ch. J. 3 Bulſt. 144. cites 4 E 3. 40.

6. It is a good Plea *that he had an elder Brother.* D. 137. pl. 26. Hill. 3 & 4 P. & M.

S. P. by Crooke J. Roll Rep. 325. cites 40 E. 3 14. 48 E 3. 21 E 4.

7. *So* it is a good Plea *that his Father was attainted* &c. D. 137. pl. 26. Hill. 3 & 4 P. & M.

Baſtardy is a good Plea in a Formedon in Remainder. D. 137 pl. 26. Hill. 3 & 4 P. & M.——S. P. by Crooke J. Roll Rep. 325. cites 40 E. 3. 14. 48 E. 3. 21 E. 4.

8. Counterplea of Age ſhall not be, but *where it appears that he is not Heir, as a Baſtard, or one who is not in as Heir*, but by Purchaſe, *or in Caſe of Inevitable Neceſſity*; per Coke, Crooke, & Haughton. Cro. J. 393. pl. 5. Mich. 13 Jac. B. R. in Caſe of Herbert v. Binion.

(N) In what Caſes, if the Parol demur *againſt one*, it ſhall *againſt another alſo.*

1. If 2 are vouched, if the Parol demur for the Nonage of the one, it ſhall demur for the other alſo. 45 E. 3. 23.

2. If Aid be pray'd by 2 Coparceners, ſcilicet, the Aunt and the Niece, and the Aunt has the Remainder by Purchaſe, and the Niece is within Age, and has the Remainder by Deſcent, the Parol ſhall demur for both. 27 E. 3. 87.

3. So

3. So if Aid be pray'd by one Coparcener of 2 other Coparceners, of whom the one is within Age, and the other of full Age, the Parol shall demur for all. 33 E. 3. Aid of the King 109.

So in Writ of Error by one Coparcener. Br. Age, pl. 58. cites 9 H. 9. 47. But it should be 9 H. 6. 47. a.

4. If one Coparcener has Aid of the other within Age, if the Parol shall demur for the Non-age of one, it shall demur for both. 9 H. 6. 47.

5. If the Tenant vouches himself and J. as Heirs, and J. is within Age, the Parol shall demur for both. 13 E. 3. Itinere North. 52. adjudged.

Fitzh Age, pl. 51. S. C. & S. P. but pl. 52 is not the S. P. and therefore seems misprinted.

6. In Dum fuit infra ætatem by 2 Coparceners of the Seisin of their * Coparceners, [Ancestor] for the Non-age of one of the Demandants, all the Parol ought to demur. D. 3. 4 Ma. 137. 25. 30 E. 3. 7. b.

* Fitzh. Age, pl. 82. cites S. C. and there the Word is (Ancestor.)

The Words of D. 137. b pl. 25. are, that In dum fuit Infra Ætatem of the Demise made by his Ancestor who died before his full Age, or for the Nonage of one of the Demandants the entire Parol shall demur.——[And so the Word Coparceners in the last Place seems to be put in by Mistake of the Printers]

7. So the Parol shall demur for both in a Non compos Mentis by 2 Coparceners of the Seisin of the Ancestor for the Non-age of one. D. 3. 4. Ma. 137. 25.

Fol. 147.

8. [So] In a Writ of Entry sur Disseisin by 2 Coparceners, of which the one is within Age, qui non prosequitur upon Summons, yet the Parol shall demur against the other also. 12 E. 1. Itinere Wilts Age 130. adjudged.

9. If a Writ of Error be brought against the Heir of the Recoveror, within Age, and a Scire Facias against the Tertenant, if the Parol demurs for the Heir, yet it shall not demur as to the Tertenant. 9 H. 6. 4. b. For the Heir shall not be at any Prejudice if it be reversed as to the Tertenant.

S. P. Br. Error, pl. 9. cites 9 H. 6. 46. says it was much argued, if the Parol

should demur against both, or proceed against the Tertenant, but leaves it a Quære.—Fitzh. Error, pl. 20. cites 9 H. 6. 40. and the Book in Roll seems to be misprinted.——Fitzh. Age, pl. 16. cites Mich. 9 H. 6. 1[illegible]. that the Parol shall demur as to the Heir, but that they shall go to the Examination of the Errors as to the other immediately.——S. P. Br. Age, pl. 21 cites 19 H. 6. 25. which seems to be right, and the Book in Roll misprinted.——And Br. Parol demur &c. cites S. C. and that after long Argument it was agreed that it should demur against the Heir only, and that the Tenant should answer.

10 If a Contra Formam Collationis be brought against the Abbot, and Scire Facias against the Tertenant, who is in by Descent, and he has his Age, yet the Parol shall not demur as to the Abbot. 9 H. 6. 47.

11. If 4 enter into a Recognizance, and after one dies, his Heir within Age, in a Scire Facias against the Heir and the others, the Parol shall demur against all. * 29 Ass. 37. adjudged. 29 E. 3. 39.

* Br. Age, pl. 24. cites 24 E. 3. 28. S. P. —— Upon this

being pleaded, the Parol shall demur against all (*if the Demandant does not deny it*) *without Proof, or Venire Facias to be viewed.* Br. Parol demur &c pl. 16. cites S. C ——Br Age, pl. 56. cites S. C. and S. P. ——Fitzh. Age, pl. 73. cites S. C ——3 Rep. 13. a. b. cites S. C. and 29 E. 3. 50. Sir John Langford's Case.

Two enter'd into a *Statute*, and one died, his Heir within Age; it was moved that the *Extent shall demur*, because the Usura recurrit [non currit] contra Hæredem infra Ætatem existentem, and cited 1 Ass. 4. per Mowbrey; and so it was agreed by the Court. Het. 59. Mich 3 Car. C. B. Wilkinson's Case.—— See (C) pl. 7.

S. P. but *contra where Land is recover'd* against the Ancestor who dies, the Heir shall not have his Age in Scire Facias; for the *Title of the Ancestor is disproved.* Br Age, pl. 24 cites S. C.——Fitzh Age, pl. 102. cites S. C.——S. C cited 3 Rep. 13. a. And the Reporter infers from thence, that if there be *Grandfather, Father, and 2 Daughters*, and *Judgment is given for Debt* or Damages *against the Grandfather*, and then *he dies*, and the *Father dies, one of the Daughters heirs within* and the other of full Age, and *Partition is made*, the eldest shall not be solely charged, but shall take Advantage of the Infancy of her Sister; for both the Heirs are but in one and the same Degree.

12. In a Scire Facias against the Tertenants to have Execution of Damages recovered against J. S. if the Parol demurs against one of the Tertenants for his Non-age, it shall demur against all. 24 E. 3. 28. adjudged.

So if one *bound in a Recognizance* has Issue 2 Daughters, and dies, and they make Partition, the one only shall not be charged but shall have Contribution, and the one shall take Benefit of the Non-age of the other; for in such Case, tho' she be charged as Tertenant, yet she shall have her Age. Ibid. Co. Litt 290. a. (h) S. P.

See pl. 12. in the Notes there.

13. In a Scire Facias if 2 Coparceners are received upon Default of the Lessee, and the Parol demurs for the Non-age of one of the Coparceners, it shall demur for both. 44 E. 3. Age 37. adjudged.

14. In Mortdancestor, *Land descended to* 4 *Daughters*, the *one enter'd into the whole*, and *took Baron*, and *had Issue and died*, the *Baron leased it* to another *for Term of Life of the Lessor*, and the *Lessee was impleaded by the two Aunts and the Niece, Daughter to the Lessor, by Assise of Mortdancestor*, the *Tenant vouch'd his Lessor, who* came and *enter'd into the Warranty and said that E. his Feme was seised in Fee, and he had Issue and is Tenant by the Curtesy, and pray'd Aid of A. his Daughter*, and by her Non-age pray'd that the Parol Demur. Belk said he ought not to have the Aid for she of whom he prays Aid is one of the Demandants, and therefore he may rebut for Parcel and vouch for the rest. But per Thorpe, we may not as here; for the Assise shall not be taken by Parcel; and Mombray accordingly, and said that the whole Assise of Mortdancestor shall demur. And Finch concessit, by which they counterpleaded the Aid for 2 Parts, and were nonsuited for the third Part, viz. the Niece was nonsuited, summon'd, and sever'd, and then the Parol did not demur. Br. Mortdancestor, pl. 48. cites 40 Ass. 37.

15. If a Man *vouches 2 as Heirs*, the *one of full Age* and the *other within Age*, and prays that the Parol demur, and the Demandant says that he is of full Age, and prays Venire Facias to be view'd, Process shall issue against him of full Age; per Markham; but per Newton contra, and that *no Process shall issue till the other be adjudged to be of full Age.* Br. Process, pl. 61. cites 19 H. 6. 5.

D. 239. pl. 39 S. C. accordingly, because the Niece is out of Court and the Original determined against her, and could not be re-summon'd at her full Age, because she never appear'd to the Court.——Bendl. 146. pl. 205. S. C. accordingly, and the Pleadings.——Mo. 74. pl. 203. S. C.

16. In *Debt against A. and B. and E. the Daughter of C.* deceased *Coheirs in Gavelkind upon an Obligation of their Father.* A. and B. were outlaw'd, and had their Pardon. E. was waived. The Plaintiff declared against A. and B. simul cum E. who was waived. The Defendants pleaded that E. now one of the Heirs in Gavelkind, is within Age; but adjudg'd upon Demurrer that A. and B. shall answer; for she never appear'd as Defendant in this Suit, and therefore A. and B. shall answer without her. And. 10. pl. 22. Pasch. 27 Eliz. Hawtree v. Awcher.

(O) In

(O) In what Cases the Demurrer of the Parol *for Part* shall be *for all.*

1. IN a Writ of Error upon a Judgment for divers Things against an Infant upon a Recovery by his Ancestor, if the Infant disclaims for Part, by which the Judgment is to be reversed for Error therein, yet the Parol shall demur for the Non-age of the Infant for the Residue, and it shall make the Parol to demur also for that in which the Infant has disclaimed, because this is only one Record, and therefore if he has his Age of Parol he shall have it of all. 47 Ass. 4.

2. The same Law if in an Action against an Infant he confesses the Action of the Demandant for Part, yet if the Parol demurs for the Residue, it shall demur for all. 47 Ass. 4. Br. Age, pl. 9. cites 47 E. 3. 7. S. P. per Tank. that he may confess the Action as to Part, and have his Age for the Residue.

3. If an Infant brings a Writ of Entry sur Disseisin to his Father, and the Tenant pleads the Release of the Father, as to Part of the Land demanded, by which the Parol is to demur for it, yet it shall not demur for the Residue. 19 E. 2. Age 123. adjudged. See Stat. Westminst. 2. 13 E. 1. cap. 47. which takes away Age in a Writ of Entry sur Disseisin en le per, at (I) supra.

4. In Assise by 3 Coparceners, if the Tenant claims as Tenant by the Curtesy of all, and prays in Aid of one of the Plaintiff's in Reversion within Age, and has Aid of him, by which the Parol ought to demur for the third Part which belongs to the Infant, and not for the Residue, yet because the Assise shall not be taken by Parcels, it shall demur for all. * 41 Ass. 37. * This is misprinted and should be 40 Ass. 37. and was an Assise of *Mortdancestor*, for that *Land descended to 3 Daughters, and the one enter'd into the Whole, and took Baron and had Issue a Daughter, and died*, and the *Baron leased it to J. S.* for the Life of the Lessor and *J. S. is impleaded by the 2 Aunts and the Niece* (the Lessor's Daughter) by Assise of Mortdancestor, *and* J. S. *vouch'd his Lessor*, who enter'd into the Warranty, and *said that E. his Wife was seised in Fee, and he had Issue, and is Tenant by the Curtesy, and pray'd Aid of A. his Daughter, and that for her Nonage the Parol may demur.* Belke held that Aide in this Case ought not to be granted, he of whom it is pray'd being one of the Demandants. But Thorpe e contra, as this Case is, because the Assise shall not be taken by Parcels; and Mombrey agreed and said, that for that Reason the intire Assise of Mortdancestor shall demur, quod Finch concessit; whereupon they counterpleaded the Aid for 2 Parts, and were nonsuited as to the third Part, viz. A. the Niece was summon'd, and sever'd, and nonsuited, and then the Parol did not demur. Br. Mortdancestor, pl. 48. cites 40 Ass. pl. 37.——Br. Age, pl. 39. cites S. C.———Fitzh. Voucher, pl. 207. cites S. C.

5. [So] In Assise against an Infant of Land, whereof he has Parcel by Descent, and Parcel by Purchase, by which the Parol ought to demur for the Descent, but ought not for the other, yet because the Assise shall not be taken by Parcels it shall demur for all. 41 Ass. 37. per Finchden.

(P) Demanded

(P) Demanded by whom. And Proceedings, Pleadings, &c.

1. DEBT *againſt an Heir upon the Obligation of his Father*, who appear'd by Guardian, and *ſaid that he was within Age*, and pray'd his Age. The Plaintiff *replied that he was of full Age*, and pray'd Writ to make him come to be view'd, and it was granted; but Stone ſaid that tho' he ſhould be *adjudged of full Age*, the Plaintiff cannot recover his Debt, but the Defendant ſhall be compell'd to anſwer &c. Fitzh. Age, pl. 122. cites Mich. 19 E. 2.

2. In Formedon, after the Parol has demurr'd ſine Die by the Nonage of the Tenant, at the Reſummons at his full Age he ſhall plead *Non-tenure*. Thel. Dig. 208. lib. 14. cap. 10. S. 2. cites Hill. 26 E. 3. 57.

3. The Parol was put without Day by the Nonage of the Vouchee, and at the Reſummons the Tenant ſaid *that the Vouchee is yet within Age*; Judgment of the Writ, which ſuppoſed him to be of full Age; to which the Demandant replied *that the Vouchee was dead* &c. Upon which the Tenant was put to anſwer over, becauſe the Demandant cannot have Writ of Reſummons of other Form. Thel. Dig. 208. lib. 14. cap. 10. S. 4. cites Trin. 31 E. 3. Reſummons 29.

Br. Age, pl. 31. cites S. C. where it is ſaid that the Parol ſhall not demur in this Caſe.

4. *Formedon againſt Tenant for Life*, who *joined Iſſue* that *Ne dona pas*, and *one* came for him in Reverſion, and *ſaid that he in Reverſion is in Ward of the King, and within Age*, and pray'd that the Parol demur during his Nonage, inaſmuch as the Tenant pleaded by Colluſion, and becauſe the Reverſioner himſelf, nor any other for the King, did not come &c. therefore the Juſtices would do nothing. Br. Parol Demur, pl. 14. cites 1 H. 6. 4.

5. So at the Reſummons, after that the Tenant has demurr'd for Nonage of the Vouchee, the Tenant may plead *that a Stranger has recover'd againſt him after that the Parol was diſcontinued* &c. *and conclude to the Action, but not to the Writ.* Thel. Dig. 208. lib. 14. cap. 10. S. 2. cites Trin. 5 H. 7. 39.

6. When the Infant, to have the Age, ſhews that his Anceſtor died ſeiſed, and the Land deſcended to him, the *Dying Seiſed ſhall not be traverſed, but the Deſcent.* Roll Rep. 325. Hill. 13 Jac. B. R. in Caſe of Herbert v. Binion, cites 43 E. 3. 18. 2 H. 5. 8 E. 4. 19. b.

* Lev. 163. S. C. but ſays that the Iſſue was found for the Demandant. [And upon Error brought, the Errors aſſign'd being in Favour of the Infant, ſhews that Judgment was given againſt him.] The Judgment in C. B. was affirm'd, Niſi.——Raym. 118. S. C. Sed adjornatur.——Keb. 869. pl. 18. S. C. and (ſays expreſsly that) by Judgment the Defendant was ouſted of his Age, and Judgment affirm'd, Niſi.

7. Formedon in Remainder was brought againſt an Infant. The Infant by his Guardian *pleaded that he was in by Deſcent*, and prayed that the Parol ſhould demur; and upon this Iſſue was taken and found for the * Tenant in the Formedon, and after ſeveral Arguments uſed 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 affirmed. Sid. 252. pl. 22. Paſch. 17 Car. 2. B. R. Amcott v. Amcott.

(Q) Age

(Q) Age triable. How and where.

1. IF a Man *vouches an Infant, or prays Aid of him*, and prays *that the Parol demur*, and the *Demandant ſays that he is of full Age, and prays that he be view'd*, Venire Facias to be view'd ſhall iſſue. Br. Proceſs, pl. 141. cites 24 E. 3. 28.

2. *But* if an *Infant* be *impleaded, and appears by Guardian, who alleges his Age, and prays that the Parol demur*, Proceſs ſhall not iſſue to be view'd, but the *Guardian ſhall be commanded to bring him in at a certain Day*, and if he makes *Default, Petit Cape ſhall iſſue.* Quod Nota bene. Br. Proceſs, pl. 141. cites 24 E. 3. 28.

3. An Infant brought Aſſiſe of Novel Diſſeiſin, and was demanded, and *came not*, and *one as next Friend pray'd to be received* to ſue for him according to the Statute, and the *Defendant ſaid* that the *Plaintiff was of full Age*, priſt, and it was *tried by* the *Aſſiſe*; per Wich, which Finch agreed. Br. Age, pl. 10. cites 48 E. 3. 10.

4. The Court of Chancery, upon *View* of the Body, and upon *Examination of* ſeveral *Witneſſes*, and upon View of the *Church Book*, adjudged the Defendant to be under the Age of 21 Years. Toth. 135. cites 28 Eliz. Wood v. Wageman.

5. If a Tenant in a Real Action *vouches* A. as Heir within Age, *or* if Tenant for Life be impleaded, and *prays in Aid of A.* in Reverſion, who is *within Age*, and that the Parol may demur &c. in either of theſe Caſes, if the Demandant *replies that A. is of full Age*, this ſhall not be tried by the Country, for the great Delay it would be to the Demandants; but *a Writ ſhall be awarded to the Sheriff, Quod Ven. Fac. tali Die prædict' A. ut per aſpect' corporis ſui conſtare poſſit præfat Juſtic. noſtris ſi prædict' A. ſit plenæ Ætatis nec-ne* &c. 9 Rep. 30 31. Mich. 33 & 34 El. in the Caſe of the Abbot Strata Mercella.

For more of Age in General, ſee **Enfant, Guardian, Trial,** and other Proper Titles.

* Aid of the King.

* There are 3 *manner of* Aids of the King. 1ſt, Expreſs Aid as Tenant for Life or Years, or Farmer ren-

Fol. 148.

dring Rent, are impleaded, they may pray in Aid. 2dly, When there is not any Expreſs Aid to be granted, but there appears ſome Cauſe of Aid, there he ſhall not conclude to have Expreſs Aid, but ſhall conclude Judgment Si *Rege inconſulto* &c. 3dly, When there is Cauſe of Aid, but no Aid is pray'd before Iſſue, then this Writ of Rege Inconſulto is granted after Iſſue, and a Copyholder, or a Cuſtomary Tenant ſhall not conclude with Expreſs Aid, nor a Purveyor, but Judgment Si Rege Inconſulto. Arg. Roll Rep 206. cites 4 H. 6 28.

But where in *Treſpaſs* the *Defendant ſhewed that the Place is Parcel of the Manor of D. whereof the King is ſeiſed* &c. *and this Land is demiſable by Copy of Court Roll*, and *the King at ſuch Court leaſed to him by Copy* &c.

(A) Aid of the King. In what *Actions*.

1. IN Treſpaſs againſt Tenant in Fee of the Grant of the King, Aid does not lie, becauſe no Prejudice can come to the King. 18 H. 6. 12.

&c. and demanded Judgment Rege Inconſulto; and per Fitzherbert J. clearly, he ſhall have Aid of the King, and no Traverſe to the Cauſe ſhall be here, as Not Parcel, or Not compriſed &c. Br. Aid del Roy, pl. 1. cites 27 H. 8. 28.

But in the Chancery *no Writ of Search* ſhall be granted upon Aid in Action of *Treſpaſs*, as here; for the King ſhall loſe nothing. Nota. Ibid.

* Fitzh. pl. 56. cites S. C. & S. P. admitted.— 2. In Treſpaſs, Aid ſhall be granted of the King. * 45 E. 3. 3. 46 E. 3. 28. b. 9 H. 6. 56.

Br. Aid del Roy, pl. 16. cites S. C. and was Treſpaſs for fiſhing in Kingſton juxta Hull, the Defendant pleaded, that he had the Vill of Hull of the King in Fee Farm, rendring 40 l. a Year, by Charter of the King, which he ſhews, and that the Place where &c. is Parcel of the ſame Vill of Hull &c. and prayed Aid of the King, and had it, notwithſtanding that the other alleged that his Action is brought in Kingſton juxta Hull, ſo that it ſhall be intended 2 ſeveral Places &c.——Br. Aid del Roy, pl. 97. cites 5 H. 7. 16 S. P.

Br. Aid del Roy, pl. 55. cites 4 H. 6. 10. contra, becauſe he has Frankenement, and

3. In Treſpaſs de clauſo fracto &c. Aid ſhall be granted of the King, becauſe by common Intendment the Freehold is the Cauſe of the Action, this being for Things annexed to the Land. Contra 4 H. 6. 10. adjudged 18.

His Frankenement is a good Plea in Treſpaſs, and a Man ſhall not recover Land nor Frankenement in Action of Treſpaſs, but only Damages, which is no Prejudice to the King; for the Aid ſhall not be granted of the King but for Feebleneſs of Eſtate, or for Loſs to the King, and neither of them is here; Quod Nota.

4. In Treſpaſs de bonis Aſportatis, or Battery Aid lies not, becauſe the Freehold cannot be intended the Cauſe of the Action. 4 H. 6. 10 b.

† Br. Aid del Roy, pl. 24. cites S. C. ——

5. Aid lies in Treſpaſs upon the Caſe. † 7 H. 4. 2. b.

6. In an Action upon the Caſe againſt the King's Farmer of a Leet for holding the Leet Aid lies. * 18 H. 6. 12. adjudged.

* Fitzh. Aid del Roy, pl. 19 cites Trin. 18 H. 6 11. S. C.

Treſpaſs upon the Caſe, in as much as the *Defendant interrupted the Plaintiff to take a Mark which belonged to him for a Leet &c.* and the *Defendant claimed* the Leet *by Grant of the King, rendring 5 l. a Year in the Exchequer* by his Charter which he ſhewed forth, and prayed Aid of the King, and had it, and yet it is only an Action of Treſpaſs, in which nothing ſhall be recovered but Damages Br. Aid del Roy, pl. 53. cites 24 E. 3. 6.——See (D) pl. 7. S. C.—(H) pl 3 S. C.

Fitzh. Aid del Roy, pl. 96. cites S. C. where the Reverſion was by Eſcheat to the King, but Search was denied.

7. In an Aſſiſe Aid ſhall be granted of the King in Reverſion. 4 H. 4 pl. 19. adjudged.

In Aſſiſe the Tenant may have Aid of the King, contra of a common Perſon: but per Cheyney and Thirne, where the King leaſes for Life *Land of his Dutchy of Lancaſter*, the Tenant ſhall *not* have Aid of the King in Aſſiſe; for of the Dutchy Land the King is as a common Perſon, *for he has it as Duke*, and not as *King*. Br. Aid del Roy, pl. 32. cites 11 H. 4 85.

In Aſſiſe of *Novel Diſſeiſin againſt the Incumbent of the King of Parcel of his Glebe*, he ſhall have Aid of the King, and the like now in Juris utrum; Quod Nota. Br. Aid del Roy, pl. 95. cites 3 H. 7 7.

In Aſſiſe of Novel Diſſeiſin the Defendant ſhall not pray in Aid, but only of the King. 2 Inſt. 411. ——8 Rep. 50. S. P. ——See Aid of a common Perſon (A) pl. 13.

Br. Scire facias, pl. 76. cites S. C. that he had Aid of the King, but nothing is

8. The Indictee of Felony being outlaw'd brings a Writ of Error, and hath a Scire Facias againſt the Tertenants and Lord; one Ter-tenant comes and ſays, that the King granted the Land to him for Life, yet he ſhall not have Aid of the King, becauſe by this Writ he had no Day in Court but to hear the Record. 11 H. 4. 53. b.

ſaid there about the having no Day in Court.——Fitzh. Scire facias, pl. 68. cites S. C. & S. P. as to his having no Day in Court.

9. In Replevin Aid ſhall be granted of the King. 9 H. 6. 56.

10. Tenant in Fee of the Grant of the King ſhall have Aid in real Actions,

Actions, because if the Demandant recovers, the King shall change his Tenant. 18 H. 6. 13.

11. In a Quare Impedit Aid shall not be granted of the King, because this is brought upon his own Disturbance, and for the Mischief of the Lapse in the mean Time. 5 H. 7. 16. S. P. if it be not in lieu of Voucher, for otherwise nothing shall be recovered but the Presentment. Br. Aid del Roy, pl. 97. cites S. C. —— Fitzh. Aid, pl. 96. cites S. C. accordingly.

In Qua. Imp. the Defendant shall have Aid against the King in lieu of Voucher. Br. Voucher, pl. 7. cites 9 H. 6 56. —— Br. Qua. Imp. pl. 7. cites S. C. & S. P. that Aid was granted upon Charter shewn. —— Br. Aid del Roy, pl. 6. cites S. C. —— Fitzh. Aid de Roy, pl. 15. cites S. C. —— See Aid of a common Person (A) pl. 22

In Qua. Imp. the Suit was stay'd by a Rege Inconsulto, because the Patronage was in the King, and adjudged, quod teneatur penes Dominum Regem, and a Procedendo pray'd and granted in Chancery, and Day given to the Attorney General, to shew Cause why it should not be granted. Roll Rep. 290. cites 3 & 4 Ma Jones v. Elkes.

12. In an Action of forcible Entry the Defendant being Tenant for Life shall have Aid of the Heir in Reversion, and of the King in whose Ward the Heir is, the Defendant making Title by the Lease of the Father of the Heir. 22 H. 6. 17. b. 18. adjudged. Br. Aid del Roy, pl. 47. cites S. C. contra; for *no Franktenement is to be recovered in Trespass*, and *he who has Franktenement is able to plead to all Purposes in Trespass*; Quod Nota, by the best Opinion, and this notwithstanding that the Plea goes in Disproof of the Reversion [The Year Book is, that the granting it was by Consent and Agreement of the other Side, as not being more in Delay than a Demurrer would be] —— Br. Aid, pl 85. cites S. C. according to Br Aid del Roy, pl. 47. —— Br. Forcible Entry, pl. 6. cites S. C. accordingly, by the best Opinion, and thereupon the Defendant pleaded Not Guilty. —— Fitzh Aid del Roy, pl 23. cites S. C. that Aid was granted, because it would be as speedy as a Demurrer, but says nothing of the Consent. —— Fitzh. Aid de Roy, pl. 11. cites 4 H. 6. 12. that Aid was denied per Cur.

13. In an Ejectione Firmæ the Defendant shall have Aid of the King, (it seems the King had the Reversion before Issue) because by Intendment the Freehold shall come in Debate in this Action, the *Earl of Kent's* Case adjudged, cited 3 Jac. B. R. See (O) pl. 5.

14. In *Scire Facias to execute an Annuity* against a Parson, Aid was granted of the King, because the Dean was Patron of the Parsonage, and the King was to collate to the Deanry. Arg. Roll Rep. 292. cites 38 E. 3. 18. The Defendant shall have Aid of the King *in Scire facias upon a Recognizance* notwithstanding the Statute. Br Scire facias, pl. 90. cites Title Aid of the King, 39.

15. *In Præcipe quod reddat* against Tenant of the King, who holds of him by *Rent and Services*, the Tenant shall *not* have Aid of the King, *unless the Title of the Demandant be elder than the Title of the King to the Seigniory*; for otherwise he who recovered should hold by the first Services. Br. Aid del Roy, pl. 13. cites 35 H. 6. 56. per Prisot.

16. In *Petition of Right* by Sorell in Trespass, the *Defendant said*, that the *King leased to him for Years*, and prayed Aid of the King, and had the Aid, but he shall not have Search, so see that it is admitted that the Lessee for Years shall have Aid of the King in Trespass and yet no Franktenement is to be lost; Per Billing, where Tenant for Life, the Reversion to the King, has Aid of the King, he shall not have Search. Br. Aid del Roy, pl. 60. cites 9 E. 4. 52.

17. In a *Quod permittat of a Common* against Tenant for Life of the Land of the Lease of the King, he shall have Aid of the King. Br Aid del Roy, pl. 93. cites 2 H. 7. 11.

18. In Writ of *Error to reverse a Judgment*, the Defendant in Error pray'd Aid of the King, but denied per tot. Cur. because no Land is in Demand, but only collaterally; but afterwards when the Lands come once in Question, then Aid shall be granted, but never before. Bulst. 218. Trin. 10 Jac. Baker v. Nichols.

This Statute having not been printed till towards the latter Part of the Reign of H. 8. and

19. 4 *E.* 1. *Stat.* 3. *cap.* 3. *Concerning the Endowment of Women, where the Guardians of their Husbands Inheritance have Wardſhip by the Gift or Grant of the King, or where ſuch Guardians be Tenants of the Thing in Demand; or if the Heirs of ſuch Lands be vouched to Warranty, if they ſay that they cannot anſwer without the King, they ſhall not ſurceaſe upon the Matter therefore, but ſhall proceed therein according to Right.*

thereby as it ſeemeth not commonly known, there have divers Aid-Prayers been granted directly againſt both Points of the Purview of this Statute, as well when the Writ of Dower hath been brought againſt the King's Grantee or Committee, as where the Heir came in as Vouchee in his Cuſtody, and the like Rule Brian gave in 4 H. 7 but when Juſtice Townſend remember'd him of this Statute of Bigamis, the Aid was over-ruled. 2 Inſt. 271.

And at the Parliament holden in 18 E. 1. an Act is in the Parliament-Roll thus enter'd, Quod viduæ recipiant Dotem de terris in cuſtodia Regis exiſtentibus, Dominus Rex præcepit Juſticiariis de Banco, quod viduæ poſt mortem virorum ſuorum petant Dotem ſuam &c. et quod in placitis illis procedant ſecundum communem legem Regni, & quod partibus faciant debitum Juſticiæ complementum. 2 Inſt. 271.

So as ſeeing the Letter of this Chapter of 4 E. 1. extends but where the King hath granted the Cuſtody over, or where the Heir came in as Vouchee, the Act of 18 E. 1. made about 14 Years after, addeth that theſe Widows ſhall recover Dower againſt the Heir in the Cuſtody of the King, where the King granteth not the Cuſtody to any, but keepeth the Lands in his own Hands. And Ld. Coke ſays he is verily perſuaded, that ſeeing the granting of Aid where no Aid was grantable, was not any Error (whereby the Judgment might be reverſed,) ſome Judges, either for that Cauſe or for Fear, have granted Aid of the King in many Caſes, where it was not to be granted by Law; and the rather for that in ancient Times, Aids of the King were little or no Delay at all; for Writs of Procedendo were ſpeedily granted; whereas of latter Times Aid-Prayers, and eſpecially Writs de Domino Rege Inconſulto, are uſed merely for Delay of Juſtice, and that for no ſmall Time. 2 Inſt. 271.

(B) In what *Caſes* it lies, *contrary to the Suppoſal of the Writ.*

See (Q) pl. 1. S. C.—S. P. Though the Plaintiff recovers in the County of H. Br. Aid del Roy, pl. 40. cites S. C.—

1. IN an Aſſiſe of S. in the County of H. if the Tenant ſays that the Land is in F. which is in the County of E. and that the King gave it to him, rendering 40 l. Rent per Annum, he ſhall not have Aid of the King, becauſe this is contrary to the Suppoſal of the Writ; ſo that if Aid ſhould be granted the Writ would abate, and the Tenant is at no Prejudice if he hath not the Aid. 21 E. 3. 19. adjudged.

Fitzh. Aid de Roy, pl. 2. cites S. C.

Fol. 149.

2. IN a Dum fuit infra Ætatem, if the Tenant ſays that he holds by virtue of a Leaſe from the King by his Patent, and ſhews it forth, by which it appears that he hath but a Chattel, and not a Freehold, which is contrary to his own Acceptance, for he hath accepted the Writ good, yet becauſe the King's Right ſhall not be tried without the King, he ſhall have Aid of the King. 31 E. 3. Aid del Roy 69. adjudged.

(C) Upon

(C) Upon Demand of what Thing. Of *another Thing than* that which is *in Demand.*

1. If the King's Farmer be ſued upon his own Grant, made by him after the Grant of the King, he ſhall not have Aid. 48 Ed. 3. 18. Aid of a common Perſon (E) pl. 1. cites S. C. but not clearly S. P.——Br. Aid del Roy, pl. 19. cites S. C. *As* where Covenant was brought by the Vill of N againſt the Vill of D. for that they covenanted with them that they ſhould be quit of Toll in D. and that they had taken Toll; and thoſe of D. ſaid, that they had their Vill of D. of the King in Fee-Farm, and prayed Aid of the King, and becauſe this is their own Covenant and Deed after the Fee-Farm, they were ouſted of the Aid. Br. Aid del Roy, pl. 19. cites 48 E. 3. 18.——Fitzh. Aid de Roy, pl. 59. cites S. C. accordingly, for the King is not endamaged by it.

2. If a Common be demanded to iſſue out of the Land of the King's Leſſee for Life, he ſhall have Aid of the King. * 6 Hen. 4. 5. b. 4 Hen. 6. 11. 19. † 1 Aſſ. 1. adjudged. * Fitzh. Counterplea of Aid, pl. 13. cites S. C. but not S. P.—— † Fitzh. Aid de Roy, pl. 86. cites S. C. ſays the Court gave Day &c. and in the mean time to ſpeak with the King &c.

3. [So] If a Rent or Common be demanded to iſſue out of the Land of the King's Leſſee for Life, he ſhall have Aid of the King. 6 H. 4. 5. b. 4 Hen. 6. 11. 19. * 3 Aſſ. 1. adjudged, though the Aid be granted of another Thing which is not in Demand. * Br. Aid del Roy, pl. 70. cites S. C. accordingly, and afterwards came a Procedendo, but not to go to Judgment Rege Inconſulto.——Fitzh. Aid de Roy, pl. 87. cites S. C.

4. If a Common be demanded to iſſue out of the Land of the Fee-farm of the King, rendering Rent, he ſhall have Aid of the King. 13 Hen. 4. Aid del Roy 99. Curia. Dubitatur * 46 Aſſ. 1. * See (G) pl. 6. S. C.

5. If a Common be demanded to iſſue out of the Lands of the King's Tenant of the Gift of the King, diſcharged of Common, he ſhall have Aid, tho' he is to have Aid of another Thing than that which is in Demand. * 25 Aſſ. 8. † 29 Aſſ. 19. * Br. Aid del Roy, pl. 75. cites S. C. but ſeems to be contra; for they were in Doubt if he ſhall have Aid, becauſe the Gift is of the Land, and the Aſſiſe is of the Common, and ſo another Thing than is given; and per Shard J. Aid is not grantable by Deed which commenced before the Title of the Action of the Plaintiff accrued.
† Fitzh. Aid de Roy, pl. 75. cites S. C. but not S. P.

6. Where a Man claims to be *diſcharged of Toll* in a Vill where the King has Fee-farm, Aid of the King ſhall be granted to the Vill. Br. Aid del Roy, pl. 93. cites 2 H. 7. 11.

(D) In what *Cases* it ſhall be granted of the King, where the *King is Party.*

Br. Aid del Roy, pl. 24. cites S. C. But Brooke ſays it is briefly reported.

1. IN Treſpaſs by the King for taking of Toll of his Tenants, who are Toll-free, the Defendant juſtified as Fee-farmer (as it ſeems) of the King, and had Aid of the King. 7 H. 4. 2. b.

Br. Aid del Roy, pl. 50. cites S. C.— Fitzh. Aid de Roy, pl. 97. cites S. C.

2. If an Office be found for the King, that ſuch a one held of the King in Chivalry, and died his Heir within Age, by which he ſeiſed the Ward, and committed it to another during the Nonage, upon which another comes and traverſes the Office, and upon this a Scire Facias iſſues againſt the Patentee, who comes and ſhews that the King granted the Ward to him, and prays in Aid of the King; yet he ſhall not have it, becauſe the King is Party to the Plea, and the Patentee may join to the King by Force of the Scire Facias. 15 Hen. 7. 10. per Curiam.

See (H) pl. 14 S. C.— Br. Aid del Roy, pl. 50. cites S. C— Br. Aid del Roy, pl 84. cites S. C. & S. P. accordingly; and Brooke ſays, and ſo ſee that where the King is intitled by Office, as he was here, his Patentee ſhall not be ouſted without being warned to anſwer to it. Quod nota.— Br. Petition, pl. 17. cites S. C.

3. But if the Office be traverſed, and found falſe, and after a Scire Facias is granted againſt the King's Leſſee, he ſhall have Aid of the King. (It ſeems, becauſe that now the King is not Party; for the Plea between him and the Plaintiff is determined. 37 Aſſ. 11. adjudged.

Br. Aid del Roy, pl. 50. cites S. C. & S. P.— Fitzh. Aid del Roy, pl. 97. cites S. C. & S. P.

4. If a Patentee be to have a Recompence in Value againſt the King, he ſhall have Aid of the King, tho' the King be Party, becauſe he ſhall not have the Recompence without Aid. 15 H. 7. 10. Per Curiam.

Fitzh. Aid de Roy, pl. 10. cites S. C.

5. Where the Cauſe of the Action is more ancient than the Cauſe of the Aid Prayer of the King, the Aid does not lie. 4 Hen. 6. 12.

6. As in Treſpaſs for a Treſpaſs in the Time of H. 4. if the Defendant ſays that after the Treſpaſs an Office was found that ſuch a one died ſeiſed after the Treſpaſs ſuppoſed his Heir in Ward to the King; he ſhall not have Aid * of the King, becauſe the Cauſe of the Aid is after the Treſpaſs ſuppoſed. 4 Hen. 6. 12.

* Fol. 150.

(A) pl. 6. S. C.—Fitzh. Aid de Roy, pl. 19. cites Trin. 18 H. 6. 11. S. C. and becauſe a Fee-Farm Rent was reſerved, and ſo it might be of Prejudice to the King, the Aid was granted.——S. P. Arg. Roll Rep. 292.

7. In an Action upon the Caſe againſt the King's Fee-Farmers of a Leet, if the Plaintiff claims the Leet by Preſcription and the Farmers by Grant of the King ſince Time of Memory, and ſo after the Title of the Plaintiff, yet the Farmers ſhall have Aid, for that perhaps the King hath barred or may bar him of the * Leet, or hath a Releaſe. 18 Hen. 6. 12. adjudged.

* The Original is miſprinted (Ley.)

8. Where

8. Where *one has Cauſe of Voucher or Warranty* of Charters *againſt a common Perſon*, in ſuch Caſe he ſhall pray Aid of the King; for he cannot vouch him nor have Quare Impedit againſt him. Br. Aid del Roy, pl. 6. cites 9 H. 6. 56.

(E) Upon what Plea. In what *Caſe* it ſhall be granted, where it appears the King *hath no Title.*

1. IF the Party himſelf who prays in Aid acknowledges any Matter that would foreclose him of Aid, he ſhall be ouſted of Aid. 39 Edw. 3. 12. b.

2. If a Man prays in Aid of the King, and ſhews for Cauſe of the Aid the King's Grant, if upon his Plea it appears to the Court that the Grant is void, he ſhall be ouſted of Aid. Paſch. 15 Jac. B. R. between *Lightfoot and Levett*, reſolved per Curiam. Cro J. 421. pl. 2. Lightfoot v. Lenet S. C adjudg'd accordingly.—

Bridgm. 88. Lightfoot v. Lerret S. C. adjudg'd that the Grant being void, the Defendant ſhould be ouſted of the Aid.

Scire Facias to be reſtored by Virtue of an Act of Parliament of Reſtitution for the Heir of the Earl of Lancaſter. He in *Reverſion was attainted* and his *Heirs reſtored before the Reverſion fell*, and afterwards *the King granted the ſame Reverſion to this Defendant, and* granted *that if he or his Heirs be ouſted* or evicted, unleſs by their own proper Act that *the King will make it up in Value*, and this Grant was after the Reſtitution, and yet upon this Matter the Grantee had Aid of the King; for the Patent of the King ſhall not be avoided without making him a Party, and the Words above are ſufficient to have in Value of the King. Br. Aid del Roy, pl. 62. cites 39 E. 12.

3. As in Replevin of Cattle taken, if the Defendant avows the taking, becauſe the King granted to him by Letters Patent that he ſhould take for all Cattle that ſhould paſs over Willoe Brig in Yorkſhire, ſo much for Toll as hath been uſually taken there & alibi within the Realm of England; and avers that at another Brig, viz. Burrow Brig, in the ſame County, 6 d. had been uſually taken for every twenty Cattle for Toll, and according to this Rate he avows the taking, and ſhews that upon this Grant the King had reſerved a Rent and prays in Aid of the King; but he ſhall not have Aid upon this Plea, becauſe it appears the Grant is void for the Uncertainty of the Place and thing to which the Reference is made, ſcilicet & alibi infra regnum Angliæ, which is too large, and the Grant is in the Copulative that he ſhould take tantum quantum had been uſually taken at Willoe Brig & alibi; and it is not averr'd that any thing was uſually taken at Willoe Brig, Ergo Paſch. 15 Jac. B. R. between *Lightfoot and Levett* adjudged. Cro. J. 421. pl. 2. S. C. adjudg'd accordingly.— Bridgm. 88. Lightfoot v. Lerret accordingly.

4. If a Man makes Conuſance as Bailiff of the King for Rent-Arrear, if the Avowry be not good he ſhall not have Aid. 4 Hen. 6. Aid del Roy 121. See (M) pl. 11. S. C.

5. In Trover and Converſion of Goods, if the Defendant pleads that the King was ſeiſed in Fee of the Manor of D. and that certain Perſons unknown ſtole the ſaid Goods of the Plaintiff, and brought them within the Manor, and there them left and waived, per quod the Defendant, as the Queen's Bailiff of the ſaid Manor, ſeized them to the Uſe of the Queen as Goods waived which is the ſame Trover and Converſion, and demands Judgment ſi Regina inconſulta; he ſhall not have Aid of the Queen upon this Plea, for it does not appear by this Plea that the Goods were forfeited to the King, [Queen] inaſmuch Cro E. 693. pl. 3. Mich. 41 & 42 Eliz. B. R. Foxley v. Anneſley S. C. and S. P. accordingly; but Gawdy and Popham

held that he should not have Aid, because it *is but a Chattle*, and he hath *not alleged that he had answer'd for it to the Queen*; and adjudg'd that he answer'd without Aid Cro. E. 693. pl 3. Mich 41 & 42 Eliz. B. R. Foxley v. Annesley.——Mo. 572. pl. 785. S. C. adjudg'd per tot. Cur. that the Aid is not grantable, because it is in Action Transitory, not Local.

inasmuch as it is not alleged that the Felon waived them in Pursuit, of for Fear of being apprehended, thinking himself pursued, fled, and waived the Goods. Co. 5. Foxly 109.

D. 25. pl 164. S. C. and adds that the Grant was fine Compoto reddendo, and adjudged that he shall not have Aid.——Mo. 4. pl. 12. S C. accordingly.——Bendl. 17. pl. 23. S. C. adjudg'd accordingly.—S. C. cited as adjudg'd accordingly, because the Grant was void. 4 Rep. 127. b.

6. The King granted the *Custody of a Lunatick and of his Lands Quamdiu* he should be a Lunatick to take the Profits to his own Use. The Patent was adjudg'd void, and therefore the Patentee cannot have Aid of the King; for Nothing passed, the King being to apply the Issues and Profits of the Lands of Lunaticks to the Maintenance of the Lunatick's Wife and Family, and not to take any thing to his own Use. And 23. pl. 48. Hill. 28. H. 8. Holmes's Case.

7. In Ejectment by Grey Lessee of the Earl of Kent v. Baude Lessee of the Earl of Northumberland for Years, the Reversion whereof came to the Queen by Forfeiture for Rebellion, he pray'd Aid of the Queen, which was granted. But at Length, because *no Title appear'd clearly for the Queen for the Escheat*, a Procedendo in Loquela was granted by the Advice of Catlyn and Dyer, but not to go to Judgment Regina inconsulta. D. 320. a. pl. 18. Mich. 14 & 15 Eliz.

Le. 284 pl. 385. S. C. accordingly. ——4 Le. 87. pl. 114. S. C. in totidem Verbis.

8. A Writ of *Dower* was brought of certain Manors, and the Tenant in a Writ of Circumspecte agatis set forth that the *Husband held one of the said Manors of the King in Capite and died seised his Heir of full Age*, Prout per quandam Inquisit' compert' est &c. by Reason whereof the Queen seised the said Manor as well as other the Manors &c. and for that the Queen was to restore the same tam integre &c. as they came to her Hands the Judges were commanded to surcease Domina Regina inconsulta. It was resolved that this Writ, being in Nature of an Aid Prayer, it could not extend to any Manors not found in the Office. 9 Rep. 15. Hill. 28 Eliz. Bedingfield's Case.

(F) In what Cases Aid shall be granted, where *both claim from* the King.

If it *appears to the Court*, that the Letters Patents, or other

1. IF it appears by the Plea of him that prays in Aid that the Grant of the Thing in Demand is void, he shall not have Aid of the King. 11 Hen. 4. 87.

Causes of Aid Prayer are void, against Law, or insufficient in Law, no Aid shall be granted; for the Law will not suffer those things to be aided or maintain'd by the Countenance of Law, which appear to the Court to be void, against Law, or insufficient; Ubi Lex aliquem cogit ostendere causam, necesse est quod Causa sit justa & Legitima. 2 Inst. 269.——See (E) pl. 5.

If *Reversion after the Death of Tenant for Life escheats to the King* by Attainder of him in Reversion, and the *King grants it to A. and the Heirs Male of his Body, and that if* the Land *be evicted* from him, *that he shall rendir in Value*, and after the *Patentee is impleaded and prays Aid* of the King, the Demandant *counterpleads* it, *because the Heir of the Attainted was restored mesne, between the Attainder and the Grant of the King, by Parliament, and therefore the Grant void*; and yet the Aid was granted by Judgment; for the Grant of the King shall not be defeated without making the King a Party. And it seems supra that the King shall not render in Value without Clause of Recompence ut supra. Br. Counterplea de Aid, pl. 31. cites 39 E. 3. 12.

2. As

2. As if the King leaſes for Life, and after charges the Land leaſed, which is void, if the Chargee brings an Action the Leſſee ſhall not have Aid, becauſe the Charge is void. 11 Hen. 4. 87.

3. So if the King grants a Fee-Farm to one. and after grants an Office, Part thereof to another, the firſt Grantee ſhall not have Aid. 11 Hen. 4. 87. Fol. 151.

Br. Aid del Roy, pl. 33 cites 11 H. 4. 86. The firſt Grant was to the Mayor and Sheriffs of London, to hold the City of London in Fee-Fee-Farm rendring Rent &c. and the after Grant was to the Plaintiff of the Office of Meaſurer of Clothes &c. in the ſaid City, bought and ſold there &c. for his Life, he taking ſo much. The Mayor &c. pleaded the Grant as aforeſaid, and that by this Office their Fee-Farm would be impair'd, and pray'd Aid of the King; but becauſe the Reverſion was in the King, therefore the Aid ſhall not be granted of the King; for this ſhould make him to be Party to deſtroy his own Right. Contra if the King had alien'd it in Fee, and had reſerved no Right. And ſo it ſeems that if the King had granted it in Fee rendering Rent, yet they ſhall not have Aid by Reaſon of the Reſervation thereof. And Brooke ſays that ſo it ſeems that if the King had granted it in Fee rendering Rent, yet they ſhould not have Aid by Reaſon of the Reſervation thereof.—Fitzh. Aid de Roy, pl. 46. cites S. C.

4. In Treſpaſs, if the Plaintiff claims by Leaſe for Years from the King, and prays in Aid, and the Defendant ſhews a prior Leaſe to him by the King before for Life, and confirm'd by Act of Parliament, the Plaintiff ſhall be ouſted of Aid. Dubitatur 11 Hen. 6. 28. b.

5. The Earl of Kent ſued by Petition to the King, becauſe *King Edward the 2d. gave* to his Father *50 l. Rent out of the Vill of A. in Tail*, and died, *his Heir* now Plaintiff within Age, and yet *within Age and in Cuſtodia Regis* by the Non-age of the Plaintiff, and that the *King has granted this Rent to J. M in Fee*, and *prayed Reſtitution, and that the Patent be repealed.* And *J. M. upon Scire facias* awarded upon this Petition indorſed to the Chancellor of this Matter, came and *ſaid, that the King granted this Rent to him in Recompence of a Promotion* &c. *and* granted *that if he be ouſted that he will make it good in Value*, and that this Rent came to the King by the Attainder of R. ſo held he by Charter of the King, and prayed Aid of the King, and had it, tho' this Suit be to repeal the Patent; and the reaſon was, becauſe it is *in lieu of Voucher* by reaſon of theſe Words to make it good in Value, and a Man cannot vouch the King; Quod Nota; and after came Procedendo. Br. Aid del Roy, pl. 41. cites 21 E. 3. 47.

6. *Aſſiſe of an Office*, and made his *Plaint by the Grant of the King by his Letters Patents*, and the *Defendant ſhewed the Grant of the other King of the ſame Office*, and prayed Aid of the King, and had it by Award, notwithſtanding that both claimed by the King, and yet *there was no Warranty nor Recompence* in the Patent, and they ſhall not have the Office but for Life, as it ſeems by the Caſe there. Br. Aid del Roy, pl. 93. cites 2 H. 7. 11.

(G) To whom.

1. THE Fee-Farmer of a City ſhall not have Aid of the King, where the Queſtion is between him and another Officer for Life of the Grant of the King within the City, which of them ſhall have the Office, becauſe the Inheritance of the Office is to the King, and therefore the Farmer ſhall not have Aid of the King to deſtroy the Inheritance of the King. 11 Hen. 4. 87.

Br. Aid del Roy, pl. 33. cites S. C. accordingly. —Fitzh. Aid de Roy, pl. 46. cites S. C.

See (F) pl. 3. and the Note there

Fitzh. Aid de Roy, pl. 46. cites S. C. —— Br. Aid del Roy, pl. 3 cites S. C.

2. But otherwise it had been if the King had granted the Inheritance of the Office reserving no Right, for there the Farmer should have Aid. 11 Hen. 4 87. But Brooke in abridging this Aid del Roy 33. seems contra.

which see at (F) pl 3. in the Note there.

3. If the Patentee in Tail of the King brings an Action against another for holding a Court within a Town, and prescribes that there hath not been any other Court besides his Court in the same Town Time out of Mind &c. and the Defendant says that he has always had such Court, paying Rent to the King, which Court is also granted in Tail to the Plaintiff, yet he shall not have Aid of the King, because it will be more beneficial for the King, when the Reversion falls, without this new Rent and Court. 13 Hen. 4. 11. b.

See (I) pl. 12. S.C.

4. If the King leases for Life, and grants the Reversion to another, if the Reverlioner brings Waste, or avows for Rent, the Lessee shall not have Aid of him. 13 Hen. 4. 11. b.

5. If the King grants a Town to Fee-Farm, rendring Rent, and after another demands certain Lands within the Town by Force of a former Grant of the King, the Fee-Farmer shall have Aid of the King. 46 Ass. 1. agrees, because if this be evicted, the Recoveror shall be Tenant to the King without his Lien, (and it seems the Rent shall be apportioned.)

See (C) pl. 4. S. C.

6. So if another demands Common out of certain Lands within the Town by Force of a former Grant of the King, the Fee-Farmer shall have Aid of the King, because perhaps the King had a Release or other Discharge before the second Grant. Dubitatur 46 Ass. 1.

(H) *Who* shall have Aid. *In respect of his Estate.*

* Br. Aid del Roy, pl. 16. cites S. C. by reason that the King may be at a Loss.

1. A Fee-Farmer of the King, rendring Rent shall have Aid. * 45 Edw. 3. 3. 46 Edw. 3. 28. b. † 49 Edw. 3. 6. b. ‡ 18 Hen. 6. 12. adjudged. ‖ 43 Ass. 2. Curia. 13 Hen. 4. Aid del Roy 99. ¶ 7 H. 4. 2. b. it seems they were Fee-Farmers.

——† Ibid. pl. 20. cites 49 E. 3. 6. S P before Issue joined, and it was for him who had Fee-Simple, by reason that the King should be at a Loss for his Fee-Farm if it should be diminished; Quod Nota. —— Fitzh. Aid de Roy, pl. 60. cites S. C.

‡ Fitzh. Aid de Roy, pl. 19 cites Trin. 18 H. 6. 11. S.C.

‖ S. P. Br Aid de Roy, pl. 89. cites S. C.

¶ S. P. Br. Aid de Roy, pl. 24. cites 7 H. 4. 2. —— Fitzh. Aid de Roy, pl. 92. cites S. C. —— S. P. admitted accordingly. Br. Aid del Roy, pl. 11. cites 33 H. 6. 6.

* Fitzh. Aid de Roy, pl. 2. cites S. C.

2. The King's very Tenant, rendring Rent, shall have Aid of the King. * 21 E. 3. 19. Admitted † 25 Ass. 8.

† Br. Aid del Roy, pl. 75. cites S. C. but nothing appears there of any Tenant rendring Rent.

* Fitzh. Aid del Roy, pl. 19. cites S.C. —— † Br. Aid del Roy, pl. 90. (89) cites S. C.

3. The very Tenant of the King by his Patent shall have Aid of the King. 45 E. 3. 3. 2 Hen. 4. 22. b. 24. b. Where nothing is reserved, * 18 Hen. 6. 13. † 43 Ass. 6. Curia.

——Fitzh. Aid de Roy, pl. 94. cites S. C.

4. In

4. In a Scire Facias against the Alienee of the King to repeal his Patent, he shall have Aid of the King. * 8 H. 4. 22. † 33 Ass. 10. adjudged. * This Sci. fa. was brought against the Heir of the

Alienee, who prayed Aid of the King by reason of the Gift made to his Father, and had it, Ex assensu Curiæ in Avoidance of Delay. But Brooke says, quære if de Necessitate Legis, for it does not appear if a Rent was reserved, nor other Cause. Br. Aid del Roy, pl. 83. cites S. C.——— Br. Petition, pl. 46. cites S. C. and says that the Aid was granted by Consent.———Br. Scire Facias, pl. 66. cites 8 H. 4. 21. S. C.———Fitzh. Scire Facias, pl. 61. cites S. C.

5. He that claims as Feoffee of the King, shall not have Aid. * 8 Hen. 4 14. b. it seems this is, because nothing passed by the Feoffment. 3 Hen. 6. 6. because the Feoffee is a Disseisor. * Fitzh. Aid del Roy, pl. 41 cites S C.

6. An Intruder upon the King shall not have Aid. 3 H. 6. 5. b. Fol. 152.

7. If the King's Tenant dies, his Heir within Age, if a Stranger enters in the right of the King, he shall have Aid if he be impleaded, because his Entry is in the right of the King. 4 Hen. 6. 12. b. Br. Aid del Roy, pl. 57. cites S C. & S. P. tho' the Entry was without any Authority.—Fitzh. Aid de Roy, pl. 11. cites S. C. & S. P. tho' there was no Privity.

8. An Abbot of the King's Foundation shall have Aid of him. 6 Hen. 4. 5. b. in an Action where he is charged as Abbot. Aid of a common Person (Y) pl. 1. S. C.———Fitzh. Counterplea del Aid, pl. 13. cites S. C.

9. But it is otherwise if he is charged as Parson appropriate. 6 Hen. 4. 5. b. Aid of a common Person (Y) pl. 2. S. C.—— Fitzh. Counterplea del Aid, pl. 13. cites S. C. accordingly; for by Huls, a Man shall not have Aid but of the Thing in Demand, or of the Thing out of which the Thing demanded is issuing, and the Annuity is not issuing out of the Abbey; and thereupon Thirn bid them have Aid of the Patron and Ordinary &c.

10. In an Assise of a Corody against the Lessee of the King, rendring Rent, with a Clause that the Lessee shall bear his Charges, the Lessee shall not have Aid of the King. 31 Ass. 27. adjudged. S. P. Br. Aid del Roy, pl. 82. cites S. C.——Fitzh. Aid de Roy, pl. 93. cites S. C.———S. C. cited Arg. Roll Rep. 208. because the King shall have Damage by it.

11. Tenant at Will shall have Aid of the King. * 4 Hen. 6. 11. b. † 21 Hen. 6. 36. b. 17 Edw. 3. 17. b. * Fitzh. Aid de Roy, pl 10. cites S. C ———Br. Aid del Roy, pl. 56. cites S. C. ——S. C. cited 4 Rep. 21. b.

† Br. Aid del Roy, pl. 46. cites S. C.——Br. Aid, pl. 82 cites S. C. ——Fitzh. Aid de Roy, pl. 22. cites S. C.——See (U) pl. 2. S. C.——S. C. cited 4 Rep 21. b.

12. Tenant by Copy of Court Roll according to the Custom, shall have Aid of the King Lord of the Manor. * 15 Hen. 7. 10. Curia. Dubitatur † 21 Hen. 6. 37. * S. P. and per Cur. he shall conclude Judgment if Rege Inconsulto. Br Aid del Roy, pl. 49. cites S. C——Fitzh. Aid de Roy, pl. 98. cites S. C.——4 Rep. 22. a. cites S. C

† Br. Aid del Roy, pl. 46. cites S C.——— Br. Aid, pl. 82. cites S. C.——Fitzh. Aid de Roy, pl. 22. cites S C.——(U) pl 2. S. C.——4 Rep. 21. b. cites S. C.———Br Aid del Roy, pl. 1. cites 27 H. 8. 28. S. P. accordingly.

13. Tenant after Possibility of Issue extinct, shall have Aid of the King in Reversion. 11 Hen. 4. 71. b.

14. If the King seises Land by Office for the Wardship of J. S. and leases this to another during the Nonage, and after upon a Petition by W. H. to the King, who was ousted of the Land by the King, a Ver- Br. Aid del Roy, pl 84 cites S C.—Br. Petition,

pl. 17. cites S. C. —— Br. Aid del Roy, pl. 50 cites S. C. ——See (D) pl. 3 S. C.

a Verdict is found for him, and he thereupon sues a Scire Facias against the Patentee, he shall have Aid of the King. 37 Ass. 11. adjudged.

Br. Gard, pl. 28. cites S. C. —— Fitzh Garde, pl. 81. cites S. C. —— *In Trespass of a Close broken*, the Defendant *justified as Committee of the King by a Ward during the Nonage of an Heir*, and prayed Aid of the King, and was ousted by Award, for the Aid shall not be granted but where the King shall render in Value, or where it *shall be to his Prejudice*, and here is neither the one nor the other; for *nothing shall be recovered but Damages*, nor shall the King be estopped; for he is a Stranger to the Recovery, and the Right of the Ward shall not come in Debate here, but *contra if it was in Writ of Ward, Dower, or Præcipe quod reddat.* Br. Aid del Roy, pl. 104. cites 22 E. 4. 20.

15. If the King's Committee of a Ward be impleaded for this, he shall have Aid of the King, for the King continues Guardian, and therefore the Right of the King shall not be put to Trial without the King. 12 Hen. 4. 25. Curia.

16. If the King has committed a Ward over, and a Stranger takes the Ward by Tort against whom a Right of Ward is brought by another Stranger, he shall have Aid of the King, because he hath in a Manner the Estate of the Grantee. 12 Hen. 4. 25. adjudged.

* S. P. and if a Man enters it is an Intrusion upon the Possession of the King. Br. Aid del Roy, pl. 55. cites 4 H. 6. 10.

17. So the Grantee of the Ward of the King shall have Aid of the King, for the King continues Guardian and in Possession. * 4 Hen. 6. 11, 12. b. for he shall sue Livery † 9 H. 6. 21. b. 29 Ass. 5. Dubitatur, where no Rent is reserved. 19 E. 3. Aid del Roy, 64.

†S. P. Br. Aid del Roy, pl. 4. cites 9 H. 6. 20. ——And it seems that there is no Difference between a Committee and Grantee, and Grantee of the Grantee. See Br. Aid del Roy, pl. 4. cites 12 H. 4. 18.

S P. Br. Aid del Roy, pl. 4. cites 9 H. 6. 20. if he has his intire Estate. ——See the Notes on pl. 17.

18 So for the same reason the Grantee of the King's Grantee of a Ward shall have Aid of the King. 39 Edw. 3. 8.

But it was held, that if Rent had been reserved, that he should have Aid of the King as well after Livery as before; for it was agreed, that Collector of Tenths or Fifteenths shall have Aid of the King after that the King is satisfied. Br. Aid del Roy, pl. 7. cites S. C. ——Fitzh. Counterplea del Aid, pl. 9. cites Hill. 9 H. 6. 61. —— S. P. Arg. Roll Rep. 292.

19. So if the Grantee of the Ward upon which no Rent was reserved, be sued in Trespass after the full Age of the Infant, he shall not have Aid of the King, because it was without Rent, and is determined. 9 Hen. 6. 62. adjudged.

20. In *Assise* of Rent, the Ter-tenant *said, that King Edward the 3d. by Charter gave to W. and his Heirs in Fee, which Estate the Tenant has*, and demanded Judgment Rege Inconsulto &c. and had Aid, notwithstanding that he *did not shew How he had the Estate of W.* But in such Case Shard was of a contrary Opinion; therefore quære; For it does not appear that it is for Feebleness of the Estate, nor that the King is to be damnified; for it is not supposed that he held of the King by Rent, nor does it appear whether the Title of the King be before the Title of the Plaintiff or after. Br. Aid del Roy, pl. 79. cites 29 Ass. 39.

21. *Assise of Rent* against Ter-tenant, who *pleaded Hors de son Fee*, the *Plaintiff made Title to a Rent-charge*, the *Tenant said that the Land is held in Chief of the King*, and prayed Aid of the King, and had it, and after Procedendo was granted; for the *Tenant of the King may charge without Licence.* Br. Aid del Roy, pl. 86. cites 40 Ass. 5.

22. *Tenant for Life who has Franktenement* shall not have Aid of the King, nor of a common Person. Br. Forcible Entry, pl. 6. cites 22 H. 6. 17. by the best Opinion.

23.

23. In Aſſiſe the *Tenant ſaid that King Edward the 3d gave to his Predeceſſor in Frankalmoigne*, and pray'd Aid of the King. Quære; for it is ſaid there, that none ſhall have Aid of the King if he *has not Warranty, or be within the Caſe of the* * *Statute de Bigamis*, or where the *King is to be at a Loſs*, as where a *Rent is reſerved*, as upon a Fee-farm &c. with Rent reſerved, and this Caſe is none of them. Br. Aid del Roy, pl. 11. cites 33 H. 6. 6. * See pl. 28.

24. In *Treſpaſs* the *Defendant ſaid that he is ſeiſed of an Acre in Fee, and holds of the King, and has Common in the ſame Place appendant to this Acre*, and pray'd Aid of the King; & non allocatur; for the *King ſhall not be at Loſs*. Br. Aid del Roy, pl. 63. cites 37 H. 6. 28.

25. *In Aſſiſe of Rent* the Tenant ſaid that he held the Land, out of which the Rent aroſe of the King, and pray'd Aid of the King. He ſhall not have it; quod nota, by the Opinion of the Court. Br. Aid del Roy, pl. 63. cites 37 H. 6. 28.

26. If a Man *has Charter of the King of the Gift of the Thing in Demand*, there either *for Salvation of the Reverſion of the King*, or of his Title, or * *for Feebleneſs of the Eſtate of the Tenant*, or if the *King is to take any Detriment or Loſs*, in theſe Caſes the Tenant ſhall have Aid of the King. Br. Aid del Roy, pl. 94. cites 2 H. 7. 7. by the Reporter. * Br. Aid del Roy, pl. 55. cites 4 H. 6. 10.

27. *Formedon in Remainder.* The *Tenant vouched to Warranty the Queen and her Siſters, as Heirs of the Duke of York.* Per Hawes J. he ſhall have the *Voucher, and Aid* * *of the King* together; for the Queen is a Perſon exempted, and a ſole Perſon by the Common Law. Br. Aid del Roy, pl. 96. (95) cites 3 H. 7. 14. [* Quære if thoſe Words (of the King) ſhou d not be omitted, and they are not in the Year-Book; for it ſeems a Man cannot vouch the King; for that is to ſue the King by Action, which cannot be.]

28. 4 *E.* 1. *Stat.* 3. *cap.* 1. *Concerning Pleas, where the Tenant excepteth, that he cannot anſwer without the King, it is agreed by the Juſtices, and other learned Men of our Lord the King's Council of the Realm, which heretofore have had the Uſe and Practice of Judgments, that where a Feoffment was made by the King with a Deed thereupon, that if another Perſon by a like Feoffment and like Deed, be bounden to Warranty, the Juſtices could not heretofore have proceeded any further,* By this Branch, if the *King gives Lands with Clauſe of an expreſs Warranty*, yet the Patentee &c. ſhall not have or recover in Value againſt the King, *without ſpecial Words that the King ſhall yield Lands in Value upon Eviction* &c. and nevertheleſs, in that Caſe he ſhall have Aid of the King by the general Purview of this Law; for it is for the Honour of the King, that he aid the Patentee with any Record or Evidence that he hath, for Maintenance of the Eſtate which he hath granted and warranted to him; but if the *King exchanges Lands* with another, by this Warranty in Law the King is bound to warranty, and to yield in Value, and ſo it was adjudged Hill. 6 E. 1. in C. B. Rot. 2. William Brewſe's Caſe, Wallia. 2 Inſt 268. 269.

If the King gives Lands to one in Fee by the Word *Dedi*, this bindeth not the King to Warranty, and yet the Patentee ſhall have Aid of the King by the Letter of this Branch, becauſe in that Caſe another Perſon ſhould be bound to Warranty by this Word Dedi; and ſo it is, albeit the Tenure by the Patent is *to hold of the Chief Lords*. 2 Inſt. 269.

Neither yet do proceed without the King's Commandment had therefore, neither can it be thought that they may proceed. This Command is by the King's *Writ of Procedendo*, whereof there be 2 Sorts, viz. *in Loquela*, and *Ad Judicium*; for the King's Commandments in judicia Proceedings are ever by Writ, according to the Courſe of the Common Law, whereof you may read in the Regiſter, F. N. B. and our Books. 2 Inſt. 269.

29. 4 *E.* 1. *Stat.* 3. *cap.* 2. *And it ſeemeth alſo, that they could not proceed in certain Caſes, As where the King hath confirmed or ratified any Man's Deeds to the Uſe of another;* Here are 3 Caſes where Aid &c. ought not to be granted of the King, nor the Court ſurceaſe by Force of a Writ de Domino Rege Inconſulto, whereof the firſt is, (when the King confirms or ratifies &c.) which muſt be ſo *underſtood when the Confirmation gives no Eſtate,*

Eſtate, and if it gives any Eſtate *where no Rent or Service is reſerved*; or *where in like Caſe* (as has been ſaid) *another Perſon were not bound to Warranty*; *but if a* Rent or Service be reſerved, and by the Action brought (if the Demandant prevail) the *Rent or Service ſhould be defeated*, then there is good Cauſe of Aid Prayer &c. Or *if a common Perſon were in that Caſe bound to Warranty*, then is the Confirmation in Nature of a Feoffment, and within Cap 1. What hath been ſaid in Caſe of Confirmation, the ſame holdeth in Caſe of *Releaſe*. 2 Inſt. 270.

In *Formedon* the *Tenant ſaid* that *he held the Land demanded by Grant of the King*, and *ſhewed Charter* of it, and pray'd Aid of the King, and had it &c. Quod mirum, *without ſhewing Rent reſerved* to the King, *or Warranty or Reverſion*. Quære if it was not by this Word *Dedimus*. Br. Aid del Roy, pl. 22. cites 2 H. 4. 19.

Here is the 2d Caſe where no Aid ought to be granted; for the King *granteth but his own Eſtate without any Warranty*. 2 Inſt. 270.

Or hath granted any Thing as much as in him is;

In Aſſiſe of the *Office of Keeper and Janitor of Woodſtock-Park*, of the Grant of the King for Life, the *Defendant made Title by a former Grant by King E. 4. by* the Word *Conceſſimus*, and pray'd Aid of the King, but the Juſtices denied it. But the Reporter held, that he ſhould have Aid by the Words of the Statute as above, and that the Word (Conceſſimus) has the ſame Force as * *Dedimus & Conceſſimus*; for that the Statute ſhall be *taken diſjunctive, and not copulative*. Br. Garranties, pl 53 cites 2 H. 7. 7. But Brooke ſays that it is not ſo; for the Statute of Bigamis is Dedimus & Conceſſimus.———Br. Aid del Roy, pl. 94. cites S. C.

* 4 E. 1. cap. 6.

This is the 3d Caſe where no Aid ſhall be granted in Caſe of a Reſtitution. 2 Inſt 270.——But in 2 Inſt. 270. Ld. Coke has theſe further Words, as contain'd in the Statute, viz. (quod Rex Tenementum aliquod reddiderit, nec Clauſula &c.)

Or where a Deed is ſhewed, and Clauſe contained therein, whereby he ought to warrantize;

Here ſome have ſuppoſed that in theſe 3 Caſes Aid ſhould be granted, but by Force of theſe Words (that no Search ſhould be granted,) wherein 2 Errors be committed, 1ſt, That Aid ſhould be granted, which is againſt the expreſs Letter of the Statute, Non erit ſuperſedendum &c. and againſt the Book of 39 E. 3. 2dly, That in Caſe of Aid-Prayer of the King, or of the Writ de Domino Rege Inconſulto, no Search ought to be granted, but only in a Petition of Right. 2 Inſt. 270.

And in like Caſes they ſhall not ſurceaſe by Occaſion of a Confirmation, Grant, or Surrender, or other like; but after Advertiſement made thereof to the King, they ſhall proceed without Delay.

And if Aid had been in any of theſe 3 Caſes erroneouſly granted, the Tenant or Defendant ſhould have a Procedendo ſine Dilatione; that is, without Delay and of Courſe. 2 Inſt. 270.

(I) In reſpect of the *Eſtate* of the King.

S.P. becauſe he did not ſay that this Land was ſeiſed into the Hands of the King, and deſcended; for an Infant in Ward of the King may have Land by Purchaſe, wherefore the Defendant pray'd in Aid of the Heir, and not of the King. Quod nota. Br. Aid del Roy, pl. 21. cites S. C.——Fitzh. Aid de Roy, pl. 38. cites S. C.

1. **If the Heir of the Leſſor for Years be in Ward of the King for other Land, and not for this, the Leſſee ſhall not have Aid of the King. 2 Hen. 4. 10. b.**

* Br. Aid del Roy, pl. 21. cites S. C.——Fitzh. Aid de Roy, pl. 38. cites S. C.

2. But if that be ſeiſed **in Ward, he ſhall have Aid of the King.** * **2 H. 4. 10. b.** † **10 H. 4. 6. adjudged.**

† In Aſſiſe againſt Tenant in Dower, where the Heir was in Ward of the King, ſhe pray'd Aid of the King. The Aſſiſe was adjourned, and afterwards the Aid was granted by all the Court without Difficulty &c. Fitzh. Aid de Roy, pl. 120. cites S. C.

3. If

3. If a Man leaſes for Life rendring Rent, and after the Reverſion comes to the King, the Leſſee, if he be impleaded, ſhall have Aid of the King; for by this Suit the Rent of the King may be deſtroy'd. 31 Aſſ. 2. 3 E. 3. Fitz. Aid del Roy 68. Fitzh. Aid del Roy, pl. 77. cites S. C.

4. Aid ſhall be granted of the King for a Reverſion eſcheated to him. 4 H. 4. pl. 19. Fitzh. Aid de Roy, pl. 96. cites 4 H 4 5. S. P.

5. If there be Leſſee for Life, the Remainder in Tail, the Remainder in Fee (*) and both in Remainder are attainted of Treaſon, the Leſſee ſhall have Aid of the King. 7 H. 4. 18. b. and if only the Remainder in Fee had been attainted, he ſhould have had Aid of the Remainder in Tail and the King. 7 Hen. 4. 18. b. * Fol. 153. Br. Aid del Roy, pl. 27. cites S. C. & S. P. for

the Right of the King cannot be tried without making him a Party. But in ſuch Caſe he ſhall have Aid of the Remainder in Tail firſt.——Br. Prerogative le Roy, pl. 80. cites S. C. accordingly; for it is to the King's Advantage.

6. If there be Leſſee for Life, the Remainder to a Priory of the Foundation of the King, if there be no Prioreſs the Leſſee ſhall have Aid of the King, for the Right is to the King till there is a Prioreſs. 32 Edw. 3 Aid 39. adjudged.

7. If in an Action the Tenant be ſeiſed in Fee, and acknowledges in Court that he is Tenant for Life, the Reverſion or Remainder to the King, he ſhall have Aid of the King, becauſe the King ſhall have the Reverſion by Eſtoppel againſt him by this Acknowledgment of Record. * 1 Hen. 7. 29. † 8 Hen. 4. 14. b. ‡ 11 H. 4. 85. b. || 8 Hen. 6. 24. * Br. Aid del Roy, pl. 92. (91) cites S. C —— S. P. Arg 8 Roll Rep. 291. cites 14 E. 3. 1.

8 H. 6. 25. 1 H. 7. 28.—— Fitzh Aid de Roy, pl. 32. cites 1 H. 7 28.

† Br. Eſtoppel, pl 203. cites S. C. but ſays nothing of Aid.

‡ Br. Counterplea de Aid, pl. 25. cites S. C. but S. P. does not clearly appear.——Fitzh. Counterplea del Aid, pl. 16. cites S. C. & S. P.

|| In *Formedon* the *Tenant ſaid*, that *King Henry the 4th leaſed to him for Life*, and the *Reverſion is deſcended to the King*, and prayed Aid of him, and could not have it without ſhewing Leaſe by Patent in Caſu Regis, by which he *ſaid that he held for Term of Life, the Reverſion to the King*, and prayed Aid of him, and had it, the Reaſon ſeems to be in as much as now the Reverſion is in the King *by Concluſion* tho' he had no Reverſion before. Br. Aid del Roy, pl. 43. cites 8 H. 6. 25. ——— Br. Monſtrans de Faits, pl. 52. cites S. C. accordingly.

8. If the King ſeiſes generally the Poſſeſſions of an Abbot in an Action againſt the Abbot he ſhall have Aid. 11 Hen 6. 10. 35. b.

9. But if they are ſeiſed for Dilapidation, he ſhall not have Aid, becauſe this is his own Act, and his Default, and it appears to the Court. 11 Hen. 6. 35. b. But Quære this. S. P. and Aſſiſe was ſued forth, becauſe *it did not appear*

that the King ever ſeiſed this Lands and the Intereſt of the Abbot was not but a Chattel, and the Land was not the Land of the Poſſeſſion of the Abbot, and ſo the Aid is not neceſſary, and alſo it is not uſual to grant Aid upon ſuch Manner of Protection for Goods upon Dilapidations; for this *is not ſufficient Cauſe to grant Protection* in Delay of the Right. Br. Aid del Roy, pl. 100. cites 11 H. 6. 12.

10. If the King takes into his Protection the Goods and Poſſeſſions of an Abbot without Cauſe, the Abbot ſhall not have Aid of the King if he be impleaded, for the King cannot delay any without Cauſe. 11 Hen. 10. Br. Aid del Roy, pl. 106. cites 11 H. 6. 12. S. P. Br.

11. But otherwiſe it is if he takes it into his Protection for good Cauſe, as for that he is in his Service in the Wars. 11 Hen. 6. 10. Aid del Roy, pl. 106. cites 11 H. 6 12

12. If the King leaſes for Life, and grants the Reverſion to another, it ſeems the Leſſee ſhall not have Aid after of the King if he be impleaded by a Stranger, for the King cannot be at any Prejudice. Contra 13 Hen. 4. 11. b. See (G) pl. 4. S. C. —— Arg. Roll Rep 291. cites 21 E. 3. 24 that

in ſuch Caſe a Suit was ſtay'd by Writ of Circumſpecte Agatis.

13. If the King ſeiſes the Land of a Prior Alien, and leaſes this to Farm, rendring Rent, and after grants the Rent over, yet the Farmer ſhall have Aid of the King. (It ſeems the King had the Reverſion to himſelf.) 13 H. 4. 11. b.

See (D) pl. 3. S. C.—— Br. Aid del Roy, pl. 6. cites 9 H. 6. 56. —— A Man ſhall have Aid of the King for Recompence *in lieu of Voucher, and* ſometimes in lieu *of Writ of Warrantia Chartæ*; for Voucher does not lie againſt the King. Br. Prerogative, pl. 146. cites 9 H. 6. 56.—— Br. Voucher, pl. 7. cites S. C. ——Br Quare Impedit, pl. 7. cites S. C.——Fitzh. Aid de Roy, pl. 15. cites S. C.

14. If the King grants an Advowſon with Warranty, in a Quare Impedit againſt the Grantee and his Preſentee, the Grantee ſhall have Aid of the King in Nature of a Voucher, the Incumbent ſhall have Aid alſo of the King, becauſe if it be tried againſt him, it will be Evidence againſt the King. 9 Hen. 6. 57. b.

15. In *Aſſiſe* the *Tenant anſwer'd as Tenant by Guardian, and ſhewed Charter of the King of the Gift to his Father in Tail*, the *Reverſion to the King, and ſhewed Writ of the King, teſtifying that he had ſeiſed for the Nonage, commanding that they ſhould not proceed to the Aſſiſe, Rege Inconſulto*, wherefore it was awarded that he ſue to the King. Br. Aid del Roy, pl. 73. cites 22 Aſſ. 24.

16. In *Scire Facias to execute a Fine*, the *Tenant ſaid that he held the Manor of the Leaſe and Grant of the King for Term of Life*, the *Reverſion to the King*, and pray'd Aid of him; and by Wilby, he ought to ſhew Deed of the Leaſe; for where a Man ſays that he holds for Life, the Reverſion to the King, there, notwithſtanding that he had Fee-ſimple before, the King ſhall have the Reverſion by the Aid-Prayer, and yet the Plaintiff ſhall not be delay'd without ſhewing Deed of the Leaſe. But per Greene & Thorpe, the Aid is well grantable *without ſhewing Deed*; but he ſhall *not recover in Value without* ſhewing Deed. Contra per Shard. But after *Writ of Chancery came, teſtifying* &c. and therefore he had Aid &c. and after came *Procedendo*, and the Tenant pleaded in Chief. Br. Aid del Roy, pl. 48. cites 24 E. 3. 1.

17. In *Aſſiſe*, the *Tenant ſhew'd how this Land for certain Cauſe was ſeiſed into the Hands of the King, and after the King by his Charter rehearſing how by the Aſſent of the Dukes, Earls* &c. *the Defendant was attainted, he reſtored him as well in Perſon as in Land and Tenement, and annull'd and ſet aſide the Cauſe of the Seiſer, and that Writ was ſent to the Sheriff to ſeize theſe Tenements, and to deliver them to the Tenant, which he did accordingly*, and after the *King in Parliament*, Anno 26, rehearſed the ſaid Reſtitution, and ratified and *confirm'd his Eſtate*, and demanded Judgment Rege inconſulto, and he was ouſted of the Aid of the King by Award; for he is *remitted* to his ancient Eſtate, and has nothing of the Gift of the King. Br. Aid del Roy, pl. 77. cites 28 Aſſ. 19.

18. In *Formedon* the *Tenant ſaid* that *he held the Land demanded* by *Grant of the King*, and *ſhewed Charter* of it, and pray'd Aid of the King, and had it. Quod mirum, *without ſhewing Rent reſerved* to the King, or *Warranty or Reverſion*. Quære if it was not by this Word *Dedimus*. Br. Aid del Roy, pl. 22. cites 2 H. 4. 19.

19. *Formedon againſt T. and E. his Feme*, who *ſaid that the King had given him and his Feme*, aud prayed Aid of the King; Per Read, this cannot extend to E. and alſo the Charter is of the Fee *without any thing reſerved to the King*; Judgment if the Aid; and for E. it was ſaid, that that ſhe was his Feme, and by this Name the King had granted to her &c. viz. by Name of Feme, as it ſeems, and not by Name of E. Feme &c. by which ſhe ſhall have Aid, quod mirum! where the King *had no Reverſion nor Rent* reſerved, *nor made Warranty* with Recompence. Br. Aid del Roy, pl. 23. cites 2 H. 4. 25.

20.

20. In *Dower of the third Part of* 20 *l. Rent*, the *Tenant ſaid that Rent is iſſuing out of the Manor of H. which is ſeiſed into the King's Hands by Non-age of the Heir*, and demands Judgment if Rege inconſulto &c. And it was agreed that he ſhall not have Aid upon this Matter, without aſcertaining the Court of this Matter by Record; whereupon a Baron of the Exchequer *brought the Record* in his Hand teſtifying the ſame, and thereupon he ſued to the King. Br. Aid del Roy, pl. 31. cites 11 H. 4. 39.

21. If a Man prays Aid of the King by Reaſon of the *Reverſion*, the *Demandant ſhall not have Counterplea*; per Hank. becauſe it is of the King, quære & concordat 24 E. 3 23. if a Deed or Record be ſhewn proving it, and contra if no ſuch thing be ſhewn; quod nota, the Reaſon ſeems to be becauſe the Counterplea *ſhall be in the Chancery*. Br. Counterple de Aid, pl. 25. cites 11 H. 4. 85.

22. In *Treſpaſs*, the Defendant made *Conuſance for Rent Arrear* becauſe the *Tenant held of the King as of the Honour of B.* which was *aſſign'd to the Queen in Dower*, by which for ſo much Arrear &c. and *pray'd Aid of the Queen and of the King by Reaſon of the Reverſion*, and had it of the Queen after Iſſue, and was ouſted of the King. Br. Aid, pl, 13. cites 28 H. 6. 13.

For it was ſaid that where the *King grants for Life*, and he [the Grantee for Life] *leaſes for Years*, the *Leſſee for Years ſhall not have Aid* of the Grantee for Life, and of the King, by Reaſon of the Reverſion, *but of his Leſſor only*; but it is ſaid that *after the Joinder they may pray Aid over*; but it was ſaid that this ſhall be after iſſue; for a Man ſhall not have Aid of the Queen, nor of other common Perſon before Iſſue join'd in Writ of Treſpaſs, and ſhall have Proceſs againſt the Queen as againſt a common Perſon, but a * Man ſhall not have Aid of the King, but where he is Bailiff or Servant to the King immediately. Br. Aid, pl. 13 cites S. C.

* Br. Aid del Roy, pl 9. cites S. C. and S. P.

23. Where the *King makes a Corporation* abſque aliquo reddendo, the Aid ſhall not be granted. Per Keble. Br. Aid del Roy, pl. 93. cites 2 H. 7. 11.

24. In *Præcipe quod reddat*, the Tenant may have *Aid of the Queen and alſo of the King*, *where he is Tenant for Life*, *the Reverſion to the Queen*, and this *without ſhewing Deed* as Aſſignee. Per Townſend, he *ſhall vouch firſt the Queen*, and then he ſhall have Aid of the King; but by Hawes, he *ſhall firſt have Aid of the King*, *and after of the Queen*, and * *not of both together*. Br. Aid del Roy, pl. 96. cites 3 H. 7. 14.

* Br. Aid del Roy, pl. 9. cites 28 H. 6. 13.

25. In *Quare Impedit*, the Defendant *ſaid that certain Perſons were enfeoffed in Fee to the Uſe of himſelf for his Life of the Manor to which the Advowſon was Appendant*, and after his Deceaſe to the Uſe of the King, and pray'd Aid of the King, and was ouſted of the Aid; for the King cannot have it but by Matter of Record, and cannot have Feoffees to his Uſe, nor is the Uſe any thing Common Law. Br. Aid del Roy, pl. 66. cites 21 H. 7. 21.

26. A Writ of Rege inconſulto came out of Chancery, reciting that the King had a *Reverſion after divers Eſtates Tail*, and becauſe it was a *remote Poſſibility*, it was diſallow'd. Roll Rep. 289. Arg. cites Hill. 18 Eliz. Rot. 157. in Ejectment by **Blofield v. Leſſee of the Earl of Kent**, and that Mich. 33 & 34 Eliz. between the ſame Parties ſuch Writ was allow'd, becauſe an *immediate Eſtate Tail dependant on an Eſtate for Life* was recited by the Writ to be in the King.

S. C. cited Mo. 421. in pl. 583. and as to Aid of the King in Reverſion after Entail where there are meſne Remainders in Tail, cites and refers to 34 E. 3. 24. 10 H. 7. 19. Fitzh. Bar. 154. and Saver Default 37. and 21 E. 3. 44.

(K) *Who* ſhall have Aid in Reſpect of Privity. For *Default of Privity, [and who ſhall be ſaid Privy]* pl. 10, 11, 12, 13, 14.

S. P. For he is a Stranger to the Patent, and no Miſchief, for he may have Aid of his Maſter in whom there is Privity, and he ſhall have Aid over of the King; Quod Nota. Br. Aid del Roy, pl 57 cites S C.—Fitzh. Aid de Roy, pl. 11. cites S. C. and Martin admitted that the Caſe put that if a Stranger enters into the Land in the Right of the King after Death of the Tenant, he ſhall have Aid if he be impleaded, but ſaid, that in the principal Caſe he ſhall not, for in the Caſe put he ſhews that his Entry is immediate in the Right of the King, and no Eſtate Meſne between the King and him, whereas here he ſhews a Meſne Eſtate, tho' it be in Right of the King, and ſo was the Opinion of the Court.

1. IF a Man juſtifies a Thing as Bailiff and Servant to the King's Grantee of a Ward, he ſhall not have Aid of the King, becauſe he is not privy to the King. 3 Hen. 6. 34. * 4 Hen. 6. 12. The ſame Law if a Rent had been reſerved upon the Grant. Contra 3 Hen. 6. 34.

Br. Aid del Roy, pl. (97.)98. cites S. C. that Aid was granted, but ſays, it ſeems that it ſhould not be granted upon the Plea of the Plaintiff——Fitzh. Aid de Roy, pl. 35. cites S.C. accordingly.— See (X) pl. 1. 2.

2. In an Aſſiſe, if the Bailiff ſays, that a Leaſe was made to his Maſter for Life, and the Remainder to the King in Fee, he ſhall not have Aid of the King for Default of Privity. * 8 Hen. 7. 11. Aid is granted, but after ſaid that it ought not. † 1 Aſſ. 1.

† Br. Aid del Roy, pl. 69. cites S. C. accordingly.——Br. Baillie, pl. 11. cites S. C. that Bailiff in Aſſiſe ſhall not have Aid; for the Bailiff cannot ſtay the Aſſiſe; Contra where the Tenant pleads good Matter for Aid by Attorney.——Fitzh. Aid de Roy, pl 86. cites S. C.

3. In Treſpaſs, if the Defendant juſtifies the Entry as Servant to the Leſſee for Life of the King, he ſhall not have Aid of the King, becauſe he is not privy to the Leaſe. 4 Hen. 6. 12.

S. P. But he ſhall have Aid of his Maſter, and he over of the King.

4. So if a Man in Replevin avows as Bailiff to the Leſſee of the King he ſhall not have Aid, becauſe he is a Stranger to the Leaſe. 9 Hen. 6. 26. b.

Br. Aid de Roy, pl. 5. cites S. C.—Fitzh. Aid de Roy, pl. 18. cites S.C.——See pl. 15.

Fol. 154. The Defendant as Bailiff may have Aid of his Maſter, and he over of the King.

5. So if a Man juſtifies the taking of Toll as Bayliff of the Leſſee for Years of the King, he ſhall not have Aid of the King for Default of Privity, but he may have Aid of the Leſſee, and then both of the King. 11 Hen. 6. 39. b. Curia.

Br. Aid del Roy, pl. 107. cites S. C. and S. P. accordingly by all the Juſtices.

* Fitzh. Aid de Roy, pl. 13. cites S. C. but there it is (Collector) inſtead of (Sub-collector.)—— † S. P. becauſe he may have Aid of the High Collector, and he over of the King. Br. Aid del Roy, pl. 4. cites 9 H. 6. 20.—Fitzh. Aid de Roy, pl. 17. cites S. C.——

6. If a Man juſtifies becauſe he is Sub-collector of Tenths, he ſhall not have Aid, becauſe he is a Stranger to the Commiſſion. * 7 H. 6. 27. † 9 Hen. 6. 20. b. 21. b. tho' the Commiſſion gave Power to make a Sub-collector.

But it was agreed that the *Leſſee or Committee of the King, who has his intire Eſtate*, may have Aid of the King; for where the thing is ſuch as may be granted over, there the Leſſee of the Leſſee or Committee of the King may have Aid of the King, if he has his intire Eſtate. But contra of an Office which cannot be granted over, as Collector, Judge, Juſtice &c. who cannot grant their Eſtate over; and notwithſtanding

withſtanding the King grants the Ward, yet Livery ſhall be ſued out of the Hands of the King, and for that Reaſon the Grantee, or the Grantee of the Grantee ſhall have Aid of the King. Br. Aid del Roy, pl. 4. cites S. C.——Ibid. pl. 57. cites 4 H. 6. 12. S. P.

7. In falſe Impriſonment, if the Defendant ſays that he was taken by certain Perſons by Force of a Commiſſion to them directed, and they deliver'd him to the Defendant to keep &c. he ſhall not have Aid, for he is not privy to the Commiſſion, 7 Hen. 6. 37. adjudged. So he ſhall not have Aid in this Caſe, altho' the Commiſſion was ſingulis jure fidelibus. * 7 H. 6. 27. * Fitzh. Aid de Roy, pl. 13. cites S. C.

8. In Treſpaſs, if the Defendant, as Bailiff to the Sheriff, juſtifies the Taking and Sale as a Stray to the Uſe of the King, he ſhall not have Aid of the King for want of Privity. Dubitatur 14 Hen. 6. 5. b. * But if the King's Tenant dies his Heir within Age, and a Stranger enters in the Right of the King, he ſhall have Aid, becauſe he enters immediately in the Right of the King. 4 H. 6. 12. b. * S. P. Br. Aid del Roy, pl. 57. cites S. C. For he is a Stranger to the Patent, and no Miſchief; for he ſhall have Aid of his Maſter, in whom there is no Privity, and he ſhall have Aid over of the King. Quod nota. Fitzh. Aid de Roy, pl. 11. cites S. C.

9. If the King leaſes certain Lands to another, and the Leſſee grants over Part of his Eſtate, in an Action againſt him, [ſcilicet, the Grantee] he ſhall not have Aid of the King, becauſe he is not privy to the Leaſe. * 9 Hen. 6. 21. Curia. Hill. 39 Eliz. B. R. between *Merry and Holdeney*, adjudged. Contra † 29 Aſſ. 21. * Fitzh. Aid de Roy, pl. 17. cites S. C.—— Br. Aid del Roy, pl 4. cites S. C.

† Br. Aid del Roy, pl. 80. cites S. C. accordingly.

10. But if the King's Leſſee grants over all his Eſtate, and he [ſcilicet, the Grantee] is impleaded, he ſhall have Aid of the King, becauſe he is privy to the firſt Leaſe, he having the ſame Eſtate. 9 H. 6. 21. b. S. P. Br. Aid del Roy, pl. 4. cites 9 H. 6. 20.— Fitzh. Aid de Roy, pl. 17. cites S. C.

11. If the King leaſes for Years, and after endows the Queen of the Reverſion, who confirms to the Leſſee for Life, he may have Aid of the King without the Queen. 11 H. 6. 39. b.

12. In Treſpaſs for taking his Cattle, if the Defendant ſays that the King, and all thoſe whoſe Eſtate the King hath in the Manor of D. have had, Time out of Mind &c. 20 l. Rent out of a Place where the Taking was, and that the Manor of D. was aſſigned to the Queen in Dower before the Taking, and that he took the Diſtreſs for Rent as Bailiff of the Queen, he ſhall not have Aid of the King for want of Privity, though he ſhall have it of the Queen. 28 Hen. 6. 13. adjudged. Br. Aid, pl. 13. cites S. C accordingly.—— Br. Aid del Roy, pl. 9. cites S. C.— Fitzh. Aid de Roy, pl. 24 cites S. C. accordingly, and ſays that Mich. 29 H. 6. it was adjudged as here, and that the Queen had Aid of the King.

13. When King Edw. 4. leaſed Land or an Office for Life, and died, and the Reverſion deſcended to his Daughter, who married Hen. 7. tho' the Reverſion was in the Queen, yet the Leſſee, being impleaded, might have Aid of the King only without the Queen. 1 Hen. 7. 29. b. by many Juſtices. Fitzh. Aid de Roy, pl. 32. cites S. C.—— In *Formedon* the *Tenant vouched the Queen and two others as Heirs of the Duke of York*, and *ſhewed Cauſe by the Duke*. Brian ſaid the Queen is not a Perſon able to be vouch'd as here; for *this is Real Matter*; but *in Perſonal Cauſes ſhe is exempt, and has Ability* as a private Perſon, and *may make a Gift by Leaſe for Term of her Life*, and therefore by him the Tenant *ſhall have firſt Aid of the King, and then of the Queen, but * not of both together.* And it was doubted if the Queen be a private Perſon *exempted by the Common Law, or by the Statute*; for if ſhe be by the Statute, it ought to be pleaded, per Brian; for it is a private Statute. But per Townſend, if ſhe

ſhe be exempted by the Common Law, the Tenant need not have Aid of the King. Br. Nonability, pl. 56. cites 3 H. 7. 14.

* Br. Aid del Roy, pl. 9. cites 28 H. 6. 13. accordingly.

14. If the Queen leaſes to another, and the King confirms it, the Leſſee ſhall have Aid of the King; for the King is enough privy to this. 15 Edw. 3. Aid del Roy 66. adjudged.

Br. Aid del Roy, pl. 5. cites S. C. and ſays that the Bailiff

15. If a Man avows as Bailiff to the Leſſee of the King of a Seignory, and hath Aid of the Leſſee, they both ſhall have Aid of the King. 9 Hen. 6. 26. b.

pray'd Aid of the King, but could not have it, becauſe there is no Privity, and it is not immediate; but that the Bailiff ſhall have Aid of his Maſter, and the Maſter over of the King.——Fitzh. Aid de Roy, pl. 18. cites S. C. according to Br.

16. In Treſpaſs, he who *juſtifies by Command of the King only, and not as Bailiff, Sheriff, Eſcheator* &c. ſhall not have Aid of the King, and yet the Juſtification is good by the Command of the King. Br. Aid del Roy, pl. 68. cites 39 H. 6. 17.

D. 258. a. pl. 15. Hill. 9 Eliz. cites S. C. that he could not have Aid of the King, inaſmuch as he was a Stranger to the Patent, and nothing would be loſt to him in this Action.

17. In *Treſpaſs* the *Defendant ſaid that the King granted the Land to the Queen for Life, who leaſed to the Defendant to hold at Will*, and pray'd Aid of the King, and was ouſted by Award. Br. Aid del Roy, pl. 109. cites 11 H. 7. 7.

Fol. 155.

(L) *Who* ſhall have it. The *Prayee.*

Fitzh. Aid de Roy, pl. 6. cites S. C.

1. If in an Ad Terminum qui præteriit the Tenant hath Aid of W. the Son and Heir of S. who comes and joins, if they ſay that the King by his Patent rehearſed that he had granted this to G. for Life, the Remainder to the Tenant for Life, yet they ſhall not have Aid of the King, becauſe this is contrary to his Prayer before, by which the Reverſion was ſuppoſed immediately to him who joined himſelf. 25 Edw. 3. 39. a.

Fitzh Aid de Roy, pl. 6. cites S. C.

2. But if they ſay the King granted the Reverſion to the Father of the Prayee, they ſhall have Aid of the King. 25 Edw. 3. 39. adjudged.

(M) *Who* ſhall have Aid in reſpect of his *Office.*

Fitzh. Aid de Roy, pl. 44. cites S. C.——

1. If the King's Officer makes a Contract by Force of his Office to the Uſe of the King, if he be ſued for this he ſhall have Aid of the King, becauſe the King is the Debtor. 11 Hen. 4. 28. b.

Br. Aid del Roy, pl. 29. cites S. C. in Caſe of the Clerk of the King's Works, who averr'd that the King had not paid him.

2. In

2. In Debt the Defendant says he was the Buyer of Victuals for the King's Houshold, and bought of the Plaintiff certain &c. and that the Plaintiff took a Bill to go to the Treasurer for Payment, he shall have Aid. 3 H. 4. 9 b. Fitzh. Aid de Roy, pl. 40. cites 3 H. 4. 8. S. C.

3. But he shall not have Aid upon such a Plea in Account against him as Bailiff of his Manor; for this is no Answer to the Plaintiff. 3 H. 4. 9. b. Fitzh. Aid de Roy, pl. 40. cites 3 H. 4. 8. S. C.

4. In Debt against a Buyer of Victuals, if he says that he bought to the King's Use, he shall have Aid. * 7 Hen. 4. 7. † 11 Hen. 4. 28. * Br. Aid del Roy, pl. 26. cites S. C. accordingly, tho' the Plaintiff replied he bought it to the Use of himself.

† Fitzh. Aid del Roy, pl. 44. cites S. C. and tho' the Moneys are allowed in the Exchequer, yet that does not prove that they are paid, and if they are not paid, he shall have Aid.——See (N) pl. 2. S. C.

5 So a Purveyor shall have Aid of the King, 11 Hen. 4. 28. if he sued for Victuals taken for the King's Houshold at a Price Br. Aid del Roy, pl. 29. cites S C. & S P. agreed; for he may take Victuals at a reasonable Price for the Use of the King, according to the Statute, whether the Party is willing or not, and this by reason of the Commission: But contrary of Clerk of the King; for a Clerk has no Commission, as it seems.——But see now the several Statutes made restraining Purveyors, by reason whereof Aid lies not.

6. If the Clerk of the King's Works buys certain Carriages and Loads of Gravel, to the Use of the King at a Price, in Debt against him he shall have Aid of the King, tho' the Party was not compellable to sell it him. 11 Hen. 4. 28. Br. Aid del Roy, pl. 29. cites S. C. —Fitzh. Aid de Roy, pl. 44. cites S C.——See pl. 5. in the Note there.

7. A Collector of Fifteenths shall have Aid of the King. * 7 Hen. 4. 6. † 11 Hen. 4. 35. 9 Hen. 6. 56. Dubitatur 14 Hen. 6. 5. b. * Fitzh. Aid de Roy, pl. 42. cites S. C. ——Br. Aid del Roy, pl. 25. cites S. C.

† Br. Aid del Roy, pl. 30. cites S. C. but there it is said, that where a Collector distrains for Fifteenths in Land charged to the Tenths, and Trespass is brought, he shall not have Aid of the King. [And so is the Year book. 11 H. 4. 37. a.]——Br. Quinzime &c. pl. 3. cites S. C.

8. A Collector of Tenths for the King shall have Aid of the King. 2 Hen. 5. 4. b. admitted. Fitzh. Aid de Roy, pl. 36. cites S. C. accordingly, if the Plaint be of taking Beasts for the Sum assess'd only; but if the Plaint be of taking for a certain Sum more than the Sum assess'd, the Defendant shall not have Aid for this tortious Taking and thereupon he pleaded to the Action.

9. A Forester shall have Aid of the King. 7 Hen. 6. 36. Fitzh. Aid de Roy, pl. 14. cites S. C.——Br. Aid de Roy, pl. 42. cites S. C.——See (P) pl. 1. S. C.

In Trespass the Defendant said that the Place where is within the Forest whereof the King is seised in Fee, and that he is a Forrester of a Walk there, by Patent for Life, and pray'd Aid, which was granted him by Consent of the Plaintiff's Counsel. D. 257. b. pl. 15. Hill. 9 Eliz. Smith v. Rigby.

10. If an Escheator, by Colour of his Office, seises a Ward, supposing his Ancestor to die in the King's Homage, and a Stranger brings a Right of Ward against him, he shall have Aid of the King. 18 Hen. 6. 12.

11. If a Man makes Conusance as Bailiff of the King for Rent-Arrear, and prays in Aid of the King, he shall have it. 4 Hen. 6. Aid del Roy 121. See (E) pl. 4. S. C.

12. *Trespass of Beasts taken*, the *Defendant said, that King Edward had a Court Baron en D. which he granted to the Mayor and Commonalty of D. in Fee-farm, and W. affirmed Plaint there and recovered*, and shewed cer-

tain &c. by which *Præcipe came to the Bailiff to make Execution, and* the Defendant Bailiff there *took the Beasts in Execution*; Quære if well in a Court Baron; and prayed Aid of the King, and it was said that he shall not have Aid of the King but *where he is immediate Officer*, and the Attorney of the King said, that if the Plaintiff would traverse the Cause, yet the Aid shall be granted of the King; for where the *King has any Interest*, they shall not proceed till the King be Counsell'd, which was affirmed by several. Br. Aid del Roy, pl. 101. cites 1 H. 4. 10.

13. In *Trespass* the Defendant *justified as Bailiff of the Hundred of D. to distrain for Amercement*, which is the same Trespass, and pray'd Aid of the King. And per Prisot, he shall not have Aid; for the *Sheriff is Officer immediate* to the King, and shall account for the Hundred among the Profits of the County, and therefore shall not have Aid of the King. *Contra of Bailiff of the King of his Manor*; for he is Officer immediate. Br. Aid del Roy, pl. 12 cites 33 H. 6. 29.

14. If it does *appear to the Court that the King's Officer seises* for the King *any Lands without Warrant against the Law*, in an Action brought against the Officer, he ought not to have any Aid of the King, neither does the Writ De Domino Rege Inconsulto lie in that Case, because that which is done by him is void; and where the Cause of Aid fails, there no Aid is to be granted; therefore in a Real Action, if the *Escheator* be examined, and upon his Examination *says generally that he has seised the Lands in Demand into the King's Hands*, this is not good, and the Action shall proceed, for he ought to shew the Cause of the Seisure, (as is implied in this Act of 3 E. 1. cap. 24.) which Cause, if it appear to be against the Law, the Judges of the Law ought to disallow the same. 2 Inst. 207.

(N) By an *Officer*. Upon what Plea.

Br. Aid del Roy, pl. 25. cites S. C.— Ibid. pl. 45. cites S. C. ——Fitzh Aid de Roy, pl. 42. cites S. C.

1. IN Replevin against a Collector of Fifteenths, who avows the Taking as a Distress for it, if the Issue be upon the Place of taking, he shall not have Aid of the King. 7 Hen. 4. 6.

Br. Aid del Roy, pl. 26. cites S. C.— See (M) pl. 4. S. C.

2. But in Debt, if the Defendant justifies the Buying of the Things to the Use of the King, and prays in Aid, if the other says he bought them to his own Use, yet he shall have Aid of the King. 7 Hen. 4. 7.

Fol. 156. S. P. Br. Aid del Roy, pl. 29. cites S. C.—— Fitzh. Aid del Roy, pl. 44. cites S. C.

3. If the King's Officer make a Contract to the Use of the King, and after he is allow'd for this in the Exchequer, yet in Debt by the Party after, he shall have Aid; for perhaps it is not paid, though it be allowed, and perhaps the Party hath released to the King. 11 H. 4. 28. b.

Br. Aid del Roy, pl. 29. cites S. C. ——Fitzh. Aid del Roy, pl. 44. cites S. C.

4. But otherways it is, if the Officer be paid by the King for it; for thereby he is Debtor to the Party. 11 H. 4. 28. (as it seems.)

Br. Aid del Roy, pl. 30. cites S. C.—

5. In Debt upon an Obligation, if the Defendant says he was the King's Buyer, and bought certain Goods for the same Sum, to the Use of

of the King, and for the greater Surety he made the Deed, **he shall have Aid of the King, without shewing how he was allowed of this in the Exchequer.** 13 Hen. 4. Aid del Roy 100. **Curia.** Br. Quinzime, pl. 3. cites S. C.

6. **In Trespass against a Collector of 15, if upon the Plea of the Parties it** appears that he took the Distress of such Things that were not chargeable, **tho' it was assess'd by virtue of a Commission, yet he shall not have Aid of the King, because the Truth appears.** * 11 Hen. 4. 35. **adjudged,** 36. b. 37. b. * Br. Aid del Roy, pl. 30 cites S. C. *As* if it is assess'd for his Beasts in D. or if he is assess'd for all his Goods in C. or if he be assess'd for Goods in S. and he has no Goods there, and the Collector distrains, and the other brings Trespass, the Collector shall not have Aid of the King.— So where the Collector distrains for 15th in Land charged to the 10th, and Trespass is brought, he shall not have Aid of the King. Br. Ibid.——— Br. Quinzime, pl. 3. cites 11 H. 4. 37. S. P. accordingly.

7. **In Trespass against a Collector, if it** appears **upon the Plea** that the Tenths were 2 s. which the Defendant [Plaintiff] laid to the Collector, and yet **after** the Collector took these Cattle **for which the Action is brought,** and them detain'd till he was paid 1 s. 6 d. more, **the Collector shall not have Aid of the King.** 2 Hen. 5. 4. b. Fitzh. Aid de Roy, pl. 30. cites S.C.

8. In *Assise* the Plaint was *of House and Land*, the *Tenant pleaded Gift in Tail by Deed inroll'd to the Lord B.* the *Remainder to the King*, and prayed Aid of the King, the *Plaintiff demanded Oyer of the Deed*, and had it, and pray'd that it be inroll'd de Verbo in Verbum, and so it was; and the *Deed was* Quod *J. F. dedit Officium & Servitium Forestæ sive Ballivæ de D. in M. cum omnibus Terris* &c. *eidem Officio pertinent*' and Livery and Seisin, and the Plaintiff demurr'd in Law, and by all the Justices he shall not have Aid, because he *has not alleged in the Plea that the Land was appendant to the Office, and therefore the Plea and the Deed do not agree*; Quod Nota. Br. Aid del Roy, pl. 92. cites 1 H. 7. 28.

(O) Upon what Plea or Issue.

1. **IN Trespass, if the Defendant says, that** he was made Collector **of Fifteenths** with Power to make Sub-collectors, **and to distrain them to make them levy the Sum, and that he made the Plaintiff his Sub-collector, and distrained him for not levying &c. if the** Plaintiff says he made J. S. his Sub-collector, absque hoc that he made the Defendant [Plaintiff] **his Sub-collector, the Defendant shall not have Aid of the King, because the** Cause **of his Aid** is traversed. 5 **Hen.** 5. 11. b. **adjudged.** Br. Aid del Roy, pl. 36. cites S. C.— Br. Counterple de Aid pl. 8. cites S. C. accordingly.——— Fitzh. Aid de Roy, pl. 37. cites S. C. ———[N. B. Roll is according to the Year-Book and Fitzh. But Br. Aid del Roy, and Counterple del Aid, mentions the Defendant as made Sub-collector, and that the Travers of being made Sub-Collector was by the Defendant that he was not made Sub-collector, but the said J. S.]

2. Where the Party may **well** maintain the Issue **without the King, he shall not have Aid.**

3. **In Replevin the Defendant** avows upon the Plaintiff as his Tenant, **and the** Plaintiff says he held of the King, and so Hors de son Fee, **and the** Defendant says within his Fee, **the Plaintiff shall not have Aid, (it seems because the King cannot aid him in this Issue.)** 14 **Hen.** 4. 26. b. * Br. Aid del Roy, pl. 35. cites S.C. the Plaintiff replied, that he held the intire Manor of the King by Homage and 12 s. and demanded Judgment if Rege inconsulto &c. & non allocatur, because it amounts only to Hors de son Fee, whereupon he said as above, and so Hors de son Fee, and the

the others e contra, and then the Plaintiff pray'd Aid of the King, & non allocatur.——— Fitzh. Aid de Roy, pl. 48. cites S. C.———Roll Rep. 407. Arg. cites S. C. accordingly, and becauſe it is in Delay of the Party.

* Br. Aid del Roy, pl. 55. cites S. C. accordingly, and a Man ſhall not recover

4. In Treſpaſs, if the Defendant juſtifies as in his Freehold by Leaſe from the King, the Reverſion to the King, he ſhall not have Aid, for he need not have Aid of the King to maintain this Plea in Treſpaſs. My Rep. 14 Jac. for his Freehold is a good Bar of itſelf. * 4 Hen. 6. 10. adjudged. 4 Hen. 6. 18. adjudged.

Land nor Franktenement in Treſpaſs, but Damages only, which is no Prejudice to the King; and after the Defendant enforc'd his Plea, and ſaid, that the Plaintiff claimed Part of the Park &c. which in Fact is the Park of the Defendant for Life, the Reverſion to the King, ut ſupra, and prayed Aid, & non allocatur.———Fitzh. Aid de Roy, pl. 9. cites S. C. Ibid. pl. 12. S. C.——Roll Rep. 407. pl. 42. cites S C.

Roll Rep. 407. pl. 42. S. C. by Coke and Bridgman, contra Haughton—See (A) pl. 13. S. P. —— See Aid of a common Perſon (A) pl. 1.

5. The ſame Law in an Ejectione Firmæ. My Rep. 14 Jac. Bennet adjudged, for this is in Nature of a Treſpaſs.

In Aſſiſe the Bailiff of the Tenant ſhewed, that A. leaſed to his Maſter

6. If an Avowry be made by the King's Bailiff for Suit to an Hundred, and Seiſin laid by Preſcription in the King and his Anceſtors, and the Preſcription traverſed, and Iſſue thereupon, the Avowant ſhall not have Aid of the King. 17 Ed. 3. 31. b.

for Life, the Remainder to the King in Fee, and prayed Aid of the King, and had it. Br. Aid del Roy, pl. 98. cites S H 7. 11. and Brooke ſays it ſeems there, that Aid ſhall not be granted upon Plea of the Bailiff.

In Replevin the Bailiff of the King juſtified, and prayed Aid of the King; He ſhall have Aid; But otherwiſe it is of a Servant of the King's Bailiff; for the Bailiff is Party to the Conuſance, but the Servant is not; Per all the Juſtices in C B. Nota. Br Aid del Roy, pl. 100. cites 9 H. 7. 15.

A Man ſhall not have Aid of the King but where he is *Bailiff, or Servant immediate.* Br. Aid del Roy, pl. 9 cites 28 H. 6. 13.———Ibid. pl. 13. cites S. C. and S. P. accordingly.

7. In *Petition to repeal a Patent* of a Seigniory, the Defendant pleaded, *that it was granted to him in Recompence of other Thing with Clauſe to anſwer in value* it &c. and prayed Aid of the King, and had it. Br. Petition, pl. 11. cites 21 E. 3. 47.

8. *Treſpaſs* by the Biſhop of Winton againſt the Prior of St. John's, the *Defendant ſhewed that his Predeceſſor was ſeiſed in Right of the Church, and died, and he was elected Prior*, and gave *Colour*, the *Plaintiff ſhewed that his Predeceſſor was ſeiſed till by W. N. diſſeiſed, who enfeoff'd the Predeceſſor of the Defendant upon whom the Plaintiff entred* &c. And the *Defendamt traverſed the Diſſeiſin*, and ſo to *Iſſue*. And *after he ſhewed that this was the Land of the Templers* who were *diſſolved* in the Time of Edward II. *and held of the King in Frankalmoigne*, and after it was *enacted by Parliament, that the Hoſpitallers*, viz. the *Defendant ſhould have their Lands, and that he ſhould hold them of the Lord of whom it was held by ſuch Services as the Templers held*, and by Judgment of the Court the Defendant was ouſted of the Aid; for he ſhall not have Aid of the King but *where the King ſhall be prejudiced, as* where by the Recovery of the Land the King *loſes his Rent-Service and Seigniory*, and by theſe Words, (*ſuch Services*) he does not hold in Frankalmoigne, for *Frankalmoigne is not any Service*; and alſo in Treſpaſs no Franktenement nor Land ſhall be recovered. Br. Aid del Roy, pl. 13. cites 35 H. 6. 56.

9. In Treſpaſs the Defendant *juſtified by Command of the King*, and well by Award, and need not ſhew Writing, but ſhall not have Aid. Br. Prerogative, pl. 42. cites 39 H. 6. 17.

10. If

10. If in *the Pleading it appears that the Aid is grantable* of the King, and the *Tenant does not pray it*, yet the Court ſhall not proceed Rege Inconſulto. Br. Aid del Roy, pl. 92. cites 1 H. 7. 28.

(P) Where no Tithe appears to the King.

Fol. 157.

1. IN Treſpaſs for entring his Chace, if the Defendant ſhews that he is the King's Foreſter in ſuch a Foreſt, and pleads a Cuſtom when any Savage Beaſt out of the Foreſt to purſue it into any Chace &c. and to re-chace it into the Foreſt &c. and that he did accordingly &c. he ſhall have Aid of the King upon this Plea, becauſe the Defendant cannot try this Cuſtom whether it is good or not without the King. 7 H. 6. 36.

S. P. and yet it was not agreed whether the Cuſtom be good or not, by reaſon that when the Savages go out none has the Property, the King nor other; but becauſe the Aid of the King lies before Iſſue joined the Aid was granted, and the Cuſtom ſhall be diſputed after. Br. Aid del Roy, pl. 42. cites S. C.——Fitzh. Aid de Roy, pl. 14. cites S. C. that the Defendant has ſhewn an Advantage to the King, which ſhall not be tried without making him a Party.——See (M) pl. 9. S. C.

(Q) Upon what Plea. Not contrary to the *Suppoſal of the Writ.*

1. IN an Aſſiſe of Land in one County, if the Defendant ſays, that the Land is in another County, and that the King gave it to him by his Letters Patents, and prays in Aid of the King, he ſhall not have Aid upon this Plea, becauſe this is contrary to the Suppoſal of the Writ that the Land is in another County; ſo that if the Demandant grants the Aid the Writ ſhall abate. 21 E. 3. 19. adjudged.

Fitzh. Aid de Roy, pl. 2. cites S C. but per Seton, if the King gives me one Acre of &c. and I am impleaded of another Acre in the ſame Vill, I may ſay that the King gave me the Land by the Charter &c. and it is no Anſwer to the Charter to ſay Nient Compriſe, without conſulting of the King, Quod fuit conceſſum, per Sharde, becauſe in this laſt Caſe it ſtands with the Writ, whereas in the other Caſe it is contrary.——See (B) pl. 1. S. C.

2. In an Aſſiſe, if the Tenant ſays, that the King leaſed to him for Life, the Remainder over to B. and after the Remainder came to the King by the Forfeiture of B. and prays in Aid of the King, he ſhall have it, tho' this be againſt the Suppoſal of the Writ. 1 Aſſ. 1. adjudged.

Fitzh. Aid de Roy, pl. 86. cites S C.——Br. Aid del Roy, pl. 69. cites S. C. but S P. does not clearly appear.

3. In Treſpaſs the Defendant *juſtified as Bailiff of the King, becauſe the Lodge was ruinous, whereupon he cut Trees to repair it*, and by the beſt Opinion he ſhall have Aid of the King. Br. Aid del Roy, pl. 10. cites 33 H. 6. 2.

(R) At what *Time pray'd.* [Or granted.]

* S. P. Br. Aid del Roy, pl. 8. cites S. C.—— Fitzh. Aid del Roy, pl. 25. cites S. C. adjudged generally, that a Man ſhall have Aid of the King before Iſſue joined.

1. WHERE Aid ſhall be **granted** of a common Perſon after Iſſue, it ſhall be **granted** of the King before Iſſue. 4 H. 6. 18. b. * 28 H. 6. 4.

Fitzh. Aid del Roy, pl. 7. cites S. C.

2. In Treſpaſs **Aid ſhall be granted of the King,** before any Plea **pleaded.** 2 H. 6. 14.

S. P. Br. Aid del Roy, pl. 12. cites 33 H. 6. 29.——S. P. Br. Aid, pl. 125. cites 5 E 4. 1.——Br. Aid del Roy, pl. 102. cites S. C.—— S. P. Br. Aid, pl. 21. cites 40 E. 3. 20.—Br. Aid del Roy, pl. 8. cites 28 H. 6. 4. S. P.

3. In **Treſpaſs Aid ſhall be granted of the King** before Iſſue. 7 H. 6. 36.

Br. Aid del Roy, pl. 8. cites S. C. For where a Man juſtifies in Right of the King, the Cauſe is not traverſable.—— Fitzh. Aid de Roy, pl. 25. cites S. C. that the Cauſe of the Taking is not traverſable.

4. In **Treſpaſs** for taking his Goods, **the** Defendant **who** juſtifies **the Taking** for Damage feaſant, as Bailiff of the King, **ſhall have Aid of the King before Iſſue.** 28 H. 6. 4. **adjudged.**

* S. P. and it is the Folly of the Defendant; for he might have had Aid before Iſſue. Br. Aid del Roy, pl. 103. cites S. C. ——Fitzh. Aid de Roy, pl. 31. cites S. C.

5. **Aid lies** not **of the King** after Iſſue, **becauſe the King cannot be Party to maintain this Iſſue taken by the Party, and if the Aid be granted,** a Procedendo in Loquela **cannot come from the Chancery, inaſmuch as the Plea is** determined by the Iſſue. 5 E. 4. 1. **adjudged.** * 7 E. 4. 8. **Curia. Contra** 22 E. 3. 6. **adjudged.**

S. P. accordingly. But Brooke ſays Quære of Tenant at Will; but becauſe the Replication was not entered, the Tenant at Will pleaded a Bar de Novo, and pray'd Aid of the King, and had it. Br. Aid del Roy, pl. 103. cites S. C.——Fitzh. Aid de Roy, pl. 31. cites S. C. and that the Defendant waived the Iſſue, and then had Aid.

6. [As] **In Treſpaſs, if the Defendant** alleges a Common in the King by Preſcription for him and his Tenants at Will, in the Place where &c. **and that he being a Tenant at Will uſed the Common, and the Plaintiff takes** Iſſue upon the Preſcription, **the Defendant ſhall not have Aid afterwards for the Cauſe aforeſaid.** 7 E. 4. 8. **Curia.**

* Fitzh. Aid de Roy, pl. 71. cites S. C.—— † Fitzh. Aid del Roy, pl. 70. cites S. C.

7. **Aid does** not **lie of the King** after Iſſue, and **a Writ de** Rege Inconſulto & Procedendo **thereupon.** * 22 E. 3. 15. b. **Contra** † 22 E. 3. 6.

Br. Counterplea de Voucher, pl. 6. cites 40 E 3. S. P.— Br. Aid del Roy, pl. 12. cites 33 H. 6. 6. that

8. In *Præcipe quod reddat* the *Tenant vouched one as Couſin and Heir of J.* viz. Son of W. Brother of J. and the *Demandant ſaid that the Father of the Vouchee was a Baſtard,* ſo that he cannot be Heir to J. and the *Tenant confeſs'd it, and relinquiſh'd the Voucher, and ſaid that* this ſame *J. leaſed to him for Life, and held of the King, and died without Heir, and ſo the Reverſion eſcheated to the King,* and therefore pray'd Aid of the King, and *had it, notwithſtanding that he had vouched before.* Nota, and the Reaſon

ſon ſeems to be, that this Aid-Prayer of the King in the Reverſion, is in Lieu of Voucher. Br. Aid del Roy, pl. 14. cites 40 E. 3. 14.

in Præcipe quod reddat Aid of the King ſhall be granted before Iſſue joined.

9. If a Man prays Aid, and *ſhews Cauſe which is rejected*, yet he may pray Aid, and *ſhew other Cauſe*, and ſo of ſeveral *in one and the ſame Term*, and e contra *after Adjournment*. The Reaſon ſeems to be, becauſe in the one Caſe the Cauſe is enter'd of Record, and not in the other. But this is in Aid of the King. Br. Aid, pl. 145. cites 3 H. 6. 5.

10. In *Recordare* it was agreed, that *he who makes Conuſance as Bailiff* of the King *for Rent due to the King by Preſcription upon a Vill* for Rent by them paid Time out of Mind &c. ſhall have Aid of the King, and this *before Iſſue joined*. Br. Aid del Roy, pl. 58. cites 4 H. 6. 30.

11. If a Man juſtifies as Bailiff of the King, by reaſon of his Manor which he has, by reaſon of the Dutchy of Lancaſter, the Defendant ſhall not have Aid of the King before Iſſue joined. Quod nota bene. Br. Aid del Roy, pl. 51. cites 15 H. 7. 17.

12. The *King's Immediate Tenant*, or his *Mediate Tenant that joins with his Immediate Tenant*, ſhall have Aid *in a perſonal Action* as well before as after Iſſue join'd; but his Mediate Tenant that does not join with his Immediate Tenant, ſhall not; per the Ch. Baron. Hard. 179. pl. 1. Paſch. 13 Car. 2. in the Exchequer, in Caſe of Anderſon v. Arundel.

(S) At what *Time* to be *granted*.

Fol. 158.

1. IN an Aſſiſe againſt two, if each takes the intire Tenancy for Life, the Remainder to the King, and the Demandant acknowledges one to be Tenant, he, who is Tenant, ſhall have Aid preſently before Trial, for the Demandant hath acknowledged him. 12 H. 6. 1. Curia. See (T) pl. 4. S. C.

2. And if the other be after found Tenant, he ſhall have Aid alſo. 12 H. 6 1. See (T) pl. 4. S. C

3. In Aſſiſe 2 Judgments were vouched, where the *Tenant pending the Aſſiſe* or Præcipe quod reddat &c. *alien'd*, and after he pray'd Aid of the King, and had it, notwithſtanding this Alienation; but Quære if the King may not refuſe to give Aid to him, by reaſon of the Alienation. Br. Aid del Roy, pl. 71. cites 12 Aſſ. 41.

4. In *Treſpaſs* the *Defendant ſaid that J. was ſeiſed*, and *did not ſhew of what Eſtate, and died ſeiſed*, and the *Manor deſcended to W. in Ward of the King*, and the *King granted it to P. whoſe Eſtate he has, and the Heir is yet within Age*, and pray'd Aid of the King, & non allocatur, without juſtifying of the Treſpaſs, by which he juſtified that he put in his Beaſts &c. and pray'd Aid of the King, and *had it before Iſſue joined*. Quod nota; but *not before Juſtification*. Br. Aid del Roy, pl. 2. cites 2 H. 6. 14. and 3 H. 6. 5.

5. If a Man prays Aid of the King, and ſhews Cauſe, and is put over, and ſo *ſeveral Times in one and the ſame Term*, yet upon new Cauſe ſhewn he may have Aid of the King. *Contra after Adjournment in another Term*; per Marten. Brooke ſays Quære, if the ſame Law be not in Plea to the Writ. Br. Aid del Roy, pl. 2. cites 2 H. 6. 14. and 3 H. 6. 5. Br. Brief, pl. 6. cites 3 H. 6. 5. S. P.

(T) At

(T) At what Time. Aid *after Aid.*

Fitzh. Aid de Roy, pl. S. cites 3 H. 6. 5. S. P. and Roll ſeem miſprinted.

1. IF Aid be granted of the King where it ought, and this is adjourned till another Term, and then a Procedendo comes, yet he ſhall not have new Aid upon a new Cauſe ſhewn, becauſe he hath once delayed the Party. 3 H. 6. 15. 15. And it is after Adjournment.

——If a Man has Aid of the King, and after has Procedendo, he ſhall not allege new Cauſe of the Aid, viz. the Tenant who was in Eſſe at the Time of the firſt Aid; for upon Aid granted all Cauſes ſhall be examined in the Chancery; otherwiſe it ſeems of a new Cauſe of later Time. Br. Aid del Roy, pl. 99. cites 9 H. 7. 8.——*And* by the Reporter, if the *Tenant after the Procedendo infeoffs A. in Fee, who leaſes to the Tenant again, the Remainder to the King by Deed inroll'd*, the Tenant ſhall not have Aid again; for it is the Act of the Tenant himſelf. Ibid.

S. P. and e contra *after Adjournment.* Br. Aid, pl. 145 cites S. C.

2. But if a Man be ouſted of Aid for one Cauſe, he ſhall have Aid the ſame Term upon a new Cauſe ſhewn. 3 H. 6. 5. b.

——Fitzh. Aid de Roy, pl. 8. cites S. C. and ſays that he may have Aid after Aid in Infinitum, in one and the ſame Term.——See (X) pl. 2.

Fitzh. Aid de Roy, pl. 4. cites Mich. 21 E. 3. S. P. and ſeems to intend S. C.——

3. If Leſſee for Life hath Aid of him in Reverſion, and the Prayee comes not at the Day, the Leſſee may ſay that the King gave the Land to her and her Husband, and to the Heirs of the Husband, and the Huſband is dead, and Aid granted of his Heir; upon this Plea, ſhewing the Charter, ſhe ſhall have Aid of the King. 21 E. 3. 59. b. adjudged.

See (U) pl. 1. S C.

See (S) pl. 1. 2. S. C.

4. In an Aſſiſe againſt two, if each takes the intire Tenancy for Life, the Remainder to the King, and the Demandant acknowledges one to be Tenant, by which he hath Aid, if the other be after found Tenant, he ſhall have Aid alſo. 12 H. 6. 1.

5. When a *Procedendo is granted*, and *upon Stay thereof a better Right appears for the King*, the Court cannot proceed to Judgment without another Procedendo. Roll Rep. 291. Arg.

(U) In what Caſes it lies. *After Aid of another Perſon.*

See (T) pl. 3. S. C. † The Words are, De Roy pur Cauſe del Reverſion; but Fitzh. Aid del Roy, pl. 4. S. C. is of a Præcipe brought againſt the Feme of R. who pray'd Aid of the Heir of R. becauſe of Reverſion &c. and ſo it appears that the Word (Roy) is miſprinted.

1. IN a Præcipe quod reddat, if the Tenant hath Aid of the Heir † of her Husband, becauſe of the Reverſion, who comes not upon the Summons, the Tenant may after ſay that the King gave the Land to her and her Husband, and to the Heirs of her Husband, and ſhews forth the Charter of the King, and ſhall have Aid of him. 21 E. 3. Aid del Roy 4. adjudged.

2. It

2. If a Tenant at Will, according to the Cuſtom, hath Aid of the Archbiſhop of Canterbury, his Lord, and after the Lord dies, the Temporalties being in the King's Hands, he ſhall have Aid of the King. 21 H. 6. 37. agreed, admitting that ſuch a Tenant at Will ſhall ſhall have Aid, of which there is a Doubt. Br. Aid, pl. 82. cites S. C. contra that he was ouſted by Award; for there is no Privity between him and the King, and the Thing does not lie in Cuſtom, for it is repugnant, for when the Biſhop died, the Will is determined, and ſo the Intereſt determined.——Br. Aid de Roy, pl. 46. cites S. C accordingly —— Fitzh. Aid de Roy, pl. 22. cites S. C. —— (H) pl. 11. 12. S C.—— Br. Aid del Roy, pl. 50. cites 2 H 6. 11. where after Avoidance of the Biſhoprick by Tranſlation, and the Temporalities coming into the King's Hands, ſuch Tenant at Will pray'd Aid of the King, and had it, by the Opinion of the whole Court.

3. *Scire Facias to repeal Letters Patents againſt Tenant for Life*, the *Remainder over in Fee of the Grant of the King*, the Tenant for Life prayed Aid of him in Remainder, and had it, and *upon the Joinder they prayed Aid of the King*, and had it. Br. Aid, pl. 44. cites 7 H. 4. 41.

4. King Richard the 2d had *Land in Ward* by Deſcent from King Edward the 3d; for a *Chattel* ſhall deſcend *in the Caſe of the King*, contra of a common Perſon, and *granted the Land by Letters Patents to W. for Life*, the *Remainder to J. in Fee*; and the *Heir*, who was *in Ward*, *ſued Scire Facias to repeal the Letters Patents*, *and to have Livery*, and the *Tenant for Life prayed Aid of* him in the *Remainder*, and had it, and he came and joined, *and they two prayed Aid of the King*, and had it, and after came Procedendo in Loquela, and they proceeded in Pleading, and demurr'd, and Judgment given that the Letters Patents ſhould be revoked, and the Land re-ſeiſed into the King's Hands, and Livery made to the Heir; and there it does not appear, that there was any Procedendo Ad Judicium, as in 9 H. 6. Br. Aid del Roy, pl. 28. cites 7 H. 4. 41. Br. Aid, pl. 44. cites S. C.

(X) In what Caſes Aid lies *after Aid*.

1. If Aid be prayed of the King upon a certain Cauſe ſhewn, the which is adjudged no Cauſe of Aid, and ſo he is ouſted of Aid, yet the ſame Term he ſhall have Aid of the King upon another ſufficient Cauſe ſhewn. 8 H. 7. 11. b. Br. Aid del Roy, pl. 2. cites 2 H. 6. 14. & 3 H. 6. 5 S P. —S. P. And when it is in Chancery, Procedendo ſhall not be granted till the Title of the King be examined; for if the firſt Cauſe be not ſufficient, yet now a better Title may be ſhewn for the King; quod nota, per Brian & Huſſey Ch. Juſtices. Br. Aid del Roy, pl. 98. cites S. C.——Fitzh. Aid de Roy, pl 35. cites S. C.——Br. Aid del Roy, pl 2 cites 2 H. 6. 14 and 3 H. 6 5. S P. accordingly.

2. If Aid be granted of the King upon an inſufficient Cauſe, upon which a Procedendo is granted out of Chancery in another Term, the Party ſhall not have Aid again of the King, tho' he ſhew other ſufficient Cauſe, becauſe he might have ſhewn this Cauſe in Chancery in Stay of the Procedendo. 3 H. 6. 6. adjudged. 8 H. 7. 11. Br. Aid del Roy, pl. 98. (97.) cites S. C.—— Fitzh Aid de Roy, pl. 35. cites S. C.——Br. Aid del Roy, pl. 2. cites 2 H. 6. 1. 4 and 3 H. 6. 5. S. P.—— See (T) pl. 2. S. C.

3. *Scire Facias* was brought *by the Abbot* of L. *againſt the Dean of F. upon a Recovery againſt his Predeceſſor in Writ of Annuity*, the *Dean ſaid*, that the *King was ſeiſed of the Advowſon of the Deanry diſcharged*, *and made*

made Collation to discharge him, so held he of the Collation of the King, and prayed Aid of the King, and had it, and yet his *Predecessor had Aid of the King before*; but it may be, that the Plaintiff had released to the King after &c. and yet Dean and Chapter have *Common Seal*, and it is said that of the *Bishop* otherwise it is, and that he shall not have Aid of the King; for he *is elective*, and not presentable by the King, and yet the Plaintiff recovered in the first Action by Verdict; And it was agreed, that the Church was no otherwise discharged but by Non-payment; and so Nota, this Delay suffered in Scire Facias notwithstanding the Statute. Br. Aid del Roy, pl. 39. cites 38 E. 3. 18.

But for Cause of later Time he shall have Aid again. Br. Aid del Roy, pl. 3. cites 9 H. 6. 3.

4. A Man shall not have Aid of the King twice *for one and the same Cause*, per Paston. Br. Aid del Roy, pl. 3. cites 9 H. 6. 3.

(Y) In what Cases the Court *ex officio* ought to grant it.

Fitzh. Aid de Roy, pl. 1. S. cites S. C. —Br. Office del &c. pl. 1. cites S. C.

1. **If the Party will not speak of Aid Prayer, and it appears that it is in the Right of the King, the Court is not bound ex officio to grant Aid.** 3 H. 6. 6.

thus: Where it *appears that the Party has good Cause to have Aid*, and the Party does not pray Aid of the King, the Court is not bound ex Officio to grant to the Party Aid of the King, per Martin; Quod Nota for Law, & nemo dedixit.——If in Pleading it appears that the Aid is grantable of the King, and the Tenant does not pray it, yet the Court shall not proceed Rege Inconsulto. Br. Aid del Roy, pl. 92. cites 1 H. 7. 28 —— Br. Office del &c. pl. 18. cites 1 H. 7. 30. and 4 H. 7. 1. contra, that the Court ex Officio ought to cease till the Aid be had.

In *Trespass*, where it appears by Deed that a Lease is made to the Defendant for Life, the Remainder to the King, if the Tenant will not pray Aid of the King, the Court shall not proceed without making the King Party. Br. Aid del Roy, pl. 100. cites 9 H. 7. 15.——If it appears to the Court that the Tenant ought to have Aid of the King, but he does not pray it, yet the Court ex Officio ought to cease till the Aid be had. Br. Office del &c. pl. 18. cites 1 H. 7. 30. and 4 H. 7. 1. ——Cro. E. 417. pl. 12. S. P. Arg. and that when they do not the King may inforce them to it by his Writ, and that such a Writ has been awarded cites F. N. B. 154. 21 E. 3. 44. and 31 E. 3. Saver Default 27. but that those are in Real Actions, yet it may also be in Personal Actions where the King's Title appears to come in Question, and that so is 2 R. 3. 13.——Roll Rep. 208. Arg. cites 16 H. 7. 12. to have been adjudg'd in Trespass, that where the Interest of the King appears the Court ex Officio ought to stay it, and that so is 11 H. 4. 70. and 4 Eliz. Com. 243, 244. by Writ of Rege Inconsulto.

(Z) Counterplea.

Fitzh. Counterplea del Aid, cites 9 H. 6. 61. S. C.

1. **Not Parcel is no good Counterplea.** 9 H. 6. 62. **because this** shall not be tried without making the King Party. * 9 H. 6. 62. 43 Ass. 6. 20 E. 3. Aid 1. **per Wilby.**

Fitzh. Counterplea de Aid, pl. 9. cites S. C. & S. P. accordingly.

2. **In Trespass, if the Defendant** justifies as in Parcel of a Manor to him granted by the King, and makes a Title to the King to the Manor, **it is no good Plea for the Plaintiff to** say **that** the Action is brought for a Trespass done in another Part, **which is** not Parcel of the Manor, **for not Parcel or** Nient Comprise **is no good Counterplea of Aid.** 9 H. 6. 62.

3. If

3. If the Defendant in an Action ſhews Cauſe to have Aid, the Plaintiff ſhall not have any Traverſe to the Cauſe of taking. 28 H. 6. 4. Br Aid del Roy, pl. 8. cites S. C.

4. Nothing in the Reverſion is a good Counterplea of Aid. 12 H. 6. 1. b.

5. Nient Compriſe is no good Counterplea, for this ſhall not be tried without making the King Party. 21 E. 3. 19. b. 39 E. 3. 12. b. per Thorp. 25 E. 3. 42. b. adjudged. *32 E. 3. Aid 1. per Fiſſe, 25 E. 3. Aid del Roy, 72. adjudged. * Fitzh. Aid, pl. 1. cites Mich. 20 E 3. and ſo it ſeems it

ſhould be here, and that it is miſprinted.——If a Man has Patent of the King of certain Land, and Aſſiſe is brought againſt him of other Land, and he ſays that this Land is compriſed, and prays Aid of the King, he ſhall have Aid, and Nient Compriſe is no Plea. Br. Aid del Roy, pl. 10. cites 33 H 6. 2.——In Treſpaſs the Defendant ſaid, that the Place where is within the Foreſt whereof the King is ſeiſed in Fee, and that he is Foreſter of a Walk there by Patent, and the Place where is Parcel of the ſaid Walk, and demanded Judgment if Rege Inconſulto &c. The Plaintiff counterpleaded, that the ſaid Place where &c. was out of the Limits and Bounds of the Foreſt, and not within nor Parcel of the ſaid Walk &c. Several Caſes were cited Pro & Con. and Welſh and Weſton held the Counterplea not good, but Brown and Dyer e contra; and afterwards in another Term the Plaintiff's Counſel granted the Aid gratis. D 257. b. pl. 15. Hill. 9 Eliz. Smith v. Rigby.

6. [So] in an Aſſiſe, if the Tenant ſays that he has granted the Land by his Charter to the King, and ſo the King is ſeiſed, and prays of him. Nient Compriſe in the Charter is no Counterplea of Aid. 38 Aſſ. 16. S. P. Br. Aid del Roy, pl. 85. cites 8 Aſſ. 16. and ſo are all the

Editions of Brooke, but they all ſeem to be miſprinted, and that it ſhould be 38 Aſſ. 16. according to Roll.

7. So in an Aſſiſe, if the Tenant ſays that he has infeoffed the King of the Land, and ſo he is Tenant, and has a Writ to the Juſtices, certifying, that the King has purchaſed the Land of the Tenant, and prays Aid, it is no Counterplea that the Lands in Demand are other Lands. 38 Aſſ. 16. adjudged. And by ſome becauſe the Writ was Si ita ſit &c. therefore it ſhall be in-

quired by the Aſſiſe if theſe are the ſame Lands or not, and others e contra, and that Aid of the King ought to be granted. Br. Aid del Roy, pl. 85. cites 8 Aſſ. 16.

8. In an Aſſiſe of Land in Wincheſter, if the Tenant prays in Aid of the King becauſe he is a Fee-Farmer of the City of Wincheſter, of which this Land is Parcel rendring Rent, it is no good Counterplea for the Demandant to ſay that A. was ſeiſed of this Land at the Time of the Fee-Farm, and held it of the King rendring Rent, and that it continued after in the Hands of divers Burgeſſes, till the Demandant purchaſed it in Fee, to which the Tenant has put his Seal affirming the Purchaſe &c. for it ſeems this amounted only to this, that it is not compriſed within the Charter of the King. 43 Aſſ. 2. Curia. Br. Aid del Roy, pl. (88) 89. cites S. C. and the Opinion of the Court was, that the Aid was grantable, and therefore the Plaintiff was

nonſuited. Fitzh. Aid de Roy, pl. 92. cites S. C

9. In an Action, if the Defendant pleads the King's Grant by Patent to him, by which he ought to have Aid, and prays it, it is no good Counterplea for the Demandant to ſhew ſpecial Matter by which the King had no Eſtate to grant at the Time of the Grant, and ſo the Patent void, for the King's Patent ſhall not be avoided without making him Party. 39 E. 3. 12. b. adjudged by all the Juſtices. Roll Rep. 293. Arg. cites 37 H. 6. 32. S. P.

10. When one juſtifies in the Right of the King, a Man ſhall have no Traverſe to the Cauſe of the Taking. 28 H. 6. 4. per Priſot. Fol. 160.

S. P. Br. Aid del Roy, pl. 8. cites S. C.

11. As

Br. Aid del Roy, pl. 8. cites S. C.

11. As in Treſpaſs for taking his Goods, if the Defendant juſtifies for Damage feaſant in the Soil and Freehold of the King and his Bailiff, it is no good Counterplea for the Plaintiff to ſay, that he took them of his own Wrong &c. abſque hoc that he was the Bailiff or Servant of the King. 28 H. 6. 4 adjudged.

Br. Aid del Roy, pl 10. cites 33 H. 6. 2. S. C. but S. P of the Counterplea does not appear.

12. So in Treſpaſs for breaking his Cloſe, if the Defendant juſtifies for that the Place where &c. was the King's Foreſt, and he as Bailiff entered and repaired the Lodge &c. it is no Counterplea that he was not Bailiff. 33 H. 6. 3. per Priſot.

——Fitzh. Aid de Roy, pl. 26. cites S. C. and S. P. accordingly.——Br. Aid del Roy, pl 64. cites 37 H. 6. 32. contra, that where a Man *juſtifies as Bailiff of the King*, it is a good Plea that he *was not Bailiff at the Time of the Treſpaſs*.——Br. Counterple de Aid, pl. 27. cites 37 H. 6. 28. 32. accordingly.

13. If a Man *demands Judgment Rege inconſulto by Reaſon of the Ward of the Heir of him who was Patentee of the King in Tail*, it is no *Counterplea that after the Gift by Patent the Plaintiff himſelf recover'd the Land againſt the Father of the Infant*; quod nota, but ſhall ſue to the King by Petition. Br. Counterple de Aid, pl. 28. cites 22 Aſſ. 24.

Br. Aid del Roy, pl. 52. cites S. C.

14. A Man demands Judgment Rege inconſulto, becauſe the *King ſeiſed the Ward of the Land and Heir of this Tenant in the Writ of Entry, by Reaſon of Ward, and granted it to J. C.* it is no *Plea that the King did not ſeiſe, nor that the Lands are not compriſed in the Patent*; quod nota. Br. Counterple de Aid, pl. 14. cites 24 E. 3. 12 & 13.

15. If a *Parſon prays Aid* of the King, becauſe he is *in of his Preſentment*, it is a good *Counterplea that the Plaintiff is Patron, and was a Prior Alien, and the King ſeiſed his Temporalties in time of War*, and preſented, and after the King *reſtored him after the War* &c. For now the Cauſe of the Aid is determined. Br. Counterple de Aid, 6. cites 46 E. 3. 6.

16. In *Treſpaſs*, the *Defendant ſaid that the King by his Letters Patents granted to him the Land*, and pray'd Aid of the King &c. and the *other ſaid that the King had nothing at the Time of the Grant*, and upon this Iſſue taken, which was tried &c. and continued 12 Years in Petition. Br. Counterple de Aid, pl. 20. cites 4 H. 7. 7.

But in Aſſiſe if the *Tenant ſays that J. N. leaſed to him for Life*, the *Reverſion to the King*, and prays Aid of him, and the *other ſays that the King had nothing of his Leaſe*, this ſhall not be *tried* here, but *in the Chancery*. And this in Aſſiſe, and contra in Treſpaſs. Ibid.

17. In *Treſpaſs*, the *Defendant ſaid that he held of the King a Houſe and 4 Acres in D. as of his Manor of D. Parcel of his Dutchy of Lancaſter, at the Will of the King, according to the Cuſtom of the Manor, and cut Trees for Houſe-boote and Hay-boote, appendant to his Tenement.* Per Chocke, he *held nothing at the Will of the King at the Time of the Treſpaſs.* And the Opinion of the Court was, that it was a good Plea to ouſt the Defendant of the Aid of the King in B. R. the ſame Year. Br. Aid del Roy, pl. 64. cites 37 H. 6. 32.

Br. Counterple de Aid, pl. 13. cites 15 H. 7. 10. S. P. and by Read the Counterplea is good, but Frowike demurr'd.

18. In *Treſpaſs*, the Defendant *ſaid that E. Biſhop of L. was ſeiſed and leaſed to the Defendant according to the Cuſtom of the Manor* &c. *by Copy, and after* the Biſhop *was tranſlated to E.* by which the *Temporalties came into the Hands of the King, and remain there* yet, and pray'd Aid of the King. Per Cur. you ſhould ſay *Judgment, if Rege inconſulto*, and *not pray Aid*, and then the Opinion of the Court was that it is a good Plea, and he ſhall ſue to the King; wherefore the *Plaintiff ſaid that this is other Land, and not the Land leaſed*, and a good Counterplea per Read J. And per Cur. in this Caſe the Defendant *need not give Colour* when he prays Aid, contra if in Bar. Br. Aid del Roy, pl. 67. cites 21 H. 7. 43. (in the old Book.)

(A. a) In what Caſes it ſhall be granted, *for all or Part.*

1. IN a Writ of Dower againſt four of the third Part of a Manor, if they ſay they hold four Parts jointly, and two of them hold the fifth Part of the Grant of the King, ſo long as the Land remains in the Hands of the King, by Reaſon of the Forfeiture of one who held jointly with the fourth, **becauſe the fifth Part is not ſevered from the four Parts they ſhall have Aid of the King for the Whole, becauſe if the Demandant recovers, ſhe ſhall have** Execution per Metas &c. **And it is not reaſonable that a Severance ſhould be without the King.** 12 H. 4. Aid del Roy 47.

2. **In a Writ of Dower,** if the Tenant vouches the Heir in Ward of the King and others, **the other ſhall not anſwer till he hath ſued to the King.** 12 H. 4. Aid del Roy 47. per Herle. See 2 Inſt. 271. the laſt Parag. on the Stat. de Bigamis, cap. 3.

(B. a) Entry, Proceedings, Pleadings &c.

1. IN *Aſſiſe*, the Tenant came by *Bailiff*, and *ſaid that the Tenements are ſeiſed into the Hands of the King for Alienation of his Tenant without Licence*, and demanded *Judgment Rege inconſulto* &c. if &c. Nul tort. And *the Eſcheator* being preſent was *examined* and *confeſſed it*, and *that he by Warrant ſeiſed it*, wherefore the Court ſaid, ſue to the King, and ſo he did, and brought Procedendo ſi illa de Cauſa & non alia ſecta fuit, procedatur, but non ad judicium. And now the *Tenant ſhewed Deed of Warranty of the King*, and pray'd Aid of the King, and the Deed bore *Date meſne between the Original of the Aſſiſe and the Writ of Procedendo.* And the beſt Opinion was that he ſhall not have Aid. Br. Aid del Roy, pl. 72. cites 22 Aſſ. 5.

2. In Aſſiſe it is ſaid that after the *Plaintiff is put to ſue to the King for Aid of the King granted to the Tenant*, or the like, there the *Procedendo* ad captionem Aſſiſæ or ad judicium, *ought to accord with all Pleas and Originals, and of Tenants and of Manors.* Br. Procedendo, pl. 7. cites 22 Aſſ. 28

3. In *Aſſiſe*, it is no Plea *that the Tenements were ſeiſed into the Hands of the King*, Judgment &c. but *ſhall ſay that they ſtill remain in the Hands of the King*, and becauſe the Eſcheator, nor Sheriff, nor Serjeant was not preſent there, this ſhall be inquired by the Aſſiſe, per Stouf, and ſo it was, nota. Br Aid del Roy. pl. 76. cites 26 Aſſ. 10.

4. In *Aſſiſe*, the *Tenant ſhew'd Charter which will'd that King Richard the firſt conceſſit & dimiſit to B. and his Heirs* ſuch a Tenement *to hold by certain Services*, and ſo held of the King, and pray'd Aid of the King. Thorp ſaid here is *no Dedi nor Warranty*, therefore he ſhall not have Aid. Skip ſaid the natural *Concluſion* had been *Rege inconſulto*, and not to have pray'd Aid of the King; and after all the Juſtices gave Day before themſelves at Weſtminſter 15 Paſch. and interim ſequatur verſus Regem. Thorp ſaid there is a great *Diverſity* between *Aid Prayer* of the King *and Rege inconſulto*, for in Aid Prayer he ought to ſpeak with the King himſelf, and in the other Caſe not. Br. Aid del Roy, pl. 78. cites 28 Aſſ. 39.

5. In Aiſſiſe of a Corody *after Aid* of the King had, the Tenant was not received to *plead Variance in the Plaint and the Specialty*. Thel. Dig. 208. lib. 14. cap 8. S. 1. cites 29 Aſſ. 55.

6. *Præcipe quod reddat*, the Tenant *pray'd Aid* of the King *by a Gift in Tail*, the *Reverſion to the King*, and the Aid granted and *Suit* thereof *ſhall be in the Chancery*, and the *Warranty ſhall be tried*, and then they *ſhall plead to the Iſſue there*, and then ſhall be *remanded into Bank to try the Iſſue*, and *in the mean Time Superſedeas ſhall go to the Bank* that they ſhall not proceed till *Procedendo ad Capiendum Inquiſitionem*. Br. Aid del Roy, pl. 38. cites 38 E. 3 14.

Kelw. 157. b. Mich. 2 H. 8. Arg. ſays this Statute is only an Affirmance of the Common Law.

7. 1 *H.* 4. *cap.* 8. *A ſpecial Aſſiſe is maintainable by the Diſſeiſee for ſuch Lands as are granted by the King's Patent without Title firſt found by Inqueſt for the King, without Suit to be made to the King in that Behalf, and if the Patentee pray in Aid of the King, a* Procedendo *ſhall be alſo granted without Suit.*

Thel. Dig. 208. lib. 14. cap. 8. S. 3. cites Trin. 2 H. 4. 25. S. P. accordingly.

8. In Formedon the *Tenant pray'd Aid of the King*, and *after pleaded in Abatement of the Writ*, that the Demandant had made *Omiſſion of a Deſcent in one who held Eſtate*, and the Demandant was compell'd to anſwer to his Challenge after the Aid. Quod nota. Br. Brief, pl. 97. cites 2 H 4. 19.

9. *Scire Facias*, becauſe the *Plaintiff himſelf had been in Poſſeſſion by Force of Letters Patents of the Gift of the King, by which he claimed*, and the Tenant *demanded Oyer* of the Letters Patents, and was ouſted thereof, becauſe the Plaintiff had been in Poſſeſſion, and the *Action is of his proper Seiſin*. Br. Oyer de Records, pl. 34. (bis) cites 7 H. 4. 40.

10. Where a Man prays *Aid of the King, by reaſon of Land ſeiſed into the King's Hands*, this ſhall be warranted by ſhewing the Record of it, unleſs it be in Aſſiſe or the Exchequer. Br. Monſtrans, pl. 35. cites 11 H. 4. 83.

Br. Aid, pl. 52. cites S. C. —— Br. Procedendo, pl. 4 cites 11 H. 4. 86. S. P.

11. Per Thirne, firſt upon Aid of the King *Procedendo in Loquela* ſhall go, and after Procedendo *ad Judicium*. Br. Aid del Roy, pl. 32. cites 11 H. 4. 85.

12. Note, by all the Clerks, that if the Tenant prays Aid of the King *to have Recompence upon Warranty, or for Feebleneſs of his Eſtate*, the the Entry in the Roll is all one. Br. Aid del Roy, pl. 3. cites 9 H. 6. 3.

13. *But* per Cott. *where* the Tenant upon his Aid *demands Judgment*, if Rege Inconſulto, it is always for the Feebleneſs of Eſtate. Ibid.

Br. Garranties, pl. 2. cites 9 H. 6. 4 S C. & S. P. —— Br. Voucher, pl. 6. cites S. C.

14. Where a Man prays Aid of the King *by Cauſe of the Warranty*, or Clauſe of the *Recompence*, and he is impleaded, and *prays Aid* of the King for ſuch Cauſe *in Lieu of the Voucher*, the Special Matter ſhall be enter'd, and otherwiſe he ſhall never have Recovery in Value by Petition, by all the Clerks. And ſo ſee that *his Recovery in Value ſhall be by Petition*; and the beſt Opinion there was, if the Tenant prays Aid of the King, that after Procedendo he ſhall not vouch a Stranger. Br. Aid del Roy, pl. 3. cites 9 H. 6. 3.

15. The Party's Aid-Prayer is where it is for his Advantage to have in Value, and then this ought to be *ſpecially enter'd* in the Courſe of his Aid-Prayer, or *otherwiſe he ſhall not have in Value*, 9 H. 6. 4. Sometimes for *Feebleneſs of the Party's Eſtate* to plead (or pray) it, and then, per Cott. the Entry is, Judgment &c. ſi Rege Inconſulto. F. N. B. 153. (F) in the new Notes there (b)

16. If

16. If any Man prays in Aid of the King *in a Real Action*, and the Aid be granted, it ſhall be *awarded that he ſue unto the King in the Chancery*, and the *Juſtices in C. B ſhall ſurceaſe, untill the Writ of Procedendo in Loquela comes unto them* &c. and then they may proceed in the Plea ſo far on till they ought to give Judgment for the Plaintiff, and then the Juſtices ought not to proceed to Judgment, till the Writ comes to them to proceed to Judgment, which is called a Writ de Procedendo ad Judicium; and the ſame of a Perſonal Action. F. N. B. 153. (E)

The Engliſh Edition cites in Marg. 9 H. 6. 12. 13.— If the *Tenant in a Præcipe prays Aid* of the King, by reaſon of the *Warranty*, the Warranty *ſhall be tried in the Chancery, and a Writ ſhall be ſent into C. B. to take the Inqueſt*; *but* if they plead *in Chancery*, and there *it appears that the Demandant has Right*, the King ſhall have a Writ to C. B. reciting the Matter, and commanding them to ſuperſede &c. becauſe *Judgment ſhall be there given Quod Tenens eat inde ſine Die.* F. N. B. 153. (E) in the new Notes there (a) and cites 38 E. 3. 14. And per Thorpe, the Right ſhall not be tried in Chancery, but in Caſe where the King has the Reverſion the Parſon may, but does not pray in Aid &c. cites 38 E. 3. 19. And therefore if the King has a Releaſe of the Annuity, and pleads it, it ſhall not be brought into Chancery; for the Aid is granted only to maintain or ſupport the Parſon, although he pleads, cites 19 H. 6. per Newton; and ſays ſee 13 H. 4. 3.

17. If the *Cauſe* of Aid-Prayer of the King is *inſufficient*, the Plaintiff in his *Replication* thereto *ſhall pray that he be ouſted of the Aid, and* ſhall *not pray Seiſin* of the Lands in Præcipe quod reddat, nor Writ to the Biſhop in Quare Impedit. Br. Aid del Roy, pl. 6. cites 9 H. 6. 56.

18. *Scire Facias againſt the Succeſſor of a Parſon upon Arrearages of Annuity recover'd againſt the Predeceſſor*, who *ſaid that Queen E. was ſeiſed of the Manor of S. to which the Advowſon is appendant, of the Dowment of King H. and preſented this ſame Defendant diſcharged* &c. the *Reverſion to the King*, and pray'd Aid of the King and Ordinary, and had it; and he was compell'd to *ſhew in what manner and where* the Queen was endow'd, and ſo he did. Quod nota; for it is now Part of his Title. Br. Aid del Roy, pl. 44 cites 19 H 6. 2.

19. In Scire Facias *againſt a Parſon upon Recovery of Annuity*, the *Defendant pray'd Aid of the King, Patron, and of the Ordinary*; and it was doubted if Proceſs ſhall iſſue *againſt the Ordinary before Procedendo*; for where they come they ſhall not plead without the Parſon, and ought to join. Br. Proceſs, pl 61. cites 19 H. 6. 5.

20. In *Treſpaſs* the Defendant pray'd Aid of the King, the Plaintiff may counterplead it; but in *Aſſiſe* e contra; for there he ſhall not be counterpleaded, but in the Chancery, and not in Bank. Note a Diverſity. Br. Counterple de Aid, pl. 18. cites 37 H. 6. 32.

21. Note per Fitzherbert J. clearly, that where a Man prays Aid of the King *in Treſpaſs, or other Action in Bank*, and ſhews Cauſe as he ought, the Plaintiff or Demandant *ſhall not have Traverſe to it there*, but *ſhall anſwer* to it *in the Chancery*, and if the Cauſe be there diſproved, he ſhall have *Procedendo.* Br. Counterplea de Aid, pl. 1. cites 27 H. 8. 28.

22. Upon the Aid Prier, or Writ, *the Award is Quod tenens ſive Defendens ſequatur penes Dominum Regem*, and the Tenant or Defendant *ought to remove the Record into the Chancery*, and in the Caſe of the Aid Prier the *Plea is not put without Day.* 2 Inſt. 269.

For more of Aid of the King, See **Aid of a Common Perſon, Rege inconſulto,** and other proper Titles.

Fol. 161.

Aid of a common Perſon.

(A) Aid. * In what Actions it lies.

* Aid-Prayer *is the Suit of the Tenant*, with which the Demandant has nothing to do. Br. Voucher, pl. 96. cites M. 14 E. 3. per Wilby.

1. AID lies in an Ejectione Firmæ for the Defendant, when the Title of the Land is to come in Queſtion. Paſch. 3 Jac. B. R. adjudged.

See Aid of the King (A) pl. 13. S. C.—(O) pl. 5. S. P.

* But contra if Defendant *intitles himſelf to Eſtate for Life*; for then he has Franktenement, *which is ſufficient to plead in this Action*; for by Treſpaſs no Franktenement ſhall be recovered. Br. Aid, pl. 85 cites 22 H. 6. 19.——Br. Aid del Roy, pl. 47. cites 22 H. 6. 17.

2. * Aid ſhall be granted to the Defendant in a Writ of Treſpaſs, for he is to be charged with Damages in this Writ. † 6 E. 4. 2. b. ‡ 13 H. 7 26. b. || 22 H. 6. 18. As it in Treſpaſs the Defendant ſays that he is Leſſee for Life of the Plaintiff who is a Villein, the Reverſion to B. he ſhall have Aid. ¶ 45 E. 3. 1. b. 33 E. 3. Aid del Roy 105. adjudged.

† Br. Aid, pl. 127. cites S. C. accordingly, but the Plaintiff ſhall not have Aid in Treſpaſs, per tot. Cur. ‡ Br. Aid, pl. 148. cites S. C. || Br. Forcible Entry, pl. 6. cites 22 H. 6. 17. S. C.——Fitzh. Aid de Roy, pl 23. cites S. C. ¶ Br. Aid, pl. 32. cites S. C accordingly.

Aid in Treſpaſs is *only to maintain the Iſſue*, and not to anſwer. Br. Aid, pl. 45. cites 8 H 4. 17. per Hulls.

S. P. if only one of them is named. Contra if Both are named Br. Aid, pl. 32. cites S. C.

3. So if the Defendant juſtifies as Bailiff to the Lord of a Town. 45 E. 3. 1. b.

S. P. Br. Aid, pl 43. cites S. C.

4. So if he juſtifies as Tenant at Will of B. 7 H. 4. 31. b.

5. In Treſpaſs, if the Iſſue be upon the Right, the Leſſee for Life being Defendant, ſhall have Aid of him in Reverſion. 22 H. 6. 18.

Contra Formam Collationis againſt an Abbot ſuppoſing that his Predeceſſor had alien'd, and the Scire Facias againſt the *Tertenants*, who came and *ſhewed that their Anceſtor died ſeiſed*, and he had this Land in Partition by Deſcent, and prayed Aid of his Coheir, and that the Parol demur for his Nonage, and the Opinion of ſome was that the Aid lies, but not the Age. Br. Aid, pl. 36 cites S. C.

6. If a Man recovers in a Contra Formam Collationis in [and brings] a Scire Facias, againſt Tenant by the Curteſy, being Tertenant, to execute this Judgment, he ſhall have Aid of the Heir in Reverſion. 2 H. 4. 16. b.

Scire Facias againſt the *Tertenant*, and he prayed Aid of him in *Reverſion*, and had it; Quod Nota. Br. Aid, pl. 20. cites 40 E. 3. 18.

* Fitzh. Aid, pl. 96. cites S. C.—S P *But* the Plaintiff *in Replevin* ſhall have Aid, for Return ſhall be awarded againſt him, and ſo he ſhall be charged, but the Plaintiff ſhall not be charged in Treſpaſs;

7. The Plaintiff in an Action of Treſpaſs ſhall not have Aid of him in Reverſion. As in Treſpaſs, if the Defendant pleads in Bar, and the Plaintiff traverſes the Bar, upon which they are at Iſſue, and the Plaintiff ſays that he is Leſſee for Years, the Reverſion to A. yet he ſhall not have Aid of A. 6 E. 4. 2. b. adjudged. * 5 H. 7. 16. b.

Treſpaſs; and a ſo after Avowry the Defendant is become Actor, and the Plaintiff is become Defendant. Br. Aid, pl. 127. cites S. C.—— Fitzh. Aid, pl. 86. cites S. C.

8. In a Ceſſavit againſt a Vicar or Parſon, he ſhall have Aid of the Patron and Ordinary. 21 E. 3. 55. b. Fitzh. Aid, pl. 55. cites S. C.—Ibid. pl. 182. cites S. C.———See (X) pl. 27. 37. S. C.

9. So Aid lies, tho' it be of his own Ceſſer. 22 E. 3. 3. adjudged. Fitzh. Aid, pl. 3 cites S. C.

10. [But] in a Ceſſavit againſt a Layman of his own Ceſſer, he ſhall not have Aid. 28 E. 3. 96. adjudged. 32 E. 3. Aid 42. adjudged. Fitzh Aid, pl. 13. cites S. C. The Tenant prayed Aid of him in Remainder, and was ouſted by Award, becauſe it was of his own Tort.

11. In an Attaint againſt Tenant in Dower of the Aſſignment of the Heir, he ſhall have Aid of him in Reverſion. 30 E. 3. Aid 36. S. P. Br. Aid, pl. 25. cites 42 E. 3. 26.

12. Aid lies in an Attaint, tho' there be Danger by the Death of the Jurors. * 40 Aſſ. 20. adjudged. 30 E. 3. Aid 36. * Fitzh. Aid, pl 158. cites S. C. — Br. Aid, pl. 111. cites S. C.———See (I) pl. 20. S. C.

13. In an Aſſiſe no Aid ſhall be granted. 3 H. 4. 14. b. * 1 H. 7. 29. b. of one that is not Party to the Writ. * Fitzh. Aid de Roy, pl. 32 cites S. P ——See Hill. 1 H. 7. 28. S C ——See (Q.) pl. 16. S. C.——Br. Aid, pl. 111. cites 40 Aſſ. 20. Aid of the King, pl. 7.——In Writ of *Entry in Nature of Aſſiſe* Aid lies, tho' it lies not in Aſſiſe. Br. pl 123. cites 4 E. 4. 14

14. So in an Attaint upon a Verdict in an Aſſiſe, becauſe it is of the Nature of the Aſſiſe. 3 H. 4. 14. b. Contra * 40 Aſſ. 20. adjudged 30 E. 3. Aid 36. * Br. Aid, pl. 111. cites S. C and that tho' Aid ſhould not be granted in the Aſſiſe, yet it lies in the Attaint upon a falſe Verdict given in the Aſſiſe.—Fitzh. Aid, pl 158. cites S. C.———See (I) pl. 20. S. C.

15. In a Secta ad Molendinum in the debet & ſolet of his own Subſtraction, and upon a Seiſin by the Hands of the Defendant himſelf, yet if the Preſcription be traverſed, and ſo the thing to be tried in the Right, the Defendant, being Leſſee for Life, ſhall have Aid of Leſſor. * 17 E. 3. 65. becauſe the Suit is in the Right. 13 E. 3. Aid 36. adjudged, but there is no Traverſe that appears. * Br. Aid pl. 55. cites S. C. and Fitzh tit. Counter. de Aid 3.

16 The ſame Law of Tenant by the Curteſy and Tenant in Dower. 13 E. 3. Aid 36. adjudg'd. Fol 162.

17. In a Quod permittat Villanos facere ſectam ad molendinum againſt one Coparcener, he ſhall have Aid of her Companion, tho' this is of her own Subſtraction. 18 E. 3. 56. adjudged.

18. If a Parſon be preſented for Subſtraction of the Alms of an Hoſpital of the King's Foundation, he ſhall have Aid of the Patron, tho' this be of his own Subſtraction. 25 E. 3. 54. adjudged. Fitzh. Barre, pl. 288. cites Mich. 25 E. 3. 50 S. P.

19. In a Writ of Intruſion, ſuppoſing the Tenant himſelf to have abated, if the Tenant ſays that he is Tenant for Life, yet he ſhall not have Aid of him in Reverſion, becauſe this is of his own Wrong. 3 E. 2. Aid 162. adjudged.

20. If the Grantee of a Rent-Charge brings a Writ of Reſcous againſt the Tenant for Life, he ſhall not have Aid, becauſe he ſhall not recover the Rent but Damages for the Reſcous. * 2 H. 6. 8. But otherways it is in Replevin. 2 H. 6. 8. * S. P. Br. Aid pl 4. cites S. C.

Br. Aid pl 4. cites S. C but not S. P.

21. If a Tenant leaſes for Life, the Remainder in Fee, and the Executor of the Lord brings Debt againſt the Leſſee for the Arrearages of Rent, (admitting it lies) he ſhall have Aid of the Remainder. 2 H. 6. 8 b.

* S. P. if it be not in Lieu of Voucher; for otherwiſe nothing ſhall be recover'd but the Preſentment.

22. No Aid lies in a Quare impedit, becauſe this is brought of his own Wrong, and alſo for the Miſchief of the Lapſe incurring in the mean Time. * 5 H. 7. 16. Curia. † 9 H. 7. 15. b. Curia. ‡ 21 H. 7. 21. adjudged.

Br. Aid del Roy, pl. 97. (96) cites S. C.——Fitzh. Aid, pl. 96. cites S. C. † Br. Aid, pl. 120. cites S. C

S. P. And alſo the Action is only perſonal, in which a Man ſhall not have Aid before Iſſue joined, as in Treſpaſs. But Brooke ſays that Quare Impedit is a mix'd Action, as appears elſewhere. Br. Aid, pl 101. cites ‡ S. C.

Fitzh. Aid pl. 96. cites S. C. for no Patronage ſhall be recover'd in Aſſiſe of Darrein Preſentment, any more than in Quare Impedit.

23. So Aid lies not in an Aſſiſe of Darrain Preſentment for the Cauſe aforeſaid. 5 H. 7. 16. b.

S. P. Br. Aid, pl. 113. cites S. C. —— Fitzh. Aſſiſe, pl. 349 cites S. C.

24. If a Writ of Error be brought againſt Tenant in Dower of him that recovered, ſhe ſhall have Aid of him in Reverſion. 42 Aſſ. 22. adjudged.

25. If Land be limited by Fine to J. S. for Life, the Remainder to another in Tail or in Fee, and J. S. recovers in Scire Facias againſt the Tenant by Default, and the Tenant brings a Writ of Error againſt J. S. he ſhall not have Aid of him in Remainder, becauſe this Writ is brought to reverſe a Judgment after the Eſtate limited; to which Judgment J. S. was only Party. 20 E. 3. Aid 29. adjudged.

So in *Scire Facias upon a Recovery* in Writ *of Annuity*, the Defendant ſhall have Aid *of the Patron and Ordinary*, and yet Eſſoin does not lie for the Patron and Ordinary at the Day of Summons Ad Auxiliandum by Reaſon of the Stat. of W. 2. cap. 45. which outſts Delays in Scire Facias Br. Aid, pl 107. cites 39 H. 6 50.

26. In a Writ of Scire Facias to execute a Judgment given in a Writ of Nuiſance againſt J. for the levying a Gorce. Where it was adjudged that this ſhould be abated, tho' this Scire Facias be only to execute the Judgment, yet the Defendant being Leſſee for Life, ſhall have Aid of J. S. in Reverſion. 33 E. 3. Aid del Roy 107. adjudged.

27. If a Man recovers in an Ejectione Firmæ againſt J. S. who dies, in a Scire Facias againſt his Heir, the Heir ſhall have Aid of him under whoſe Title his Anceſtor claimed. Paſch. 3 Jac. B. R. between *Carter and Claypoole* adjudged.

(L) pl. 3. 28. In a Writ of Partition between two Coparceners no Aid lies, becauſe nothing is demanded thereby but a Partition. H. 37. El. B. Curia.

(L) pl. 3. 29. So in a Writ of Partition between two Tenants in Common (by the Statute) no Aid lies no more than in Partition between Coparceners. H. 37 El. B. Curia.

30. In *Mortdanceſtor* the Tenant *vouch'd J. who* enter'd *and pray'd Aid of A. one of the Demandants*, and *ſhew'd Cauſe, and pray'd that the Parol demur for his Nonage*; and by 3 of the Juſtices, if the Parol demurs it ſhall demur for the Whole; for Aſſiſe of Mortdanceſtor ſhall not be taken by Parcels, by which he, of whom the Aid was pray'd, was *ſummon'd and ſever'd, and was nonſuited*, and the Aid *counterpleaded for the other two Parts*. Quod nota bene. Br. Age, pl. 39. cites 40 Aſſ. 37.

Br. Aid, pl. 149. cites S. C. that

31. In *Quo Warranto* he claimed a Leet in his Manor of D. The Defendant ſaid that he *held the Manor of the Leaſe of P. for Life*, and pray'd Aid

Aid of him, and had it, and yet he *might have vouch'd P.* Br. Quo Warranto, pl. 1. cites It. Nott. fol. 2.

Aid was granted of him in Reverſion.—— In Quo Warranto a Man ſhall have Aid, and vouch. Br. Franchiſes, pl. 26. cites 20 E. 4. 5. by Briggs.

(B) In what Caſes it lies, in reſpect of the *Thing* demanded.

Fol. 163.

1. IN a Replevin, if the Defendant avows upon a Stranger for a Rent-Service, the Plaintiff, being his Leſſee for Life, ſhall have Aid of him, becauſe he can plead only Hors de ſon Fee, without the other. 22 H. 6. 34.

In *Replevin* the Defendant *avowed upon a Stranger.* The *Plaintiff ſaid that he held certain Land for Life, of which the Land where he avows is Parcel*, the *Reverſion to another Stranger*, and pray'd Aid of him, and had it; for he cannot charge the Land which he holds, and it may be that the Prayee, when he comes, may abate the Avowry, and compel him to avow upon him for the Services, as by Tender of the Services, by reaſon of the Feoffment made to him, or in other manner &c. Trin. 7 H. 4. 18. b. pl. 21.——Br. Aid, pl. 42 cites S. C.

In *Replevin* after *Avowry upon a Stranger* to the Replevin [for Homage, Fealty, and Rent-ſervice &c.] the Plaintiff, who was a Stranger to the Avowry, *ſaid that the Baron and Feme, upon whom the Avowry was made, leaſed to him for Term of Life*, and pray'd Aid of them, and well, per Curiam. Br. Aid, pl. 31. cites 44 E. 3. 41.

In Replevin *in Avowry*, or in *Conuſance for a Rent-Charge*, the *Tenant for Life of the Land of the Plaintiff in the Replevin* had Aid of the Leſſor. Br. Aid, pl. 81. cites 22 H. 6. 41.

So where the Avowry was *upon him in Reverſion for Rent Service, where the Tenant for Life is a Stranger to the Avowry*; for tho' in a Rent-Charge the Tenant may plead in Diſcharge of the Land, yet if the Chargee *releaſes to him in Reverſion*, the Tenant for Life cannot plead this without having the Deed, by which he had the Aid. Ibid.

2. So in an Avowry for a Rent-Charge, the Plaintiff being Leſſee for Life, ſhall have Aid of him in Reverſion for the Feebleneſs of his Eſtate to plead in Diſcharge of the Land. * 22 H. 6. 33. b. adjudged, 41. † 6 E. 4. 3. Contra ‖ 8 E. 4. 23.

* Fitzh. Aid, pl. 74. cites S. C. and perhaps the Prayee may diſcharge all the Land.——

† S. P. Tho' the Avowry was for a Rent-Charge, and made upon no Perſon certain, and notwithſtanding that the intire Manor was charged, and that 3 Acres only, Parcel thereof, were charged. Br. Aid, pl. 86 cites 22 H. 6. 33.

† Ibid. pl. 128. cites 6 E. 4. 3. S. P. per Cur. without Privity; for Avowry for a Rent-Charge is not made upon any Perſon certain. Quere of Rent-Service, and therefore there ſhall be Privity. Brooke ſays, but it ſeems all one at this Day, if he avows upon the Land for Rent-Service, by the Statute 21 H. 8.—— Fitzh. Aid, pl. 81. cites S. C.

‖ Fitzh. Aid, pl. 91. cites 8 E. 4. 33.

3. So in an Avowry for a Rent-Charge, if the Plaintiff ſays he hath nothing in the Land, but in the Right of his Wife, he ſhall have Aid of his Wife. 13 H. 4. 4. And 176. adjudged.

4. If a Writ be brought againſt another to demand a Rent, the Defendant, being Leſſee for Life, ſhall have Aid of him in Reverſion. 8 R. 2. Aid del Roy 114. Curia.

5. In a Writ of Entry for Diſſeiſin of a Rent, the Tenant, being Leſſee for Life of the Land, ſhall have Aid of him in Reverſion. 12 R. 2. Aid 124. adjudged, who leaſed to him the Land diſcharged.

6. The ſame Law in a Scire Facias out of a Fine to execute a Rent. 13 R. 2. Aid 126. adjudged.

6. In a Scire Facias out of a Fine of a Rent-Charge, the Tenant being Leſſee for Life of the Land, out of which this iſſues, ſhall have Aid of him in Reverſion. 13 R. 2. Aid 126.

8. The

8. The ſame Law is of a Rent-Service. 13 R. 2. Aid 126. Per Kirkel.

9. In an Avowry for a Rent granted for Equality of Partition, the Leſſee for Life of the Land, whence this iſſues, ſhall have Aid of him in Reverſion. 17 E. 3. 33. b.

See (Q.) pl. 19. S. C. 10. In a Scire Facias to execute a Recognizance againſt the Tertenant, who is but Tenant for Life, he ſhall have Aid of the Heir of the Recognizor in Reverſion; for altho' if the Plaintiff recover, this ſhall not bind the Reverſion, yet he may be diſturbed of his Poſſeſſion after the Death of the Leſſee, which will be a Damage to him, and he in Reverſion may have a Releaſe or Acquittal to diſcharge the Execution, which the Leſſee hath not. 8 R. 2. Aid del Roy 114. But there by the Judgment he was ouſted of Aid, it ſeems becauſe he in Reverſion was Party to the Writ; but it is not mentioned wherefore the Judgment was.

11. In a Formedon of a Rent, one Coparcener ſhall have Aid of the other. 8 R. 2. Aid del Roy 115. adjudged.

(C) In what Caſes it ſhall be granted, contrary to the *Suppoſal of the Writ.*

Br. Aid del Roy, pl. 16. cites S. C.— Fitzh. Aid de Roy, pl. 56. cites S. C. 1. IN Treſpaſs for Land in one Vill, if the Defendant ſays that it is in another Vill, and ſhews the Cauſe of Aid, yet he ſhall have it, tho' contrary to the Suppoſal. 45 E. 3. 3.

Br. Aid del Roy, pl. 16. cites S. C.— Fitzh. Aid de Roy, pl. 56. cites S. C 2. The ſame Law in an Aſſiſe, without taking the Aſſiſe in what Vill the Tenements are. 45 E. 3. 3.

3. In a Writ of Entry ſur Diſſeiſin of a Rent, the Tenant being Leſſee for Life of the Land out of which &c. ſhall have Aid of him in Reverſion. 12 R. 2 Aid 124. adjudged.

* Br. Aid, pl. 100. cites S. C. by Candiſh, obiter. 4. In an Aſſiſe the Tenant ſhall not have Aid of one who is a Stranger to the Suppoſal of the Writ. * 14 H. 6. 22. b. † 9 H. 5. 13. b.

† Fitzh. Aid, pl. 101. cites S. C.

Fol. 164. * Br. Aid, pl. 100. cites S. C.—S. P. by all the Court. Br. Aid, pl. 100. cites S. C. 5. In a Writ of Entry in Nature of an Aſſiſe, if the Tenant ſays he holds for Life, the Reverſion to N. who is a Stranger to the Suppoſal of the Writ, yet he ſhall have Aid of him. * 14 H. 6. 22. b. Curia. 21 E. 4. 15 b. 50. b. 12 R. 2. Aid 122. admitted. Contra 2 E. 3. 63. adjudged.

† S. P. ibid. pl. 137. cites S. C.—Fitzh. Aid, pl. 94.

Fitzh. Aid, pl. 101. cites S. C. 6. So in a Writ of Entry in Nature of an Aſſiſe againſt a Parſon, he ſhall have Aid of the Patron and Ordinary, becauſe it is contrary to the Suppoſal of the Writ, tho' he claims but an Eſtate for Life, and ſays that the Reverſion is over to the Biſhop, who is Patron and Ordinary. 9 H. 5. 13. b. adjudged.

Fitzh. Aid, pl. 55. & 7. In a Writ of Entry of a Diſſeiſin to his Father againſt a Parſon or Vicar

Vicar, if the Tenant ſays he found the Vicarage ſeiſed, he ſhall have Aid of the Patron and Ordinary, for he ſhall not be ouſted of his Aid by a falſe Suppoſal. 21 E. 3 55. b. 182. cites S. C.

8. But otherwiſe it is if he found not the Vicarage ſeiſed, for there he ſhall not have Aid againſt the Suppoſal of the Writ. * 21 E. 3. 55 b. † 22 E. 3. 9 b. * Fitzh. Aid, pl 55. & pl. 182 cites S. C. — † Fitzh. Aid pl 4. cites S. C.

9. But if he ſays that his Predeceſſor died ſeiſed, and that the Anceſtor of whoſe Seiſin the Demandant demands in the Time of Vacation abated, and of ſuch Eſtate continued ſeiſed till he himſelf was Parſon, and he enter'd &c. he ſhall have Aid. 22 E. 3. 9. b. adjudged. Fitzh Aid, pl. 4. cites S. C.

10. In a Cui in Vita, ſuppoſing the Entry of the Tenant by J. to whom the Baron leaſed &c. if the Tenant ſays that R. leaſed this to him for Life, and prays in Aid of J. N. his Heir, to whom the Reverſion does now belong, he ſhall have it, tho' this be againſt the Suppoſal of the Writ. 18 E. 3. Aid 149. adjudged. Fitzh. Aid, pl 140 cites Paſch. 18 E. 3. S P. and ſeems to be S. C. and that Roll is printed.

11. [So] in a Cui in Vita where the Entry of the Tenant is ſuppoſed by the Huſband, if the Tenant ſays that A. leaſed to him for Life, and granted the Reverſion to B. to which he attorned, he ſhall have Aid of B. tho' it be againſt the Suppoſal of the Writ, for he does not plead this in Abatement of the Writ. 22 E. 3. 17. adjudged. Fitzh. Aid, pl. 5 cites S. C.

12. In a Writ of Entry ſur Diſſeiſin done to his Father, ſuppoſing the Entry of the Tenant by B. who diſſeiſed &c. the Tenant may ſay that R. leaſed to him for Life, and pray in Aid of him, [in this Caſe] he ſhall have it, tho' this be contrary to the Suppoſal of the Writ. Contra 20 E. 3. Aid 31.

13. [So] in a Writ of Entry ſur Diſſeiſin of a Diſſeiſin done to his Father by the Tenant, if the Tenant ſays that he is Leſſee &c. the Reverſion to J. S. he ſhall have Aid of him, tho' it be againſt the Suppoſal of the Writ. 9 H. 5 14. ſaid to be adjudged before Thirning in 11 R. 2 11 R. 2. Aid adjudged, per Belknap. I cannot find this in the Year-Book.

14. In a Formedon of a Gift made by E. 3. if the Defendant ſhews a Gift made by E. 2. the Father of E. 3. and ſo conveys it to her and other Coparceners, and that Partition is made between them, ſhe ſhall have Aid of her Coparceners, tho' the Plea is contrary to the Suppoſal of the Writ, for the Court ſhall grant it tho' the Plaintiff himſelf cannot without abating his Writ. 29 E. 3. 28. b. adjudged.

15. In a Writ of Dower againſt 2, they may ſay that they are Coparceners &c. and made Partition, and one ſhall have Aid of the other, tho' the Writ ſuppoſes them Jointenants. 39 E. 3. 4. b. adjudged.

16. In a Dum fuit infra Ætatem in the per & cui the Tenant ſhall have Aid out of the Line. 34 E. 3. Aid 165. adjudged.

17. In a Writ of Entry within the Degrees, if the Tenant prays in Aid of a Stranger who is not named in the Writ, the Court ſhall grant it ex Officio, tho' the Demandant cannot grant it for abating his Writ. 35 E. 3. Aid 166. Fol. 165.

18. *Ceſſavit* that the Tenant held of him and ceſſed, the *Tenant ſaid* that *J. S. was ſeiſed in Fee, and leaſed to him for Life*, and pray'd Aid of him, and had it by Award, tho' it be *in a manner contrary* to the Suppoſal of the Writ that he held of the Demandant. Br. Aid, pl. 119. cites 9 H. 7. 15.

19. *But* in *Waſte* the Tenant ſaid that a Stranger leaſed the Land to him for Life, and pray'd Aid, he ſhall not have it, for this is contrary to the Suppoſal of the Writ. Ibid.

(D) In what Caſes it lies contrary to the *Suppoſal of an Avowry.*

* Fitzh. Aid pl. 139. cites S. C. — In Avowry *upon a Stranger for Relief*, the Plaintiff ſaid that he *held for Term of his Life of the Leaſe of this Stranger*, and pray'd Aid of him, and had it. Fitzh. Aid, pl 133. cites Hill. 17 E. 3. 9.

1. IF in a Replevin brought by Leſſee for Years an Avowry be made upon a Stranger, and the Leſſee ſays that one J. S. was and yet is ſeiſed in Fee, and holds it of the Defendant by certain Services, he ſhall have Aid of the Leſſor, becauſe without the Leſſor he cannot plead this Matter in Abatement of the Avowry. Co. 9. Avowry, 20. b. Reſolved 17 E. 3. 6. b. * 18 E. 3. 7.

Fitzh. Aid pl. 139. cites S. C.

2. But upon a general Allegation that his Leſſor was ſeiſed in Fee and leaſed to him for Life or Years, he ſhall not have Aid, becauſe for any thing that appears this is but Hors de ſon Fee, which he himſelf may plead without Aid. Co. 9. Avowry 20. b. 18 E. 3. 7. adjudged.

S. P. by the Opinion of Keble and Brian; for it may be that the Avowry be falſe and the Aid Prayer true. Quære. Br. Aid, pl. 117. cites S. C. ——— Fitzh. Aid, pl. 95. cites S C.

3. In a Replevin, if the Defendant avows upon J. S. as upon his very Tenant, and the Plaintiff ſays that A. was ſeiſed in Fee, and gave to J. in Tail the Remainder over, which J. leaſed to the Plaintiff for Years, the Plaintiff ſhall have Aid of J. tho' this Plea goes in the Abatement of the Avowry, for his falſe Suppoſal ſhall not ouſt him thereof. 2 H. 7. 10. b. 11. adjudged.

4. So if the Defendant avows upon two Strangers, where he ought to avow upon three, the Plaintiff being Leſſee for Years ſhall have Aid of them, tho' this be contrary to the Suppoſal of the Avowry. 19 E. 4. 9. b. Quære.

Br. Aid, pl. 58. cites S. C. — Fitzh. Aid, pl. 110. cites S. C. —

5. In a Replevin, if the Defendant avows upon F. as his very Tenant, and the Plaintiff ſays that F. gave the Land by Fine to G. which G. leaſed to him for Years, he ſhall have Aid of G. (Nota, the Avowry is changed by the Fine without Notice.) 5 H. 5. 5. adjudged.

In *Replevin*, the *Defendant avow'd upon A. B. as upon his very Tenant*, and the *Plaintiff ſaid that N. W. was ſeiſed in Fee, and leaſed to him for Term of Years, and pray'd Aid of him*, and could not have it; for N. W. is a Stranger to the Avowry by which the *Plaintiff ſaid that the ſame A. B. upon whom the Defendant avow'd, made a Feoffment to the ſaid N. W. who gave Notice to the Defendant* &c. and *after leaſed to him for Years*, and pray'd Aid of him. And per tot. Cur. he ſhall not have Aid, becauſe he is yet a *Stranger to the Avowry*; Quod nota. Br. Aid, pl. 8. cites 3 H. 6. 54.

6. In a Replevin, if the Defendant avows upon a Stranger the Plaintiff may ſay that he was jointly infeoffed with his Wife to hold of the Chief Lord, and ſhall have Aid of his Wife, tho' this be againſt the Suppoſal of the Avowry. 2 E. 2. Aid 159.

7. *At Common Law* no Aid was grantable of a Stranger to an Avowry, becauſe the Avowry was made of a certain Perſon; but now by the *Statute* 21 *H.* 8. the Lord need not avow for any Rent or Service upon any Perſon certain, and conſequently in an Avowry, according to that Act, Aid ſhall be granted of any Man. Co. Litt. 312. a.

(E) In

(E) In what *Caſes* it ſhall be *granted*. Where Title is derived out of the Party himſelf.

1. WHere Title is derived from the Leſſee for Life, being Defendant, he ſhall not have Aid of the Leſſor. 48 E. 3. 18. Fitzh. Aid de Roy, pl. 59 cites S. C.——Br. Aid, del Roy, pl. 19. cites S. C.——But for the Point of the Caſe in thoſe Books, ſee Aid of the King (C) pl. 1.

(F) In what Caſes it *lies*.

1. LEſſee for Life ſhall have Aid of him in Reverſion tho' he may vouch him. 18 E. 3. 8. adjudged. Contra * 30 E. 3. 26. b. adjudged. Contra 45 E. 3. Aid 118. adjudged. * Fitzh. Aid, pl. 44. cites S. C.

2. If it can *appear that he who prays in Aid may vouch*, he is always ouſted of the Aid and put to the Voucher, *except the Tenant by the Curteſy*, who may pray in Aid but cannot vouch. Per Markham, quod non negatur. Br. Voucher, pl. 73. cites Tempore R. 2.

3. If a Man *diſtrains &c. in his own Name, and* after *makes Conuſance as Bailiff*, he ſhall not have Aid of the Lord. F. N. B. 118. (B) in the new Notes there (a) cites 7 H. 4. 34.

4. Where a *Reverſion for Years comes to the Lord by Eſcheat or* by Alienation in *Mortmain, or* by Claim, for *Purchaſe of his Villein*, the Leſſee ſhall have Aid without Privity. Br. Aid, pl. 118. cites 8 H. 7. 8. per Keble, Fiſher and Jay.

5. *And* where a Man by Teſtament *deviſes that* his *Executors ſhall make a Leaſe for Years, which they do*, the Leſſee ſhall have Aid of him in *Reverſion* without other Privity. Ibid.

6. *And* if *Guardian endows the Feme*, ſhe ſhall have Aid of the *Heir*. Ibid.

(G) *Upon what Plea* it ſhall be *granted*.

1. IN a Scire Facias to execute a Fine levied of the Manor of B. if the Defendant ſays that the Land for which he is warned is part of another Manor of which he is ſeiſed for Life, upon this Plea he ſhall not have Aid of the Reverſion, becauſe this Plea amounts to this that it is Not Comprized within the Fine which goes to the Action. 18 E. 3. 24. b. adjudged. *Præcipe quod reddat*, the Tenant ſaid that *J.* leaſed to him for Life, and after acknowledged by Fine all his Right in the Tenements to be the Right of *B. come ceo* &c. and prayed Aid of him, and the Opinion of the Court was, that he ſhall have Aid, for ſuch Fine is good of the Reverſion, becauſe all his Right after the Leaſe is the Reverſion, and therefore Reverſion paſſed, and the Aid Prayer of the Conuſee amounted to an Attornment, therefore he ſhall have Aid, per tot. Cur. Br Aid, pl. 97. cites 37 H. 6. 5.

2. In Replevin, if the Defendant acknowledges the taking as Bailiff to J. S. as in his Several, if the Plaintiff claims Common appendant there, Fol. 166. See (P) pl. 6. S. C.

there, which is in the Right, yet the Bailiff ſhall not have Aid of his Maſter. 39 E. 3. 27. adjudged.

4. *Treſpaſs [of falſe Impriſonment,]* the *Defendant juſtified taking the Plaintiff as Villein of his Maſter regardant to his Manor of B. in another County*, and prayed Aid of his Maſter, and could not have it, but after they were at Iſſue if he was born within the Eſpouſals between his Father and Mother or not, and then prayed Aid, and had it &c Br. Br. Aid, pl. 62 cites 38 E. 3. 34.

4. In *Replevin* the *Defendant avowed for a Rent-charge*, the *Plaintiff replied that he held jointly with J. N. of the Feoffment of W. N. and ſhewed Deed*, and prayed Aid of him, and was ouſted of the Aid by Award. Br. Aid, pl. 104. cites 1 H. 6. 6

5. In *Annuity* per Danby, Priſot, and others, Anno 30 H. 6. *Parſon* ſhall have Aid *of Patron without Cauſe ſhewn, otherwiſe* than to ſay *that B. was ſeiſed of the Manor of D. to which the Advowſon was appendant, and preſented him, and that he found the Church diſcharged* &c. and prayed Aid, and the Cauſe is not traverſable where he ſhews Cauſe, as it ſhall be where *Land* is *demanded againſt Tenant for Life*, for *he ſhall ſhew Cauſe*, and the Cauſe is traverſable of the Aid, and not in Writ of Annuity. Note the Diverſity. Br. Aid, pl. 89. cites 22 H. 6. 47.

6. In *Replevin* the *Defendant avowed upon N. as upon his very Tenant for Rent*, the *Plaintiff ſaid that N. enfeoff'd P. who was ſeiſed in Fee, and leaſed to the Plaintiff for* 40 *Years*, and prayed Aid of P. & Curia contra eum, becauſe P. was a Stranger to the Avowry, *and* therefore he ſaid further, *that* P. *gave Notice to the Lord*, now Defendant, and prayed Aid of P. and the whole Court was with him, by which they granted the Aid gratis to the Plaintiff; Quod Nota. Br. Aid, pl. 121. cites 5 E. 4. 106.

(H) Upon what *Iſſue* it lies.

Fitzh. Aid, pl. 54. cites S. C. — See (P) pl. 5. S. C. — In *Ejectione Firmæ*, where the *Title of him in Reverſion is not diſcloſed* in Pleading, *nor comes in Queſtion*, Aid ſhall not be granted; per Broker, Prothonotary. Owen 43, 28 Eliz. Anon.

1. IN Ejectment of Ward of J. S. the Heir of J. D. who held of him by Homage &c. if the Defendant ſays, that A. was ſeiſed in Fee, and leaſed this to J. D. for Life, the Remainder to P. and he enter'd as Bailiff to P. after the Death of J. D. and upon this Plea Iſſue is joined, whether J. D. was ſeiſed for Life or in Fee, the Defendant ſhall have Aid of P. becauſe his Eſtate will come in Queſtion; for if J. D. had a Fee, his Eſtate is gone. 21 E. 3. 22. b.

Br. Aid, pl. 68. cites S. C.

2. In Treſpaſs of cutting of certain Trees, if the Defendant juſtifies for Common of Eſtovers as Leſſee for Years of J. S. by Title of Preſcription, if Iſſue be taken whether he cut them of his own Wrong, or for the Cauſe aforeſaid, the Defendant ſhall not have Aid of the Plaintiff, becauſe the Iſſue is all in the Perſonalty, (and the Preſcription is acknowledged.) 21 E. 3. 41. adjudged.

Br. Aid, pl. 68. cites S. C.

3. But if Iſſue had been taken upon the Right of Eſtovers he ſhould have had Aid. 21 E. 3. 41.

4. In a Replevin, if the Defendant as Leſſee for Life avows for a Rent-Service, and the Plaintiff pleads Hors de ſon Fee, upon which they are at Iſſue, the Defendant ſhall have Aid of him in Reverſion, tho' he in Reverſion may diſtrain after the Death of the Defendant, altho,

altho' this be now found againſt the Defendant. 29 E. 3. 40. adjudged.

5. So if an Avowry be upon the Husband Plaintiff in Replevin, as in the Right of his Wife for Services, and the Plaintiff pleads Hors de ſon Fee, and Iſſue thereupon joined, the Husband ſhall have Aid of his Wife. 29 E. 3 24. adjudged.

6. [So] in Replevin by the Baron, if the Defendant avows by reaſon of a Leaſe for Life made to the Baron and Feme rendring Rent, and for Rent Arrear avows &c. the Baron ſhall have Aid of the Feme. 38 E. 3. 6

7. In Treſpaſs for beating his Servant, if the Defendant juſtifies becauſe the Servant was his Villein in Right of his Wife, to which the Plaintiff ſays he was Not his Villein at the time of the Battery, upon which they are at Iſſue, the Husband ſhall not have Aid of the Wife, becauſe the Iſſue is taken between Strangers upon a Treſpaſs only. 28 E. 3 98. b. adjudged. * 27 E. 3. 89. b. * Fitzh. Aid, pl. 11. cites S. C.

8. In an Action upon the Statute for taking Averia Carucæ where there where others ſufficient, if the Defendant acknowledges the taking as Bailiff to J. S. for Rent, abſque hoc that there were other ſufficient Cattle, and Iſſue is taken upon this, the Bailiff ſhall not have Aid of his Maker, becauſe by this Iſſue the Seigniory is not in Queſtion. 15 H. 6. Aid 72 adjudged. See (P) pl. 7. S. C.

9. The ſame Law if in Replevin he pleads Non cepit. 15 H. 6. Aid 72. Per Jenny. See (P) pl. 8. S. P. and intends S. C.

but is miſprinted there (14) inſtead of (15) and the Word (Aid) omitted.

10. In *Treſpaſs* the *Defendant ſaid that the Place where* &c. *is the Franktenement of his Brother, who leaſed to him*, Judgment if Actio. Horton ſaid, Our Franktenement, priſt, and the other e contra; and the Defendant pray'd Aid of the Leſſor, and had it. Br. Aid, pl. 39. cites 7 H. 4. 4.

(I) *What Perſons* ſhall have Aid, *in reſpect of* their *Eſtates.*

Fol 161.

1. IF there are 2 Jointenants in Fee, and one is impleaded, he ſhall not have Aid of his Companion, becauſe one hath as * high an Eſtate as the other, and hath Power to plead any Plea in Diſcharge of the Land as well as the other. 2 H. 6. 7. Br. Aid, pl. 3. cites S. C. ——Ibid pl. 4. cites S. C. For it was ſaid that one

Tenant of Fee-ſimple ſhall not have Aid of another, unleſs in Caſe of Coparceners to recover Pro rata, or to have the Voucher for the Warranty Paramount.——Br. Jointenancy, pl. 2. cites S. C.—— Fitzh. Aid, pl. 51. cites 2 H. 4. 6. 7. S. P. and ſeems to intend S. C.——S. P. and alſo the other is at no Miſchief; for he ſhall not be concluded by the Plea of his Companion, but may falſify in another Action. Br. Aid, pl. 133. cites 12 E. 4. 2——Br. Aid, pl. 106. cites 39 H. 6. 35. S. P.

2. So if 2 Jointenants in Fee make Partition, and one is impleaded, he ſhall not have Aid of the other at the Common Law; for the Warranty was deſtroy'd by the Partition. Contra 2 H. 6. 7 b. 31 H. 8. *cap.* 1. § 3. Enacts, That *Jointenants and Tenants in Common, and their Heirs, after Partition made, ſhall have Aid of the other, or of their Heirs, to demand the Warranty Paramount, and ſo recover Pro Rata, as is uſed between Coparceners by the Courſe of the Common Law after Partition made.*

See (I. a) pl. 2. S. C.—— Fitzh. Replevin, pl. 4. cites S.C.

3. If the Tenant brings a Replevin againſt the Lord Paramount, and he avows upon him as his Tenant, and he pleads in Abatement of the Avowry that he holds of the Meſne, and the Meſne of the Avowant, he ſhall have Aid of the Meſne, becauſe perhaps the Meſne hath a Matter of Eſtoppel againſt him. 9 H. 6. 27.

Tenant in Tail ſhall have Aid of the Queen, but not of a common Perſon. Arg. Cro. E. 417. pl. 12. cites 10 H. 7. 20. and 38 E. 3. 14.

4. Tenant in Tail ſhall not have Aid of him in Remainder in Fee; for he himſelf hath an Inheritance. 2 E. 3. 46. b. adjudged.

* S. P But he in Remainder ſhall be received in his Default Br Aid, pl. 37. cites 2 H. 4. 16.——Co. Litt. 27. b. S. P.——Le. 291. pl. 397. Arg. S. P. but ſays that his Grantee ſhall have it.

5 Tenant after Poſſibility ſhall not have Aid. * 2 H. 4. 17. b. adjudg'd. and 61. b. 11 H. 4. 15. 8 H. 6. 25. 10 H. 6. 1. 8. adjudged, for the Inheritance that was once in him. 39 E. 3. 16. adjudged. 31 E. 3. Aid 35. adjudged.

See (K) pl. 3. S. C.—— S. P. notwithſtanding he himſelf had the Fee. Quod nota. Br. Aid, pl. 23. cites S. C.——Fitzh. Aid, pl. 111. cites S. C. accordingly, after great Debate.

6. Leſſee for Life, the Remainder in Tail, the Remainder in Fee to himſelf, ſhall have Aid of the Remainder in Tail. 41 E. 3. 16. b.

Br. Aid, pl. 10. cites S. C. but this Matter ought to appear in the Avowry; for otherwiſe he has not ſhewn Cauſe to pray in Aid upon his Avowry.

7. If Leſſee for Life of a Seigniory avows in Replevin, he ſhall have Aid, 9 H. 6. 26. b. of the Reverſioner.

* Br. Joinder in Aid, pl. 5. cites Paſch. 45 E. 3. 7. S. C.—Fitzh. Joinder en Aid, pl 9. cites S. C. † Br. Aid, pl. 127. cites S. C.

8. Leſſee for Years ſhall have Aid in an Avowry for a Rent-Service. * 45 E. 3. 8. † 6 E. 4. 2. b.

So in Avowry for a *Rent-Charge* as well as for Rent-Service, and yet the Avowry is not made upon any Perſon in certain. Br. Aid, pl. 106. cites 39 H. 6. 35. per Cur.

* Br. Aid, pl. 53. cites S. C. & S. P. per Culpepper, after his Term ended.——Fitzh. Aid, pl. 105. cites S. C. † Br. Aid, pl. 127. cites S. C. accordingly, but contra if he is Plaintiff.

9. So in Treſpaſs Leſſee for Years ſhall have Aid. * 11 H. 4. 90. † 6 E. 4. 2. b. being Defendant, adjudged.

10. Leſſee for Years ſhall have Aid in Treſpaſs for Fiſhing in a Piſchary. 46 E. 3. 11.

* Br. Aid, pl. 43. cites S. C.—— Ibid. pl. 53. cites S. C. accordingly, that he ſhall not have Aid; for he has no Intereſt certain to loſe, by the Opinion there.

11. Tenant at Will ſhall have Aid. * 7 H. 4. 31. b. † 4 E. 4. 14. b. adjudged. Dubitatur 2 H. 4. 25. Contra ‡ 11 H. 4. 90. adjudged. Contra 27 E. 3. 88. ‖ 12 E. 4. 5. adjudged.

† Br. Aid, pl. 122. cites S. C. that he had the Aid; for the Iſſue is upon the Franktenement, which Tenant at Will cannot try without Aid of the Tenant of the Franktenement.——Fitzh. Aid, pl. 85. cites S. C. ‡ Br. Tenant per Cooie, pl. 3. cites S. C.——Fitzh. Aid, pl. 105. cites S. C. but that he was ouſted, he praying it after Iſſue joined.

‖ In Replevin the Defendant avow'd upon a Stranger; the Plaintiff ſhew'd that this Stranger leaſed to him at Will. Awarded that he ſhall not have Aid. Fitzh. Aid, pl. 93. cites S. C.—— Br. Aid, pl. 135. cites S. C. accordingly.——S. P. accordingly, Br. Aid, pl. 139. cites 10 H. 6. 27.

* Br. Aid, pl. 26. cites S. C.—— Fitzh. Aid, pl. 114. cites S. C.

12. If an Avowry be upon Baron and Feme, after Iſſue had for Homage in the Right of the Feme, the Baron ſhall have Aid of the Feme. * 43 E. 3. 13. in a Replevin brought by the Husband. † 35 H. 6. 10. adjudged.

† Br. Joinder in Aid, pl. 9. cites S. C.——Fitzh. Aid, pl 82. cites S. C.——Br. Aid, pl. 17. cites S. C.——See pl. 13. S. C.

13. [So]

13. [So] In an Avowry upon Baron and Feme, for Rent iſſuing out of the Land of the Feme, the Baron, Plaintiff ſhall have Aid of his Feme. 46 E. 3. 11. * 9 H. 6 26. b. † 35 H. 6. 10. adjudged. * So if the Avowry is made by Baron and Feme, for

the Right of his Feme; but this Matter ought to appear in the Avowry; for otherwiſe he has not ſhewn Cauſe to pray in Aid upon his Avowry. Br. Aid, pl. 10. cites S. C.

† Br. Joinder in Aid, pl. 9. cites S. C. but mentions nothing of the Rent, or what the Avowry was for.——Fitzh. Aid, pl. 82. cites S. C. that it was made in Right of the Feme, but ſays not for what. ——Br. Aid, pl. 1-. cites S. C.

14. If the Baron juſtifies the Impriſonment of his Wife's Villein during Coverture, after the Death of the Feme he ſhall have Aid of the Heir. 11 H. 4. 90.

15. In an Avowry upon the Baron for Services due in Right of the Feme, he ſhall have Aid of the Feme. 39 E. 3. 15.

16. In an Avowry, Leſſee for Life ſhall have Aid of the Reverſion. 17 E. 3. 33. b.

17. So Tenant in Dower in a Replevin ſhall have Aid of him in Remainder upon whom the Avowry is. 15 E. 3. Aid 33. adjudg'd. Tenant in Dower ſhall have Aid of him in Reverſion Br. Quo Warranto, pl. 1. cites It. Nott. fo. 2.

18. If Leſſee for Years holds over his Term he ſhall have Aid of the Leſſor. 11 H. 4. 90. b. Ow. 28, 29 Arg. takes a Difference

between a Tenant at Will and a Tenant at Sufferance; that a Tenant at Will ſhall have Aid, but that Tenant at Sufferance ſhall not; and cites 2 H. 4.——2 Le. 47. pl. 59. Arg. S. P. cites 11 H. 4.—— See pl. 11. and ſee (L) pl. 9. 10.

19. In a Real Action Tenant by the Curteſy ſhall have Aid of the Reverſioner for the Feebleneſs of his Eſtate. * 21 E. 3. 14. b. 26 E. 3. 69. * Br. Aid pl. 65 cites S. C.—— Fitzh. Aid pl. 21. cites

S. C.——See (E. a) pl. 5. S. C.——See (F) pl. 2.

20. In an Attaint againſt the Wife of him who recover'd, being Tenant in Dower, ſhe ſhall have Aid of him in Reverſion for the Weakneſs of her Eſtate. 40 Aſſ. 20. adjudged. Fol. 68. See (A) pl. 12. and 14.

S. C.—Fitzh. Aid, pl. 158. cites S. C.

21. If 2 Executors have a Term one ſhall have Aid of the other, becauſe one alone cannot have Aid of the Leſſor. 11 H. 4. 63. b. Br. Aid, pl. 49. cites S. C.——

Fitzh. Aid, pl. 804. cites S. C.——See (O) pl. 3. S. C.

22. So if a Man juſtifies as Jointenant for Life with another he ſhall have Aid of him. 11 H. 4. 63. b. Br. Aid, pl. 49. cites S. C. thus viz. 3

Jointenants are for Life, Treſpaſs is brought againſt the one, he ſhall juſtify as the Franktenement of him and his Companions, and they 3 ſhall have Aid of him in Reverſion. Per Skrene.

23. In a Rationabilibus diviſis againſt Leſſee for Life, he ſhall have Aid of him in Reverſion; for this is a Writ of Right. 14 E. 3. Aid 23. adjudged.

24. The ſame Law in a Writ of Admeaſurement of Paſture. 14 E. 3. Aid 23. per Shard.

25. If a Man gives the Veſture of his Land, and he cuts and carries it, and a Stranger brings Treſpaſs againſt him, he ſhall not have Aid of the Donor, becauſe he has not an Eſtate, but by carrying he hath the Effect of his Gift. 11 H. 4. 90.

26. It

26. It was ſaid for Law that *Tenant for Life may chooſe whether he will vouch or pray in Aid* of him in Reverſion. Br. Aid, pl. 9. cites 9 H. 6. 3.

(K) Of whom.

If there be Tenant for Life, the Remainder in Tail, the Remainder in Tail, the Reverſion in Fee, and the Reverſion deſcends upon the laſt Remainder, and after the Leſſee is impleaded, he ſhall have Aid of all. * 40 E. 3. 13.

* Br Aid, pl 19 cites S. C.—— Fitzh Age, pl. 28. cites S. C.—— So of Leaſe for Life, Remainder in Tail, the Remainder in Fee, the Leſſee ſhall have Aid of the 2 ſeveral Remainders at one Inſtant. Br. Aid, pl. 134. cites 12 E 4. 3.—— And was not ſuffer'd to have Aid of One without praying Aid of Both. Br. Aid, pl. 38. cites 7 H. 4. 2.

2. If there be Tenant in Tail the Reverſion in Fee to himſelf, he ſhall not have Aid of himſelf. 40 E. 3. 13.

3. But if there be Tenant for Life, the Remainder in Tail, the Remainder in Fee to the Leſſee, the Leſſee ſhall have Aid of the Remainder in Tail. * 41 E. 3. 16. b. and there he prays it only of him. 42 E. 3. 8. b. But the Reaſon is given, becauſe the Fee is not in himſelf till the Tail ſpent.

* Br. Aid, pl. 23. cites S.C.—— Fitzh. Aid, pl. 111. cites S. C.——

See (I) pl. 6. S. C.

4. Feme Leſſee takes the Reverſioner in Fee to Husband, and after Writ is brought againſt them, ſhe ſhall not have Aid of the Husband. 41 E. 3. 17.

5. If there be Leſſee for Life, the Remainder in Tail to J. S and after the Reverſion in Fee deſcends upon J. S. alſo, the Leſſee ſhall have Aid of him. Contra 21 E. 3. 55. b. adjudged; but Quære.

6. A Parſon ſhall not have Aid of himſelf, being Patron. 7 H. 6. 41.

Br. Counterplea de Aid, pl. 10. cites S. C.

7. Leſſee for Life ſhall have Aid of the right Heir of J. S. who hath the Remainder limited by ſuch Name, and he having this by Purchaſe. 11 H. 74.

S. P. Br. Aid, pl. 51. cites 11 H. 4. 74. ——Fitzh. Aid, pl. 25. cites Trin 11 H. 4 74. S P. and ſeems to be the Caſe intended by Roll.

8. If there be Leſſee for Life, the Reverſion after Poſſibility to J. S. the Remainder to the right Heirs of J. S. Leſſee ſhall have Aid of J. S. 17 E. 3. 43. b. adjudged.

9. If there be Leſſee for Life, the Remainder in Fee to another, the Leſſee ſhall have Aid of him in Remainder; for he hath a preſent Eſtate veſted. 26 E. 3. 69. b. adjudged. Contra 29 E. 3. 9. adjudged.

10. If there be Leſſee for Life, the Reverſion for Life, the Reverſion in Fee, the Leſſee ſhall have Aid of him in Reverſion for Life, tho' he hath no Inheritance, becauſe he may pray in Aid over of him that hath the Fee. Contra * 11 E. 3. Aid 32. per Shard.

* Ow. 137. cites S. C. as reſolved that Tenant for Life ſhall have Aid of the Reverſioner for Life. But Fitzh. Aid, pl. 32. which cites the S. C. is that by Sharde the Age is not grantable.

A. granted *to B. for Life*, [Remainder *to C. for Life*,] the *Reverſion to A.* A Formedon is brought againſt B. who pray'd in Aid of C. without praying it of A. All the Juſtices, præter Warburton, held that

B

B ſhould not have the Aid of C. becauſe B. hath as high an Eſtate as C. and may plead all that C. may; *but if B. was Tenant for Life, the Remainder to C. in Tail*, there he ſhall have Aid of C. the Tenant in Tail. Ow. 137. Trin. 10 Jac. Barnes's Caſe.

If A. be *Tenant for Life*, the Remainder *to B. for Life*, the Remainder *to C. in Fee*; A. ſhall have *Aid of B. and C.* For otherwiſe he in Remainder ſhall not come in to plead. Ow. 137. per Cur. cites 22 H. 6. 6. 11 E. 3. 16.

11. Not of him who is eſtopp'd to maintain the Iſſue.

12. [As] If a Replevin be againſt three, and one denies the Taking, and the others confeſſes the Taking, as Bailiffs of him who denied it, for Damage feaſant, they ſhall not have Aid of him; for he cannot maintain the Taking which he hath denied. 42 E. 3. 6. b. † 22 H. 6. 53. 19 E. 3. Aid 27. adjudged. Quære 18 E. 3. 53. b. Fol. 169. Fitzh. Joinder en Aid, pl. 8. cites S. C.

See (P) pl. 4. S. C. —— S. P. by the Reporter; but dubitavit. Br. Aid, pl. 90. cites 22 H. 6. 53. —— See pl. 4. S. C.

(L) What Perſon, *in reſpect of his Eſtate*, ſhall have Aid.

1. IN a Juris Utrum againſt Leſſee for Life, he ſhall have Aid of him in Reverſion. 13 H. 4. Aid 177. adjudged.

2. [So] In a Formedon againſt Leſſee for Life, he ſhall have Aid of him in Reverſion. 33 E. 3. Aid de Roy 106.

3. In a Writ of Partition brought againſt Tenant by the Curteſy, he ſhall have Aid of him in Reverſion, becauſe the Partition falls in the Right, tho' no Land is demanded thereby. 5 E. 3. Aid 143. In a Writ of Partition *by one Coparcener againſt Tenant by the Curteſy of the other* Coparcener who is dead, he pray'd Aid, and had it, tho' the Land ſhall not be recover'd by this Action; for the Partition ſhall bind. Br. Aid, pl. 140. cites the Regiſter 76. —— See (A) pl. 28. 29.

4. In a Replevin, if the Defendant avows for Damage feaſant, and the Plaintiff claims Common, upon which they are at Iſſue, the Defendant being Leſſee for Life, ſhall have Aid of him in Reverſion. 19 R. 2. Aid del Roy 113. adjudged.

5. In a Replevin the Plaintiff, Leſſee for Years, ſhall have Aid of him in Reverſion, if the Avowry be upon his Leſſor, becauſe a Return ſhall be awarded againſt him, and he without Aid cannot plead but Purs de ſon Fee, or Tantamount. * 6 E. 4. 2. b. † 5 E. 4. 2. b. tho' it ſeems he may join to the Prayee. Contra 3 E. 2. Aid 161. adjudged. Contra 8 R. 2. Aid del Roy 118. adjudged. * So Br. Aid, pl. 127. cites 6 E. 4. 2. —— † S. P. by the Reporter. Br. Aid, pl. 126. cites 5 E. 4. 2.

7. The ſame Law in an Action of Treſpaſs by the Leſſee for Years. Contra 8 R. 2. Aid de Roy, 117. See (A) pl. 7. S. P.

8. If there are 2 Coparceners, and each has Iſſue a Son, and one Coparcener enfeoffs her Son and Heir, and one J. in Fee, and dies, and the other Coparcener dies, and her Son leaſes her Part to J. for 10 Years, and J. leaſes the Land, where the taking was, to the two Sons for 8 Years, and the Lord diſtrains, and the two Sons bring a Replevin, and he avows upon them, they ſhall not have Aid of J. upon this Matter, becauſe they have a Fee, and ſo their Eſtate not feeble. 34 H. 6. 46. b. Fitzh. Aid, pl. 81. cites S. C. —— Br. Aid, pl. 16. cites S. C. and that the beſt Opinion was, that he ſhall not have Aid of the Stranger to the Avowry, neither ſhall one Termor have Aid of another Termor in Avowry; but if he had

had prayed Aid of him who was Party to the Avowry, he might have Aid of him, and the other might join without Proceſs; and if Notice was given to the Lord by the Stranger to the Avowry of the Feoffment of the Coparcenor made to him, he might join to the Plaintiff and abate the Avowry. Br. Aid, pl. 16. cites S. C. per Priſot and Moile.

See (I) 11 18.—Tenant at Will ſhall have Aid in Replevin, Fitzh. Aid, pl. 63. cites 13 H. 6.

9. Tenant at Will ſhall have Aid of his Leſſor for the Weakneſs of his Eſtate.

Br. Aid, pl. 82. cites S. C. accordingly. — He ſhall have Aid of the Lord in Treſpaſs after Iſſue joined. Br. Tenant by Copy &c. pl. 4. cites S. C. — Fitzh. Aid de Roy, pl. 22. cites S. C. — Mo. 128. pl. 276. S. P. cites 12 E. 4. 7. and 21 E. 4. — See (K. a) pl. 11.

10. Tenant at Will, according to the Cuſtom, ſhall have Aid of the Lord, where the Right of the Seigniory comes in Queſtion, by the Iſſue taken. 21 H. 6. 37. adjudged.

11. *He who has Fee ſhall not have Aid.* Br. Counterple de Aid, pl. 4. cites 41. E. 3. 37.

Fol. 170.

(M) *Who* ſhall have Aid. The *Baron of the Feme.*

So where the *Baron ſaid that the ſame Stranger leaſed to his Feme for Life*, and ſo had nothing but in Right of his Wife, and prayed Aid of her, and had it, and after they 2 may pray Aid of this Leſſor, and then all of them may plead Riens Arrear, or diſclaim, per Cur. Br. Aid, pl. 84. cites 22 H. 6. 2 & 3.

1. In a Replevin by the Baron, if the Defendant avows upon J. S. a Stranger, the Baron may ſay, that he has nothing in the Land, but in the Right of his Feme as her Dower, the Reverſion to J. S. and ſhall have Aid of his Wife, tho' ſhe is a Stranger to the Avowry. 19 E. 3. Aid 143.

2. *Avowry upon W.* becauſe he *leaſed to W. and his Feme for Life rendring Rent* &c. by which W. prayed Aid of his Feme, and had it; Quod Nota. Br. Aid, pl. 60. cites 38 E. 3. 6.

3. If a Man brings *Writ againſt the Baron and Feme, and recovers*, and the *Feme dies before Execution*, there the Baron ſhall not have Aid of the Heir of the Feme, for *the Eſtate of his Feme* by which &c. *is defeated.* Br. Aid, pl. 36. cites 2 H. 4. 16. per Brenche.

(N) Vouchee.

See (U) pl. 124. S. P.

1. A Biſhop that comes in by Voucher upon his own Warranty, ſhall have Aid of the Patron and Ordinary.

(O)

(O) Prayee.

1. IF the Servant juſtifies in the Right of his Maſter, being Leſſee for Life, who joins to him, they both ſhall have Aid of him in Reverſion. 8 H. 4 16. b. Br. Aid, pl. 45. cites S. C.

2. But if the ſervant prays in Aid of the Maſter who comes in by Proceſs after Iſſue, he cannot pray in Aid, for there ſhall not be Aid upon Aid, Dubitatur 8 H. 4. 16. b. Br. Aid, pl. 45. cites S. C.

3. If an Executor of the Tenant of a Term has Aid of his Companion Executor, they both ſhall have Aid of him in Reverſion. * 11 H. 4. 63. b. 64. 13 H. 4. Aid 186. * Br. Aid, pl. 49. cites S. C. accordingly.—— Fitzh. Aid, pl. 104. cites S. C —— See (I) pl. 21. S. C.

4. If a Baron has Aid of his Feme Leſſee for Life, they ſhall have Aid of him in Reverſion. 11 H. 4. 63. b. Br. Aid, pl. 49. cites S. C. per Hank.

5. So if Leſſee for Life leaſes for Years, and Leſſee for Years hath Aid of the Leſſee for Life, they ſhall have Aid of him in Reverſion. 11 H. 4. 63. b.

6. If a Bailiff of Leſſee for Life has Aid of the Leſſee, the Leſſee may have Aid over of him in Reverſion. 11 H. 6. 39. b.

7. Leſſee for Life ſhall have Aid of the Leſſor, and the Leſſor ſhall after have Aid of the King who granted this to him. 26 Aſſ. 55.

8. He that is Actor in an Action ſhall have Aid. 9 H. 6. 56. b.

9. As the Defendant in Replevin after Avowry is an Actor, yet he ſhall have Aid. 9 H. 6. 56. b.

(P) In what Caſe a *Servant* ſhall have Aid *of his Maſter*. Aid by *Officers*. *Servant*.

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1. IN Raviſhment of Ward, the Defendant juſtifies as Servant to his Maſter, who is Lord by Priority, and the Priority is traverſed, he ſhall have Aid of his Maſter. 7 H. 4. 9. b. Fitzh. Aid, pl. 103. cites S. C. but mentions nothing of the Priority.—— Br. Aid, pl. 40. cites S. C. and mentions the Priority.

2. Otherwiſe it had been if the other had ſaid, De injuria ſua propria &c. 7 H. 4. 9. b. Br. Aid, pl. 40 cites S. C.——

3. In Raviſhment of Ward, the Defendant juſtifies as Bailiff of J. S. and makes to him Title as Guardian by Priority, and the Defendant traverſes the Eſtate by which he ſhould be in Ward to J. S. the Defendant ſhall have Aid of J. S. 17 E. 3. 25. b.

4. In Replevin againſt two, if the one denies the Taking, and the other acknowledges it as Bailiff to him who hath denied it, he ſhall not have Aid of him becauſe he cannot maintain the Taking which he had denied. * 22 H. 6. 53. † 42 E. 3. 6. b. Fitzh. Quære 18 E. 3. 53. * Br. Aid, pl. 90. cites S. C. by the Reporter; but dubitavit. —— Fitzh. Joinder en Aide, pl 8. cites S. C.——(K) pl. 12. S. C.

5. In

Fitzh. Aid, pl 54. cites S. C. (H) pl. 1. S. C.

5. In an Ejectment of Ward, if the Plaintiff ſays that A. held of him &c. and died in his Homage &c. and the Defendant ſays that J. was ſeiſed in Fee thereof, and gave this to A. for Life, the Remainder to H. in Fee, and that after the Death of A. he ſeiſed the Land by the Command of H. to which the Plaintiff ſays, that A. was ſeiſed in Fee, the Defendant ſhall have Aid of H. his Maſter, becauſe his Eſtate is to be tried. 21 E. 3. 22. b. adjudged.

(G) pl. 2. S. C.

6. In Replevin, if the Defendant acknowledges the Taking as Bailiff to J. S. as in his Several, if the Plaintiff claims Common Appendant there, which is in the Right, yet the Bailiff ſhall not have Aid of his Maſter. 39 E. 3. 27.

(H) pl. S. S. C. but cites it as 15 H. 6. Aid -2.

7. In Treſpaſs upon the Statute for taking Averia Carucæ, if the Defendant ſays he diſtrain'd them as the Bailiff of J. S. for Rent Arrear &c. abſque hoc that there were other Cattle at the time than thoſe, upon which they are at Iſſue, the Bayliff ſhall not have Aid of J. S. becauſe the Seigniory is not in Queſtion. 15 H. 6. 72. adjudged.

(H) pl. 9. S. P. cites 15 H. 6 Aid 72. per Jenny,

8. In Replevin, if the Defendant ſays Non cepit he ſhall not have Aid. 14 H. 6. 72.

and it ſeems that this is miſprinted here in Roll, and ſhould be (15) inſtead of (14).

In Treſpaſs, *Bailiff* may have Aid; for he *claims in Auter Droit*. Br. Aid, pl. 55. cites 11 H. 4. 9c —— Ibid. pl. 45. cites 8 H. 4. 17. S. P.

9. In Treſpaſs, if the Defendant juſtifies as Bailiff, becauſe the Plaintiff is his Matter's Villein, and the Plaintiff ſays he is Free &c. he ſhall have Aid of his Maſter. 28 E. 3. 98.

Br. Aid, pl. 130. cites S. C. becauſe that is traverſed, which is the Cauſe of the Aid, ſo where the Command is traverſed is in Debate

10. In Treſpaſs for Goods, if the Defendant ſays that the Goods were the Goods of two of the King's Enemies, and that he ſeiſed them as Servant to J. S. and by his Command, and to his Uſe, and Iſſue is taken upon the Seiſure in Manner and Form aforeſaid, the Defendant ſhall not have Aid of his Maſter, for the Title of the Maſter comes not in Queſtion, for peradventure another ſeiſed them for him. 7 E. 4. 13. b. per Curiam præter Yelv.

Contra where the Iſſue is upon the Frankfereement; for there the Title of the Maſter ——— Fitzh. Aid, pl. 89. cites S. C.

Fitzh. Aid, pl. 89. cites S. C. —— Br. Aid, pl. 130. cites S. C. ——

11. If a Man juſtifies the taking, of Cattle in a Cloſe as Servant to J. S, and by his Command as Damage feaſant &c. and the Plaintiff ſays that he took them of his own Wrong without ſuch Cauſe, the Defendant ſhall have Aid of J. S. for his Title comes not in Queſtion. 7 E. 4 13 b. per Jenny.

Fitzh. Aid, pl. 89. cites S. C. Br. Aid, pl. 130. cites S. C.

12. But if he ſays that the Place where &c. is the Freehold of J. D. and he as Servant &c. and the Plaintiff ſays it is His Freehold, and not the Freehold of J. D. the Defendant ſhall have Aid of J. D. becauſe his Title comes in Debate. 7 E. 4. 13. b. per Jenny.

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13. In a Replevin, if the Defendant makes Conuſance as Bailiff for a Rent-Charge granted to R. by W. and the Plaintiff ſays that W. was obliged to him in a Statute-Merchant before the Grant of the ſaid Rent, upon which Iſſue is taken, the Bailiff ſhall have Aid of R. his Maſter. 21 E. 3. Aid 183.

14. Avowry upon *Conuſance by Bailiff of the Seigniory upon the Plaintiff, Tenant to* the Lord, *for Services of his Maſter* arrear. The *Plaintiff ſaid that before the Taking the Lord leaſed to A. B. for* 3 *Years, which is yet in Being*, Judgment &c. and the Bailiff pray'd Aid of his Lord, and the Court ouſted him of the Aid. Br. Aide, pl. 92. cites 24 E. 3. 23.

15. *The*

15. *The ſame Law* where the Plaintiff *pleads Hors de ſon Fee*, the Defendant ſhall not have Aid of his Maſter; but if Deed was ſhewn forth, there he ſhould have Aid. Ibid.

16. *Treſpaſs* by one *againſt a Miller who took Toll*, where he ought to grind Toll-free. The *Defendant ſaid that J. had the Mill for Term of Life, to whom he is Deputy, the Reverſion to W. in Fee*, and pray'd Aid of the Tenant for Life, and of him in Reverſion, and had it of the Tenant for Life, and not of him in Reverſion. Quod nota. And this for want of *Privity*, as it ſeems. Br. Aid, pl 30. cites 44 E. 3. 20.

(Q) *Of whom* it ſhall be granted. Not of him who is *Party to the Action.*

1. If one Defendant juſtifies as in the Right of the other Defendant, he ſhall not have Aid of him; for this needs not, when he is Party to the Writ before. * 45 E. 3. 1. b. Otherways in the Caſe of the King. 7 H. 4. 2.

* Br. Aid del Roy, pl. 32. cites S. C. —— Fitzh. Aid, pl. 116. cites S. C.

2. The ſame Law is in an Avowry 45 E. 3. 1. b.

Br. Aid, pl. 32. cites

S. C. Contra if he was not named. —— Fitzh. Aid, pl. 116 cites S. C. but S. P. does not appear. —— Fitzh. Aid, pl. 117. cites S. C. and is of an Avowry, but no mention of 2 Defendants.

3. So if one Defendant juſtifies as Servant to the other Defendant, who makes Default, he ſhall have Aid of him. 8 H. 4. 16. adjudged; for he is not Party before Appearance; but there it is ſaid by Hills, that Aid ought not to have been granted.

Br. Aid, pl. 45. cites S. C. accordingly; but per Huls if the one Defendant will make Default, the other ſhall maintain the Iſſue alone.

4. So if one Defendant juſtifies as in the Freehold of another Defendant and two other Strangers, Joint-tenants, yet he ſhall not have Aid of him who is Party to the Action with others. 7 H. 6. 21. Curia.

S. P. Br. Aid, pl. 71. cites 7 H. 6. 71. —— Fitzh. Aid, pl. 60. cites 7 H. 6. 12. S. P. accordingly [But it ſhould be 7 H. 6. 21. a. pl. 137. and ſo Fitzh. and Br. ſeem to be miſprinted Both of them]

5. But in this Caſe he ſhall have Aid of the Strangers. 7 H. 6. 21. Curia.

S. P. Br. Aid, pl. 71. cites 7 H. 6. 71. But the Plaintiff, to avoid Delay, granted the Aid of all. —— Fitzh. Aid, pl. 60. cites 7 H. 6. 12. S. P. accordingly. —— See the Notes of pl. 4.

6. In Treſpaſs againſt two, if one juſtifies as in the Freehold of the other, as Servant to him, and by his Command, and the other ſays His Freehold, the Servant ſhall not have Aid of the other, becauſe he [his Maſter] is Party to the Writ. * 34 H. 6. 35. b. adjudged. 16 H. 7. Aid 173. per Fineux.

* Br. Aid, pl. 15. cites S. C. —— Fitzh. Aid, pl. 185. cites S. C.

7. But if the Servant pleads this Plea before the other appears, he ſhall have Aid of him; for he is not Party before Appearance. 16 H. 7. Aid 173. 15 H. 7. 10.

8. If A. and B. recover in an Aſſiſe againſt C. who brings an Attaint againſt them, and A. makes Default, and B. ſays that this Land and

* Br. Aid, pl. 110. cites S. C.

† Br Aid, pl. 116. cites S. C.

other Land descended to her and A. and they made Partition, and prays in Aid of her, she shall not have Aid, because she is Party to the Writ, tho' it may be that B. who prays in Aid had all this Land in Allowance of other Land, and so she shall lose her Warranty pro Rata. * 30 Ass. 24. adjudged. † 50 Ass. 4. adjudged. 32 E. 3. Aid 37. adjudged; for the Loss shall be equal without the Aid.

See (Y) pl. 13. S. C. † S. P. Br. Aid, pl. 7. cites 19 H. 6. 36. and if at the Summons the Patron makes Default, and

9. If the Patron of a Vicarage or Parsonage brings an Annuity against the Vicar or Parson, he shall have Aid of the Patron, tho' he be Plaintiff in the Action. * 10 H. 6. 11. † 19 H. 6. 36. ‡ 18 E. 3. Aid 28. adjudged. § 28 H. 6. 1. adjudged. 10 E. 4. 50. and he may join in Aid. ‖ 21 H. 6. 3. adjudged. 34 E. 3. Aid del Roy 111. adjudged. 8 R. 2. Aid del Roy 116. adjudged. Contra ** 23 E. 3. 21. b.

the Ordinary appears, the Parson and the Ordinary may plead without the Patron, and if the Patron appears and pleads a Plea, which goes to charge the Church, yet the Parson may plead in Discharge, and this Plea shall be taken, and no Regard to the Plea of the Patron, and the same Law of the Plea of the Ordinary, if &c. wherefore he had the Aid by Award ‡ Fitzh. Aid, pl. 28. cites 19 E. 3. and so Roll (18) seems mi printed.

§ Fitzh. Aid, pl. 28. cites S. C. —— Note, that Aid was granted of the Plaintiff and others in *Writ of Annuity brought against a Parson*, tho' he cannot join in Aid &c. and this, it seems, by reason of the others; for it was not granted of the Plaintiff only. Br. Aid, pl. 12. cites 28 H. 6. 1. ‖ Br. Aid, pl. 79. cites S. C. ** Fitzh. Annuity, pl. 36. cites S. C. that Aid was granted of the Patron.

So in Annuity *by Abbot against Parson*, the Parson pray'd in Aid of the Ordinary and the Abbot Patron, and had it, tho' the Plaintiff himself was Patron, and had Process against him. Br. Aid, pl. 107. cites 39 H. 6. 50.

Fitzh Aid, pl. 3. cites S. C. — See (X) pl. 27. S. C.

10. As in a Cessavit by the Patron against the Parson, the Parson shall have Aid of the Patron who is Plaintiff, and of the Ordinary. 22 E. 3. 3. adjudged.

Br. Aid, pl. 22. cites S. C. and 41 E. 3. 7. — Fitzh. Voucher, pl. 207. cites S. C.

11. In a Mortdancestor by three, scilicet, 2 Aunts and a Niece, if the Tenant says that A. his Wife was seised of the Land in Fee, and had Issue by him B. one of the Plaintiffs, and died, and that he is in as Tenant by the Curtesy, he shall have Aid of B. in Reversion, tho' she be one of the Demandants, because it may be that she hath a Release, or other Thing which may bar the other Demandants. 40 Ass. 37.

Fol. 173. In *Formedon* the *Tenant said, that J. was seised, and leased to the Tenant for Life*, and after he *granted the Reversion to* 7, and the Tenant attorned, and then 4 *released to* 3, and after *one of the three released to the two, and* so he held for Life, the Reversion to the two, and prayed Aid of them, and *shewed all the Deeds*, and had Aid; Quod Nota. Br. Aid, pl. 57. cites 14 H. 4. 32.

12. In a Formedon by two Coparceners against a Tenant for Life, the Tenant for Life shall not have Aid of the Demandants which have the Reversion, because they are Demandants. 34 E. 3. Aid del Roy, 112. adjudged.

Br. Aid, pl. 115. cites 47 Ass. 9.

13. If a Man recovers Land and dies seised, and this descends to his Daughter, who takes Husband, and has Issue, and dies, and after a Writ of Error to reverse this Judgment is brought against the Husband, Tenant by the Curtesy, and the Heir, the Husband upon the shewing of this Matter shall have Aid of the Heir in Reversion, tho' he be Party to the Writ. 47 Ass. 4. 9. adjudged.

14. In a Writ of Cosinage by A. and B. two Sisters, if A. be summon'd and sever'd, the Tenant being Lessee for Life shall have Aid of the Demandants, which have the Reversion, tho' he cannot have it of one of them alone without the other, for he needs no Aid of A. who is severed, for he is discharged of him for the Moiety, and for the other Moiety he shall not have Aid of the Demandants, for he may

may plead any Bar againſt him as againſt both. 34 E. 3. Aid del Roy 110. adjudged.

15. In a Writ of Entry in Nature of an Aſſiſe againſt Baron and Feme. if the Feme received upon the Default of the Husband ſays, that the Land was given to her and her firſt Husband, and to the Heirs of the Husband, ſhe ſhall not have Aid of the Heir of her firſt Husband, who has the Remainder, if the Heir be Demandant. 12 R. 2. Aid 122. adjudged.

16. In an Aſſiſe againſt ſeveral, one ſhall have Aid of another who is Party to the Writ. 1 H. 7. 29. b. admitted. Fitzh. Aid, pl. 32. cites 1 H. 7. 28.

S. C. and ſays that Aid does not lie in Aſſiſe of one that is not named.——See (A) pl. 13.

17. In a Writ of Entry againſt Baron and Feme and W. if W. makes Default after Default, and the Baron and Feme take upon them the intire Tenancy, and ſays they are but Tenants for Life, the Reverſion to W. they ſhall have Aid of W. tho' he was Party to the Action, and has made Default. 8 E. 2. Aid 168. adjudged.

18. If a Manor be demanded againſt three Coparceners, and 2 make Default after Default, by which they loſe their Part, the third ſhall not have Aid of them, becauſe they were Parties, as it ſeems, and no Partition was between them. Dubitatur 19 E. 2. Aid 172.

19. In a Scire Facias to execute a Recognizance, if the Sheriff returns the Conuſor dead, upon which a Writ is awarded to warn the Heir, and the Sheriff returns the Heir and B. as Ter-tenants warned, the Ter-tenant, being Tenant in Dower, ſhall not have Aid of the Heir in Reverſion, becauſe he is Party to the Writ. 8 R. 2. Aid del Roy, 114. adjudged. But it does not appear whether the Judgment was for this Cauſe, or becauſe the Thing demanded would not bind him in Reverſion, tho' it ſhould be now adjudged againſt Tenant in Dower, for both Reaſons were urged. See (B) pl. 10. S. C.

(R) Againſt *whom.*

1. If a Villein brings an Action of Treſpaſs, and the Defendant juſtifies in the Right of his Lord, he ſhall have Aid of the Lord. 49 E. 3. 2. Br. Aid, pl. 35. cites S. C. but this Point does not appear, but ſee pl. 2. infra.

2. So if a Stranger brings an Action upon the Statute of Labourers for his Servant, if the Defendant juſtifies in the Right of the Lord, the Servant being his Villein, he ſhall have Aid notwithſtanding it is between Strangers. 49 E. 3. 2. S. P. But per Belknap, *if the Plaintiff had ſaid* that *De ſon tort Demeſne without ſuch Cauſe*, the Defendant ſhall not have Aid; Quod non negatur. Note a Diverſity. Br. Aid, pl. 35. cites S. C.

(S) *Of*

Fol. 174.

(S) *Of whom it* ſhall be granted.

Br. Aid, pl. 49. cites S. C. —— Owen 13. S. P. The *Difference* is where the *Remainder in Fee* was *to the Tenant for Life*, or to a *Stranger*, that in the firſt Caſe he could not pray Aid of himſelf, but in the laſt Caſe he muſt pray Aid of all thoſe that are in Remainder, and this by the Opinion of all who argued. Fitzh. Aid, pl. 80. cites Hill. 33. H. 6 6. And Roll 166 ſeems to be miſprinted.

1. IF there be Leſſee for Life, the Remainder for Life, the Remainder in Fee, the Leſſee ſhall have Aid of both Remainders at one Time, becauſe all began at one Time, and depend upon the firſt Eſtate. 11 H. 4 63. b.

2. If there be Leſſee for Life, the Remainder in Tail, the Remainder in Fee, the Leſſee ſhall not have Aid of the Remainder in Tail only, but of both. 11 H. 4. 2. b. adjudged. 33 H. 6. 66. * 43 Aſſ. 45. per Finchden. 11 R. 2. Aid 120. nor of the Remainder in Fee only, but of both. † 7 H. 4. 18. b.

* Br. Aid, pl 114. cites S. C. for they are as one Remainder. † Br. Aid del Roy, pl. 27.

3. If there be Leſſee for Life, the Remainder in Tail, the Remainder to the right Heirs of Tenant in Tail, the Leſſee ſhall have Aid of him in Remainder. 25 E. 3. 39.

Br. Aid, pl. 49 cites S. C. that he and his Companion together may have Aid of the Leſſor

4. One Executor, Leſſee for Years, ſhall not have Aid of his Companion and Leſſor at one Time, becauſe he is not entirely Tenant to the Leſſor, but [he ſhall have it] of his Companion, and then both of the Leſſor. 11 H. 4. 63 b.

* See (Y) pl. 10. &c. —— Br. Aid, pl. 14. cites S. C. accordingly. —— Fitzh. Aid, pl. 80. cites S. C.

5. If there be Leſſee for Life, the Remainder in Tail, the Remainder in Fee to the Leſſee, the Leſſee ſhall have Aid of him in Remainder in Tail only, and not of * himſelf. 33 H. 6. 6. adjudged.

Br. Aid, pl. 14. cites S. C per Laycon.

6. So if there be Leſſee for Life, the Remainder in Tail, the Remainder to the Leſſee in Tail, the Remainder in Fee to another, the Leſſee ſhall have Aid of him in Remainder in Tail, and of him in Remainder in Fee, but not of himſelf. 33 H. 6. 6. For a Man ſhall not have Aid of himſelf.

S. P. For he is a Stranger to the Patent, and at no Miſchief. Br. Aid del Roy, pl. 57 cites S. C. —— Fitzh. Aid de Roy, pl 11. cites S. C.

7. If a Man juſtifies as Servant to the Grantee of the Ward of the King, he ſhall not have Aid of the Grantee and of the King preſently; but he may have Aid of the Grantee, and when he comes in, he may have Aid of the King. 4 H. 6. 12. b.

8. If there be Leſſee for Life, the Reverſion in Tail, the Remainder in Tail, the Remainder in Fee, the Leſſee ſhall have Aid of him in Reverſion, and of both Remainders. 11 R. 2. Aid 120. adjudged.

9. If a Man juſtifies as Bailiff of a Leſſee for Life, he ſhall not have Aid of him in Reverſion for want of Privity between them. 11 H. 6. 39. b.

10. If there be Leſſee for Life, the Reverſion for Life, the Remainder for Life, the Remainder in Fee, the Leſſee ſhall not have Aid of him in Reverſion for Life only, but ſhall have Aid of him and the others in Remainder. 33 E. 3. Aid del Roy 108. adjudged.

11. If

11. In Treſpaſs againſt a Miller for taking of Toll, where he ought to be Toll-free, if he be the Miller of A. who is Leſſee for Life, the Reverſion to B. he ſhall have Aid of the Leſſee, but not of the Reverſion, for want of Privity. 44 E. 3. 2. Brooke Aid 30 cites S. C. and Brooke ſeems miſprinted. Br. Aid, pl. 30. cites 44 E. 3. 2. —Br. Treſpaſs, pl. 47.

12. If a Man be poſſeſſed of a Ward in the Right of his Wife, and a Replevin is brought by him, and the Defendant avows for a Rent-Charge iſſuing out of the Land, the Baron ſhall have Aid of the Heir, but not of the Feme. 25 E. 3. 38. b. adjudged 44. Fitzh. Age, pl. 100. cites S. C.

13. If a Feme, Tenant in Dower, takes Husband, and they leaſe the Land to B. for the Life of the Feme, and after B. is impleaded, he ſhall not have Aid of the Baron and Feme, as in the Right of the Feme; for tho' he hath a Poſſibility to have it again, if ſhe ſurvives her Husband, becauſe ſhe leaſed this in Pais, yet ſhe hath no Reverſion or Eſtate during the Life of the Husband. 19 R. 2. 113. adjudged. Fitzh. Aid de Roy, pl. 113. cites S. C.

14. But in this Caſe B. the Leſſee ſhall have Aid of the Heir of the firſt Husband, who hath the Reverſion only without the Baron and Feme, becauſe he hath the immediate Reverſion. 19 R. 2. Aid del Roy 113. adjudged. Fol. 175.

15. If Ceſtuy que Uſe, before the Statute of 27 H. 8. had made a Leaſe for Years by the Statute 1 R. 3. the Leſſee ſhould have Aid of the Feoffees, tho' they were not privy to the making of the Leaſe, becauſe they had the Reverſion. * 21 H. 7. 21. b. adjudged. † 8 H. 79. Curia. 11 H. 7. 6. b. * Fitzh. Feoffment al Uſes, pl. 17. cites S. C. but S. P. does not appear.

—Br. Aid, pl. 102 cites S. C. & S. P. Law, and all was well convey'd in Law.—— † Br. Aid, pl. 118. cites S. C. For there was Privity in Ibid. pl. 148. cites 13 H. 7. 26. S. P. For the Statute makes Privity

16. In Replevin, if the Defendant avows upon B. as his very Tenant, and the Plaintiff ſays that B. leaſed to W. for 10 Years &c. which W. made him and one A. Executors, and died, A. being living, he ſhall have Aid of A. becauſe he alone, without A. cannot have Aid of B. 13 H. 4. Aid 186. adjudged.

(T) *Abatement* of Aid. By *Death.*

1. IF Aid be granted of three, who have the Reverſion to them, and to the Heirs of two of them, and at the Summons ad Auxiliandum, the Sheriff returns that one who had the Fee is dead, this ſhall not abate the Aid, becauſe all ſurvives to the reſt. 4 H. 4. 3. b. Fitzh. Aid de Roy, pl. 119. cites Mich. 4 H. 4. 4. S. C. —Thel Dig. 185. lib. 12. cap. 5. S. 1. cites Mich. 4 H. 4. 1. S. P. The Sheriff *returned that the one was dead*, and that the others were ſummon'd, upon which the Tenant was put to anſwer, without praying in Aid de Novo.

2. But if the Reverſion had been to two Perſons, [* Parceners] it had been otherways for the ſeveral Right. (It ſeems intended in Common, of which there ſhould be no Survivor.) 4 H. 4. 3. b. * Fitzh. Aid de Roy, pl. 119. cites 4 H. 4. 4. S. C. and S. P. by Hornby.

3. In *Replevin by the Baron*, the Defendant *avow'd upon the Baron and his Feme*, upon which the *Baron had Aid of his Feme*, and afterwards they were at Iſſue with the Avowant, and the Inqueſt ready to paſs, and

the Baron ſaid that his *Feme died after the laſt Continuance*, yet it was held by Newton that the Inqueſt ſhall be taken. Thel. Dig. 183. lib. 12. cap. 5. S. 2. cites Hill. 21 H. 6 24.

4. If *Prayee* in Aid dies, the Original Writ ſhall not abate; and if *one Coparcener prays Aid of her Coparcener* to recover in Value, and ſhe dies, the Writ ſhall abate; and if Judgment be given that ſhe recover Pro rata, it is Error. Hill. 20 H. 7. 10. a. b. pl. 19.

(U) What *Spiritual Perſon* ſhall have Aid.

1. TR. 1 E. 2. B. R. 57. Error brought of a Judgment in B. and Error aſſign'd, becauſe it was there proceeded to take a Jury againſt the Parſon, Predeceſſor of the Plaintiff of the Glebe Land without Aid of the Patron and Biſhop, and thereupon adjudged Dum Eccleſia quæ ſemper eſt infra ætatem fungetur vice minoris nec eſt juri conſonum quod infra ætatem exiſtentes per negligentiam cuſtodum ſuorum exhæreditationem patiantur &c. ideo reverſed &c.

*S. P. per Babbington and Cott. 2. A Parſon ſhall have Aid becauſe he hath not the meer Right. * 8 H. 6. 24. b. † 11 H. 6. 9. 20 H. 6. 46. 33 E. 3. Aid del Roy 103.

but contra per Paſton, Strange, and Martin. And Brooke ſays, Quære of the Aid, for after the Plaintiff granted the Aid Gratis, becauſe he would not be delay'd Br. Aid, pl. 76. cites S. C —— Ibid. pl. 141. cites S. C that he ſhall have Aid —— Br. Dean and Chapter, pl. 8 cites S. C.——Fitzh. Aid, pl 63. cites S. C. that a Parſon ſhall have Aid.——D 239. b. pl. 41. S. P. by Walſh, Weſton, and Dyer † Fitzh. Aid, pl. 69. cites S. C.

* Br. Aid, pl. 141. cites S. C. accordingly 3. So a Prebendary for the ſame Reaſon ſhall have Aid. * 11 H. 6. 9. adjudged. 33 E. 3. Aid del Roy 103.

; for it was agreed that Parſon nor Prebend cannot have Writ of Right, but only Juris Utrum.——Fitzh. Aid, pl. 69. cites S. C.—— D 239 b. pl. 41. S. P by three Judges.

S P. Br. Aid del Roy, pl. 15. cites S. C. but contra 4. A Maſter of an Hoſpital, who hath no College nor Common Seal, ſhall have Aid. 44 E. 3. 11. b.

if he has a College and Common Seal, per Thorpe.———Fitzh. Aid de Roy, pl. 54 cites S. C. and S. P. accordingly.

* Br. Aid del Roy, pl. 15. cites S. C.—— † Br. Aid, pl. 50. cites S. C. accordingly. 5. But an Abbot ſhall not have Aid. * 44 E. 3. 11. b. † 11 H. 4. 68. b. becauſe he hath the Right in him, and may have a Writ of Right. 8 H. 6. 24. b. 11 H. 6. 9. ‡ 20 H. 6. 46. 14 E. 3. Aid 22. Contra 8 H. 6. 24. b.

—Fitzh. Scire Facias pl. 71. cites S. C. ‡ Fitzh. Faux Recovery, pl. 7. cites Trin. 20 H. 6. 45. S. C.

* Br. Aid del Roy, pl. 15. cites S. C. 6. Nor a Dean. 44 E. 3. 11. b.

———Fitzh Aid de Roy, pl. 54. cites S. C. and S. P. admitted.

A *Dean* may have Aid of the Patron and Ordinary where he is *in by Preſentation.* Br. Aid, pl. 95. cites 9 E. 4. 16.

* Fitzh. Counterple del Aide, pl. 13. cites S.C. 53. and S. P. accordingly, per Thirne. cites 11 H. 4. 68. per Thirne. 7. If an Abbot be ſued as Parſon, he ſhall have Aid of the Patron and Ordinary. * 6 H. 4. 5. b. 11 H. 4. 6. b. † 68. b. 8 R. 2. Annuity adjudged.

† Fitzh. Scire Facias, pl. 71. cites S. C.——Br. Aid. pl. 50.

8. If

8. If an Abbot hath uſed to preſent a Monk to the Patron of the Priory who ought to preſent him to the Biſhop, who ought to inſtitute him Prior, if this Prior hath a Convent and Common Seal, altho' the Prior be preſentable, yet he ſhall not have Aid, becauſe he hath the Right in him, and may maint. in a Writ of Right. 11 H. 4. 68. b. adjudged. Br. Aid, pl. 50. cites S. C. accordingly. — Fitzh. Scire Facias, pl. 1. cites S. C.

9. If a Man founds a new Chantry, and orders that they ſhall have a Common Seal, and that the Chaplains ſhall be preſented, they ſhall not have Aid. 11 H. 4. 6. 8. b. Fol. 170.

10. If a Prebendary hath a Covent and a Common Seal, he ſhall not have Aid, becauſe he may have a Writ of Right. 11 H. 6. 9.

11. A Maſter of an Hoſpital ſhall have Aid. 2 E. 3. 47. b. 48. adjudged.

12. A Maſter of an Hoſpital who is by Election, ſhall not have Aid, for he is in equal Eſtate with an Abbot, and ſhall not have a Juris utrum. 14 E. 3. Aid 22. adjudged.

13. So he ſhall not have Aid tho' the Maſter be to be preſented by the Patron of the Place to the Ordinary, for divers Priors and Abbats are preſentable. 14 E. 3 Aid 22. adjudged.

14. A Maſter of an Hoſpital preſentable who hath a College and Covent Seal ſhall not have Aid. 33 Edw. 3. Aid del Roy 103. ſaid to have been adjudged and agreed.

15. A Parſon appropriate ſhall have Aid of the Patron and Ordinary in Annuity. * 6 H. 4 5. b, adjudged. || 11 H. 4. 68 b. 8. R. 2. Annuity 53. adjudged. * Fitzh. Counterplea del Aide, pl. 13. cites S. C. —

|| Br. Aid, pl 50. cites S. C. ——— Fitzh. Scire Facias, pl 71. cites S. C.

16. A Prior, tho' he himſelf be Parſon, ſhall not have Aid, for he being by Election has the Right in him. 14 E. 3. Aid 22.

17. So he, or an Abbot ſhall not have Aid, tho' they are preſentable. 14 E. 3. Aid 22.

18. A Biſhop ſhall have Aid of the Prior and Chapter, tho' he be the Sovereign of the Priory and Chapter. 18 E. 3. 7. b. adjudg'd. Fitzh. Aid, pl. 138. cites S. C. ———

See (X) pl. 28. 40. 42. S. C.

19. A Biſhop ſhall have Aid of the Dean and Chapter. 5 E. 2. Aid 167 adjudged.

20. A Biſhop ſhall not have Aid of the King who is Patron, becauſe he is elective. 38 E. 3. 19. Contra 33 E. 3. Aid del Roy 103. per Thorpe.

21. A Dean of a free Chaple of the King, who has no College or Covent Seal, ſhall have Aid of the King if his Deanry be in Demand. 33 E. 3. Aid del Roy, 103. agreed.

22. A Dean who is of the Collation of the King ſhall have Aid of the King, tho' he and the Chapter have a Common Seal, and may charge it, becauſe he is not elective, but comes in by Collation. 38 E. 3. 19. adjudged. Co. Litt. 341. b. that ſuch Dean ſhall not have Aid.

23. A Dean and Chapter ſhall not have Aid of the Biſhop. Contra 32 E. 3. Aid 40. adjudged.

24. A Biſhop who comes in as Vouchee upon his own Warranty, ſhall have Aid of the Dean and Chapter. 5 E. 2 Aid 167. adjudged. See (N) pl. 1. S. C.

25. If a Dean of a free Chapple of the King, who has not a Covent Seal nor College, has a Church appropriated to him which is demanded by a Writ of Right of Advowſon, he ſhall have Aid of the King. 33 E. 3. Aid del Roy 103. by all the Juſtices, praeter Thorpe.

26. If the King be ſeiſed of the Poſſeſſions of a Prior Alien in the Time

Time of War, and after leaſes them to the ſame Prior during the War, rendring Rent, the Prior in an Annuity ſhall have Aid of the King, tho' he be a Prior perpetual, not removeable, and tho' the Charter of the Leaſe be that he ſhall diſcharge all Charges. 20 Ed. 3. Aid 2. adjudged.

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(X) In what *Actions* it ſhall be granted.

* Fitzh. Aid, pl 73. cites S. C. —— Br Aid, pl. 58. at the End cites 19 H. 6 44. that it was agreed that Succeſſor ſhould have Aid in Scire Facias. Br. Aid, pl. 70. cites S. C.

1. IN a Scire Facias to execute an Annuity againſt a Parſon upon a Judgment againſt the Predeceſſor, in which no Aid was granted, the Defendant ſhall have Aid, becauſe there may be a Releaſe after to the Patron, but it does not appear whether the firſt Judgment was by Nient dedire. * 19 H. 6. 44. adjudged. † 8 H. 6. 23. adjudged. 24.

† Fitzh. Aid, pl. 63. 64 cites S. C.——

* Br. Aid, pl. 24 cites S. C. accordingly, but cites 29 E. 3. Fitzh. Scire Facias, 152 contra.——Fitzh Aid, pl. 112. cites S C. that the Aid was granted by Advice of the Court.

2. [So] in a Scire Facias to execute a Judgment in a Writ of Annuity, in which the Predeceſſor of the Defendant had Aid of the Father of the Patron which now is, the Defendant ſhall have Aid, the Judgment being by Nient dedire, becauſe perhaps the Plaintiff had after releaſed to the Patron. * 41 E. 3. 20.

* Br. Aid, pl. 29 cites S. C. accordingly, becauſe his Predeceſſor had had the Aid before. Quod nota.——Fitzh. Aid de Roy, pl. 57. cites S. C.

3. Contra * 44 E. 3. 18. adjudged, but it does not appear whether the Judgment was by * Nient dedire, and ſo 46 E. 3. 6. b. adjudged.

† A Man brought Annuity againſt a Parſon, who pray'd Aid of the Patron and Ordinary, and they were returned ſummoned, and would not appear, wherefore he confeſs'd the Action, and died, and afterwards the Recoveror ſued Scire Facias on the Recovery againſt the Succeſſor, who pray'd Aid of them again; and held that he ſhould have Aid, and yet they were the ſame Perſons that made Default, and would not appear before ——Fitzh. Aid, pl 61. cites Trin. 7 H. 6 38.——Br. Aid, pl. 72. cites S. C. & S. P. but ſays that the ſame Perſon ſhall not have Aid afterwards in Scire Facias on the ſame Judgment.

Fitzh. Aid de Roy, pl. 57. cites S. C. but I do not obſerve S. P.

4. But if in ſuch Caſe the Defendant alleges a Releaſe between the Judgment and Scire Facias, Aid ſhall be granted. 46 E. 3. 6. b.

* Br. Aid, pl. 99. cites S. C.—— † Fitzh. Aid, pl 61. cites S C.—— S P. But it was agreed there, that if the ſame Parſon or Tenant for Life who has Aid, and the Patron and Ordinary, or he in Reverſion, makes Default, and the Demandant recovers, then the ſame Parſon or Tenant for Life ſhall not have Aid in Scire Facias upon the ſame Judgment, & concordat Priſot. 34 H. 6. 2. But it was not adjudged. Br. Aid, pl. 72. cites 7 H. 6. 38.

5. [So] In a Scire Facias againſt a Parſon to execute an Annuity upon a Judgment againſt a Predeceſſor, in which Aid was granted, and the Patron and Ordinary fecerunt defaltam, and the Defendant acknowledged the Action, this Succeſſor ſhall have Aid, becauſe it may be releaſed after. * 14 H. 6. 8. † 7 H. 6. 38. b.

* Br. Aid, pl. 54. cites S. C. and 8 H. 6. 23. accordingly. —† Br. Aid del Roy, pl. 44. cites S C.—— Fitzh. Aid de Roy, pl. 20. cites S. C. but S. P. does not appear either in Br. or Fitzh. as to the Releaſe.

6. But in a Scire Facias to execute an Annuity againſt a Parſon, upon a Judgment againſt the Predeceſſor, he ſhall have Aid. * 12 H. 4. 4. b. † 19 H. 6. 2. b. becauſe there may be a Releaſe after.

7. [But]

7. [But] In a Scire Facias to execute a Judgment had againſt the Defendant himſelf in Annuity, the Defendant ſhall not have Aid. 12 H. 4. 18. Br Aid, pl. 55. cites S. C. —— Fitzh Counterplea del Aid, pl. 17. cites S. C. that Annuity was brought againſt a Parſon, and alleged Seiſin by the Hands of the Defendant, who pray'd Aid. It was anſwered by Norton, that the Plaintiff had alleged Seiſin by Defendant's Hands, as in Scire Facias on Recovery againſt the Defendant himſelf But per Thirne, This Action is to try the Right of the Annuity, which ſhall not be done without making the Ordinary and Patron Party &c.

In *Scire Facias upon Recovery* in Writ *of Annuity*, the Defendant ſhall have Aid *of the Patron and Ordinary*, and yet Eſſoign does not lie for the Patron and Ordinary at the Day of the Summons ad Auxiliandum, by reaſon of the Statute of W. 2. cap. 45. which ouſts Delays in Scire Facias. Br Aid, pl. 107. cites 39 H. 6. 50.

8. So if he had Aid of the Patron and Ordinary. 7 H. 6. 39. 17 E. 3. 56. b. admitted.

9. [But] In a Scire Facias to execute an Annuity againſt a Parſon, upon a Judgment againſt his Predeceſſor, in which Aid was granted of the Patron and Ordinary, the Defendant ſhall have Aid. (But it does not appear whether the firſt Judgment was by Nil dicit, or how, becauſe there may be a Releaſe after to the Patron, to which the Parſon is a Stranger. * 8 H. 6. 23 b. 38 E. 3. 25. adjudg'd. * Br. Dean and Chapter &c. pl. 8. cites S. C. & S. P. —— Fitzh. Aid, pl. 64. cites S. C. ——

D. 26. pl. 169. Hill. 28 H. 8. S. P. admitted generally, without mentioning the Reaſon.

10. [So] In a Scire Facias againſt a Parſon to execute a Judgment had in a Ceſſavit againſt a Predeceſſor, the Defendant ſhall have Aid, becauſe there may be a Releaſe after the Judgment. 10 H. 6. 5. b. adjudged contra. 8 H. 6. 24 33. b. Dubitatur. * Per Babington & Cott He ſhall have Aid as well here as upon a Recovery in Writ of Annuity. But contra per Paſton, Strange, and Martin; for Annuity cannot be granted to bind the Succeſſor without the Patron and Ordinary, and there the Succeſſor may falſify the Recovery. Contra upon a Recovery in Præcipe quod reddat, as here; for Præcipe quod reddat is well brought againſt Tenant for Life, and he ſhall not have Aid in Scire Facias, but is put to his Writ of Error or Attaint; and a Parſon has a better Eſtate than for Term of Life; for he may join the Miſe, and by his Alienation the Patron cannot enter &c. Quære of the Aid. Br. Aid, pl. 76. cites 8 H. 6. 24. —— Br. Dean and Chapter &c pl. 8. cites S C. & S. P. as to the Præcipe quod reddat, by the beſt Opinion. —— Fitzh. Aide, pl. 63. cites S. C. as to the Ceſſavit.

11. In a Writ of Annuity Aid ſhall be granted of the Patron and Ordinary. * 46 E. 3. 6. b. † 6 H. 4. 5 becauſe the Church is to be charged by the Recovery. 2 H. 6. 8. b. 7 H. 6. ‡ 19. b. ** 38. b. 39. 11 H. 6. ¶ 9. || 10. b. 20 H. 6. 46. 6 E. ‡‡ 43. 9 H. 5. 14 8 R. 2. Aid del Roy 116 adjudged. 20 E. 3. Annuity 32. 16 E. 3. Annuity 23. adjudged. * Fitzh. Aid del Roy, pl. 57. cites S C. & S. P. admitted. —— † Fitzh. Counterple del Aid, pl. 13. cites S. C. ‡ Fitzh. Aid, pl. 59. cites S. C. in Debt for Annuity. —— Br. Aid, pl. 70. cites S. C. ** Fitzh. Aid, pl. 61 cites S. C. —— Br. Aid, pl 72. cites S. C. but ſee pl. 3. ſupra in the Notes. ¶ Fitzh. Aid, pl. 69. cites S. C. —— Br. Aid, pl. 141. cites S. C. —— See (U) pl. 2. 3. (Y) pl. 5. || Br. Aid, pl 142. cites S. C. —— Br. Aid de Roy, pl. 105. cites S. C. —— See (Y) pl. 7. S. C. ‡‡ Fitzh. Aid, pl. 87. cites Mich. 6 E. 4. 3. S. P. and ſeems to be S. C. intended by Roll, but miſprinted.

12. So Aid ſhall be granted, altho' Seiſin be alleged by the Hands of the Defendant himſelf, [and] tho' the Action be brought of his own Subtraction. * 12 H. 4. 18. 13 R. 2. Aid 125. adjudged. 16 E. 3. Aid 132. adjudged. * Br. Aid, pl. 55. cites S. C. —— Fitzh. Counterple del Aid, pl. 17. cites S. C. —— See pl. 7. ſupra in the Notes.

*Fitzh. Aid, pl. 48 cites S. C.——Br. Aid, pl. 105. cites S. C. that he was Executor of a Prebendary, and had Aid of the Patron and Ordinary.

13. In Debt for the Arrearages of an Annuity, by an Executor againſt a Parſon, he ſhall have Aid. * 1 H. 6. 6. † 2 H. 6. 8. adjudg'd. ‡ 7 H. 6. 19. b.

† S. P. For tho' this Action be but a Perſonal Action, yet becauſe the Plaintiff counted upon Annuity by Preſcription, which Title here may be tried, therefore it goes to the Right. Br. Aid, pl. 4. cites S. C.——‡ Fitzh. Aid, pl 59 cites S. C.——Br. Aid, pl. 70. cites S. C.

Fitzh Aid, pl. 48. cites S. C. but the Diverſity between this and the former Plea, does not appear there.

14. But in Debt for the Arrearages of an Annuity againſt a Parſon, brought by an Executor upon the Grant of an Annuity by the Defendant for the Life of the Teſtator, he ſhall not have Aid, becauſe this does not charge the Church. 2 H. 6. 8. b.

See ſupra pl. 1. &c.

15. In a Scire Facias to execute a Fine of the Manor of E. againſt J. S. who is Maſter of the Hoſpital of the ſaid E. ſo that this is to defeat his Name, he ſhall have Aid of the Patron and Ordinary. 2 E. 3. 48. adjudged.

† And the Executor ~ * Fol. 1-S. ~ of the Predeceſſor ſhall not be thereof charged. Br. Aid, pl. 70 cites S C——Fitzh. Aid, pl. 59. cites S. C. and the Church ſhall be charged with the Nomine Pœnæ as well as with the Annuity.

16. In Debt againſt a Parſon for a Pain, for Non-payment of an Annuity, he ſhall have Aid of the Patron and Ordinary; for the Church ſhall be * charged by this. † 7 H. 6. 19. b. adjudged. 40 E. 3. 4. 8 H. 6. 6. 9 H. 6 56.

Br. Aid, pl. 99. cites S. C.——See ſupra pl. 1. &c.

17 In a Scire Facias to execute a Judgment in an Annuity, if in the firſt Action the Parſon had Aid granted of the Patron and Ordinary, and they would not join, and then the Parſon * acknowleged the Action, this Succeſſor ſhall have Aid. 14 H. 6. 8.

* See pl. 3 in the Notes.

Br. Aid, pl. 99. cites S. C.

18. The ſame Law in ſuch Caſe, if the Judgment had been given upon the Default of the Parſon. 14 H. 6. 8.

Br. Aid, pl. 99. cites S. C accordingly

19. So if the Parſon in ſuch Caſe had traverſed the Title of the Action, and this had been found againſt him, the Succeſſor ſhould have Aid in this Scire Facias, becauſe there may be a Releaſe after. 38 E. 3. 18. b. adjudged. Contra * 14 H. 6. 8. Curia.

* Br. Aid, pl. 99. cites S C. accordingly. Otherwiſe it is where he renders in Court, or makes Default

20. If in a Writ of an Annuity the Parſon hath not any Aid of the Patron and Ordinary, but he traverſes the Title of the Plaintiff, and this is found againſt him, [yet] in a Scire Facias againſt the Succeſſor, he ſhall have Aid, becauſe there may be a Releaſe after. Contra. * 14 H. 6. 8. Curia.

21. The ſame Law tho' the Patron and Ordinary join in Aid, in the Writ of Annuity, becauſe there may be a Releaſe after. Contra 14 H. 6. 8. Curia.

22. So if in an Annuity Aid be granted of the King, and after ſeveral Procedendo's granted the Plaintiff recovers, yet in a Scire Facias againſt the Succeſſor, he ſhall have Aid again of the King, becauſe there may be a Releaſe after. 17 E. 3. 56. b. adjudged.

* Br. Aid, pl 108. cites S. C.——Fitzh. Aid, pl. 157. cites S. C.

23. In a Mortdanceſtor againſt a Parſon, he ſhall have Aid of the Patron and Ordinary. 8 Aſſ. 36.

24. In

24. In a Præcipe quod reddat againſt a Parſon for the Glebe Land, he ſhall have Aid of the Patron and Ordinary, becauſe he hath not the meer Right, and the Patron and Ordinary will receive Prejudice thereby. 3 E. 2 Aid 164. adjudged. Contra * 8 H. 6. 24. b. Fitzh Aid, pl. 63. cites S. C. but not S. P —— * Br. Aid, pl. 76. cites S. C. —— Fr. Dean and Chapter, pl 8. cites S. C. but not exactly S. P. —— See pl. 27. in the Notes.

25. So he ſhall have Aid in a Formedon againſt him for the Land which he hath as Parſon. * 17 E. 3. 58. b. adjudged. 18 E. 3. 54. b. * Fitzh Aid, pl. 137. cites S. C. ——

26. So he ſhall have Aid in a Writ of Entry for Rent. 21 E. 3. 55. b. adjudged. Fitzh. Aid, pl. 55. cites S. C. and Ibid. pl. 182. cites S. C. —— Writ of *Entry in Nature of Aſſiſe againſt the Parſon of N.* who *ſaid that the Land is Parcel of his Glebe*, and pray'd Aid of the Patron and Ordinary, and was ouſted by Award; for he ſhall not have Aid in this Action, becauſe he is *ſuppoſed in of his own Wrong*, and therefore ſhall have Aid of none unleſs he be named in the Writ. Br Aid, pl. 59 cites 9 H. 5 17.

Entry in the Poſt againſt the Parſon of D. who pray'd Aid of the Patron and Ordinary, and ſaid that this is Parcel of his Glebe; Quære; for there was no more ſaid of it. Br. Aid, pl. 93. cites 4 H. 6. 1.

27. So he ſhall have Aid in a Ceſſavit. * 21 E. 3. 55. b. ‡ 22 E. 3. 3. *Fitzh Aid, pl. 55. cites S. C. and Ibid. pl. 182 cites S. C. —— See (A) pl. 8. S. C. Infra pl. 37. S. C. ‡ Fitzh. Aid, pl 3. cites S C.

In Scire Facias brought by one as Heir upon a Recovery in Ceſſavit againſt a Parſon, the Defendant who was the Succeſſor, pleaded that he found the Church ſeiſed of this Land, and that it was Parcel of the Glebe, and ſo had been Time out of Mind, and pray'd Aid of the Patron and Ordinary, and it was granted. Fitzh. Aid, pl 63. cites Hill. 8 H. 6. 24. —— Br Aid, pl. 76. cites S. C. accordingly. —— Br. Dean and Chapter, pl. 8. cites S. C —— See (Q) pl. 10. S. C.

28. In an Action againſt a Biſhop for Land, or other Freehold, he ſhall not have Aid of the Prior and Chapter. 18 E. 3. 7. b. Fitzh. Aid, pl 138. cites S. C. ——

See Infra pl. 40. 42. S. C. —— (U) pl. 18. S. C.

29 [But] Vide 5 E. 2. Aid 167. The Biſhop had Aid of the Dean and Chapter in a Præcipe quod reddat.

30 In a Scire Facias to have Execution of a Fine againſt a Prebendary of certain Land, the Prebendary ſhall have Aid of the Patron and Ordinary. 20 E. 3. Aid 30.

31 So Aid lies tho' his Name of Prebendary is to be defeated by this Writ. 20 E. 3. Aid 30.

32. In a Juris Utrum the Parſon ſhall have Aid of the Patron and Ordinary, becauſe he may loſe the Land for ever in this Writ. Contra 9 H. 5. 14. per Juſtic.

33. In a Writ of Right brought againſt a Parſon, he ſhall have Aid of the Patron and Ordinary, tho' he found not the Church ſeiſed, if he claims it in the Right of the Church, and had recover'd it before in a Juris Utrum. 3 E. 2. Aid 164. adjudged. But it was held that he who may maintain Writ of Right of Advowſon ſhall not have Aid of the Patron and Ordinary if he be impleaded. Thel Dig 19. lib. 1. cap. 22. S. 9. cites Paſch. 5 E. 3. fol. 189.

34. In an Action of Treſpaſs for cutting his Trees, if the Defendant ſays that he is Parſon, and that the Place where &c. is Parcel of the Glebe of his Rectory, upon which they are at Iſſue, the Defendant ſhall have Aid of the Patron and Ordinary, becauſe he himſelf is Tenant of the Freehold. 12 R. 2. Aid 121.

35. In

Fol. 179.

35. In a Ceſſavit againſt a Parſon of his own Ceſſer, if the Tenant ſays, that he holds the Land as the Demandant has acknowledged, he ſhall not have Aid of the Patron and Ordinary. 17 E. 2. Aid 170. adjudged.

36. In a Replevin by a Parſon, if the Defendant avows upon the Plaintiff for Service Arrear, he ſhall have Aid of the Patron and Ordinary. Contra 17 E. 2. Aid 170. per Devon.

Fitzh Aid, pl. 55. cites S. C. and ibid. pl. 182. cites S C. ——See (A) pl. S. S. C. ſupra pl. 27. S. C.

37. In a Ceſſavit againſt a Vicar, if he found his Church ſeiſed, he ſhall have Aid of the Patron and Ordinary. 21 E. 3. 55. b. per Hill ſaid to have been adjudged.

Br. Aid, pl. 5. cites S. C. per Cur.—— Fitzh. Aid, pl. 52. cites S. C.

38. If a Writ of Annuity be brought againſt a Parſon upon a Grant by the Parſon himſelf without the Confirmation of the Patron and Ordinary, he ſhall not have Aid, becauſe he himſelf is Party to the Grant, and this ſhall not charge the Church. 2 H. 6. 12.

Fitzh. Aid, pl. 52. cites S. C.—And upon the Plaintiff's ſhewing the Deed of the Parſon now Defendant, and of the Patron and Ordinary to charge him, Aid was granted him notwithſtanding that himſelf was Party. Br. Aid, pl. 5. cites S. C.

39. But he ſhall have Aid, if the Grant was confirmed by the Patron and Ordinary, becauſe he himſelf is Party to the Grant, and well knows this is the Cauſe of the Charge, becauſe this will charge the Church. 2 H. 6. 12. adjudged.

Fitzh. Aid, pl. 138. cites S. C. —— See pl. 28. 44. S. C. and ſee (U) pl. 18.

40. So a Biſhop ſhall have Aid in Annuity upon his own Grant, which is confirmed by the Prior and Chapter, altho' he himſelf be Sovereign of the Priory and Chapter, for this will charge the Biſhoprick. Contra 18 E. 3. 7. b.

Br. Aid, pl. 18. cites S. C. —— Fitzh. Aid, pl. 109. cites S. C.

41. In Annuity againſt a Parſon upon the Grant of his Predeceſſor, he ſhall have Aid, altho' a Deed of Confirmation of the Patron and Ordinary be ſhewn, for the Parſon does not know whether it be their Deed. 40 E. 3. 3. b. adjudged.

Fitzh. Aid, pl. 138. cites S. C.—See (U) pl. 18. and ſupra pl. 28. 40. S. C.

42. So in an Annuity againſt a Biſhop upon a Grant of the Predeceſſor, with the Confirmation of the Prior and Chapter, he ſhall have Aid of the Prior and Chapter, tho' he himſelf be Sovereign of the Priory and Chapter. 18 E. 3. 7. b. adjudged.

43. Note for Law in an *Indicavit*, that if a *Vicar* be *impleaded of a Thing touching his Vicarage*, he ſhall have Aid of the Parſon; Quod Nota. Br. Aid, pl. 143, cites 31 H. 6. 7.

44. Aid lies in Writ of *Entry in Nature of Aſſiſe*, tho' it lies not in *Aſſiſe*. Br. Aid, pl. 123. cites 4 E. 4. 14. admitted.

(Y) Spi-

(Y) Spiritual Corporations. *Of whom* they ſhall have Aid. Of the *King*. [Or others.]

1. IN an Action againſt an Abbot of the Foundation of the King, which will charge the Abby, he ſhall have Aid of the King. 6 H. 4. 5. b. Fitzh. Counterple del Aid, pl. 13. cites S. C. —

2. But in an Annuity againſt an Abbot as Parſon appropriate of a Church, he ſhall not have Aid of the King. 6 H. 4. 5. b. adjudged. Fitzh. Counterple del Aid, pl. 13. cites S. C. accordingly:

for by Huls, a Man ſhall not have Aid but of thing in Demand, or of the thing out of which the thing is iſſuing, and the Annuity is not iſſuing out of the Abbey.—And Hankford ſaid that there is a great Diverſity where he holds In Proprios Uſus, and where not; for when he holds In Proprios Uſus, it is Parcel of the Abbey, in which Caſe if the Abbey be recover'd &c. the Patronage of the Abbey is ſo far charged, but not ſo in the other Caſe. And Thirn bid them to take Aid of the Patron and Ordinary without the King &c. 11 H. 4. 6. a. pl. 27.

3. In an Annuity againſt a Parſon, if the Biſhop be Patron and Ordinary, and the Temporalties ſeiſed by the King for Cauſe, he ſhall have Aid of the Biſhop and King. 40 E. 3. 3. b. Br. Aid, pl. 18. cites S. C. —— Fitzh. Aid, pl. 109. cites S. C.

S. C. ——*Scire Facias againſt Maſter of an Hoſpital*, who *ſaid that the Hoſpital is of the Preſentation of the Biſhop of S who died, and the Temporalties ſeiſed into the King's Hands, the Hoſpital voided*, and the *King gave it to the Defendant* for Life by Patent, which is here, and praved Aid of the King by reaſon of the Temporalties yet in the King's Hands. Br. Aid, pl. 28. cites 44 E. 3. 11.——Per Belk. he may implead, and be impleaded, and ſhall have Writ of Right of his Poſſeſſion But per Cur. he ſhall not have Writ of Right, but Juris Utrum as a Parſon; Per Thorp, if he has College and Common Seal, he ſhall not have Aid no more than an Abbot or Dean; Quod Nota. Br. Aid del Roy, pl. 15. cites S. C.

4. So if the Temporalties are in the King by Vacancy of a Biſhoprick. 4 H. 6. 10. b. Br. Aid del Roy, pl. 54. cites 4 H. 6. 1. and ſeems to be the Caſe intended.

5. So if the Temporalties are in the King by Vacancy of a Biſhoprick which is Patron to a Prebend or Parſonage, if the Prebendary be ſued during the Vacancy, he ſhall have Aid of the King. * 11 H. 6. 9. 19 E. 3. Aid del Roy, 5. adjudged. * Br. Aid, pl. 141 cites S. C. —— Fitzh. Aid, pl 69. cites S. C.

In Treſpaſs the *Defendant juſtified for Common in a waſte Soil*, and becauſe it *belonged to the Biſhop of N.* and the *Temporalties are ſeiſed into the King's Hands, pending the Writ*, therefore the Defendant ſhall have Aid of the King before Iſſue joined, as he ſhould have where the King is Party; Quod Nota. Br. Aid del Roy, pl. 108. cites R. 3. 13.

6. But if a Biſhoprick be full of a Biſhop at the Time of Suit, he ſhall not have Aid of the King; for there the Biſhop with his Chapter may charge the Church without the King. 11 H. 6. 9. Br. Aid, pl. 141. cites S. C.—Fitzh. Aid, pl. 69. cites S. C.

7. So if the Patron be in Ward to the King, the Parſon ſhall have Aid of the Patron and King. 11 H. 6. 10. b. Br. Aid, pl. 142. cites S. C. and S. P.

and that he ſhall have it of the Ordinary alſo.—— Br. Aid del Roy, pl. 105. cites S. C.

Br. Aid de Roy, pl. 91. (90) cites S. C. and Brooke ſays that hence it ſeems that the Parſon of a Church has not properly the Fee Simple as Biſhop &c. have. ——Br. Dean &c. pl 17. cites S. C. —— Fitzh. Aid de Roy, pl. 95. cites S. C.

8. In an Aſſiſe againſt the Preſentee of the King of Parcel of his Glebe, the Parſon ſhall have Aid of the King, tho' the King had the Preſentation but hac vice, 43 Aſſ. 13 adjudged. Quere.

Fol. 180.

9. The Dean of a Free Chappel of the King of the Collation of the King, ſhall have Aid of the King. 33 E. 3. Aid del Roy 103.

Fitzh. Aid, pl. 7. cites S. C.

10. A Parſon appropriate ſhall have Aid of himſelf and of the Ordinary. 25 E. 3. 39. adjudged.

Br. Counterple de Aid, pl. 10. cites S. C.

11. A Parſon ſhall not have Aid of himſelf being Patron. 7 H. 6. 41.

Br. Counterple de Aid, pl 10. cites S. C.

12. But he ſhall have Aid of himſelf and another, being Joint-Patrons. 7 H. 6. 41.

* Br. Aid, pl. 138 cites S. C. accordingly —— Fitzh. Aid, pl 68. cites S. C. ——See (Q) pl. 9. S. C. † Fitzh. Aid, pl. 141. cites 18 E. 3. 27. S. C. || Fitzh. Aid, pl. 3. cites S. C.——See (X) pl 27. S. C.——See (Q) pl. 10. S. C.

13. He ſhall have Aid of the Patron, tho' he be Plaintiff in the Action. * H. 6. 11. † 18 E. 3. 28. adjudged. || 22 E. 3. 3. 34 E. 3. Aid del Roy 111. adjudged. 8 R. 2. Aid del Roy 116. adjudged. 26 E. 3. Annuity 32. adjudged.

Br. Aid, pl. 141. cites S. C. & S. P. admitted.——Fitzh. Aid, pl. 69. cites S. C.

14. Aid ſhall be granted of all thoſe who have Power to charge the Church. 11 H. 6. 9.

In Annuity againſt a Chantor of Exeter, Parſon of B. upon Compoſition made between the Predeceſſor of the Plaintiff and the Predeceſſor of the Defendant, by which the Defendant's Predeceſſor granted the Annuity to the Plaintiff's Predeceſſor, and his Succeſſor, for Tithes which was confirmed by the Patron and Ordinary; the Defendant ſaid that the Biſhop of Exeter is Patron of the Benefice charg'd, and that his Temporalties are ſeiſed into the King's Hands, and prayed Aid of the King, and of the Biſhop as Patron and Ordinary, and of the Dean and Chapter, becauſe this Parſonage belongs to the Chantor as one of the Chapter, and had it de omnibus; Quod Nota. Br. Aid, pl. 18. cites 40 E. 3. 3.

* S. P. for the Biſhop, Patron, and Dean and Chapter are one Body. Br. Aid, pl. 141. cites S. C. —— Fitzh. Aid, pl. 69. cites S. C. † Fitzh. Aid, pl. 10. cites S. C.

15. As if a Prebend, of which the Biſhop is Patron and Ordinary, be to have Aid, he ſhall have Aid of the Biſhop, and the Dean and Chapter, becauſe without all theſe the Church cannot be charged. * 11 H. 6. 9. adjudged. † 25 E. 3. 54. adjudged, altho' this be of the ſeveral Poſſeſſions of the Biſhop. In 33 E. 3. Aid del Roy 103. It is ſaid that he ſhall have Aid of the Dean and Chapter, without mentioning the Biand this is ſaid per Fiſh.

D. 26. b. pl. 169. Hill. 28 H. 8. S. P. admitted.——S. P. per Cur. Obiter Noy 11. and cited D. 26.

16. In an Annuity againſt a Parſon, he ſhall have Aid of both Patrons, being Coparceners.

Noy. 11. S.C. and S. P. agreed accordingly per Cur.

17. So if the King and common Parſon are Coparceners of an Advowſon, tho' the King ſhall have all the Preſentations alone, yet the Parſon ſhall have Aid of both. Trin. 3 Jac. B. R. in Harris's Caſe, per Popham.

18. In

18. In an Annuity againſt an Incumbent, if he ſays that A. and B. were ſeiſed of the Manor of D. to which this Church was appendant, and an Accord was made between them to preſent by Turns, and A. preſented him, yet he ſhall have Aid of both Patrons. 22 Hen. 6. 47. Br. Aid, pl. 88. cites S. C. and ſhall have Aid of them, and of the Ordinary, ſurmiſing that he found the Church diſcharged; By the beſt Opinion.——Fitzh. Aid, pl. 76. cites S. C.

19. So if one Coparcener preſents by Turn, the Incumbent ſhall have Aid of all the Coparceners. 22 H. 6. 47. Curia. S. P and not of him only who preſented him. But Poole denied it, and after nothing of the Matter was enter'd, therefore quære. Br. Aid, pl. 88. cites S. C.———Fitzh. Aid, pl. 76. cites S. C. & S. P. and ſays it was affirm'd in a manner by all the Juſtices.

20. In an Annuity againſt a Parſon Appropriate, he ſhall have Aid of himſelf as Patron. 8 R. 2. Annuity 53. adjudged.

(Z) Of the Ordinary. [*And of the King or Patron together.*]

1. THE Parſon in an Annuity ſhall have Aid of the Guardian of the Spiritualties of the Biſhoprick, the See being vacant. 31 H. 6. 10. adjudged. Br. Aid, pl. 146. cites S. C. —— Fitzh. Aid, pl. 79. cites S. C.

2. If the Parſon be to have Aid of the King as Patron, and of the Ordinary, he ſhall not upon Prayer have Aid of the King only, without the Ordinary, without praying in Aid of both together; for otherways the Plaintiff may be delay'd again after, which is not reaſonable. Tr. 3 Jac. B. R. *Harris*'s Caſe. Per Curiam. Noy 11. S. C. & S. P. accordingly agreed; for it had been no Difference if a common Perſon had been Patron.

(A. a) In what *Actions* they ſhall have Aid. Aid by *Coparceners.*

Fol. 181.

1. IN a Scire Facias upon a Fine, the Tenant ſhall have Aid of her Coparcener, tho' this Aid be in Lieu of a Voucher. 16 E. 3. Aid 130. adjudged. 33 E. 3. Aid del Roy 109. adjudged.

2. In a Writ of Meſne againſt a Coparcener, to whom the Services were allotted in Purparty, in Allowance of other Land, ſhe ſhall have Aid of her Coparcener. 3 E. 2. Aid 163. adjudged.

3. In a Writ of Admeaſurement of Paſture againſt a Coparcener, (as is intended as it ſeems) ſhe ſhall have Aid of the other Coparceners. 32 E. 2. Aid 178. adjudged.

4. In a Cui in Vita one Coparcener ſhall have Aid of the other. 30 E. 1. Itinere Cornubiæ 179. adjudged. Fitzh. Aid, pl. 179. S. P. cites 30 E. 1. It. Cornub. and ſeems to be S. C. only that the Word (Aid) is omitted.

5. In

* 9 Rep. 28 b cites 2 E. 3. 29 Roger Mortimer's Caſe, and there are not ſo many Fol. as 55. of that Year in the Year-book.

5. In a Quo Warranto againſt one Coparcener for holding Conuſance of Pleas, ſhe ſhall have Aid of the other Coparcener. 2 E. 3. * 55 b. adjudged. Co. 9. Ab. Str. Mar. 28. b. 2 E. 3. B. R. Rot. 128. adjudged in a Writ of Error.

6. In a Formedon of a Rent againſt one Coparcener, after Partition, ſhe ſhall have Aid of the other Coparcener, tho' the Rent be only in Demand. 8 R. 2. Aid del Roy 116. adjudged.

7. If *two Coparceners make Partition*, and afterwards in Præcipe quod reddat againſt the one, ſhe prays Aid of the other, who is returned warn'd, and makes Default, yet the other who prays in Aid ſhall deraign the firſt Warranty as well as if her Companion had come, and the other ſhall have Pro Rata againſt her, and ſhe who made Default ſhall not falſify the Recovery. Br. Garranties, pl. 55. cites 4 H. 7. 2. Per Keble.

(B. a) *What Coparceners [or Alienee of one]* ſhall have Aid. In reſpect of the *Eſtate*.

Br. Counterplea de Aid, pl. 7. cites S. C.—— Fitzh. Counterple del Aid, pl. 15. cites S. C.

1. WHERE a Partition is made without Title of Coparcenary, tho' by this they are Coparceners by Eſtoppel between themſelves, yet they ſhall not have Aid the one of the other; for they ſhall not delay the Demandant, who is a Stranger thereto by this. 11 H. 4. 60. b.

Fitzh Aid, pl. 136. cites Mich. 13 E. 3. S. C.

2. As if two intrude after the Death of their Father, who was but Tenant for Life, and make Partition, they ſhall not have Aid the one of the other, becauſe they have no Right. 17 E. 3. 47.

Fitzh. Aid, pl. 136. cites S. C.

3. So if Baron and Feme are ſeiſed to them and the Heirs of the Feme, ſo that the Baron hath but for Life, the Baron dies, and his Daughters enter and make Partition, and after the Wife dies without laying Claim to the Eſtate, yet they ſhall not have Aid the one of the other, becauſe no Right is to them deſcended. Contra 17 E. 3. 46. b. adjudged, for the not laying Claim.

Br. Aid, pl. 48. cites S. C. but S. P. does not clearly appear.——Fitzh. Counterple del Aide, pl. 15. cites S. C.

4. If two Diſſeiſors make Partition, and die, the Heir of one ſhall not have Aid of the Heir of the other. 11 Hen. 4. 60. b.

Fitzh. Counterple del Aid, pl. 15. cites S. C. —— Br. Aid, pl. 48. cites S. C.

5. So if two recover by Action Anceſtrel, without Title, the one ſhall not have Aid of the other after Partition, tho' between themſelves they are Coparceners by Eſtoppel. 11 H. 4. 61.

* Fitzh. Counterple del Aid, pl. 15. cites S. C.— † Fitzh. Aid, pl. 136. cites S. C.

6. But if two Coparceners have a Title Anceſtrel, and enter where their Entry is not lawful, and make Partition, yet they ſhall have Aid one of the other. * 11 H. 4. 60. b. † 17 Edw. 3. 46. b.

7. As

7. As if they enter upon a Deſcent, and make Partition, Aid lies, having a Right Anceſtrel by Deſcent. 17 Edw. 3. 46. b. 39 Edw. 3. 4. b. Fitzh. Aid, pl. 136. cites S. C.

8. In an Ad terminum qui præteriit, if the Writ ſuppoſes them Tenants by their Anceſtor, tho' the Anceſtor had but for Life, and his Daughters entered and made Partition, yet they ſhall have Aid the one of the other. 17 Edw. 3. 47. b.

9. If Tenant in Tail leaſes for Life, and after aliens the Reverſion to another by Fine, and dies, and his Daughters enter after the Death of the Leſſee as Coparceners, and make Partition, in a Scire Facias to execute the Fine (tho' this be to defeat the Cauſe of their Prayer, and their Entry is not lawful, but becauſe they have a Right Anceſtrel,) they ſhall have Aid the one of the other. Contra * 21 Edw. 3. 15. Fol. 182. * Br. Aid, pl. 65. cites S. C.—Fitzh. Aid, pl. 21. cites S. C.

10. [So] if Tenant in Tail leaſes for Life, and aliens the Reverſion by Fine, and dies, and his Daughters enters after the Death of the Leſſee as Coparceners, and the one takes Husband, and has Iſſue, and dies, and after the other dies, and a Scire Facias to execute the Fine is brought againſt the Tenant by the Curteſy, and the other Coparcener, the Coparcener ſhall have Aid of the Heir, becauſe they are in by Deſcent, tho' the Entry of their Anceſtor was not lawful. 21 Edw. 3. 15. Br. Aid, pl. 65. cites S. C. — Fitzh. Aid, pl. 21. cites S. C.

11. If two enter as Coparceners, having no ancient Right, and die ſeiſed, their Heir ſhall have Aid one of the other, becauſe they are in by Deſcent. 21 Ed. 3. 15. will prove this. Br. Aid, pl. 65. cites S. C. — Fitzh. Aid, pl. 21. cites S. C.

12. If two Coparceners make Partition, and a Seigniory is allotted to one, and after the Tenancy eſcheats to her, ſhe ſhall have Aid after of her Siſter, for this Tenancy comes in lieu of the Seigniory. 16 E. 3. Age 46. per Thorpe.

13. It is no good Counterplea of Aid, that the Anceſtor by whom they claim did not die ſeiſed, for if he had a Right, tho' he did not die ſeiſed, yet Aid lies. Contra 29 E. 3. 6. b. but Quære.

14. In a Cui in Vita, if 4 Sons, Coparceners in Gavelkind, are vouched upon the Warranty of their Anceſtor, and 3 of them make Default after Default, by which Seiſin of the Land is awarded for three Parts, and the 4th. enters into Warranty, he ſhall not have Aid of the other 3, becauſe the Land in Demand never deſcended to them from their Anceſtor, and the Charge is now equal, and the others have loſt their Part, and if he ſhould have Aid of them, he ſhould recover alſo pro Rata againſt them for his Part, and ſo he ſhould not loſe ſo much as the reſt. 19 Edw. 2. Aid 172. adjudged. See (E. a) pl. 8.

15. No Coparcener ſhall have Aid unleſs there has been a Partition between them. 19 Hen. 6. 78. b. 17 Ed. 3. 47. Fitzh. Aid, pl 136. cites S. C.—

See (E. a) pl. 2. S. C.

16. But after Partition one Coparcener ſhall have Aid of the other. * 20 Hen. 6. 2. † 17 E. 3. 47. * Br. Aid, pl. 11. cites S. C. —

Fitzh. Voucher, pl. 35. cites S. C. † Fitzh. Aid, pl. 136. cites Mich. 17 E. 3. S. C.

17. Coparceners in Gavelkind ſhall have Aid one of the other. * 11 Hen. 4. 22. b. † 17 Edw. 3. 12. b. * But they had not the Aid in this Caſe. † Fitzh. Aid, pl. 134.

Br. Aid, pl. 46. cites S. C.——Fitzh. Counterple del Aid, pl. 14. cites S. C.

Br. Aid, pl. 67. cites S. C. She vouched her Siſter by this Releaſe

18. If there are two Coparceners, and one releaſes to the other who is after impleaded, ſhe ſhall vouch her Siſter who releaſed; for this Acceptance of the Releaſe does not deſtroy the Privity of Coparcenary. 21 E. 3. 27.

of the one Moiety, and praved Aid of her for the other Moiety, becauſe this countervails a Partition in Law, and ſo is the Opinion of the Court there.——See (C. a) pl. 2. S. C.——(E. a) pl. 6. S. C.

S. P. and alſo of this Eſtate they two cannot join in Voucher, for the one is a Stranger

19. If there be Tenant in Tail, the Reverſion expectant to her and her Siſter in Coparcenary, and ſhe is impleaded, ſhe ſhall not have Aid of her Coparcener, becauſe ſhe cannot recover pro Rata, nor vouch over for this Land, becauſe ſhe is not ſeiſed of the Tail in Coparcenary. 2 H. 6. 16. adjudged.

to the Eſtate, and therefore per Cur. he ſhall not have the Aid; by which he vouched himſelf and the other as Heirs of the Donor, by reaſon of the Reverſion to them deſcended. Br. Aid, pl. 6. cites S. C.——— Fitzh Aid, pl. 5. cites S. C.———Co. Litt. 174. b. S P. and cites S. C.——See (D. a) pl. 1. S.C.

* Fitzh. Counterple del Aid, pl. 14. cites 11 H. 4 22 S. C. ——— Br. Counterple de Aid, pl. 24. cites S. C.——Br. Aid, pl. 46. cites S. C.

20 If Coparceners make Partition, and one aliens, the Alienee ſhall not have Aid of the others. * 11 Hen. 4. 23. It ſeems † 32 Edw. 1. 178. intended the Heir of the Coparcener who made the Partition, tho he pleads he has the Eſtate of one of the Coparceners.

† Fitzh. Aid, pl. 178. cites Paſch. 32 E. 1. and ſeems to be the Caſe intended by Roll.

* Br. Aid, pl. 46. cites S. C. and they were adjourned to another

21. So if after Alienation ſhe purchaſes, ſhe herſelf ſhall not have Aid of the other, becauſe ſhe comes in by the Alienee, and not in Privity of the Coparcenary. * 11 Hen. 4. 22. b. adjudged. Contra 18 E. 3. 65.

Term, at which Day it was awarded that ſhe ſhould anſwer without the Aid, becauſe ſhe is *in of other Eſtate, and* cannot have the Voucher or Warranty paramount, becauſe ſhe *is not in as Heir*, nor can ſhe *recover pro Rata*, becauſe ſhe is now *Purchaſor*, and ſo holds not in Coparcenary.——Fitzh. Counterple del Aid, pl. 14. cites S. C.——Br. Counterple del Aid, pl. 24 cites S. C———The Coparcenary between them is determin'd; for now ſhe is in of other Eſtate. Br. Coparceners, pl. 5. cites S. C. ——S Rep. 75. b. cites S. C. accordingly.

Fol. 183.

22. But after an Alienation, if the Coparcener comes to the Land again in Privity of the firſt Eſtate, ſhe ſhall have Aid. 11 Hen. 4. 22. b.

Fitzh. Counterple del Aid, pl. 14. cites S. C.——Br. Aid, pl. 46. cites S. C.

* S. P. and yet in ſuch Caſe 11 H. 4. 22. one Coparcener who made a

23. As if her Alienee with Warranty vouch her, and ſhe enters into Warranty, ſhe ſhall have Aid of the other, becauſe now ſhe comes in [in] Privity of the firſt Eſtate. * 11 Hen. 4. 23. † 43 Edw. 3. 23. 18 Ed. 3. ‡ 3. 31. admitted.

Feoffment after Purparty and retook Eſtate in Fee, was ouſted of the Aid; Quod nota.——Br. Aid, pl. 27. cites S. C.——— Br. Counterple de Aid, pl 5. cites S C. but cites 11 H. 4 22. Contra, therefore Brooke ſays, Quære if there be not a *Diverſity* between the *Feoffee himſelf*, and the *Son of the Feoffee*. † Br. Aid, pl. 46 cites S. C. ‡ This (3) ſeems too much.

If the Feoffee of the Coparcener be impleaded and vouches the Feoffor, ſhe may have Aid of her Coparcener to dereign the Warranty Paramount, but never to recover Pro Rata againſt her by Force of the Warranty in Law upon the Partition. Co. Litt. 174. a.——Hob. 21. Hobart Ch. J. ſaid that ſhe may dereign the Warranty Paramount, as if ſhe were in Poſſeſſion, and cites 43 E. 3. 23.——And Ibid. 26. Hobart Ch. J. ſaid ſhe may pray in Aid of her Fellow, and either have Pro Rata upon the Loſs, or vouch over with him upon the Warranty Paramount.

24. So

24. So if one Coparcener aliens with Warranty, and takes back for Life, and being impleaded prays in Aid of the Alienee, and he vouches her, and ſhe enters into Warranty, ſhe ſhall have Aid of the others. 11 Hen. 4. 23. Fitzh. Counterple del Aid, pl. 14. cites S. C.

25. If Partition be made between 3 Coparceners in Chancery, and after one Coparcener in a Writ of Error reverſes the Partition for Inequality, and hath the Manor of D. aſſign'd to her for Equality, and dies, and her Heir aliens the ſaid Manor, and after another of the ſaid Coparceners brings a Writ of Error upon the laſt Judgment againſt the Heir and Tertenant, the Heir, tho' he hath nothing in the Manor, ſhall have Aid of the 3d Coparcener, who is not named; for he is made Privy by the Writ. 42 Aſſ. 22. adjudged. Br. Aid, pl. 113 cites S. C and the Coparcener was ſummoned, and came not, by which the Heir was awarded to anſwer alone.——Br. Error, pl. 131. cites S.C.——Fitzh. Aſſiſe, pl. 349. cites S. C.

26. If there be two Coparceners of Land intail'd, and they make Partition, and after one leaſes her Part for the Life of the Leſſee with Warranty, and the Leſſee being impleaded vouches her, and ſhe enters into Warranty, ſhe ſhall have Aid of her Siſter; for now ſhe comes in in Privity of the firſt Eſtate. 14 Edw. 3. Aid 24. adjudged.

27. The ſame Law if ſhe had made a Feoffment in Fee with Warranty, and the Feoffee had vouched &c. tho' the Eſtate which ſhe gave be higher than what ſhe had. Contra 14 Edw. 3. Aid 24. Per Pole.

28. If after Partition one Coparcener leaſes her Part for Life, [to one] who is impleaded, and he vouches his Leſſor, who enters into the Warranty, ſhe ſhall have Aid of the other Coparcener.

29. If a Man leaſes Land for Life, and dies, by which the Reverſion in Fee thereof, and other Lands, deſcend to two Coparceners, and they make Partition, and the Reverſion is aſſigned to one, and for the better Aſſurance of this Partition, the other paſſes the Reverſion to her by Fine, and after ſhe who had the Reverſion is impleaded, ſhe ſhall have Aid of her Coparcener, becauſe the Anceſtor died ſeiſed thereof, and this deſcended to them, of which they had made Partition, and the Fine was only levied for the better Aſſurance of the Partition. 18 Edw. 2. Aid 171. adjudged.

30. In Aſſiſe it is ſaid, that after the *Plaintiff is put to ſue to the King for Aid of the King granted to the Tenant*, or the like, there the *Procedendo* ad Captionem, Aſſiſe, or Ad Judicium, *ought to accord with all Pleas and Originals, and of Tenants, and of Names.* Br. Procedendo, pl. 7. cites 22 Aſſ. 28.

(C. a) Of *whom* it ſhall be granted. [*Coparceners.*]

1. IF Coparceners make Partition, and one aliens her Part, yet the other Coparcener ſhall have Aid of her, for her Act ſhall not prejudice the other. * 11 Hen. 4. 23. 29 Edw. 3. † 24 Edw. 3. 37 8 Rich. 2. Aid del Roy 115. adjudged. The Cauſe there is to dereign the Warranty Paramount, but it is there agreed ſhe ſhall not have in Value Pro Rata of her that hath aliened. *Br. Counterple de Aid, pl. 24. cites 11 H. 4. 22. S. C.——Fitzh. Counterple del Aid, pl. 14. cites 11 H. 4. 22. S. C.——See (B. a) pl. 20. 21. &c. S. C. 6. cites S. C. † Fitzh. Counterple del Aid, pl.

2. If

† Br. Aid, pl. 67. cites S. C. — See E. a) pl. 6. S. C. — (B. a) pl. 18. S. C.

2. If there be two Coparceners, and the one hath releaſed to the other in Fee, and after ſhe to whom the Releaſe was made is impleaded, ſhe ſhall have Aid of her Siſter for her own Moiety, tho' ſhe herſelf was Party to the diveſting the Eſtate out of her Siſter; for ſhe ſhall have Aid for the Voucher Paramount. 21 Edw. 3. 27.

* Fol. 184.

3. If two Coparceners make Partition, and the one takes Husband, and hath Iſſue which dies, and after [ſhe] dies without Iſſue, by which the Husband is Tenant by Curteſy, the Reverſion to the other Coparcener, who is impleaded for her Moiety, ſhe ſhall not have Aid of the Tenant by the Curteſy, becauſe he is * Stranger to the Blood, and holds not in Coparcenary, and the Reverſion is in her who prays the Aid. 16 Edw. 3. Aid 129. adjudged. 19 Edw. 3. Aid 144. Curia.

4. So in this Caſe Aid lies not of Tenant in Dower. 16 Edw. 3. Aid 129. Per Gainford.

* Orig. is (en) and ſo miſprinted

5. But in theſe Caſes, if the Reverſion had been in the Heir of the other Coparcener who died, or in a Stranger, Aid would have lain of Tenant by the Curteſy * or Dower, and he in Reverſion to have had in Value. 19 Ed. 3. Aid 144. agreed.

6. If two Coparceners make Partition, and the one takes Husband, hath Iſſue, and dies, by which the Husband is Tenant by the Curteſy, the Reverſion to the Iſſue, the other Coparcener being impleaded ſhall have Aid of the Husband, Tenant by the Curteſy, and of the Iſſue. 33 Edw. 3. Aid del Roy 109. adjudged.

(D. a) Aid of *Coparceners*. *Cauſa* efficiens.

* Br. Aid, pl. 46. cites S. C. — Br. Counterplea of Aid, pl. 24. cites S. C. — † Br. Aid, pl. 6. cites S. C. — pl. 7. cites S. C.

1. THE Prayer in Aid by one Coparcener of the other, is for two Cauſes, one to have in Value Pro Rata againſt her Coparcener, in Caſe ſhe loſes, the other to have the Warranty Paramount in common in Safeguard of their Eſtates. 46 Edw. 3. 31. b. * 11 Hen. 4. ¶ 22. b. † 2 Hen. 6. 16. 17 Edw. 3. 47. ** 21 Edw. 3. 14. b. ‡ 2 Hen. 6. 7. b.

See (B. a) pl. 19. S. C. ** Br. Aid, pl. 65. cites S. C. ‡ Br. Aid, ¶ Orig. is 226. but is miſprinted, and ſhould be 22. b. pl. 45.

S. P. Co. Litt. 174. a.

2. One ſhall have Aid of the other, tho' there can be no Recovery in Value, if the Warranty Paramount may be deraign'd thereby. 21 Edw. 3. 27. admitted. 8 Rich. 2. Aid del Roy 115.

(E. a) In what *Caſes*. Aid by Coparceners.

* Br. Aid, pl. 7. cites S. C. — ** Fitzh. Aid, pl. 136. cites Mich. 17 E. 3. S. C.

1. IF Coparceners make Partition, and after one is impleaded, he ſhall have Aid of the reſt. * 2 Hen. 6. 7. b. ** 17 Edw. 3. 47.

Br. Aid, pl. 112. cites 40 Aſſ. 24. S. P.

2. If

2. But one Coparcener ſhall not have Aid of the other before Partition. 17 Edw. 3. 47. Fitzh. Aid, pl. 136. cites Mich. 1 E. 3. S. C.

3. One Coparcener ſhall not have Aid of the other before Partition in Deed or in Law. 29 Edw. 1. b. 2.

4. But if one Coparcener takes Husband, hath Iſſue, and dies, in a Præcipe againſt the Tenant by the Curteſy and the other Coparcener, the Coparcener ſhall have Aid of the Heir who is Coparcener of the Reverſion with her, tho' there be no Partition between them; for the Tenancy by the Curteſy hath in a manner made a Partition 21 Edw. 3. 14. b. 15. adjudged. Br. Aid, pl. 65. cites S. C —— Fitzh. Aid, pl. 21. cites S. C See (I) pl. 19. S. C.

5. And in this Caſe, for the ſame Reaſon, the Tenant by the Curteſy ſhall have Aid of the Heir in Reverſion, for the Weakneſs of his Eſtate. 21 Edw. 3. 14. b. adjudged. Br. Aid, pl 65. cites S. C —— Fitzh. Aid, pl. 21. cites S. C.

6. If two Coparceners are ſeiſed, and the one releaſes to the other, and after an Action is brought againſt her to whom the Releaſe was made, ſhe ſhall have Aid of her Siſter for her Moiety, tho' no Partition was made between them, becauſe this Releaſe hath in a manner made a Partition of their Moieties. 21 Edw. 3. 27. Br. Aid, pl. 67. cites S. C.—— Br. Counterple de Voucher, pl. 29. cites S. C.——See (C. a) pl. 2. S. C.——(B. a) pl. 18. S. C

7. If Land deſcends to two Coparceners, and one enters claiming the Whole to her own Uſe, and after the other releaſes to her in Fee, if ſhe be after impleaded, ſhe ſhall not have Aid of her Siſter for her own Moiety, becauſe * the Releaſe enures by way of Extinguiſhment, and ſo this does not amount to a Partition. 21 Edw. 3. 27. Br. Aid, pl. 67. cites S. C. but it ſeems to be contra where one enters in the Name of both; for this is a Partition in Law, and countervails Entry and Feoffment for a Moiety; and ſo is the Opinion of the Court there, by which they took Iſſue upon the Entry.—— Br. Counterple de Voucher, pl 29 cites S C. accordingly. * Fol 185.

8. In a Cui in Vita, if four Coparceners in Gavelkind are vouched upon the Warranty of the Anceſtor, and three make Default after Default, upon which Seiſin of three Parts of the Land is awarded, and the fourth enters into Warranty, he ſhall not have Aid of the other Coparceners, becauſe they were not Parceners of the Land demanded. See (B. a) pl. 14. S. C. cites 19 E 2 Aid 172. adjudged.

9. If one Coparcener aliens her Part, and after the other is impleaded, ſhe ſhall have Aid, becauſe this Alienation is a Partition in Law. 29 Edw. 3. 2. * 38 Edw. 3. 20. b. ſaid that it had been adjudged 8 Rich. 2. Aid del Roy 115. adjudged. Contra † 38 Edw. 3. 20. b. * In *Formedon* the *Tenant alleged a Deſcent in Tail, and ſhew'd How*, (viz.) *to him and to one K. which K. of her Purparty enfeoffed W.* and ſo held ſhe with K. in Purparty, and pray'd Aid of K. Per Finch, *by the Alienation of K. ſhe has nothing of which you may recover Pro Rata*, and in ſuch Caſe you *ſhall have the Voucher Paramount alone, and* ſhall have the *Warranty alone*; and Knivet agreed by which the Tenant paſs'd over. Br. Aid, pl. 61. cites 38 E. 3 20.——Fitzh. Aid, pl. 107. cites S. C. by Belk. † Fitzh. Aid, pl. 107. cites S. C. Knivet ſaid, he knew not how they could have Aid, by reaſon &c. and thereupon Iſſue was taken upon Ne dona pas &c.

10. So if one Coparcener recovers her Moiety in any Aſſiſe againſt the other, ſhe ſhall have Aid; (for this is a Recovery with a Partition, as is intended;) for this is a * Partition in Law. 29 Edw. 3. 2. * See Co. Litt. 167. b. The different Opinions of Fraſton and Britton, as to ſuch Recovery, being a Partition in Law; and Coke ſays it ſeems reaſonable that it is not a Parti-

a Partition; for he muſt have his Judgment according to his Plaint, and that was of a Moiety, and not of any thing in Severalty; and the Sheriff cannot have any Warrant to make any Partition in Severalty, or by Metes and Bounds ——6 Rep. 13. a. S. P.

11. If one Coparcener be diſſeiſed of Parcel by the other, and after the Diſſeiſee is impleaded for the reſt, ſhe ſhall have Aid; for this affirms it for a Partition, and ſhe ſhall not come after to defeat the Poſſeſſion of the Diſſeiſor againſt this Agreement. 29 Edw. 3. 2. But Quære.

12. If one Coparcener be diſſeiſed, and not the other, (admit this which cannot be) the that is not diſſeiſed, ſhall have Aid of the other while ſhe is diſſeiſed; for this Diſſeiſin is a Partition in Law.

(F. a) *At what Time* it ought to be demanded.

Fitzh. Aid de Roy, pl. 8. cites S. C.

1. He ought to demand it the firſt Day of the Term that he begins to plead. 2 Hen. 6. 5. b.

Fitzh. Aid, de Roy, pl. 8. cites S. C. —S.P. For it ought to be demanded in the former Term, and before Plea pleaded. F. N. B. 153. (F) in the new Notes there (b) cites S. C.

2. If a Plea be adjourned from one Term to another, in the other Term he ſhall not have it. 3 Hen. 6. 5. b.

3. In an Avowry for a Rent reſerved upon a Partition, if the Plaintiff challenges the Avowry, he ſhall not have Aid as Leſſee for Life of him in Reverſion. 16 Ed. 3. Aid 128. adjudged.

4. If a Man be ouſted of Aid for one Cauſe, he may have other Cauſes in Infinitum the ſame Term to have Aid. 3 Hen. 6. 5. b.

5. In Ejectione Firmæ, *after Not Guilty pleaded, and in another Term* the Defendant prayed in Aid of the King's Leſſees for 99 Years of his Dutchy Lands in Truſt for the Queen, and as Bailiff to them, and it was denied by the Court. Hard. 179. Paſch. 13 Car. 2. in Scaccario. Anderſon v. Arundel.

6. A Writ of *Dower* was brought, and the *Tenant pleaded Jointenancy as to Parcel*, and Judgment was given that he anſwer over, after which the Tenant prays in Aid of his 3 Daughters, ſhewing that himſelf was but Tenant by the Curteſy, and the Reverſion in his three Daughters. Per Cur. Aid is not demandable in another Term after Judgment to anſwer over. 2 Jo. 6 & 8. Paſch. 23 Car. 2. C. B. Cobham (Lady) v. Tomlinſon.

7. In *Perſonal Actions* Aid cannot be prayed in another Term *after Imparlance*, becauſe there it is Ad Reſpondendum, and after ſuch Imparlance taken no Aid lies; Per the Ch. Baron. Hardr. 179. Paſch. 13 Car. 2.

(G. a) At

(G. a) At what Time it ſhall be granted. Where *before* any *Plea pleaded*, and where not.

1 IN a Replevin brought by Leſſee for Life, if the Defendant avows upon W. as upon his Tenant, and the Plaintiff pleads that W leaſed to him for Life, he ſhall not have Aid of W. before any Plea pleaded. 32 Edw. 3. Aid 41. adjudged. Contra 8 Hen. 2. Aid del Roy 117. agreed. But if he pleads Hors de ſon Fee, he ſhall have Aid of him in Reverſion. 32 Edw. 3. Aid 41. adjudged.

2. In Treſpaſs by Leſſee for Years, if the Defendant avows upon J. S. as upon his very Tenant for certain Services arrear, the Plaintiff ſhall not have Aid of J. S. before any Plea pleaded. 8 Rich. 2. Aid del Roy 117. adjudged, becauſe it is but a Termor, and has not the Freehold (it ſeems not to be Law.)

3. In Treſpaſs, if the Defendant avows for that the Uſage of the Vill of D. is, That if any one erects a Fold within the Town, the Lord of the Town may take it, ſaving the Abbot of C. who has a Houſe and Land, by reaſon of which he is to have a Fold, and 40 Sheep, and if he has more the Lord may take them, and alleges that the Abbot leaſed the Houſe and Land to the (*) Plaintiff for certain Years, and he put in 7 Sheep above the 40, for which, he [the Defendant] being Lord of the Town, took them &c. the Plaintiff ſhall have Aid before any Plea pleaded. 8 Rich. 2. Aid del Roy 117 adjudged. (*) Fol. 186.

4. In a Replevin, if the Defendant avows upon J. S. as upon his very Tenant, the Plaintiff being Leſſee for Years of J S. ſhall have Aid of him before any Plea pleaded; for they may join. Contra 8 Rich. 2. 118. adjudged. Fitzh. Aid de Roy, pl. 118. cites Paſch. 8 R. 2. S. C

(H. a) At what Time it ſhall be granted. *Before Iſſue* who ſhall have Aid.

1. A Bailiff ſhall not have Aid before Iſſue. 43 Edw. 3 13. b. Fitzh. Aid, pl. 114. cites S. C. & S. P.——Bendl. 180. in pl. 224. S. P. in Marg.

2. And ſo 46 Edw. 3. 11. b. where the Iſſue is, whether it be the Freehold of his Maſter. S. P. in *Treſpaſs*. Br. Aid, pl. 33. cites S. C. but not before Iſſue.

3. So of the Servant. 8 Hen. 4. 14. S P. per Huls. Br. Aid, pl. 45. cites 8 H. 4. 17. S.P.——See (I. a) pl. 3. S. C.

4. A Baron ſhall have Aid of his Feme before Iſſue, where the Avowry is upon him and his Feme in the Right of the Feme. 43 Edw. 3. 13. b. Br. Aid, pl. 26. cites S. C. —— Fitzh. Aid, pl. 114. cites S. C.

5. But otherwiſe it is if he avows upon the Baron only, as in the Right of the Feme. 29 Edw. 3 24.

6. In a Replevin by the Husband, if the Avowry be made upon a Stranger, the Husband may ſay that he hath nothing but in the Right of

of his Wife, who is Tenant in Dower, the Remainder over to a Stranger, and ſhall have Aid of his Wife before other Plea pleaded. 19 Edw. 3. Aid 143. adjudged.

7. In a Replevin, if the Defendant avows upon the Plaintiff for certain Services as Bailiff of J. S. to which the Plaintiff ſays, that A. whoſe Eſtate the Defendant hath in the Seigniory, releaſed to B. whoſe Eſtate he hath in the Tenancy, the Plaintiff [Defendant] ſhall have Aid of J. S. without more Pleading. 24 Edw. 3. 25.

Fitzh. Aid, pl. 43. cites S. C.

8. So if the Bailiff avows upon the Plaintiff for Services, and the Plaintiff traverſes the Seiſin, yet the Bailiff ſhall not have Aid before Iſſue joined. 30 Edw. 3. 19 adjudged.

Br. Aid, pl. 4 cites S. C. not S. P.

9. In Debt for the Arrearages of an Annuity againſt a Parſon, if the Defendant ſays he found the Church diſcharged, he ſhall have Aid before any Plea pleaded. 2 Hen. 6. 8. b. adjudged.

S. P. but otherwiſe it is per Moile and Jenny, in Avowry

10. In a Replevin, if the Defendant avows for Damage-Feaſant, as in the Right of his Wife in certain Lands, he ſhall not have Aid before Iſſue joined. 7 Edw. 4. 2. b. Curia.

by the Baron for Rent-Service or Suit of Court in Jure Uxoris, or of the Claim of a Villein in Homine Replegiando in Jure Uxoris; for theſe are real, and the Damage-Feaſant is perſonal. And per Danby and Caresby, if a Bailiff juſtifies or makes Conuſance in Jure Magiſtri for Rent or Service, and the Plaintiff pleads a Releaſe of the Maſter, the Bailiff ſhall not have Aid of his Maſter before Iſſue joined. Contra per Moile. Br. Aid, pl. 129. cites S. C.——Fitzh. Aid, pl. 88. cites S. C.

* Thoſe Words are in Fitzh. Aid, pl. 56.

11. In a Replevin, if the Defendant makes Conuſance as Bailiff for a Rent-Charge granted to R. by one H. and the Plaintiff ſays that H. was bound to him in a Statute Merchant, and after granted the Rent to R. and * [the Defendant] prays in Aid of R. he ſhall not have Aid before Iſſue joined. 14 Edw. 3. Aid 56. per Curiam. 21 Edw. 3. Aid 183. adjudged.

If *Tenant for Life or Years makes Avowry*, or *Bailiff makes Conuſance for*

12. In a Replevin, if the Defendant avows for a Rent-Service, as Leſſee for Life, the Reverſion to J. S. to which the Plaintiff pleads Hors de ſon Fee, the Defendant ſhall not have Aid of him in Reverſion before he hath joined. 29 Edw. 3. 40. adjudged.

Rent-Service or Rent-Charge, and the *Plaintiff traverſes the Avowry, or ſays Hors de ſon Fee, Or in Rent-Charge, that he who charged had nothing at the Time of the Charge*, or *in Conuſance for Damage Feaſant*, in theſe Caſes &c. they ſhall have Aid after Iſſue join'd; for peradventure he of whom Aid is pray'd may eſtop the Plaintiff. Ibid. cites Paſch. 21 E. 3.

And if *Guardian in Socage in Right of the Heir pleads Hors de ſon Fee*, he cannot have Aid till after Iſſue join'd. Ibid. cites M. 30 E. 3.

Br. Aid, pl. 2. cites S. C.——Fitzh. Aid, pl. 50. cites S. C.—S. P. D. 289. b. pl. 59. Trin. 12 Eliz.——

13. In a Replevin, if the Defendant avows upon J. S. for Services Arrear as his Tenant, and the Plaintiff ſays, that J. S. leaſed the Land to him for Years, and prays Aid of him, he ſhall have it before Iſſue joined, becauſe he is Plaintiff. 2 Hen. 6. 1. per Curiam.

See (I a) pl. 4. S. C.

Replevin, by the Opinion of the Court the *Termor for Years, Plaintiff*, ſhall not have Aid of his Leſſor before Iſſue join'd, *where the Defendant avows for a Rent-Charge*; for he *may plead at large. Contra for Rent Service*, for there he *is not privy* becauſe the Avowry is upon the Perſon, but after iſſue join'd he ſhall have Aid. Pigot was in a contrary Opinion; for *it may be that the Leſſor has a Releaſe* or other Deed, which the Termor has not *to plead*. Br. Aid, pl. 131. cites 7 E. 4. 24.

Fitzh. Aid, pl. 50. cites S. C.——

14. But otherwiſe it had been, if he had been Defendant, for the Wrong ſuppoſed in him. 2 Hen. 6. 1. Curiam.

Br. Aid, pl. 2. cites S. C.——But ibid. pl. 91. cites 24 E. 3. 3. Contra, that *Bailiff Defendant* in Replevin pray'd Aid of his Maſter, and had it immediately, and ſo had Tenant for Life the next Term in ſuch Caſe.——*So* ibid. pl. 63. cites 21 E. 3. 12. *Bailiff* Defendant had Aid of his Maſter before Iſſue joined.

15. In

15. In *Treſpaſs*, the Defendant *ſaid that the Place where &c. is the Franktenement of W. N. who leaſed to him for* 10 *Years*, by which he enter'd &c. Cand. it is the *Franktenement of the Plaintiff* &c. wherefore the Defendant pray'd Aid of his Leſſor, and had it, quod nota, after Iſſue in Treſpaſs, and not before, as appears here. Br. Aid, pl. 103. cites 1 H. 6. 3.

In *Replevin*, the *Defendant avow'd becauſe the Place where &c was the Franktenement of J. N. who leaſed to him at Will, and he diſtrain'd for Damage Feaſant*, and the *other ſaid that the Place where &c. was His Franktenement and Not the Franktenement of J. N.* and the Defendant pray'd Aid, and was not ſuffer'd to have the Aid before Iſſue join'd, becauſe *by the Avowry it appears that it is perſonal*, and therefore is only as an Action of *Treſpaſs*; quod nota that in Treſpaſs and ſuch Avowry the Aid does not lie before Iſſue join'd, and ſee that Tenant at Will had Aid. Br. Aid, pl. 130 cites 10 H. 6. 2.

In *Replevin*, *the* Defendant *juſtified as His Franktenement for Damage-Feaſant.* The *Plaintiff ſaid that J. S. was ſeiſed in Fee, and leaſed to him for Years, and pray'd Aid.* Per Heydon, he ſhall not have Aid before Iſſue join'd. But *otherwiſe* it is where he avows *for Rent.* But the Reporter ſays he ſhall have Aid in both Caſes before Iſſue join'd. Br. Aid, pl. 126 cites 5 E. 4. 2.

16. Aid is not grantable *after Plea to the Action* in the Caſe of a common Perſon; Per Vaughan Ch. J. 2 Jo. 8. cites 3 H. 6. 1. and 5.

17. A Man *leaſed to W. for Life rendering Rent*, and after *granted the Reverſion to J. S Tenant of the King of other Lands in Fee, which J. S. died his Heir within Age, and in Ward of the King*, the Tenant for Life in Avowry may have Aid of the Heir after Iſſue join'd, but not of the King. Br. Aid, pl. 80. cites 21 H. 6. 11.

18. Aid of the King in *Treſpaſs* ſhall be before Iſſue join'd, but of a common Perſon it may be *after Iſſue join'd.* Br. Aid, pl. 125. cites 5 E. 4. 1.

(I. a) At what *Time* it ſhall be granted. *Before Iſſue* in what Actions.

Fol. 187.

IN Replevin, if the Defendant avows as a Aſſignee of a Rent reſerved for Equality of Partition, the Plaintiff being Leſſee for Life, ſhall have Aid before Iſſue. 15 Edw. 3. Aid 34. adjudged. 16 Edw. 3. Aid 128. 130. adjudged.

2. In an Avowry upon a Stranger Aid ſhall be granted before any Plea pleaded to the Right, becauſe he being a Stranger to the Avowry cannot plead in Abatement. 44 Edw. 3. 39. b. * 9 Hen. 6. 27. 15 Edw. 3. Aid 33 adjudged. † 17 Edw. 3. 9. b. adjudged.

* Fitzh. Replevin, pl. 4. cites S. C. —— See (I) pl. 3. S. C. † Fitzh. Aid, pl. 133. cites S. C. but ſays nothing of its being to be granted before Iſſue.

3. In Replevin the Servant ſhall have Aid of his Maſter before Plea pleaded. 8 Hen. 4. 15.

Br. Aid, pl. 45. cites 8 H. 4. 17.

S. P. ——See (H. a) pl. 3. S. P. cites 8 H. 4. 15.

4. If Leſſee for Years brings a Replevin, and the Lord avows upon the Leſſor, the Leſſee ſhall have Aid before Iſſue becauſe he is Plaintiff. 2 H. 6. 1.

Br. Aid, pl. 2. cites S. C. —— Fitzh. Aid, pl. 50. cites S. C.

5. In Pleas Real the Tenant ſhall have Aid before Plea pleaded and Iſſue taken. 4 H. 6. 30. b.

Fitzh. Aid, pl. 58. cites S. C. ——

In Real Actions Aid Prayer of a common Perſon lies before Iſſue joined, becauſe there the Title of him in Reverſion or Remainder appears by the Plea, for without ſhewing it he cannot draw his Plea; Per the Ch. Baron. Hard. 179. Paſch. 13 Car. 2. ——— See pl. 10. contra.

6. In Replevin, if the Defendant avows as Bailiff to J. S. for certain Services, if the Plaintiff says that the Place where &c. is not held by the Services alleged, but by Fealty only, the Bailiff shall have Aid before Issue, because after Issue joined the Lord when he comes cannot alter it. 21 Ed. 3. 12 b. adjudged.

Br. Avowry, pl. 117. cites S. C.

7. In Replevin, if the Defendant says, that the Place where &c. is the Freehold of a Stranger, who leased to him at Will, and he took it Damage feasant, if the Plaintiff says that it is his Freehold, absque hoc that it is the Freehold of a Stranger, yet the Defendant shall not have Aid before Issue joined, because this Replevin is but merely in the Personalty as a Trespass. 10 Hen. 6. 26. b.

Fitzh. Aid, pl. 58. cites S. C. ——

8. In Pleas Personal, the Defendant shall not have Aid before Plea pleaded. 4 Hen. 6. 30. b.

See pl. 12. and the Notes there

* Br. Avowry, pl. 117. cites S. C. — † Br. Aid, pl. 45 cites 8 H. 4. 17 ——

9. In Trespass the Defendant shall not have Aid before Plea pleaded. 8 Hen. 4. 15. but * before Issue in Trespass. † 10 Hen. 6. 26. b.

Ibid. pl. 13. cites 28 H. 6 13. S. P. ——S. P. Br. Aid, pl. 125. cites 5 E. 4. 1.

In *Trespass* the Defendant justified, *because J was seised of such Land, and had Common appendant in the Place* &c. Time out of Mind, *and that J. leased to the Defendant for Years, and he used the Common* &c. and the *Plaintiff traversed the Prescription*, by which the Termor prayed Aid of J. his Lessor, and had it; Quod Nota, after Issue joined in Trespass, and of the King in Trespass the Aid shall be before Issue joined. Note a Diversity. Br. Aid, pl. 21. cites 40 E. 3. 21.

As where *Bailiff makes Conusance*, and *does not pray Aid in the Conclusion of his Cognizance*, and the *Plaintiff replies* thereto, the *Defendant shall not pray Aid after the Replication.* Br. Laches, pl. 5. cites S. C. ——Fitzh. Aid, pl. 58. cites S. C.

10. After Plea pleaded to the Action a Man shall not have Aid. 4 Hen. 6. 30. b. In Actions Real the Defendant shall † not have Aid before Issue. 26 Hen. 6. Aid 77.

† [The Word (Not) is put in by Mistake of the Printer, and is contrary to the Book cited. And see pl. 5. in the Affirmative.]

* S. P. per Brown. Br. Counterple de Aid, pl. 10. cites S. C. that he shall attend till the Issue be tried to have Aid of the Ordinary. ——S. P. per Browne, Clerk, which Babington J. held for Law, and none denied it. Br. Aid, pl. 73. cites S. C. —— Br. Joinder in Aid, pl. 12. cites S. C. —— Br. Process, pl. 139. cites S. C. —— See (N a) pl. 9. and (S. a) pl. 3.

11. If Aid be prayed of the Patron and Ordinary, and the Estate of the Patron is counterpleaded, the * Patron shall not have Aid of the Ordinary before the Issue determined, for if this be found for the Plaintiff, he shall have Judgment presently; (Quære this) and if with the Defendant he shall have Aid of the Patron and Ordinary insimul. 7 Hen. 6. 41.

S. P. and there the Prayee does nothing, but shall give in Evidence in Maintenance of the Issue, and shall not plead, but contrary in Plea Real. Br. Joinder in Aid, pl. 14. cites 19 H. 6. 6. ——In Personal Actions Aid does not lie of a common Person till after Issue joined upon the Right of the Matter, but not upon the General Issue; because it does not appear to the Court whether the Right will come in Question or not, and if it does not there is no Cause of Aid; per Ch. Baron. Hard. 179. Pasch. 13 Car. 2. in the Exchequer.

12. In Actions Personal the Defendant shall not have Aid before Issue joined. 26 Hen. 6. Aid 77.

13. As Aid does not lie in a Replevin before Issue. 26 Hen. 6. Aid 77.

(K. a) Aid after Aid. In what Caſes Aid ſhall be granted *after Aid.* Fol. 188.

1. IF one Coparcener has Aid of his Brother upon Partition between them, and he makes Default, the other ſhall have Aid of his Uncle upon a Partition made between his Father and Uncle, and ſo in Infinitum after Paramount, becauſe if his Brother had appeared they both ſhould have had Aid, and his Default ſhall not prejudice him. 17 Edw. 3. 12. b. Fitzh. Aid, pl. 134. cites S. C.

2. If one Coparcener has Aid of B. her Coparcener, and the other Coparceners, and they make Default, ſhe ſhall not have Aid of the Heirs of B. and other Coparceners, becauſe B. and the others made Default before. 18 Ed. 3. 31 Fitzh. Aid, pl. 142 cites S. C.

3. If a Man has Aid of the King becauſe of his Charter, by which it is given in Exchange for Life, after a Procedendo he ſhall have Aid of him in Remainder, becauſe he could not anſwer without Aid of the King, tho' this Aid be in lieu of a Voucher. Mich. 17 Edw. 3. 12 b. Fitzh. Aid. pl. 135 cites S. C.

4. If there be Leſſee for Life, the Remainder to a Priory, which Prory is of the Foundation of the King, and the Leſſee has Aid of the King, becauſe there was not any Prioreſs at the Time, ſo the Right to the King, and after a Procedendo comes, and then a Prioreſs is made, the Leſſee ſhall not have Aid of her. 32 Edw. 3. Aid 39. adjudged.

5. In a Replevin, if the Plaintiff, being Leſſee for Life, hath Aid of him in Remainder, who comes not at Summons, and after the Plaintiff is nonſuit, and after the Heir of him in Remainder grants his Remainder over, and the Leſſee attorns, and after he brings a ſecond Deliverance, he ſhall have Aid again in this of the Grantee. 25 Ed. 3. 40. b. adjudged. Fitzh. Aid, pl. 8. cites S. C.

6. If Leſſee for Life hath Aid of him in Reverſion, and after he in Reverſion dies, the Leſſee ſhall have Aid of his Heir. * 31 H. 6. 10. † 21 H. 6. 38. b. * Fitzh. Aid, pl. 79. cites S. C.

† If in Treſpaſs againſt me for ſpoiling his Graſs, I plead that M. was ſeiſed of two Acres in D. to which he had Common appendant in the Place where &c. and after leaſed the Land to me for Life, and I put in my Beaſts to Common there, and give Colour to the Plaintiff &c. whereupon the Plaintiff replies that it was and is His Several, and traverſes the Right of Common in M. or any others &c. and ſo to Iſſue, whereupon I pray Aid of M. and M. dies, I ſhall have Aid of his Heir. For his Heir ſhall have as great Damage, and as great Avail, and is in the ſame Miſchief as his Father was. 21 H. 6. 38. b. pl. 4. per paſton. But Newton thought that he ſhould not have Aid in this Caſe.

7. And if the Heir after dies, he ſhall have Aid of his Heir. 21 Hen. 6. 38. b.

8. If a Parſon in an Annuity hath Aid of the Metropolitan Guardian of the Spiritualties, as Ordinary &c. the See being vacant of a Biſhop, and after a Biſhop is created, he ſhall not have new Aid of him; for now the Metropolitan hath the ſame Right in his Perſon which he had before. 31 Hen. 6. 10. Fitzh. Aid, pl. 79. cites S. C. & S. P.

9. If a Parſon hath Aid of the Ordinary, and after the Ordinary dies, the Parſon ſhall not have Aid of the Metropolitan Guardian of the Spiritualties. 31 H. 6. 10. ſaid to be adjudged. Fitzh. Aid, pl. 79. cites S. C. & S. P.

10. So if a Parſon hath Aid of the Ordinary, who dies, he ſhall not have Aid of his Succeſſor; for the Succeſſor comes not in from the Predeceſſor. 31 Hen. 6. 10. Fitzh. Aid, pl. 79. cites S. C. & S. P.

11. If

Br. Aid, pl. 82. cites S. C & S. P. accordingly; for there is no Privity between him and the King, and the Thing does not lie in Cuſtom, becauſe it is repugnant; but it was held nevertheleſs, that if the Copy had been Tenendum to him and his Heirs of the Biſhop and his Succeſſors, by expreſs Words, then he might have Aid of the Succeſſor; and therefore now he is only Tenant at Sufferance, ut videtur.——Br. Aid del Roy, pl. 46 cites S. C.—— Br. Tenant by Copy of &c. pl. 4 cites 21 H. 6. 37.——Fitzh. Aid de Roy, pl. 22. cites S. C.

11. If Tenant at Will, according to the Cuſtom, hath Aid of a Biſhop, whoſe Tenant he is, and after, when the Inqueſt appears, he ſhews that the Biſhop is dead, and that the King hath the Temporalties, and the Manor of which he himſelf holds, ſo that he holds of the King as of the ſaid Manor during the Voidance; yet he ſhall not have Aid of the King for the Miſchief, that by ſuch means the Plaintiff ſhould be delay'd perpetually. 21 Hen. 6. 37. 39. adjudged.

Fol. 189.

12. In an Action for Land againſt Baron and Feme, Leſſees for Life in the Right of the Feme, if they have Aid granted of him in Reverſion, who comes not upon the Summons, by which the Baron and Feme are put to anſwer, and after the Feme is received upon the Default of the Baron, ſhe ſhall have Aid again of him in Reverſion. 12 R. 2. Aid 123. adjudged.

13. In an Avowry for a Rent reſerved for Equality of Partition, if the Plaintiff Leſſee for Life hath Aid granted of him in Reverſion, who makes Default upon the Summons, upon which the Plaintiff is adjudg'd to anſwer alone, and after he in Reverſion dies, the Plaintiff ſhall not have Aid of his Iſſue, becauſe he was adjudged to anſwer alone before. 16 Edw. 3. Aid 128. adjudged.

14. But there he had alſo demanded Judgment of the Avowry, after the Default of the firſt Prayee.

Br. Aid, pl. 14. cites 10 H. 7. 29. where the Avowry was upon a Stranger, Aid was granted again, tho' the Second Deliverance be not but Writ Judicial depending upon the firſt Original.

15. But in this Caſe, if the Plaintiff be nonſuit, and after ſues a ſecond Deliverance, and the Defendant avows as before, the Plaintiff ſhall have Aid of the Heir, tho' he was adjudg'd to anſwer alone in the firſt Action, becauſe this ſecond Deliverance is in Lieu of a new Original. 16 Edw. 3. Aid 131. adjudged.

16. After *Aid granted in Attaint* the *Baron* and he in Reverſion *made Default after the Iſſue joined*, and the *Feme* pray'd to be received, and *was received, and pray'd Aid again, and had it.* Quod nota bene. Br. Aid, pl. 111. cites 40 Aſſ. 20.

17. *Scire Facias* againſt a Parſon, *upon Recovery of Annuity* in Writ of Annuity *againſt his Predeceſſor*, who ſaid that he was preſented by J. to the Church diſcharged, and pray'd Aid of him and of E. the Ordinary, and had it, notwithſtanding that his *Predeceſſor who loſt had Aid of the Anceſtor of J. Patron in the firſt Action.* Br. Aid, pl. 24. cites 41 E. 3. 20. and cites 29 E. 3. Fitzh. Scire Facias 152. contra.

18. A Man ſhall *not* have Aid *twice for one and the ſame Cauſe*, but for a new Cauſe of later Time he may have Aid de Novo. Br. Aid, pl. 9. cites 9 H. 6. 3.

19. *Scire Facias by the Maſter of an Hoſpital againſt a Parſon of D.* to have Execution *of an Annuity recover'd by S. late Maſter, againſt R. late Parſon*, who pray'd Aid of the Patron and Ordinary, and had it, and Proceſs continued till the Ordinary appear'd, and the Patron made Default; and in the Writ of Annuity the Plaintiff made Title by Preſcription, that he and his Predeceſſors, Time out of Mind, have been ſeiſed of the Annuity by the Hands of the Parſons of D. for the Time being, Time out of Mind, in which Action the Parſon Defendant pray'd Aid of the Patron, and had it; and upon Proceſs he appear'd, and joined, and

and traverſed the Preſcription, and found for the Plaintiff, and he had Judgment to recover, and he died, and the Plaintiff was made Maſter, and the Defendant died, and this Parſon was made Parſon; and the Ordinary and the Parſon ſaid that he ought not to have Execution; for they ſaid that *all the Petit Jurors which paſs'd* &c. *are dead*, and traverſed the Preſcription again as above, Judgment if Execution; and the Opinion of the whole Court was, That he ſhall not have the Plea, becauſe it was once tried, and the *Succeſſor may have Writ of Error or Attaint, and it is his Folly if he paſs'd the Time till all the Petit Jurors are dead.* Quod nota. Br Aid, pl. 78. cites 19 H. 6. 39. and in the principal Caſe here it was awarded after, the ſame Year, Fol. 75. that the Plaintiff ſhould recover the Annuity. Quod nota.

(K. a. 2) What ſhall be a good *Counterplea.* To the Eſtate of the Prayor.

1. THE Cauſe of the Aid may be traverſed, as if it be pleaded that J. leaſed to him &c. it is a good Traverſe that J. did not leaſe to him. 44 E. 3. 39. b. 41. b. 3 H. 6. 10. 7 H. 6. 25. b. 19 H. 6. 21. b. 18 E. 3. 28. b. Contra 11 H. 4. 42. b. * Fitzh. Iſſue, pl. 153. cites S. C. & S. P.

2. But it is not a good Counterplea that he had nothing of the Leaſe of the Prayee the Day of the Writ purchaſed, nor after; for this may be true, and yet he ſhall have Aid; As if he had leaſed to him, and he had granted it over before the Writ purchaſed, and that he purchaſed it again pending the Writ. 3 H. 6. 9. b. Br. Counterplea de Aid, pl. 2. cites S. C. per Martin and Paſton; but they agreed that *Nothing of his Leaſe generally* is a good Counterplea. Quære the Diverſity. ——Fitzh. Counterple del Aid, pl 7. cites S. C. accordingly.——Fitzh. Iſſue, pl. 153 cites 44 E. 3. 39. S. P.

3. It is no good Counterplea that the Leſſee had nothing of the Leaſe of the Prayee the Day of the Writ purchaſed; for if he had nothing in the Land when the Writ was purchaſed, but pending the Writ purchaſed it for Life, yet he ſhall have Aid. 21 E. 3. 44. *Præcipe quod reddat againſt Tenant for Life*, who pray'd Aid of him in Reverſion. The Demandant ſaid, that he had nothing of the Leaſe of the Leſſor the Day of the Writ purchaſed; Judgment, & non allocatur; for if he *purchaſes for Life pending the Writ*, he ſhall have Aid. Br. Aid, pl. 69. cites 46 E. 3. 46.

4. It is a good Counterplea that the Leſſee hath a Fee. 41 E. 3. 8. b. 11 H. 4. 43. Br. Counterple del Aid, pl. 4. S. P. cites 41 E. 3. 7.

5. So it is a Counterplea that the Leſſee was ſeiſed in Fee the Day of the Writ purchaſed. * 3 H. 6. 9. b. † 17 E. 3. 5. b. adjudged. 21 E. 3. 44. For if he had alien'd pending the Writ, and re-purchaſed, this is no Cauſe of Aid. 50 Aſſ. 3. * Fitzh. Counterple del Aid, pl. 7. cites S. C. & S. P. admitted by Iſſue. † Fitzh. Counterple del Aid, pl. 2. cites S. C & S. P. adjudged.

6. If the Tenant prays in Aid, becauſe A. his Wife was ſeiſed in Fee, and had Iſſue by him B. and died, and he is Tenant by the Curteſy, and ſo prays in Aid of B. in Reverſion, it is a good Counterplea Br. Counterple de Aid, pl. 4 cites 41 E. 3. 7.

—Br. Aid, pl. 22. cites 40 E. 3. 37. and 41 E. 3. *. Fitzh. Voucher, pl 207. cites S. C.

terplea that J. S. enfeoffed the Tenant and his Wife in Fee of the Land, ſans ceo that he holds now by Curteſy. * 40 Aſſ. 37.

* Br Counterple de Aid, pl. 29. cites S. C. For he is *in of other Eſtate.*——

Br. Aid, pl. 65. cites 21 E. 3. 14.

7. If the Defendant ſhews a Seiſin in his Wife, and another as Coparceners in Fee, and that he had Iſſue by her, and that he is Tenant by the Curteſy after the Death of his Wife, and ſo prays in Aid of the Heir in Reverſion, it is no Counterplea that the Wife had nothing &c. in the Land during the Coverture, without denying the Seiſin of the other in Coparcenary, or ſhewing a Diſcontinuance or Alteration of the Eſtate. 21 E. 3. 15. b. adjudged.

Fol. 190.

8. But it had been a good Counterplea that the Wife and the others never had any Thing in the Land &c. 21 E. 3. 15. b. Iſſue.

Br. Aid, pl. 65. cites 21 E. 3. 14.

Fitzh. Aid, pl. 6. cites S. C.

9. It is not a good Counterplea that the Leſſee hath departed with his Eſtate pending the Writ. 23 E. 3. 21. b.

10. In *Aſſiſe* two Judgments were vouched, where the *Tenant pending the Aſſiſe, or Præcipe quod reddat* againſt him, *alien'd the Land*, and yet pray'd Aid, and had it. Quære if the Prayee might not refuſe to join in Aid, by reaſon of the Alienation. Br. Aid, pl. 109. cites 12 Aſſ. 41.

11. In *Scire Facias upon a Fine*, the *Tenant ſhewed that ſhe had Land in Dower, and exchanged it for this Land, and ſo ſhe held for Life, the Reverſion to R* and pray'd Aid of R. Finch ſaid that *ſhe did not hold in Exchange*, priſt, and a good Iſſue; per Thorpe Ch. J. Br. Counterple de Aid, pl. 15. cites 39 E. 3. 1.

12. In Dower one Coparcener pray'd Aid of the other *after Partition.* The *Demandant ſaid that her Baron died ſeiſed, abſque hoc that the Anceſtor of the Parceners ever had any Thing after the Death of her Baron in Demeſne or in Reverſion*; & non allocatur, but the Aid granted. Br. Counterple de Aid, pl. 17. cites 39 E. 3. 4.

13. In *Replevin* the *Defendant avow'd as His Franktenement for Damage feaſant.* The *Plaintiff ſaid that J. N. was ſeiſed in Fee, and leaſed to him for Years*, and pray'd Aid of the Leſſor. The *Defendant ſaid that it is his Franktenement, abſque hoc that J. N. leaſed it*; and a good Counterplea. Br. Counterple de Aid, pl. 21. cites 5 E. 4. 2.

14. It is a good Counterplea to an Aid-Prayer to ſay, *that he claims under the ſame Title, and in Affirmance of it*; per Hale Ch. Baron. Hardr. 179. Paſch. 13 Car. 2.

(L. a) [Counterplea. Good.] To the *Eſtate of the Prayee.*

* Br. Counterple del Aid, pl. 34. cites S. C.— ‡ Fitzh. Aid, pl. 44. cites S. C.——

1. Nothing in Reverſion is a good Counterplea of Aid; for peradventure a Stranger enter'd upon the Leſſee, and the Leſſor releaſed to him, and the Leſſee re-enter'd, or a Stranger recover'd the Reverſion againſt the Leſſor. * 41 E. 3. 8. b. 11 H. 4. 42. b. Quære. 4 H. 6. 5. † 30 E. 3. 26. b.

In *Scire Facias upon a Fine*, the *Tenant ſhew'd that J. made a Feoffment to the Tenant and to J. N. and to the Heirs of J. N. which J. N. is dead*, and he *pray'd Aid of his Heir* to whom the Reverſion belonged, to

to which the *Demandant ſaid that the Heir had nothing in Reverſion.* Per Marten, it is a good Plea upon Reſceit; contra upon Aid Prayer; for there the *Cauſe ſhall be traverſed.* Br. Counterple de Aid, pl. 3. cites 3 H. 6.

2. If a Man ſays that J. was ſeiſed, and leaſed to him for Life, the Remainder to B. and prays in Aid of B. it is a good Counterplea that J. never had any thing in the Land. 18 E. 3. 28. b. Dubitatur.

3. If Aid be pray'd of the Patron and Ordinary, it is a good Counterplea to the Aid of the Patron that he had nothing in the Patronage the Day of the Writ purchaſed, nor ever after. 7 H. 6. 41. Br. Counterple de Aid, pl. 10. cites S. C.

4. So if he ſays that he hath nothing in the Patronage. 18 E. 3. 55.

5. *Scire Facias upon a Fine*, by which the *Father of the Plaintiff gave in Tail, ſaving the Reverſion*, and that the *Father and the Tenant in Tail died without Iſſue*, and pray'd Execution. *The Tenant ſaid that ſhe held in Dower the Reverſion to S.* and pray'd Aid of him; Seton, ſhew how he has the Reverſion, & non allocatur, by which the *Plaintiff ſaid that S. after the Death of the Tenant in Tail without Iſſue, endow'd the Tenant, againſt which S. we have recover'd the 2 Parts of the Tenements*, and yet non allocatur; for by the Recovery of 2 Parts, the *Reverſion of the 3d Part is not deveſted from him*, wherefore the Aid was granted. Br. Aid, pl. 64 cites 21 E. 3. 12.

6. If *Bailiff makes Conuſance in Replevin*, and prays Aid, it is a good *Counterplea* to the Aid for the Plaintiff to ſay, *that the Lord granted over the Seigniory for Term of Years, which Term yet continues*, or to ſay *Hors de ſon Fee.* Br. Counterple de Aid, pl. 26. cites 24 E. 3. 45.

7. *Entry in Nature of Aſſiſe*, the *Tenant ſaid that J. S. was ſeiſed in Fee, and leaſed to him for Life*, and pray'd Aid of him; for the Aid lies in this Action, and yet not in Aſſiſe. And the *Demandant ſaid that he was ſeiſed till by the Tenant diſſeiſed, which Eſtate he continued till the Writ purchaſed, and pending the Writ he enfeoffed the ſame J. S. who leaſed to him for Life*, abſque hoc that he held for Life of the Leaſe of J. S. the Day of the Writ purchaſed, and by Judgment he was ouſted of the Aid. Br. Aid, pl. 123. cites 4 E. 4. 14. Br. Counterple de Aid, pl. 33. cites S. C.

(M. a) [Counterplea. What is a good Counterplea.] To the Eſtate of the Prayor.

1. IN a Writ of Dower, if the Tenant ſays that he is Tenant by the Curteſy, the Reverſion to J. and prays in Aid of J. it is a good Counterplea that the Tenant was the firſt who enter'd after the Death of the Husband of the Demandant, who died ſeiſed of the Land. 2 E. 2. Aid 160. adjudged.

2. In a Mortdanceſter of the Death of C. if the Tenant ſays that C. leaſed to her and her Husband, and to the Heirs of the Husband, and ſo prays in Aid * [of the Heir] of the Husband, it is a good Counterplea that the ſaid C. is the Anceſtor, of whoſe Death he brings the Action, and that the Tenant was the firſt who abated after the Death of C. 6 E. 2. Aid 169. adjudged. *Fitzh. Aid, pl. 169. cites 16 E. 2. and has thoſe Words (of the Heir.)

3. In *Aſſiſe* 2 Judgments were vouched, where the *Tenant pending the Aſſiſe or Præcipe quod reddat* againſt him *alien'd the Land*, and yet pray'd Aid, and had it; quære if the Prayee may refuſe to join in Aid by Reaſon of the Alienations or not. Br. Aid, pl. 109 cites 12 Aſſ. 41.

4. In *Dower*, *Feme Tenant for Life was received in Default of her Baron*, and *ſaid that J. was ſeiſed, and leaſed to her for Life, the Remainder to R. and pray'd Aid of him*; and per Cur. ſhe ſhall have the Aid without ſhewing

ing Deed of Remainder; for all may be by Livery without Deed, by which the Demandant *counterpleaded that J. did not leaſe for Life*, and the Iſſue accepted, but by ſome it ought to be that *Ne Leſſa pas Modo & Forma prout* &c. *the Remainder to R. in Fee prout* &c. and this goes to all, for the other is *Negative Pregnant* by others. Br. Counterple de Aid, pl. 11. cites 22 H. 6. 2

(N. a) [Counterplea. What is a good Counterplea.] To the Eſtate of the Prayee.

Br. Counterple de Aid, pl. 16. cites S. C. —— Fitzh. Counterple de Aid, pl 19. cites S. C.

1. IF Leſſee for Life prays in Aid of J. S. in Reverſion, **it is no good Counterplea** that the Reverſion is to J. S. and a Stranger, ſhewing How, and ſo he ought to have Aid of both, **for this is nothing to the Demandant, for the Delay is all one to him.** 39 E. 3. 4 b.

Br. Aid, pl. 65. cites S. C. —— Fitzh. Aid, pl. 21. cites S. C. ——

2. If one Coparcener prays in Aid of the other, becauſe their Anceſtor was ſeiſed in Fee, and died ſeiſed, **and ſhe entr'd &c. it is no Counterplea** that their Anceſtor did not die ſeiſed; **for if he was ſeiſed at any Time ſhe hath Cauſe to have Aid.** 21 Edw. 3. 15. b.

Br. Counterple de Aid, pl. 65. cites S. C. and it was in Scire Facias upon a Fine, the one Coparcener prayed Aid of the other, the Plaintiff ſhewed that he claimed by the Fine of the Anceſtor Paramount, and therefore it is to defeat their Eſtate, and yet no Counterplea.

Br. Aid, pl. 65. cites S. C. ——

3. But **it is a good Counterplea in this Caſe**, that the Anceſtor never had any thing. 21 Edw. 3. 15. b.

Br. Counterple de Aid, pl. 9. cites S. C. —— Fitzh. Aid, pl. 21. cites S. C.

4. **In a Writ of** Dower, **if the** Defendant ſays that the Land deſcended to her and A. her Siſter, as Coparceners, from J. **their Brother, and of which they have made Partition, and prays in Aid of A. it is no good Counterplea by the Demandant,** that her Husband died ſeiſed Sans ceo that J. ever had any thing in the Land after the Death of the Husband. 39 E. 3. 4. b. **adjudged.**

5. So **in this Caſe it is no good Counterplea** that J. never had any thing in Demeſne or Reverſion after the Death of the Husband. 39 E. 3. 4. b. **adjudged.**

Fol. 101.

6. **If the Tenant in an Action for certain Land** ſays, that the King by his Charter gave the Manor of S. of which this Land is Parcel, to R. and the Tenant his Wife, and to the Heirs of R. **and ſo ſhe is but Tenant for Life, the Reverſion to the Heirs of R. and prays in Aid of the Heir, it is no Counterplea to** ſay this Land is not Parcel of the Manor, **for by this Counterplea ſhe would avoid the King's Charter.** 20 E. 3. Aid 1. **adjudged.**

7. But if **certain Land be demanded, and the Tenant** ſays, **that** he is Tenant for Life, the Reverſion to B. by Fine of the Manor of D. of which the Land in Demand is Parcel, **it is a good Counterplea** that this Land is not Parcel **of the Manor.** 21 E. 3. Aid 25. **adjudged, for this is a direct Traverſe.**

8. **In a** Formedon, **if the Tenant** ſays, **that** he is Leſſee for Life, the Reverſion to B. and prays in Aid of B. **it is no Counterplea for the Demandant to** ſay, that at another Time he ſued a Scire Facias of

of this againſt him, and he ſaid the Grandfather of the Demandant was ſeiſed by Force of the Fine, and ſo the Fine executed &c. by which Plea he acknowledged that he had a Fee, and this Writ is freſhly ſued after the Abatement of the other. 33 E. 3. Aid del Roy, 106. adjudged.

9. If a Parſon prays in Aid of the Patron and Ordinary, it is not ſufficient to counterplead the Patronage of the Patron, for he is to have Aid of the Ordinary notwithſtanding this, and it will be all the ſame Delay to have Aid of Both as of One. 18 E. 3. 55. but Quære. See (I. a) pl. 11. and (S. a) pl. 3.

(N. a. 2) Joinder in Aid. In what Caſes. And who.

1. CUI *in Vita againſt Tenant for Life*, who prayed Aid of him in *Reverſion*, and he *was ready to join* immediately, and the *Tenant ſaid that he is another Perſon, and not the Prayee*; and per Cur. this is no Iſſue without making the Demandant Party, and therefore he was compelled to anſwer alone, becauſe he would not ſuffer the Demandant to join with him in this Iſſue. Br. Joinder in Aid, pl. 7. cites 21 E. 3. 14.

2. If *one in Replevin denies the Taking*, and *the other confeſſes* the Taking *as Bailiff to the other, and by his Command before*, and prays Aid of him, and has it, the other ſhall not be ſuffered to join, becauſe he had refuſed [denied] the Taking before. Quære. Br. Joinder in Aid, pl. 4. cites 42. E. 3. 6.

3. 21 *H.* 8. *cap.* 19. *The Plaintiffs and Defendants in Replevin or ſecond Deliverance, as well without Proceſs as by Proceſs, ſhall from henceforth have like Pleas, and like Aid Prayers, and Joinders in Aid, and Advantages, (Diſclaimer only excepted) as they might have done by the Common Law before this Act.*

(O. a) Joinder in Aid. In what Caſes *Joinder* may be *without* * *Prayer.* [Privity.]

1. THERE ought to be Privity between him that joins, and the other to whom he is joined, otherwiſe the Joinder ſhall not be ſuffered. 45 E. 3. 7.

2. As if an Avowry be made upon a Stranger, the Stranger cannot join with the Plaintiff if the Plaintiff has nothing in the Land, for there is not any Privity. 45 E. 3. 7. b.

3. So if an Avowry be upon a Diſſeiſor, the Diſſeiſee cannot join to him for want of Privity. 45 E. 3. 8.

4. But in an Avowry upon him that has the Freehold, he may join to Leſſee for Years, being Plaintiff, for there is ſufficient Privity. 45 E. 3 8. adjudged. Fitzh. Joinder en Aid, pl. 9. cites S. C. —— Br. Joinder in Aid, pl. 5. cites S. C —— Avowry was made upon a Stranger, who comes and ſays, that he *leaſed to the Plaintiff for Years by Parol, which Term yet continues*, and they joined in Plea without praying Aid of

of him; Per Cur. the Joinder is good, tho' the Leaſe is by Parol; ſo that the Leſſee cannot have Action of Covenant to diſcharge him. Br. Joinder in Aid, pl. 18. cites 39 H. 6. 7.

Fitzh. Joinder en Aid, pl. 9. cites S. C. & S. P. by Finch, quod Caund. conceſſit.

5. But he that has the Freehold cannot join to Leſſee at Will, (for the Feebleneſs of his Eſtate, as it ſeems.) 45 E. 3. 7. b.

* Br. Joinder in Aid, pl. 5. cites S. C. & S. P. admitted; for he may have Writ of Meſne, and tho' the Termor cannot have Writ of Meſne, yet he may have Covenant, and therefore the Joinder good. ——Fitzh. Joinder en Aid, pl. 9. cites S. C. and Caund. agreed that the Termor in ſuch Caſe may have Covenant if the Leſſor be bound to acquit him; which Finch agreed. ——Where the Lord *diſtrains upon the Tenant, and avows upon the Meſne*, the Tenant ſhall not have Aid of the Meſne, becauſe the one has as High Eſtate as the other, but becauſe the Meſne is Party to the Avowry, the Meſne may join Gratis and plead, or the Tenant may have Writ of Meſne; Quod Nota. Br. Aid, pl. 16 cites 34 H. 6. 46. ——S. P. for Summons in Auxilium does not lie, becauſe the Tenant who has Fee-ſimple cannot pray Aid. Br. Ibid. pl. 8. cites 7 E. 4. 20. ——See 9 Rep. 22. b.

6. If there be Lord, Meſne, and Tenant, and the Avowry is upon the Meſne, he may join to the Tenant. * 45 E. 3. 7. b. 14 H. 4. b. for he is made Privy by the Avowry. 17 E. 3. 6. b. 15. b. 39 E. 3. 34. b. agrees.

S. C. cited 9 Rep. 22. b and ſo by putting his own Cattle in the Pound, and then ſuing a Replevin, he may make himſelf a Party.

7. [But] if there be Lord, Meſne, and Tenant, and the Lord avows upon a Stranger, the Meſne cannot join to the Tenant, (and abate the Avowry.) 17 E. 3. 6. 15. he may put his Cattle in the Pound and bring a Replevin.

8. If the Avowry be upon a Stranger, the Donor cannot join to the Donee in Tail, being Plaintiff. 17 E. 3. 6. b. contra.

9. If there be Lord, two Meſnes and Tenant, and the Lord avows upon the firſt Meſne, who is his Tenant, the ſecond Meſne may join to his Tenant. Contra 17 E. 3. 6. b.

Fol. 192.

(P. a) In what Caſes Joinder in Aid ſhall be, *without Proceſs.*

Fitzh. Aid de Roy, pl. 24. cites S. C. and ſays that Mich. 29 H. 6. it was adjudged accordingly.

1. If a Bailiff hath Aid of the Queen, Proceſs ſhall be awarded againſt the Queen as againſt a common Perſon. 28 H. 6. 13. adjudged.

* Br. Aid, pl. 26. cites S. C. —— Fitzh. Aid, pl. 114. cites S. C. —— † S. P. But Proceſs may be awarded againſt her; for the one and the other is good enough. Br. Aid, pl. 74. cites S. C.

2. If the Husband hath Aid granted of his Wife, he ſhall be commanded by the Court to have his Wife at the Day in Court, without Proceſs made againſt the Wife. * 43 E. 3. 13. b. † 7 H. 6. 45. ‡ 9 H. 6. 26. b. 29 E. 3. 24. becauſe ſhe is ameſnable at the Will of the Husband, and Proceſs would be a Delay. ¶ 35 H. 6. 10. adjudged, and alſo it may be granted at the Election of the Court. ** 7 H. 6. 45. || 35 H. 6. 10.

‡ Br. Aid, pl. 10. cites S. C. ¶ Br. Joinder in Aid, pl. 9. cites S. C. ——Fitzh Aid, pl. 82. cites S. C. ** Br. Baron, pl. 46. cites S. C. ——Br. Proceſs, pl 65. cites 21 H. 6. 22. S. P. ——Fitzh. Proceſs, pl. 77. cites Trin. 7 H. 6. 75. S. P.

|| Br. Aid, pl. 17. cites S. C. ——Br. Aid, pl. 81. cites 21 H. 6. 22.

3. In

3. In Replevin by Leſſee for Years, if he hath Aid granted of the Leſſor, upon whom the Avowry is made, the Leſſor may join without Proceſs. 2 H. 6. 1. Fitzh. Joinder en Aid, pl. 2. cites S. C.

In Replevin the Defendant avowed upon W. who had leaſed to the Plaintiff for Years, and the Leſſor is ready in Court the Day of the Avowry made, to join to the Leſſee, yet if the Leſſee will not pray Aid of him, the Leſſor ſhall not be ſuffer'd to join; quod nota; quod conceditur Arguendo. Br. Joinder in Aid, pl. 10. cites 11 H. 4. 28.

4. If the Tenant brings a Replevin, and the Lord avows upon the Meſne, and Aid is granted of the Meſne, he may join without Proceſs; becauſe otherways the Tenant ſhall have a Writ of Meſne againſt him if he loſes. 2 H. 6 1. See (O. a) pl. 6 and the Notes there.

5. If a Bailiff makes Conuſance in the Right of his Maſter, and hath Aid of him, the Maſter cannot join without Proceſs. 2 H. 6. 1.

6. So in Falſe Impriſonment, if the Defendant juſtifies that the Plaintiff is the Villein of J. S. and that by his Command &c. if the Iſſue be whether he be free, and the Defendant hath Aid of his Maſter, yet he cannot join without Proceſs, 1 H. 6. 2.

7. In an Avowry upon B. as Tenant, if the Plaintiff ſays that A. was ſeiſed and leaſed to him for Years, altho' he ſhall not have Aid upon this Plea, yet A. may join to abate the Avowry. 3 H. 6. 54.

8. In a Plea of Land, if the Tenant hath Aid of one within Age, the Prayee may join without Proceſs. 7 H. 6. 45. b.

9. In a Plea of Land againſt Leſſee for Life, if Aid be granted of him in Reverſion, he may join without Proceſs. * 21 E. 3. 14. † 28 E. 3. 94. b. adjudged, 32 E. 3. Aid 38. * Fitzh. Joinder en Aid, pl. 11. cites S. C.

† Fitzh. Joinder in Aid, pl. 13. cites S. C.—Tenant for Life of a Seigniory may make Avowry, and immediately pray in Aid of him in Reverſion upon the ſame Avowry. Br. Aid, pl. 10. cites 9 H. 6. 26. per Paſton. Nota.

10. But in this Caſe, if he in Reverſion prays to join, and the Leſſee ſays that he is not the ſame Perſon of whom he hath pray'd in Aid, the Leſſee ſhall be ouſted of Aid, and ſhall anſwer alone. 21 E. 3. 14. Fitzh. Joinder in Aid, pl. 11. cites S. C.

11. In a Writ of Error againſt Tenant by the Curteſy, and the Heir of the Recoveror, if Aid be granted of the Heir in Reverſion for the Tenant by the Curteſy, the Heir ſhall not be received to join in Aid to the Tenant by the Curteſy without Proceſs; tho' he be preſent in Court. 47 Aſſ. 9. adjudged. Quære this. Br. Aid, pl. 115. cites S. C. and is of Tenant for Life; but the Words (Tenant by the Curteſy) is not mentioned there.——S. P. accordingly; and Brooke ſays the Reaſon ſeems to be, inaſmuch as Covin may be between the Plaintiff and the Tenant for Life. Quære. Br. Joinder in Aid, pl. 17. cites 47 E. 3. 9.——See (A) pl. 24.

12. In a Scire Facias to execute a Recognizance upon a Return of the Conuſee dead, if a Writ iſſues to warn his Heir, and the Sheriff returns the Heir and B. as Tertenants warn'd, and Aid is granted to B. Leſſee for Life of the Heir in Reverſion, (admitting this) yet no Proceſs ſhall be awarded againſt the Heir to join in Aid, becauſe he is Party to the Writ before. 8 R. 2. Aid del Roy 114.

13. Joinder may be the * *firſt Day* without Proceſs; but not at another Day where the Prayee is in proper Perſon, but they cannot join *by Attorney* without Day given upon Proceſs. Br. Joinder in Aid, pl. 7. cites 21 E. 3. 14. agreed. The ſame Diverſity, and in the laſt Caſe there muſt be Proceſs and Day in Court. Br. Joinder in Aid, pl. 16. cites 1 H. 6. 4 ——Fitzh. Joinder in Aid, pl. 1. cites S. C.

* Br. Joinder in Aid, pl. 1. cites Trin. 26 H. 8. 6. S. P.

(Q. a) How the Joinder ſhall be *without Proceſs.* By *Attorney.*

Br. Aid, pl. 47. cites S. C. but Brooke ſays, Quod Mirum, that it had not been in Perſon, or by Attorney upon Proceſs ——Br. Joinder in Aid, pl. 6. cites S. C. accordingly.——Ibid. pl. 10. cites S. C. but S. P. of joining by Attorney does not appear.——Fitzh. Attorney, pl. 35. cites S. C. and S. P.——Dy. 111. pl. 43. Hill. 1 & 2 Mar. Dormer v. Clark, Tenant for Life pray'd in Aid of him in the Reverſion who came in by Proceſs, and by his Attorney join'd in Aid.

1. IF Leſſee for Years hath Aid of the Leſſor upon whom the Avowry is made, the Leſſor may join in Aid by Attorney. 11 H. 4. 28. b.

Fol. 193.

2. But the Meſne ſhall not join to the Tenant by Attorney, becauſe by the Joinder he acknowledges an Acquittal, and therefore ought to join in Perſon. 11 H. 4. 28. b.

3. So where an Avowry is upon a Stranger, and Aid granted of him, he cannot join by Attorney without Proceſs. 1 H. 6. 4. b.

S.P. Br. Aid, pl. 81. cites 21 H. 6 22. and he had Proceſs to bring her in, and this before Anſwer made, or Iſſue joined.

4. *Avowry for Rent and Services upon Baron and Feme, as in Jure Uxoris*, the *Baron prayed Aid of his Feme*, and had it, and Day given to him to bring in his Feme without Proceſs, but he might have had Proceſs if he would; Quod Nota. Br. Aid, pl. 17. cites 35 H. 6. 10.

(R. a) Joinder in Aid *by Proceſs.* [*What Proceſs.*]

Br. Proceſs, pl. 38. cites S. C. but by the Prothonotaries both Summons ad Auxiliandum, and alſo Sci Fa. ad Auxiliandum have been uſed, but by Thirne, and the Opinion of the Court, the ancient Courſe is to award a Scire Facias &c.——Fitzh. Proceſs, pl. 124. cites S. C.

1. IN a Scire Facias, if the Tenant Leſſee for Life has Aid of the Reverſioner, a Scire Facias in Auxilium according to the Nature of the firſt Writ ſhall be granted, and not a Summons ad Auxiliandum. 12 H. 4. 3.

(S. a) At what *Time* Proceſs ſhall be granted.

Br. Aid, pl. 45. cites S. C.

1. IF a Servant be at Iſſue, and has Aid of his Maſter, it is not neceſſary that the Scire Facias ad Jungendum ſhould be returned before any Venire Facias ſhall be awarded, but they may be returnable at one time, becauſe the Iſſue being joined, the Prayee cannot alter the Iſſue, but is only to give Evidence. 7 H. 6. 21. Contra 8 H. 4. 16. b.

* Br. Proceſs, pl. 61. cites S. C. —— Fitzh. Proceſs, pl. 87. cites S. C.

2. If Aid be granted of the King and Ordinary, by which he is awarded to ſue to the King, yet before a Procedendo comes Proceſs ſhall be awarded againſt the Ordinary preſently. 12 H. 4. 4. b. tho' it may be Proceſs ſhall not come before the Return. Dubitatur. * 19 H. 6. 5. b. 19 E. 3. Aid del Roy 5.

3. If

3. If Aid be granted of the Ordinary, and the Eſtate of the Patron is counterpleaded, Proceſs ſhall not be awarded againſt the Ordinary till the Iſſue tried. 7 H. 6. 41 See (I. a) pl. 11. S. C. and ſee (N a) pl 9.

4. If Aid be granted of a common Perſon, Patron and Ordinary, Proceſs ſhall iſſue againſt both at the ſame time. 19 H. 6. 6.

5. If a Parſon has Aid of King Patron, and of the Ordinary, and Proceſs is made preſently againſt the Ordinary before any Procedendo comes, if the Ordinary comes in upon the Return, he ſhall not join in Aid to the Parſon before the Procedendo comes. 19 H. 6. b. Curia. Fitzh. Proceſs, pl. 8. cites 19 H. 6. S C.—Br. Proceſs, pl. 61. cites 19 H. 6. 5.

and ſo the (b) in Roll ſeems miſprinted for (6.)

6. In *Treſpaſs*, the *Defendant ſaid, that it was the Franktenement of R. and he is his Tenant at Will, and entered, and did the Treſpaſs*, Judgment &c. the *Plaintiff ſaid that it was the Franktenement of J. N. who leaſed to him at Will, abſque hoc that it is the Franktenement of R.* and ſo to Iſſue, and the Defendant prayd Aid of R. and had it, and Venire Facias iſſued, and Writ to warn the Prayee returnable at a certain Day, at which Day the Inqueſt came, and the *Sheriff returned R. Nihil*, and the Defendant teſtified that he had Aſſets &c. and prayed Garniſhment, and that the taking of the Inqueſt ſhall ſtay, and notwithſtanding the Inqueſt was taken, and found for the Plaintiff, and he recovered Damages againſt the Defendant; Quod Nota. Br. Aid, pl. 43. cites 7 H. 4. 31. Br. Proceſs, pl. 135. cites 7 H. 4. 31.——Br. Enqueſt, pl. 13. cites S. C.

7. Aid was granted *in Treſpaſs after Iſſue for one in the Writ of another named in the Writ, and of a Stranger*, and Venire Facias iſſued immediately upon the Iſſue, and Proceſs againſt the Prayee only, all at one Day; for the Prayee ſhall not plead, but ſhall maintain the Iſſue and give Evidence. Br. Proceſs, pl. 55. cites 7 H. 6. 25. Br. Aid, pl. 71. cites 7 H. 6. 71.

8. In *Treſpaſs* they were at Iſſue *in C. B.* and after Aid was granted, and there it was doubted whether *Summons ad Auxiliandum* ſhall iſſue with the Venire Facias or not, and after Summons ad Auxiliandum iſſued firſt. Contra in B. R. for there *both ſhall iſſue together*. Br. Aid, pl. 136. cites 18 E. 4. 10.

(T. a) How. By Attorney.

1. IN an Avowry upon the Leſſor, if the Leſſee has Aid of him, the Leſſor may join by Proceſs by Attorney. 11 H. 4. 28 b.

2. So where the Avowry is upon the very Tenant, and Aid granted of him, he may join by Proceſs by Attorney. 1 H. 6. 4. b.

(U. a) How granted without Monſtrans or Profert of Deed.

1. TEnant for Life may have Aid *of him in Remainder* without ſhewing Deed thereof, for it may be that the Deed was delivered to him in Remainder upon the Livery, and not to the Tenant for Life. Br. Aid, pl. 34. cites 47 E. 3. 18. S. P. and then the Deed does not belong to the Tenant for Life. Br. Monſtrans, pl. 25. cites S. C.

* Br. Aid, pl 83. cites S.C. accordingly, that *Feme Tenant for Life reſceived in Default of her Baron*, pray'd Aid of him in Remainder, and had it without ſhewing Deed.——Br. Monſtrans, pl. 56. cites S.C. accordingly ——Br. Counterple del Aid, pl 11 cites 22 H. 6. 2 S. C. & S. P accordingly.——Br Reſceipt, pl. 63. cites S. C.——Br. Aid, pl. 81. cites 22 H. 6. 41. that if the Grantee of a Rent-Charge releaſes to him in Reverſion, the Tenant for Life cannot plead this without having the Deed, and therefore in Avowry upon him in Reverſion for Rent Service, the Tenant for Life who was a Stranger to the Avowry had Aid granted him of the Reverſioner.

2. In *Præcipe quod reddat*, the *Tenant for Life pray'd Aid of* him in *Remainder*. Thirne bid him ſhew Deed of Remainder, for it belongs to you; and ſo he did. But Brooke ſays, Quære if of Neceſſity, for otherwiſe it is in * 22 H. 6. 1. For *Remainder may be by Livery without Deed.* Br. Aid, pl. 56. cites 12 H. 4. 20.

(W. a) Proceedings, Pleadings &c.

1. IN Writ of *Coſinage*, the Tenant pray'd in Aid, and after he and the Prayee *pleaded jointly a Laſt Seiſin* in Abatement of the Writ, and held good. Thel. Dig. 208. lib. 14. cap. 8. S. 6. cites Mich. 10 E. 3. 527.

But upon Demurrer upon the Aid, this is not peremptory.

2. If the *Tenant prays Aid*, and the *Demandant counterpleads*, and the *Tenant pleads Eſtoppel againſt the Counterplea*, which is adjudg'd againſt him, this is *peremptory*. Per Seton. Br. Peremptory, pl. 76. cites 13 E. 3.

Br. Peremptory, pl. 76. cites 13 E. 3. per Seton.

3. In *Scire Facias* out of a Fine after Aid Prayer, the Tenant was received to *ſay that the Fine was once executed in the Father of the Demandant*. Thel. Dig. 208. lib. 14. cap. 8. S. 2. cites Hill. 29 E. 3. 21. and Mich. 26 E. 3. 69. and ſays ſee 11 H. 4. 68.

4. *Cui in Vita*, the *Tenant ſaid* that *J. was ſeiſed in Fee, and leaſed to him for Life ſaving the Reverſion*, and pray'd Aid of him, and the *Demandant ſaid that J. had Nothing in Reverſion.* And it was argued, if he ſhould traverſe the Leaſe or the Reverſion, but after Gratis they were at Iſſue upon the Reverſion; Nevertheleſs after it is ſaid elſewhere often, that *upon Aid Prayer the Leaſe ſhall be traverſed*, and *upon Reſceipt the Reverſion.* Br. Counterple de Aid, pl. 34. cites 41 E. 3. 8.

5. *Treſpaſs againſt J. and 2 others*, and *the 2 juſtified becauſe the Plaintiff was Villein Regardant to the Manor of B of J. their Maſter*, and would not be juſtified, by which they took him, and *the other ſaid that Frank* &c. and ſo to Iſſue, and the Defendant pray'd Aid of J. their Maſter, and had it, and *Venire Facias iſſued*, and *Scire Facias ad jungendum in auxilium* againſt J. *returnable at one and the ſame Day*, and *Proceſs upon the Original againſt J. returnable the ſame Day*, at which Day *J. came*, and *join'd in Aid, and alſo anſwer'd upon the Original, and pleaded Villeinage* ut ſupra; Judgment if he ſhall be anſwer'd; and the *Plaintiff pleaded Frank, and of Frank Eſtate, and pray'd Venire Facias*, and Proceſs upon this Iſſue; and the ſaid *J. ſaid that ſhe held the ſaid Manor in Dower, the Reverſion to J.* and pray'd Aid of him; And per Gaſcoyne, the laſt Venire Facias ought not to iſſue, for one Venire Facias may make an End of all. Contra per Huls, and that both ſhall iſſue, and *if the one Iſſue be found contrary to the other, He who his warn'd may have Attaint*; for in Replevin againſt Maſter and Servant, the Servant juſtified in Name of his Maſter, and after the Maſter join'd and avow'd for the ſame Cauſe, the Servant is out of Court, for in Replevin Aid ſhall be granted before Iſſue, and in Treſpaſs not, but after

after Iſſue, and therefore here the Servant is not out of Court; for if J. will make Default, the 2 ſhall maintain the Iſſue alone, and this Aid in Treſpaſs is not but Ad Manutenendum exitum, and not Ad Reſpondendum, and therefore both Iſſues ſhall be tried; And per Gaſcoigne, J. ſhall not have Aid of him in Reverſion becauſe he is Party to the Writ. Contra per Huls, and that all is one, and ſee the Proceſs upon Aid Prayer ſupra, that the *one Iſſue tried ſhall not be a Concluſion againſt J. upon the other Iſſue*, notwithſtanding the Aid Prayer; Quære thereof if it be pleaded, and How the Proceſs againſt the Jury, and againſt the Prayee, and againſt the third as Party, ſhall have one and the ſame Return. Br. Aid, pl. 45. cites 8 H. 4. 17.

6. It was held that after Aid Prayer a Man ſhall plead *a thing apparent to the Writ* as Amicus Curiæ. Thel. Dig. 208. lib. 14. cap. 8. S. 4. cites 11 H. 4. 67.

In *Replevin*, after the Avowry made the *Plaintiff had Aid of his Feme, and after* the Aid had, he and his Feme *were not received to plead Matter apparent in Abatement of the Avowry*. Thel. Dig 208. lib 14. cap. 8. S. 6. cites Trin 39 E. 3. 19. but ſays the contrary was held Mich 11 H. 4 28. where it is ſaid alſo, that the Plaintiff and the Prayee in Aid ſhould plead *Matter in Fait* in Abatement of the Avowry. But that it is held Mich 34 H. 6 S. 21. that after the Joinder in Aid, they ſhall not plead a thing apparent in Abatement of the Avowry, *but only as Amicus Curiæ*.

7. In *Replevin*, the Defendant *avow'd upon a Stranger*, and the *Plaintiff ſaid that this Stranger leaſed to him for Years*, and pray'd Aid of him and had it, and they join'd, there if *they cannot agree in Plea*, the *Plea of the Termor ſhall be taken*. Br. Joinder in Aid, pl. 11. cites 5 H. 5. 6.

In *Replevin*, the Defendant *avow'd for Tenure upon T. a Stranger* to the Replevin, *as his very Tenant*, and the *Plaintiff ſaid that this T. leaſed to him for 20 Years, and pray'd Aid* of him and had it before Iſſue, whereupon *T. join'd*, and thereupon the *Defendant confeſſed the Avowry*, and the *Plaintiff pleaded Riens Arrear as to Part, and Tender upon the Land of the Reſt, and Ne unques Seiſie for other Part*, whereupon the *Defendant demurr'd*, and well; becauſe when Aid is granted and the Prayor does not agree in Plea, there the Anſwer and the Plea of the Prayee, who is Tenant as to the Avowry, ſhall be taken, and the other refuſed. Br. Joinder in Aid, pl. 2. cites Mich. 2 H. 6. 1. 2.

8. If *Tenant for Life prays Aid* in *Præcipe quod reddat*, and *he and the Reverſioner do not join in Plea*, there the *Plea of Tenant for Life ſhall be taken*; for he has the Franktenement which is the Cauſe of the Action, and he in the Reverſion may falſify the Recovery after, if he has Cauſe. Br. Joinder in Aid, pl. 2. cites Mich. 2 H. 6. 1, 2.

9. And *in Aſſiſe* the *Plea of the Tenant ſhall ſtand*, and not the Plea of the Diſſeiſor to the Right of the Land. Br. Joinder in Aid, pl. 2. cites Mich. 2 H. 6. 1, 2. and ſays that 45 E. 3. concordat.

10. *Recordare*, the Defendant made *Conuſance as Bailiff of A. B. Daughter and Heir of T. P.* the *Plaintiff ſaid that A. B. is a Baſtard* &c. and upon this the Defendant pray'd Aid of A. B. And per Babbington and Cott. he ſhall have the Aid; Contra per Straunge and Martin; for by him he ought to have pray'd the Aid in the Concluſion of his Conuſance, and in *Plea Perſonal* a Man ſhall have Aid after Plea pleaded, and not before, *but in Plea Real* a Man ſhall have Aid before Plea pleaded, and there are only 2 *Manner of Entries of Aid*, the *one* is of Aid *before Plea pleaded*, viz. that the Defendant or Tenant *Petit Auxilium de C. ſine quo ipſe non poteſt reſpondere*, and after it be *after Plea pleaded*, the Entry is *Quod defend' petit Auxilium de B. ad manutenendum exitum*, and in this Caſe it cannot be Ad manutenendum exitum; for no Iſſue is join'd, and it cannot be &c. Sine quo non poteſt reſpondere; for he has anſwer'd to the Action, and in the Concluſion thereof has not pray'd Aid, and therefore he has paſſed the Advantage of it, and there are no more Entries of the Aid but theſe 2; Quære, for it is not adjudged. Br. Aid, pl. 94. cites 4 H. 6. 30.

11. In

11. In *Treſpaſs* againſt ſeveral, *one juſtified by the Command of thoſe that had pleaded, and of others not named, becauſe that was the Franktenement of them* by which he entered, and ſo to Iſſue, and ſo prayed Aid of all after Iſſue joined. The Court held that he ſhould have it of thoſe not named in the Writ, but not of thoſe named; whereupon the *Plaintiff to avoid Delay granted the Aid of all*, and per Cheney the *Ven. Fac. ſhall iſſue immediately* without attending the coming of the Prayee; and *Proceſs ſhall iſſue againſt the Prayee inſtanter*; for when he comes he ſhall not plead any Plea, but ſhall join in Aid of the Iſſue, and give Evidence; Quod Nota. Br. Aid, pl. 71. cites 7 H. 6. 71. [21.]

Br. Aid, pl. 75. cites S. C. accordingly.

12. In *Præcipe quod reddat* the Tenant *prayed Aid of A. who is ready to join*, and the *Tenant demurr'd* [*averr'd*] *that he is not the ſame Perſon*, and *the other e contra.* The Tenant prayed Proceſs againſt the Prayee, and ſaid that the Iſſue is not receivable, whereupon the Tenant was awarded to anſwer alone in as much as he refuſed the Averment; and ſo ſee that *Iſſue* may be taken, *whether he be the ſame Perſon.* Br. Joinder in Aid, pl. 13. cites 7 H. 6. 45.

13. After Aid pray'd of a Parcener, the Tenant ſhall not *plead Parcenary with one not named* in Abatement of the Writ. Thel. Dig. 208. lib. 14. cap. 8. S. 5. cites Paſch. 9 H. 6. 5.

14. In *Præcipe quod reddat* the *Tenant pray'd Aid of one B his Couſin, by reaſon of Partition made between them, and pray'd that he be ſummoned in diverſe Counties, and in the County of Cheſter*, and the *Plaintiff ſaid that B. had Aſſets to be ſummon'd in the County of D. and pray'd Proceſs thereof*; And by the Opinion of the Court, except Paſton, tho' the Demandant ſued the Proceſs for his own Haſte, it ſhall be intended the Proceſs of the Tenant, and it is Reaſon that the Tenant have his own Proceſs where he prays it; Quære. Br. Aid, pl. 98. cites 14 H. 6. 3.

But in Plea of Land, where *Tenant for Life prays Aid of* him in *Reverſion*, he ſhall ſhew Cauſe, and there the Cauſe is traverſable. Ibid.

15. In *Annuity againſt a Parſon*, who *ſhewed Cauſe* of Aid, *and pray'd Aid of the Patron*, the *Cauſe* is not *traverſable*. Br. Counterple de Aid, pl. 12. cites 22 H. 6. 47.

16. In *Replevin* the *Avowry was on a Stranger, of whom the Plaintiff pray'd Aid*, and had it; there, *upon the Joinder, they may plead Ne unques Seiſie*, and the like againſt the Defendant; *tho' the Termor himſelf, without the Joinder, cannot* have ſuch Pleas. Br. Joinder in Aid, pl. 15. cites 22 H. 6. 3.

17. In *Avowry* the *Plaintiff pray'd Aid of his Leſſor for Years*, and had Summons ad Auxiliandum returned ſerved, at which Day *the Prayee came not*, and the *Plaintiff is eſſoign'd.* There Judgment ſhall not be given immediately that the Plaintiff anſwer alone, but the *Default of the Prayee ſhall be recorded; and at the Day* which the Plaintiff has *by the Eſſoign*, the *Judgment ſhall be given that the Plaintiff anſwer alone.* Quod nota; for his *Appearance at the Day of Eſſoign ſhall not ſerve*, if he does not appear now at this Day of the Return of the Summons &c. Br. Aid, pl. 1. cites 27 H. 6. 4.

18. Note per Brown, Prothonotary, That if the Defendant in *Treſpaſs* prays in Aid of his Maſter or Leſſor, who is a *Stranger to the Writ*, the *Plaintiff may ſay that the Prayor is dead*, and the *other may ſay that Alive*, &c. and Iſſue ſhall be thereof taken. Br. Aid, pl. 144. cites 32 H. 6. 34.

Ibid. pl 14. cites S. C.

19. *Prayee* cannot plead *in Abatement of the Avowry admitted by the Plaintiff*, unleſs as Amicus Curiæ. Quod nota. Per Curiam. Br. Avowry, pl. 12. cites 34 H. 6. 8. 21.

So if the *Patron and Ordinary*

20. In *Annuity* it was ſaid that if a *Parſon prays Aid of the Patron and Ordinary*, and *they are eſſoign'd, or make Default*, the Defendant may *relinquiſh*

linquiſh his Aid-Prayer, and anſwer alone. Br. Aid, pl. 124. cites 4 E. 4. 28. *will not join,* there the Defendant ſhall plead alone. Ibid.——*But if they will join* with the Defendant, *and plead the ſame Plea* that the Defendant pleads, then they ſhall be ſuffer'd to join with the Defendant therein. Ibid.—*But* if they *vary in Plea*, the Plea of the Defendant only ſhall be taken Ibid.——*And* tho' they *offer to join*, yet the *Defendant may relinquiſh the Aid-Prayer, and confeſs the Action*; per Danby Ch. J. Ibid.

21. In Annuity *after Aid-Prayer, and before Appearance*, he who prays in Aid *may refuſe the Aid, and plead in Bar only*; but *contra after* the Prayee appears and offers to join, *unleſs they vary in Plea*; for then the *Plea of the Tenant ſhall be taken*; but the Defendant may *confeſs the Action*, notwithſtanding the Prayee offers to join, and if the *Prayee be eſſoign'd*, this is no Appearance; and note that the Defendant may anſwer alone. Br. Joinder in Aid, pl. 19. cites 4 E. 4. 28.

22. In *Writ of Right* by W. againſt F. who *ſaid that he held for Life, the Remainder to B. and C.* who joined by Proceſs, and pray'd that the *Demandant* count againſt them, and it was ſaid that he *ſhall not count*, but ſhall have *Oyer of the firſt Writ and Count*, and ſo he had, and vouch'd. Br. Aid, pl. 132. cites 11 E. 4. 2.

23. If Aid be *granted where it does not lie*, it is *not Error*, but Delay. *Contra* if Aid be *denied where it does lie*, it is Error; per Fineux. Br. Aid, pl. 118. cites 8 H. 7. 8.

For more of Aid of a Common Perſon in General, ſee **Aid of the King, Parceners, Receipt (S) Voucher**, and other Proper Titles.

Alien.

(A) Alien-born. Alien-Friend. What Things he may have, without Forfeiture to the King. Fol. 194.

1. AN Alien may purchaſe Land. * 11 H. 4. 26. b. † 14 Hen. 4. 20. Co. Lit. 2. b. * Br. Denizen, &c. pl. 17. cites S. C.

† Br. Denizen &c. pl. 2. cites S. C.

2. But the King may ſeiſe it. * 11 Hen. 4. 26. b. † 14 Hen. 4. 20. * Br. Denizen, pl. 17. cites S. C. & S. P. But the Purchaſe *ought to be found by Office*. And ſo it was in the Caſe of Alan King in the Time of King E. 6. Quære if *Information in the Exchequer* ſhall not ſerve in this Caſe. It ſeems that it ſhall not.——Br. N. C. pl. 443. Temp. E. 6.—— The King, upon Office found, ſhall have them. Co. Litt. 2. b.

† S.P. if without Licence. Br. Denizen, pl. 2. cites 14 H. 4. 19. S.C.

3. If an Alien Friend be a Merchant, he may purchaſe a Leaſe for Years of a Houſe for his Habitation, and the King ſhall not have this ſo Though he cannot purchaſe Free-

hold, yet he may have a House of

so long as he inhabits there. Co. Litt. 2. b. For this was necessary for his Trade and Traffick.

Habitation here for the Time that he is here, though he be no Denizen, but is to remain here for Merchandize, or the like; per Cur. obiter. Poph. 36.——S. P. admitted; for if they were disabled in such Case, it were in Effect to deny them Trade and Traffick, which is the Life of every Island. Rep. 17. a. in Calvin's Case ——See D. 2. b. Marg. pl. 8. Yarborow's Reading upon the Statute of 27 E. 3. cap. 2. accordingly.

S. P. unless he leaves Servants

4. But if he departs or leaves the Realm, the King shall have this Lease. Co. Litt. 2. b.

residing there during the Time. D. 2. b. Marg. pl. 8. in Yarborow's Reading in Lent, 35 Eliz. on the Stat. 27 E. 3. cap 2.

5. So if he dies possess'd thereof, yet his Executors or Administrators shall not have it. Co. Litt. 2. b. Sir *James Croft's Case*, 29 Eliz.

It was said 5 M. 1 in Parliament, that if an Alien born obtains a

6. But such Alien Friend, tho' he be a Merchant, yet if he purchases a Lease for Years of Land, Meadow &c. the King shall have it; for this is not necessary for his Trade or Traffick. Co. Litt. 2. b. Sir *James Croft's Case*. 29 Eliz. Resolved.

Lease for Years, the King shall have it; for he cannot have Land in this Realm of any Estate. Br. Denizen, pl. 22. cites 5 M.——Br. N. C. pl. 491. S. C.——No Alien can have Land within the Realm, unless he be Denizen. D. 2. b. pl. 8. Pasch. 19 H. 8.—— And. 25. pl. 56. The Opinion of the Justices of C. B. was, that Alien Friend may have Goods and Leases in England, and may make Testament of them, tho' he be not Denizen.——Bendl. 36 pl. 61. S. C. accordingly.——S. P. 7 Rep. 17. a. in Calvin's Case.

See pl. 24.

7 But if an Alien Friend, who is not any Merchant, purchases a Lease for Years of a House for his Habitation, yet the King shall have it. Co. Litt. 2. b. Sir *James Croft's Case*, Resolved.

* All. 14. S. C. and Roll said, that though the King should have the Use, he could not seise the Land itself by Law, but by Equity might have a Decree for it, and so was Sir John Dack's Case.

8. If an Alien Friend purchases a Copyhold in Fee in the Name of J. S. in Trust for himself and his Heirs, Quære whether the King shall have this Trust of the Copyhold. Pasch. 24 Car. B. R. this was a Question between the *King and Holland*, and much argued at Bar, but no Opinion given therein; but the Trust being traversed, and this found for the King, yet Judgment was given against the King, because by the Inquisition by which this Trust and Matter was found, J. S. who was the Person trusted, and who had the Estate in Fee in him, was put out of Possession thereof by the Inquisition; whereas the Alien had but the Trust, and no Possession, and therefore admitting the Trust was given to the King, yet the King could not have the Possession by Force thereof, but ought to sue to have the Trust executed in a Court of Equity. Intratur Trin. 21 Car. Rot. 20.

——Sty. 20. 41. 76. 84. 90. 94. S. C. Curia advisare vult.——Mod. 17. pl 46. Arg. cites Styles's Reports S. C. that if an Alien purchase Copyhold Lands, the King shall not have the Estate but as a Trust, and that the particular Reason was, because the King shall not be Tenant to the Lord of the Manor. But see Sty. 40. &c. cited as above.——D. 2. b. Marg. pl. 8. says, that Harrison in his Reading at Lincoln's-Inn, 1632. held, that an Alien cannot purchase Copyhold Land, because he has no Capacity to retain but only for the King, and the King cannot hold of any, and therefore if he purchases it ought to escheat to the Lord of the Manor.

9. Pasch. 11 E. 3. Rot. 87. *Land* was *extended upon a Statute acknowledged to an Alien Friend Merchant, and delivered to him*, and *Office was found* for the King, and adjudged that he shall have the Land upon the Extent, and shall not be taken from him upon Office found, and that this is within the Stat. 13 E. 1. de Mercatoribus, and if he be ousted he shall have an Assise, and so Glanvill J. inclin'd in his Reading,

ing, and the Caſe above was debated three Years Hill. 13 E. 3. accordingly. D. 2. b. Marg. pl. 8.

10. If a *Reverſion* of Land be *granted to an Alien by Deed*, and *before Attornment the Alien is made Denizen*, and then the Attornment is made, the King upon Office found ſhall have the Land; for as to an Eſtate between the Parties it paſſes by Deed ab initio. Co. Litt. 310. b.

11. An Alien is not capable of an *Office*. Jenk. 130. pl. 64. cites 4 E. 4. 9.

12. By the Common Law an Alien was capable of a *Beneſice* in England; for the Church is one throughout the whole World; but at this Day it cannot be without the King's Licence, by the Statutes made 25 E. 3. and 10 R. 2. Jenk. 130. pl. 64.

13. An *Alien and an Engliſhman* were *joint Purchaſors*; the *Alien died*; the Survivor ſhall not have the whole, but upon Office found the *Queen ſhall have the Moiety*. Le. 47. in pl. 61. Fenner cited it as adjudg'd in Forcet's Caſe. D. 283. b. pl. 31. Paſch. 11 Eliz. S. C. and it was that T. K. infeoffed B. an Alien, and Forcet, to the Uſe of himſelf and his Wife in Tail, Remainder to his right Heirs, and it ſeemed, that if an Office be found, the Queen ſhould have the Moiety by her Prerogative to her own Uſe, and the other Uſe in this Moiety is gone for ever ——— Goldsb. 29. pl. 4. Mich 28 & 29 Eliz. Fenner ſaid that he had heard lately in the Exchequer, that an Alien and an Engliſhman purchaſed Lands jointly, and the Alien dying, it was adjudged that the other ſhould have the whole by Survivorſhip. But Anderſon and the whole Court ſaid, that this could not be Law; for it is a Maxim, that Nullum Tempus occurrit Regi. ——— If one *covenants to ſtand ſeiſed to the Uſe of his Brother, being an Alien*, the ſame is good, and an Uſe will ariſe; per Cur. Godb. 275. in pl. 388. Hill. 16 Jac. B. R.

14. If one *takes an Alien to Wife, and* then he *aliens his Land*, and afterwards *ſhe is made Denizen*, and the *Husband dies*, ſhe ſhall not be endowed, becauſe her Capacity and Poſſibility to be endowed came by the Denization, but otherwiſe it is if ſhe were naturaliz'd by Act of Parliament. Co. Litt. 33. a. But ſee Dower (A) pl. 2. (B) pl. 1. and (C) pl. 1. where ſuch Marriage was by the King's Licence, that ſhe had Dower.

15. *Leaſe for Years* was made to an Alien on *Condition to have Fee* on paying 20 l. During the Leaſe he is made *Denizen*, and after pays the 20 l. Frowike in his Reading, as cited by Dyer, held that the King ſhould have the Fee, but Plowden thinks the Alien, being then a Denizen at the Time of Payment, ſhall have it. Pl. C. 482. b. Mich. 17 & 18 Eliz. in Caſe of Nicholls v. Nicholls.

16. *Duplicatus Sanguis* if not neceſſary in Deſcents or Purchaſes; As Alien has Iſſue a Son by a Wife Inheritrix, which Son is born in England, this Son, after the Death of the Wife, ſhall inherit the Land. Jenk. 203. pl. 27. Jenk. 3 pl. 2. S. P. viz. both on the Part of the Father and of the Mother.

17. An Alien born purchaſed Lands, and *before Office found the Queen made him Denizen and confirmed his Eſtate*. Anderſon Ch. J. thought the Lands were not in the Queen before Office, and ſo the Confirmation good; But Rhodes held that he ſhould take only to the Uſe of the Queen, and then the Confirmation void. And afterwards Shuttleworth being asked as to his Opinion by divers Barriſters, declared, that he thought it not in the Queen before Office, and therefore thought the Confirmation good. Quære. Goldsb. 29. pl. 4. Mich. 28 & 29 Eliz. Anon. Le. 47. pl. 61. S. C. but no Judgment. ——— 4 Le. 82. pl. 175. S. C. in totidem Verbis.

18. A. an Alien had *Lands by Purchaſe in Tail*, the *Remainder to B. in Fee*. A. *ſuffered a common Recovery, and died without Iſſue*. This being *found by Office*, the whole Court held that the Recovery was good, and ſhould bind the Remainder. 4 Le. 84. pl. 177. Mich. 30 Eliz. C. B. Anon. Goldsb. 102. pl. 7. S. C. and Anderſon J. held him a *good Tenant to the Præcipe before Office found*, and that the Office has Relation for the Poſſeſſion of the Alien, but not ſo ſay that the Alien

Alien never had it, and the Juſtices held it a ſtrong Caſe that the Queen ſhall have it, and that the Remainder is gone ——10 Mod 124. Arg. S. P. accordingly, that he is a good Tenant to the Præcipe before Office found.

S. C. cited Vent. 417. by Hale Ch. J.

19. An Alien may have *Adminiſtration of Leaſes* as well as of perſonal Things, becauſe he has them in another's *Right*, and not to his own Uſe. Reſolved per tot. Cur. Cro. C. 9. pl. 6. Paſch. 1 Car. 1. C. B. Carvon's Caſe.

7 Rep. 25. a. in Calvin's Caſe, S. P and inſtances as to Dower and Curteſy.

20. The Law will not give an Alien the Benefit of Taking by an Act in Law; as by *Deſcent*, *Curteſy*, *Dower*, or *Guardianſhip*, becauſe he cannot keep it; and Lex nihil facit fruſtra. Per Hale Ch. Baron. Vent. 417. in the Caſe of **Collingwood v. Pace.**

——Co. Litt. 31. a S. P. accordingly as to Dower.

21. If an *Agreement for a Houſe* is made with an Alien Artificer *for ſo long as he and I pleaſe*, at the Rate of 20 l. per Ann. Aſſumpſit will lie thereon, and ſo the Statute is evaded; ſo if it be that he ſhall have my Houſe for ſo long as he and I pleaſe, *for ſo much as it is worth*. Per Cur. And yet agreed that a Contract which amounts to a Leaſe is void by this Statute. 2 Show. 135. pl. 114. Mich. 32 Car. 2. B. R. in Caſe of Pilkington v. Peach.

22. An Alien cannot *purchaſe Land* for his own Benefit, but he may for the Benefit of the Crown. See 10 Mod. 91. 94. 120. 122. Arg.

23. *Marriage* is not a Gift in Law of a *Term for Years* to an Alien, for his Wife may ſue and be ſued *as a Feme ſole*. Admitted. Arg. 9 Mod. 104. Mich. 11 Geo. in Caſe of Theobald v. Duffoy.

A Leaſe was made of a Houſe and a Bond given for Performance of Covenants.

24. 32 *H.* 8. *cap.* 16. *S.* 13. Enacts, that *Leaſes of Houſes or Shops to Strangers Artificers, who are not made Denizens, ſhall be void, and that the Leſſor and Leſſee ſhall forfeit 5 l. to be divided between the King and the Proſecutor.*

In Debt brought upon the Bond the Defendant pleaded this Statute, and that it was a Leaſe for Years made to an Alien Artificer. It was admitted that the Leaſe was void, and therefore per Cur. the Obligation is void alſo; for it would be abſurd that when the Statute makes the Leaſe void and ſo deſtroys the Contract, the Obligation to inforce the Payment of the Rent ſhould remain good. And it was ſaid that tho' ſuch Leaſe be *made to an Alien Artificer by the Name of Gent.* yet if in Truth he be an Artificer, ſuch Leaſe ſhall be void by this Statute; and Judgment for the Defendant. Sid. 308. pl. 19 Mich 18 Car. 2. B. R. Jevons v. Harridge.——Saund. 7. S. C. ſays Exception was taken to the Plea, that the Defendants had *not averr'd that the Meſſuage demiſed was a Manſion Houſe*, and that the Statute intended only to provide that Alien Artificers ſhould not have Houſe or Shop to exerciſe their Trades publickly in Prejudice of Natural Subjects exerciſing the ſame Trades, but if they would live here as Gentlemen upon their Eſtates, they might take Leaſes of Stables, Coach-houſes, or other convenient Houſes to lodge their neceſſary Goods in, and ſuch are not within the Words nor Meaning of this Act, becauſe not within the Miſchief of it; and therefore the Plea was ill for Uncertainty; and of ſuch Opinion were Twiſden and Windham J. But Kelynge held that the Meſſuage ſhall be intended a Manſion-houſe prima facie, and that the Plaintiff ought to reply that it was not a Manſion-houſe, and ſo the Point would come in Queſtion. Moreton J. hæſitavit. And afterwards the Defendants thinking the Judgment of the Court would be againſt them, they paid the Plaintiff the Rent and Charges as the Reporter (who was Counſel for the Plaintiff) ſaid he was told by the Plaintiff's Attorney; and that ſo no Judgment was given. ——S. C. cited as adjudg'd, that the the Bond for Performance of Covenants was void, and agreed by all the Court and Counſel at the Bar to be good Law. 2 Show. 135, 136. Mich 32 Car. 2.——In Debt brought on ſuch Bond, the Defendant pleaded this Statute, and ſets forth that he is a *Vintner*, and an Alien Artificer. The Ch. Juſtice ſaid that this Statute refers to 1 R. 2. cap. 9. which prohibits Alien Artificers to exerciſe any Handy-craft in England, unleſs as Servant to a Subject ſkilful in the ſame Art, upon Pain to forfeit his Goods; ſo that it is plain that ſuch as uſed any Art or manual Occupation were reſtrain'd from uſing it here to the Prejudice of the King's Subjects; that the Myſtery of a Vintner chiefly conſiſts in *mingling Wines*, which is not properly an Art but a Cheat; and ſo the Plaintiff had his Judgment. 3 Mod. 94. Hill. 1 Jac. 2. B R. Bridgham v. Frontee.

At Common Law, a Leaſe to an Alien Artificer, either of an Houſe or Shop, *was good between the Parties, but forfeitable to the King*; but now if a Shop is let to an Alien Artificer, the Leaſe is void by the Statute 32 H. 8. and if the Leſſor brings an Action of *Debt for Rent*, the Leſſee may *plead this Statute in Bar* to the Action; *but* if an *Houſe or Shop is let to an Alien Gentleman*, the Leaſe is not void within that Statute, neither is it pleadable in Bar to an Action. 3 Salk. 29. Anon.

(A. 2) Who is Alien, and who Alien Friend or Alien Enemy.

1. HE who is *born beyond Sea before the Statute*, whoſe *Father and Mother* were *Engliſh*, was inheritable by the Common Law, nevertheleſs now this is clear by the Statute; Per Huſſey. Br. Diſcent, pl. 47. cites H. 10 H. 4. 9.

2. If a *Man goes over Sea without the King's Leave*, and has Iſſue there and dies, and the Iſſue ſurvives, the *Iſſue* ſhall not be his Heir inaſmuch as he *is Alien born*, and the Land ſhall eſcheat, and no other ſhall be his Heir; Per Newton. Br. Denizen, pl. 14. cites 22 H 6. 38. Thel. Dig. lib. 1. cap. 6. pl. 16. cites S.C.

3. *But* contra Lib. Dr. & St. and that *where the eldeſt Son is an Alien, and the youngeſt Denizen*, there the youngeſt ſhall be Heir, As between Baſtard and Mulier; But e contra where the eldeſt lawful Son is attainted in the Life of his Father of Felony; for he was once able. Contra of Baſtard and Alien, nota Differentiam. Ibid.

4. If the King *grants Patent of Denizen to W. N. born at B. under the Dominion of the Emperor, where he was born in France*, this Grant is void by the falſe Surmiſe; Per Brian, but per Cur. contra, and that this cannot be tried, and the Effect is that he is made Denizen. Br. Denizen, pl. 23. cites 9 E. 4. 11. Bagot's Caſe.

5. If all the People of England would make War with the King of Denmark, and the King will not Conſent to it, this is not War; but where the *Peace is broke by Ambaſſador*, the League is broke. Br. Denizen, pl. 20. cites 19 E. 4. 6.

6. An *Engliſhman paſſed the Sea and married a Female Alien*, by this the Feme is of the Legeance of the King, and her Iſſue ſhall inherit. Br. Denizen, pl. 21. cites the printed Book of Abridgment of Aſſiſes.

7. He who was *born beyond Sea*, and *his Father and his Mother* were *Engliſh*, their Iſſue ſhall inherit by the Common Law; Per Huſſey Ch. J. Thel. Dig. 4. lib. 1. cap. 6. S. 9. cites 1 R. 3. 4.

8. Thel. Dig. 4. lib. 1. cap. 6. S. 13. Says, that the Opinion of Sir Edward Saunders, Ch. Baron, in the Caſe of Stowel, Pl. C. fol. 368. b. is that *thoſe* who are *in Ireland or Scotland*, *are* extra Regnum Angliæ, and ſo *within the Exception of extra Regnum in the Statute of Fines.*

9. 14 & 15 *H* 8. 4. *Engliſhmen ſwearing Allegiance to Foreign Princes ſhall pay the ſame Duties as Aliens, but upon their returning and dwelling in the Realm, to be reſtored to their Privileges.*

10. The *Son of an Alien* whoſe Son is *born in England* is an Engliſhman, and not an Alien. Br. Denizen, pl. 9. cites 36 H. 8.

11. A *Baſtard was begot at Tournay by an Engliſhman* of an Engliſhwoman after the Conqueſt thereof by H. 8. and Catline Ch. J. Saunders Ch. B. Whiddon and Brown J. and Dyer, held that this Baſtard was a Liege-man, in like Manner as Iſſue born here in England between Aliens, and ſo capable of purchaſing and impleading here as a Denizen, Tourney being at the Time Parcel of the Dominions of England. D. 224. pl. 29. Trin. 5 Eliz. Anon. S. C. cited 7 Rep. 22 b — Jenk. 227. pl. 91. cites S. C. & S. P. accordingly; and ſays, that he continues ſo altho' Tourney be won back by the French; for he was born in Obedientia & Ligeantia Regis Angliæ. By the two Chief Juſtices and other Judges. Jenk. 227. pl. 91.

The Law is the ſame altho' the Mother be French, or the *Father and Mother French*; for the Reaſon is alike. Jenk. 227. pl. 91.—S. C. and S. P. cited by Vaughan Ch J. Vaugh. 282. For it was part of the Dominions belonging to the King of England Pro Tempore.

Such alſo is the Law, if an *Husband and Wife* who are *Aliens have Iſſue born in England*, where the Parents are born in France. Jenk. 227. pl. 91.

12. Perſons *born upon the Engliſh Seas* are not Aliens. Molloy 370.

13. If an Alien comes into England, and has Iſſue two Sons, thoſe 2 Sons are Indigenæ, Subjects born, becauſe born within the Realm. Co. Litt. 8. a.

14. Alien *ſignifies* one born in a ſtrange Country, under the Obedience of a ſtrange Prince or Country. Co. Litt. 128. b. 129. a.

4 Le. 110. pl. 223. 19 Eliz. S. C. that by ſtaying there longer than the appointed Time, they loſe the Benefit of Subjects

15. If Baron and Feme *go beyond Sea without Licence, or tarry there after the Time limited* by the Licence, and have Iſſue, this Iſſue is Alien, and not inheritable. Held upon Evidence in Ejectment, contrary to the Opinion of Hutley, 1 R. 3. 4. Cro. E. 3. pl. 8. Hill. 24 Eliz. B. R. Hyde v Hill.

——— But it being further proved that the Baron, who was attainted of Treaſon, and went beyond Sea without Licence, *returned* in the Time of Queen Mary, *and was reſtored by Act of Parliament*, it was thereupon held that the Iſſue was inheritable.

16. A.'s *Father and Mother enſeint dwelt in Calais when it was took by the French*, and fled into Flanders, and there the Wife was delivered. Adjudged he ſhall be Denizen, becauſe *the Parents were born in Calais*, and he was begotten there, tho' *born in Flanders*. D. 224. pl. 29. Marg. cites 2 Jac. in the Exchequer, Colt's Caſe.

7 Rep. 1. Trin. 6 Jac. S. C.

17. A *Poſtnatus in Scotland* brought an Aſſiſe of Lands in Middleſex. The Defendant pleaded to his Perſon, that he was an Alien born in Scotland, after the Death of Queen Elizabeth, ſub Ligeantia Regis Scotiæ. Upon a Demurrer, and after ſeveral Adjournments, it was reſolved for the Plaintiff by all the Judges of England. Jenk. 306. pl. 82 Calvin's Caſe.

If *Enemies* ſhould come into any of the King's Dominions, and *ſurprize any Caſtle* or Fort, and poſſeſs the ſame by Hoſtility, *and have Iſſue there*,

18. There are regularly (unleſs in Special Caſes) 3 *Incidents to a Subject born*. 1. * That the *Parents be under the actual Obedience* of the King. 2dly, † That the *Place of his Birth be within the King's Dominions*. 3dly, ‡ The *Time* of his Birth is chiefly to be conſider'd; for he cannot be a Subject born of one Kingdom, that was born under the Legiance of the King of another Kingdom; albeit afterwards the one Kingdom deſcends to the King of the other Kingdom. 7 Rep. 18. a. Trin. 6 Jac. in Calvin's Caſe.

ſuch Iſſue is no Subject to the King, tho' he be born within his Dominions, becauſe he was not born under the King's Ligeance or Obedience. 7 Rep. 18. a. b. in Calvin's Caſe.——Ibid 6 a. S. P. and alſo becauſe ſuch Iſſue was not born under the King's Protection.

† And therefore all Perſons *born in Normandy*, Gaſcoign, Guyen, Anjou and Bretaigne, *while* they were *under the actual Obedience of the King of England*, were inheritable within this Realm as well as Engliſhmen, becauſe they were under one Ligeance due to one Sovereign; and therefore Perſons born in the *Iſles of Guernſey and Jerſey*, Parcel of the Dukedom of Normandy, tho' no Parcel of the Realm of England, but ſeveral Dominions enjoy'd by ſeveral Titles, and govern'd by ſeveral Laws, are inheritable to Lands within the Kingdom of England 7 Rep. 20. b. 21. a.—— But Perſons born in other Parts of Normandy &c now out of the actual Poſſeſſion of the Kings of England, are not, for that Reaſon, Subjects of the Kings of England. 7 Rep. 18. a.

‡ And therefore the *Antenati in Scotland* were Aliens born. 7 Rep. 18 b. in Calvin's Caſe.——And the uniting the Kingdoms by Deſcent ſubſequent cannot make him a Subject to that Crown, to which he was an Alien at the Time of his Birth; but if the Kingdoms ſhould by Deſcent be divided and govern'd by ſeveral Kings, yet all thoſe born under one Natural Obedience, while the Realms were united, will not be Aliens; for Naturalization veſted by Birth-right, cannot by a Separation of the Crowns afterwards be taken away; nor can he that was by Judgment of Law a Natural Subject at the Time of his Birth, become an Alien by ſuch a Matter, Ex poſt Facto. 7 Rep. 27. a. b.———S. P. & S. C. cited by Vaughan Ch. J. Vaugh. 286. 287. in Caſe of Craw v. Ramſey.

19. An Alien *is* a Subject that is born out of the Allegiance of the King, and under the Ligeance of another. 7 Rep. 16. in Calvin's Caſe.

Secus if the Wife be a

20. If *Ambaſſador in a Foreign Country has Iſſue there by his Wife, an Engliſhwoman*, by the Common Law they are natural-born Subjects, and yet

yet they are born out of the King's Dominions. 7 Rep. 18. a. in Calvin's Caſe. Foreigner. Jenk. 3. pl 2.

21. A *Merchant trading in Poland married an Alien*, and *died*, *leaving her big with Child*. It was held that the Father, being an Engliſh Merchant, and living abroad for Merchandize, the after-born Child is born a Denizen, and ſhall be Heir to him; for as Berkley J. ſaid, ſhe is Sub Poteſtate viri & quaſi under the Allegiance of our King. And per Brampton, tho' the Civil Law is that Partus ſequitur Ventrem, yet our Law is otherwiſe, and the Child ſhall be of the Father's Condition, and he being an Engliſh Merchant, and reſiding there for Merchandize, his Children ſhall by the Common Law, or rather, as Berkley ſaid, by the Statute 25 E. 3. be accounted the King's Lieges, as their Father was. And another Caſe being cited to have been adjudged 2 Car. accordingly, Judgment was given for the Plaintiff, the after-born Child. Cro. C. 601. pl. 5. Hill. 16 Car. B. R. Bacon v. Bacon. Mar. 91. pl. 150. S. C reſolved accordingly — Jenk. 3. pl. 2. cites S. C. accordingly; for the *Vocation* of a Merchant *requires a* long *Commorance abroad*, if he will not truſt his Fortune wholly to Factors.——Sid 198. cites S. C.——S. C. cited by Hale Ch Baron in his Argument, as adjudged by all the Juſtices of England.

So where ſuch Merchant had ſeveral Children born in Poland of a Poliſh Woman, and deviſed his Lands in England to ſuch Children; and it being demanded of all the Juſtices of England at Serjeant's-Inn, as Yelverton J. ſaid, they made no Scruple any of them but that the Iſſue ſhould inherit, and were not Aliens, becauſe the Father went with Licence, being a Merchant, and in our Law Partus ſequitur Patrem; and alſo there is Blood between him and his Iſſue, and he communicates Nature to them; and the Judges ſaid that this Iſſue have Fidem utriuſque Regis, both of England and Poland. And ſeveral of the Judges took it, that the Words of 25 E. 3. De Natis ultra Mare, *whoſe Fathers and Mothers be, or ſhall be of the Allegiance of the King*, ſhall be taken diſtributive & non copulative, Fathers or Mothers. But the Reporter adds a Nota, that no ſuch Opinion was delivered by ſome of the Juſtices as mentioned by Yelverton J. Litt. Rep. 28. 29.

(A. 3) How far privileged, reſtrain'd, or enabled.

1. AN Alien born *ſhall not be a Juror in a Jury*; for he is out of the Allegiance of the King, and is not Liege of the King. Quod nota. Br. Denizen, pl. 2. cites 14 H. 4. 19.

2. If Alien Enemy *invades* this Realm, and is taken, he ſhall not be put to Death, but *ranſomed* Jure Belli. Jenk. 216. pl. 58. ſays 13 E. 4. 9. accords as to this.

3. If an Alien, *whoſe King is in Amity with our King*, *joins with Rebels*, he ſhall be put to Death as a *Traytor*. Jenk. 216. pl. 58.

4. How far an Alien may be capable of being guilty of *High Treaſon*, ſee Hawk. Pl. C. cap. 17. S. 5. 6. 7.

5. *May freely import Fiſh, or other Victual.* See Hawk. Pl. C. cap. 80. S. 7.

6. May have the Benefit of *Clergy*. 2 Hawk. Pl. C. cap. 33. S. 5.

7. Note, by all the Juſtices, if a *Merchant Stranger* who is *of the Amity of the King be robb'd* by one who is of Obedience of the King, or who is of the Amity, he ſhall have *Reſtitution*. Br. Denizen, pl. 8. cites 2 R. 3. 2.

8. *But if* the Party *was not of the Amity of the King* at the Time &c. *or* if the *Robber was not under the Obedience of the King at the Time &c. or in Amity of the King*, he ſhall not have Reſtitution, for then *Quiſque capere poteſt, quod capere poteſt.* Ibid.

9. If Alien Amies living here under the King's Protection commit Treaſon, the Indictment ſhall conclude, that it was done contra debitam Allegiantiam, and ſhall call the King Dominum ſuum, but not Naturalem Dominum; per Hobart Ch. J. Hob. 270. pl. 356. Mich. 17 Jac. in the Star-Chamber, in Courteen's Caſe.

10. A

10. A Frenchman brings Goods into England *before War proclaimed* between the two Nations, neither his Perſon or his Goods may be *ſeized*; But if it was *after War proclaimed*, both his Perſon and Goods may be ſeized, and the ſame Law it is if he be drove in by Tempeſt; per omnes J. Angliæ. Jenk. 201. pl. 22.

11. An Action upon the *Caſe* was brought *by an Executor for Work done* &c. by his Teſtator an Alien; if the Action attach'd in him before the breaking out of any War between the 2 Nations, and ſo he died before he became an Alien Enemy, he might have an Executor, and the Action tho' brought by his Son who is Executor, tho' an Alien, *en auter Droit*, ſhall be maintained. Skin. 370. pl. 18. Mich. 5 W. & M. in B. R. Villa v. Dimock.

12. If an Alien *Enemy* come into *England without the Queen's Protection*, he ſhall be ſeiz'd and *impriſon'd* by the Law of England, and he ſhall have no Advantage of the Law of England, nor for any Wrong done to him here. 7 Mod. 150. Hill. 1 Ann. B. R. Sylveſter's Caſe.

Fol. 195.

(B) Alien. Enemy.

Br Denizen, pl. 16. cites S.C. and Ibid.

1. IF a Man be bound to an Alien Enemy, this is void quoad the Obligee. 19 E. 4. 6. a. b.

pl. 20. cites S. C per Brian.—Br. Barre, pl. 84. cites S. C that by ſome the Obligation is void.—Br. Obligation, pl. 54. cites S. C.——Br. Dette, pl. 219. cites S C.

Br. Denizen, pl 16. cites S C.——

2. So if a Man be bound to an Alien Friend, who after becomes an Enemy, it is void quoad him. 19 E. 4. 6. a. b.

Brian ſaid, that perhaps the King ſhall have it. S. P. Br. Denizen, pl. 20. cites S. C. and note, that in Debt upon the Obligation the *Defendant ſaid that the Plaintiff was Alien born at D in Denmark, under the Obedience of the King of Denmark, the King's Enemy*, and all his Lieges are the King's Enemies a long Time, viz. Anno 8 of the now King; and ſo it ſeems, that if he had been Alien who had not been Enemy to the King, that then he ſhall not be diſabled, becauſe he is Alien; and per Brian, the Defendant ought to *ſhew how the League is broke*; for if all England would make War with the King of Denmark, and the King will not conſent to it, it is not War, but where the *Peace is broke by Ambaſſador* the League is broke.

Br. Denizen, pl 16. cites S. C. *But*

3. But in both Caſes the King ſhall have it. 19 E. 4. 6. a. b. but Quære.

Brooke ſays, that *the Caſe of Debt [as to Alien Friend] is denied at this Day, and* never was Law, for the Alien ſhall have it, and *ſhall ſue before the Counſel* at leaſt. But Quære thereof; for by ſeveral he ſhall ſue at Common Law in Action Perſonal, and Alien born is no Plea.——Br. Denizen, pl. 20. cites S. C. which ſee in the Notes at pl. 2. ——Br. Barre, pl. 84. cites S. C. & S. P. as to Alien Enemy.—Br. Obligation, pl. 54. cites S. C. & S. P. as to Alien Enemy.——Br. Dette, pl. 219. cites S. C.

Jenk. 201. pl. 22. S. P. and cites S C.

4. If a *Frenchman inhabits in England, and afterward War is proclaimed* between England and France, none can take his Goods, becauſe he was here before Br. Property, pl. 38. cites 7 E. 4. 14.

Jenk. 201. pl. 22. S. P. and cites S. C.

5. *But* if a Frenchman *comes here after the War proclaimed*, be it by his good Will, or by Tempeſt, or if he yields and renders himſelf, or ſtands in his Defence, every one may arreſt him and take his Goods, and by this he has Property in them, and the King ſhall not have them, and ſo it was put in Ure the ſame Year between the Engliſh and Scots, and the King himſelf bought divers Priſoners and Goods the ſame Year

as

as Bologne was conquer'd, of his own Subjects; Quod Nota bene. Br. Property, pl. 38. cites 7 E. 4. 14. and 36 H. 8.

6 *Where an Alien ought to have Amerciament* the King have it, if it appears in the Rolls of the Court, and this is of Amerciament for Suit of Court &c. Br. Denizen, pl. 16. cites Fitzh. Avowry 223.

(C) Alien. Denizen. What Act in Law will make a Man a Denizen.

1. IF an Alien Friend comes into England when he is an Infant, and always after for a long Time continues here, and is sworn to the King, yet he continues an Alien. 14 H. 4. 20. S. P. tho' he abides long here and is sworn in Leets; for *he cannot be Denizen but by Grant of the King.* Br Denizen, pl. 11. cites 14 H. 4 19. and 14 E. 3. accordingly. — And his having been sworn in Leets and Juries does not make him a Liege-Man of the King. Nota. Br. Challenge, pl. 48. cites S. C. ——Fitzh. Challenge, pl. 91. cites 14 H. 4. 19. S. C. and S P. so that he cannot be a Juror, and if he purchase Land it shall be seised into the King's Hands—— Fitzh. Denizen, pl 3 cites S. C.

2. A. devised an House to his Wife for Life, Remainder to B. (who was an Alien) if he should be then a Denizen, and capable to take, if not, then to the Heirs of his Body, and in Default of such Issue, Remainder to the Master and Governors of the Free-School of St. Olives, after the Death of the Wife B. enter'd, and enjoy'd the same many Years, and sold the same to C. The Master and Wardens brought an Ejectment supposing that B. was an Alien, and died without Issue; But to prove that he was a Denizen, it was shew'd that *in the Deed and Fine he called himself a Freeman, and that the Fine was with Proclamations, and 5 Years passed.* And that as Aliens are prohibited by Statute from being of any Trade, upon Pain of Forfeiture of their Goods, he would not have incurr'd the Penalty by *using a Trade here* without being first made a Denizen. But per Williams J. a Denizen cannot be made but by Letters Patents, or Act of Parliament, which cannot be sufficiently proved without Matter of Record. The Court were all clear of Opinion, that the Plaintiff had good Title, but the Parties agreed, and no Verdict given, but a Juror withdrawn. 2 Bulst. 33. Mich. 10 Jac. The Free-School of St. Olave's Case.

(C. 2) Denizen. Who. And How considered and favoured.

1. IF a Man be *born beyond Sea*, whose *Father and Mother are English*, such was inheritable before the Statute, but now the Statute makes it clear; per Hussey Ch. J. Br. Denizen, pl. 6. cites 1 R. 3. 4.

2. If *Alien born has Issue a Son beyond Sea*, and *after is Denizen here*, and *purchases Land*, and *has Issue another Son*, and dies, the youngest Son shall inherit the Land; for the Eldest is Alien born. Br. Denizen, pl. 7. cites 1st Book of Dr. & St. S. P. Br. Denizen, pl. 19.

3. *And* the eldeſt Son is not Heir, becauſe he is alien; but this is not Corruption of Blood, as where the eldeſt Son is attainted in the Life of the Anceſtor, there the Land ſhall eſcheat. Br. Denizen, pl. 7. cites Doct. & Stud. 1. lib.

Br. Denizen &c. pl. 19.

4. *But of Land purchaſed before he was Denizen*, none ſhall inherit it; for the King ſhall have it. Quod nota bene. Ibid.

* See Trial, (G. a 2)— S. C. & S. P. cited and approved by Vaughan Ch. J. Vaugh. 291.

5. It appears by the Statute * 28 *E.* 3. *cap.* 13. that Denizens *are as well thoſe who are Engliſh born as thoſe who were Aliens, and are made Denizens* by the King by his Letters Patents. Br. Denizen, pl. 4. cites 21 H. 7. 32.

6. *But* ſee *the Statute, that Denizens ſhall pay Cuſtoms as Aliens*, is not ſo conſtrued nor intended, but *is intended of thoſe who were made Denizens* by the King, and who were Aliens before. Ibid.

7. If an *Alien is made Denizen*, and *purchaſes Lands, and dies without Iſſue*, the Lord of the Fee ſhall have the *Eſcheat*, and not the King. Co. Litt. 2. b. cites it as reſolved inter alia Paſch. 29 Eliz. in Sir James Crofts's Caſe.

S. C. & S. P. cited and approved by Vaughan C. J. Vaugh. 291.

8. In Caſe of the Conqueſt of a Chriſtian Kingdom, as well thoſe that ſerved in the Wars at the Conqueſt, as thoſe that remained at home for the Safety and Peace of the Country, and other the King's Subjects, as well Antenati as Poſtnati, are capable of Lands in the Kingdom or Country conquer'd, and may maintain any real Action, and have the like Privileges and Benefits there as they may have in England. 7 Rep. 18. a. in Calvin's Caſe.

(D) Alien. Naturalization.

Br. Denizen &c. pl. 1. cites S. C. but S. P. does not appear.

1. **An Alien born in Portugal, who came into England with Beatrice Counteſs of Arundel, was naturalized by Parliament, and was enabled to purchaſe &c.** 3 H. 6. 55.

2. Letters Patents of the King ſhall not enure to two Intents; as where *Land or Aſſiſe* is *granted to an Alien born*, this does not make him a Denizen. Br. Patents, pl. 62. cites 7 E. 4. 30. per Cur.

S. P. as to Naturalization. Cro. J. 539. pl. 7. in S. C. by the Ch. Juſtice; but

3. An Alien may be made *Denizen for Life, or in Tail*; but *Naturalization cannot be* either *with Limitation* for Life or in Tail, *or upon Condition*; for that is contrary to the Abſoluteneſs, Purity, and Indebility of Natural Allegiance. Co. Litt. 129. a.

Denization may be pro Tempore, as for Years &c.

2 Roll Rep. 95. S. C. & S. P. by Mountague Ch. J. Trin. 17 Jac. in Caſe of Godfrey v. Dixon.

4. Naturalization is *always by Parliament, and perpetual*; for if one be naturalized *for a Day it is good for ever*; per Mountague Ch. J. Cro. J. 539. pl. 7. Trin. 17 Jac. in Caſe of Godfrey v. Dixon.

6. Naturalization *is* an Adoption of one to be intitled by Birth to what an Engliſhman may claim; and where Naturalization is, it *takes Effect from the Birth of the Party*, but *Denization* takes Effect from the Date of the Patent. Arg. Cart. 187. cites Cro. Jac. 539. Godfrey's Caſe.

2 Sid. 23. & 148. Foſter v. Ramſey, S. C. ad-

7. *Naturalizing in Ireland* is *of no Effect as to England*; for Naturalization is but a *Fiction of Law*, and can have Effect but upon thoſe only conſenting to that Fiction, therefore it has the like Effect as a Man's Birth hath,

hath, where the Law-makers have Power, but not where they have not. Naturalizing in Ireland gives the ſame Effect in Ireland as being born there; ſo in Scotland as being born there; but not in England, which conſents not to the Fiction of Ireland or Scotland, nor to any but her own. Vaugh. 280. Hill. 21 & 22 Car. 2. C. B. in Caſe of Craw v. Ramſay.

judged.—— Cart. 185. S. C. argued. ——2 Jo. 10. Crow v. Ramſey, S. C. adjudged.——

2 Vent. 1. S. C. adjudged by 3, contra 1.——But becauſe Naturalization in Ireland, which makes a Man as born there, ſhall not make him likewiſe as born (viz. not to an Alien) in England, it is no good Inference that therefore one denizen'd in England ſhall not be ſo in Ireland, which is a conquer'd and ſubjected Country; per Vaughan Ch. J. Vaugh. 291. in S. C.

8. 25 *E.* 3. *Stat.* 2. *De natis ultra Mare. The King's Children are inheritable in England, whereſoever born.*

Subjects Children (born beyond Sea) are alſo inheritable, ſo that their Parents at the Time of their Birth were within the King's Allegiance, and that the Mother went beyond Sea with her Husband's Conſent.

If Baſtardy be alleged againſt any born beyond Sea, the Certificate ſhall be made by the Biſhop of the Place where the Land demanded lieth.

9. 7 *Jac. cap.* 2. *No Perſon of the Age of* 18 *Years, or above, ſhall be naturalized or reſtored in Blood, unleſs he have received the Lord's Supper within one Month before any Bill exhibited for that Purpoſe, and alſo ſhall take the Oath of Supremacy and Allegiance in the Parliament-Houſe before his Bill be twice read; and the Lord Chancellor, if the Bill begin in the Upper Houſe, and the Speaker of the Commons Houſe, if the Bill begin there, ſhall have Authority during the Seſſions to miniſter ſuch Oaths.*

10. 11 & 12 *W.* 3. *cap.* 6. *All Perſons, being the King's natural born Subjects, may inherit as Heirs, and make their Titles by Deſcent from any of their Anceſtors Lineal or Collateral, altho' the Father and Mother, or other Anceſtor of ſuch Perſons, thro' whom they derive their Title, be born out of the King's Allegiance.*

11. 7 *Ann. cap.* 5. *No Perſon ſhall be naturalized by this Act, unleſs he hath received the Sacrament in ſome Proteſtant Congregation in* Great-Britain, *within* 3 *Months before the taking the Oaths appointed by* 6*th of Q. Ann; and at the Time and Place of taking them muſt produce a Certificate ſigned by the Parſon who adminiſter'd the Sacrament, atteſted by two credible Witneſſes, which muſt be enter'd of Record in the Court.*

Children of natural born Subjects, born out of the Queen's Ligeance, ſhall be deem'd natural born Subjects.

Foreign Proteſtants, taking and ſubſcribing the Oaths and the Declaration appointed by the Act made in the 6*th of Q. Anne, touching electing* 16 *Peers of Scotland &c. are naturalized.*

12. 10 *Ann. cap.* 5. *The ſaid Statute of* 7 *Ann.* 5. *is repealed, (except ſo much by which the Children of natural born Subjects, born out of the Allegiance of the Queen or her Succeſſors, are to be adjudged and taken to be natural born Subjects of this Kingdom) and that this Repeal ſhall not prejudice the Naturalization of any Perſons who have been or ſhall be naturalized before the* 4*th of February* 1711.

13. 1 *Geo.* 1. *cap.* 4. *S.* 1. *The Clauſe in the Act* 12 *W.* 3. *cap.* 2. *whereby it is enacted that no Perſon born out of the Kingdom, tho' he be naturalized, except ſuch as are born of Engliſh Parents, ſhould be capable to be of the Privy Council &c. ſhall not extend to diſable any Perſon who before his Majeſty's Acceſſion to the Crown was naturalized.*

14. 1 *Geo.* 1. *cap.* 4. *S.* 2. *No Perſon ſhall be naturalized, unleſs in the Bill exhibited for that Purpoſe there be a Clauſe to declare, that ſuch Perſon not to be enabled to be Privy Council, or a Member of either Houſe of Parliament, or enjoy any Office of Truſt, or have any Grant from the Crown; and no Bill of Naturalization ſhall be received without ſuch Clauſe.*

15. 4 *Geo.* 2. *cap.* 21. *S.* 1. *Children born out of the Allegiance of the Crown of Great-Britain, whoſe Fathers ſhall be natural born Subjects, ſhall by virtue of the Act of* 7 *Ann. cap.* 5. *and of this Act, be natural born Subjects.*

S. 2. *Provided that nothing in* 7 *Ann. cap.* 5. *or in this Act, ſhall make any Children born out of the Ligeance of the Crown to be natural born Subjects, whoſe Fathers, at the Time of the Birth of ſuch Children, were or ſhall be attainted of High Treaſon, either in this Kingdom or in Ireland, or where liable to the Penalties of High Treaſon or Felony in caſe of their returning in this Kingdom or Ireland without Licence of his Majeſty, or were or ſhall be in the Service of any Foreign State then in Enmity with the Crown of Great-Britain.*

S. 3. *If any Child, whoſe Father at the Time of the Birth of ſuch Child was attainted of High Treaſon, or liable to the Penalties of High Treaſon or Felony, in caſe of returning without Licence, or was in the Service of any Foreign Eſtate in Enmity with the Crown, (excepting all Children of ſuch Perſons who went out of Ireland in purſuance of the Articles of Limerick) hath come into Great-Britain or Ireland, or any other of the Dominions of Great-Britain, and hath continued to reſide within the Dominions aforeſaid for two Years, at any Time between the* 10*th of Nov.* 1708, *and the* 25*th of March* 1731, *and during ſuch Reſidence hath profeſſed the Proteſtant Religion, or hath come into Great-Britain &c. and profeſſed the Proteſtant Religion, and died within Great-Britain &c. at any Time between the ſaid* 16*th of Nov.* 1708, *and the* 25*th of March* 1731, *or hath continued in the actual Poſſeſſion or Receipt of the Rents of any Lands in Great-Britain &c. for one Year, at any Time between the ſaid* 16*th of Nov.* 1708, *and the* 25*th of March* 1731, *or hath, Bona Fide, ſold or ſettled any Lands in Great-Britain or Ireland, and any Perſon claiming Title thereto under ſuch Sale or Settlement, hath been in the actual Poſſeſſion or Receipts of the Rents thereof for ſix Months between the ſaid* 16*th of Nov.* 1708, *and the* 25*th of March* 1731, *every ſuch Child ſhall be deemed a natural born Subject of the Crown of Great Britain.*

(E) Alien. Denization. By whom; and what Perſons ſhall be.

1. If an Alien be made a Denizen, and the Letters of Denization have a * Proviſo (uſual in ſuch Charters) that the Denizen ſhall do his Liege Homage, and that he ſhall be obedient and obſerve the Laws of this Realm, this Proviſo is not any Condition; for tho' he never does his Liege Homage, nor be obedient to all the Laws of this Realm, yet this will not make the Denization void; for if he does not obſerve the Laws he ſhall forfeit the Penalties appointed by them. Paſch. 8 Jac. Scaccario Derſeline, † [Worſelm or Worſely] *Manning's Caſe*, per Curiam.

* 32 *H.* 8. *cap.* 16. *S.* 7. Enacts, that *all Strangers (made Denizens) ſhall be obedient to the Statutes of* 1 *R.* 3. *cap.* 9. 14 *H.* 8. *cap.* 2. *and* 21 *H.* 8. *cap.* 16. *And that in all Letters Patents of Denization a Proviſo for that Purpoſe ſhall be inſerted, ſave only when the King ſhall grant ſpecial Liberties, and then thoſe Liberties ſhall be expreſſed.*

† Lane. 58. 59. Trin. 7 Jac. S. C. & S. P reſolved accordingly.

S. P. by Doderidge J. 2 Roll Rep. 93 and ſays the Kings of this Realm have been cautious of making many Denizens——Palm. 14. Arg. ſays, that Denizations cannot

2. The King cannot grant to any other *to make* Aliens born *Denizens*, but it is by the Law itſelf *inſeparably united and* annexed *to his Royal Perſon.* 7 Rep. 25. b. in Calvin's Caſe, cites 20 H. 7. 8. a.

not be but by the King's Charter, and that this is a Sun-beam of the Crown, and a Prerogative inſeparable from the Perſon of the King, and cites 20 H. 7. 8. and that as the Kings of England have the ſole Power, ſo they have always uſed it ſparingly, and not to grant more than other Kings; that Claudius the Emperor made at one time all the Subjects of the Empire Denizens of Rome; and H. 2. of France made all the Citizens of Antwerp Denizens of France; bnt that this Land being an Iſland the King never indenizens many of his Neighbours, Ne inde admittantur Inimici tanquam in Equo Trojano.

3. He that is *born within the King's Liegeance* is called ſometimes a Denizen, quaſi *deins nee*, viz. born within, and thereupon in Latin is called *Indigena*, the King's Liegeman, for Ligeus is ever taken for a natural born Subject; but many times in Acts of Parliament Denizen is taken for an Alien born, that is infranchiſed, or *denizated by Letters Patents* whereby the King does grant unto him, Quod ille in omnibus tractetur, reputetur, habeatur, teneatur & gubernetur tanquam ligeus noſter intra dictum Regnum noſtrum Angliæ oriundus, & non aliter, nec alio modo. But the King may make a *particular Denization*, as he may grant to an Alien, *Quod in quibuſdam Curiis ſuis Angliæ audiatur ut Anglus*, & quod non repellatur per illam exceptionem, quod ſit alienigena & natus in partibus tranſmarinis, to enable him to ſue only. Co. Litt. 129. a.

4. A *Denization* may be *Temporary* for Life, or in Tail, and this enables only to purchaſe; per Mountague Ch. J. 2 Roll Rep. 95. Trin. 17 Jac. B. R. in Caſe of Godfrey v. Dixon. Cro. J. 539. pl. 7. S. C. & S. P. and it may be for Years &c. — Co. Litt. 129. a. S. P.

5. Denization by Letters Patents for Life in Tail or in Fee, whereby he becomes a Subject in regard of his Perſon, will not *enable* him to *inherit* in England, but according to his Denization will enable his Children born in England to inherit him. Vaugh. 268. Hill. 21 & 22 Car. 2. C. B. Craw v. Ramſey. 7 Rep. 7. a. in Calvin's Caſe, S. P. — It does not enable him to take by Deſcent, per Periam J. Mo. 204. — S. P. by Manwood Ch. B. 4 Le. 176. — It enables the Party to purchaſe Lands, but *not* to inherit the *Lands of his Anceſtor as Heir* at Law, *but as a Purchaſor* he may inherit Lands of his Anceſtor. Sty. 139. Andrews v. Baily. — It enables only *Children born after* Denization to inherit, and not thoſe born before, as Naturalization does. Jenk. 306. pl. 82. — S. P. Arg. Godb. 275. pl. 388. — Hale Ch. J. ſaid it reſembles a Pardon in Caſe of Attainder. Vent. 419.

(F) The Effect and Operation of Naturalization and Denization.

1. NOTE for Law, that where an *Alien born comes* into England, *and brings his Son* with him who was *born beyond Sea*, and is an Alien as his Father is, there the *King by his Letters Patents cannot maks the Son Heir to his Father*, nor to any other, for he *cannot alter his Law by his Letters Patents*, nor otherwiſe but by Parliament, for he cannot diſinherit the right Heir, nor diſappoint the Lord of his Eſcheat. Br. Denizen, pl. 9. cites 36 H. 8.

2. If an *Alien born has Iſſue a Son beyond Sea*, this Son is an Alien as the Father is, and if he comes into England, and is *made a Denizen*, and after *has Iſſue another Son in England*, and he purchaſes Land, viz. the Father, the *ſecond Son ſhall inherit*, and not the eldeſt Son. Br. Diſcent, pl. 57. cites Doct. & Stud. lib. 1.

3. If an Alien be *made Denizen* by the King's Letters Patents, yet he *cannot inherit to his Father or any other*; but *otherwiſe* it is *if* he be *naturaliz'd* by Act of Parliament, for then he is not accounted in Law Alienigena, but Indigena; but the *Iſſue* which he has *after his being made Denizen, ſhall be Heir* to him, but not any Iſſue which he had before. Co. Litt. 8. a.

Godb. 275. pl. 388. Hill. 16 Jac. B. R. the S. C. adjornatur.— 2 Roll Rep. 92. Trin. 17 Jac. S. C. adjudged for the Plaintiff. ——Ibid. 113. S. C. and the Judges perſiſted in their former Opinions.—— Palm 13. S. C. adjudg'd that the Brother ſhould have the Land, and not the Lord by Eſcheat.

4. An *Alien had Iſſue his eldeſt Son*, and *afterwards was made Denizen, and had Iſſue his youngeſt Son born in England, and died*, the *eldeſt Son was naturalized, and after purchaſed* Copyhold Land *and died without Iſſue*. The Queſtion was, whether the younger Son ſhould inherit the Copyhold, and the Doubt grew upon *the Words of the Naturalization* Act, whereby *he was enabled to purchaſe, inherit &c. as Heir to any Anceſtor lineal or collateral, but* it was *not ſaid that they ſhould be Heirs unto him*. It was objected, that at the Time of the Father's Death the eldeſt Son had no inheritable Blood in him, and therefore the youngeſt Son might not be Heir to him, but it was anſwered, that tho' there was a *Diſability* in him, it *was not of Blood, but from the Place of his Birth*, for the Law reſpects not the Blood where there is no Allegiance, and there needs not any Blood from the Father, becauſe the Land came not from him, and *in the Naturalization* were theſe further Words, viz. that *he*, (the younger Son) *ſhould be adjudg'd as a natural born Subject* &c. *in every Reſpect* &c. *to all Intents, Conſtructions, and Purpoſes*, the Conſequence is, that he ſhall have Heirs to inherit to him both Lineal and Collateral, and therefore adjudg'd that the younger Son ſhould inherit. Cro J. 539. pl. 7. Trin. 17 Jac. B. R. Godfrey v. Dixon.

Vent. 413. to 430. S. C. argued by Hale Ch. B. and ſaid by the Reporter to be adjudg'd.—— Hardr. 224 S. C but very ſhort, but ſays, that by the Opinion of moſt of the Judges and Barons in the Exchequer-Chamber, the younger Brother ought to inherit, and not the Iſſue of the Elder.

5. *A. B. C. and D. were Brothers*, Aliens, *born in Scotland before the Union*. C. and D. were *afterwards naturalized*. *C. ſeiſed of the Lands in Queſtion, deviſed the ſame to the Heir of B. and his Heirs*, and *died without Iſſue*, after which the *eldeſt Son of B. entred, claiming by the Deviſe*, againſt whom the *Plaintiff, Son and Heir of D. brought an Ejectment as Son and Heir of D. and Brother and Heir of C.* Reſolved, that B. being an Alien, could not have any Heir by our Law in England, where the Lands lay, tho' in Scotland he might, and therefore the Deviſe was void, and ſo Judgment was given for the Plaintiff. Lev. 59. Hill. 13 & 14 Car. 2. in the Exchequer-Chamber. Collingwood v. Pace.

S.P. by Mountague Ch. J. 2 Roll Rep. 95.—— * S. P. becauſe the *making him to inherit would be altering the Law by Patent*, which the King cannot do. Arg. Palm. 14. cites 36 H. 8. Denizen 9 & 37 H. 8. Br. Patents 100.

6. *Denization* by Letters Patents *enables the Party to purchaſe Lands*, but not to * inherit the Lands of his Anceſtor as Heir at Law; but as a Purchaſor he may enjoy Lands of his Anceſtor. Sty. 139. Mich. 24 Car. ſaid in Caſe of Andrews v. Baily.

7. It was taken for a Ground, that *no Statute of Naturalization ſhall be taken by Equity*, becauſe it carries with it a Prejudice to the Subjects in general, by making others Sharers with them, not only in the Rules, but alſo in the Trades of the Kingdom, by which our Subjects born are made leſs capable of acquiring a livelyhood; Per 3 Juſtices; and for this Reaſon, and alſo for that hereby other Subjects may be diſinherited of their Lands Bridgman Ch. J. ſaid, Naturalization (if it may be ſaid of a Parliament) carries in it ſomewhat of Injuſtice, and the rather, becauſe it is not agreeable to the Policy of other States, as in France and elſewhere, where Perſons are naturalized they have not ſo great Privileges as here. Sid. 197. Paſch 16 Car. 2. in the Exchequer-Chamber, in Caſe of Collingwood v. Pace.

10. If

8. If *two Brothers Aliens are naturalized*, they and their Heirs ſhall inherit one another; per 7 Judges in the Exchequer-Chamber. Lev. 60. Hill. 13 & 14 Car. 2. Collingwood v. Pace.

9. If *Alien has two Sons born in England*, the *one ſhall inherit the other*, tho' none of them can inherit to their Father; for the Deſcent between them is immediate, *and* they ſhall *make their Title in Mortdanceſtor &c. as Heir to the Brother without Mention of the Father*, and this anſwers an Objection, that tho' the Act enables them to inherit to any Anceſtor lineal or collateral, yet this is reſtrained by the Words (as if they were born in England) per 7 Judges in the Exchequer-Chamber, contra 3. Lev. 60. Hill. 13 & 14 Car. 2. in Caſe of Collingwood v. Pace. Sid. 193. 201. S. C. adjudged that the Brothers ſhall inherit one another, and ſays that the main Ground of the Judgment that

the Brothers ſhould inherit the one the other notwithſtanding their Father was Alien, was, becauſe *the Deſcent between the two Brothers was an immediate Deſcent, and ſo there could be no other Impediment than ſuch as is between the Parties themſelves*; and a Father, tho' an Alien, is regarded as a Father to conſer Relationſhip, tho' not to have an Heir, and ſo if an Inheritrix takes Baron, an Alien, the Baron ſhall communicate ſuch a Quality to their Iſſues, that they ſhall inherit to their Mother as well as to one another.——Vent. 413. to 430. S. C. argued by Hale, Ch. B. and ſaid by the Reporter to be held accordingly.——Hard. 224. S. C. accordingly.——This Judgment is contra to Co. Litt 8 a. where he ſays, that they ſhall not inherit one another.——Adjudged that the one ſhould inherit the other by Virtue of the Acts of Naturalization, per 7 Judges againſt 3. Vent. 429. S. C.

(G) Actions. What Actions Alien may have, and in what Caſes, and where.

1. IT is a good *Plea in* Bar of *Aſſiſe* to ſay that the Plaintiff was not born within the Liegeance of the King of England, and if he *replies* that he was born &c. *he ſhall ſay where &c.* Thel. Dig. 4. lib. 1. cap. 6. S. 5. cites 22 Aſſ. 25

2 An Alien and A. *join in an Aſſiſe of an Office*, the Writ ſhall abate. Jenk. 130. pl. 64. cites 4 E. 4. 9.

3. It was moved, where a *Merchant Stranger hired a Carrier to carry his Packs to Exeter*, and he *open'd it* by the Way, *and took Part of the Stuff*; whether this be Felony, and the Alien *ſued to the Council* thereof. The Chancellor ſaid that the Alien is come by ſafe Conduct, and therefore *is not bound to ſue by the Law of the Land*, and by Trial of 12 Men, *but* may ſue here, and *it ſhall be determined according to the Law of Nature in the Chancery*, and may *ſue there from Day to Day, and from Hour to Hour* for the Speed of Merchants, and that they ſhall not be bound *by our New Statute, unleſs they were declarative of the Ancient Laws, viz. Nature*, but they ſhall be order'd by the Law of Nature, which is the Law of Merchants, which ſerves through all the World. Br. Denizen, pl. 5. cites 13 E. 4. 9. Thel. Dig. 5. lib. 1. cap. 6. S. 19 cites S. C. *and Ibid. S. 20.* refers to Stat. 31 H. 6. cap. 4.

4. In *Debt upon an Obligation*, the *Defendant ſaid that he was born in Denmark*, viz. at D. under the Obedience of H. King of Denmark, which King and all his Lieges were Enemies of the King a long time, viz. from Anno 8 E. 4. and *demanded Judgment ſi Actio*, by which the *Plaintiff alleged that he was born at D. in the Dioceſs of York.* And the *Defendant ſaid that he was born as above, abſque hoc that he was born at D. in the Dioceſs of York*, and Writ iſſued to inquire of his Birth there; Quod nota bene. Br. Trials, pl. 105. cites 19 E. 4. 7.

5. An Alien *Pagan* is Perpetuus Inimicus, and cannot have or maintain any Action at all. 7 Rep. 17. a. b. cites 12 H. 8. 4. *Turks and Infidels* are not Perpetui

Inimici, nor is there a particular Enmity between them and us; but this is a common Error founded on a groundleſs Opinion of Juſtice Brooke; for tho' there be a Difference between our Religion and theirs, that does not oblige us to be Enemies to their Perſons; they are the Creatures of God, and of the

the ſame Kinds as we are, and it would be a Sin in us to hurt their Perſons ; Per Littleton (afterwards Lord Keeper to King Charles the firſt) in his Reading on the 27 E. 3. 17. M. S. 1 Salk. 46. pl. 2.

Br Nonability, pl. 13. cites Mich. 1 E. 6 —— Ibid pl. 62. cites S. C. ——S. P. accordingly if there be no War between this Country and his own ; for in ſuch Caſe he ſhall not have any Benefit of the Laws here. D. 2. b. pl. 8. Paſch. 19 H. 8. Anon.——Co. Litt. 129. b S. P. accordingly.——S. P. Arg. Bulſt. 134. cites D. 2. pl. 8.——And. 25 pl. 56. S.P. held in C. B. Trin. 6 E. 6.—Gilb. Hiſt. of C. B. 165. S. P.

6. Alien born may bring *Action Perſonal*, and ſhall be anſwer'd, and ſhall not be diſabled by his being Alien born. Br. Denizen &c. pl. 10. cites 38 H. 8. per tot. Cur.

D. 2. b. pl. 8. Paſch. 19 H. 8. S. P. held accordingly.——Co. Litt. 129. b. S. P. accordingly.——Gilb. Hiſt. of C. B. 166. the S. P. becauſe there is no Neceſſity that he ſhould ſettle among us.——New Abr. 83. (D) S. P. and the ſame Words.

7. *But* contra as to *Real Actions*. Br. Denizen &c. pl. 10. cites 38 H. 8. per tot. Cur.

Co. Litt. 129. b. S. P. accordingly. Gilb Hiſt. of C.B. 166. S.P.

8. And *ſo* it ſeems in Actions *mixt*. Br. Denizen &c. pl. 10. cites 38 H. 8. per tot. Cur.

9. If an Alien be made *Prior or Abbot*, the Plea of Alien born ſhall not diſable him to bring any *Real or Mixt Action concerning his Houſe*, becauſe it is *en auter Droit*. Co. Litt. 129. b.

Gilb. Hiſt. of C. B. 166. S. P.

10. An *Abbot &c. Alien* ſhall have Actions Real, Perſonal or Mixt for any thing concerning the Poſſeſſions or Goods of his Monaſtery here in England, becauſe he brings the Action not in his own Right but *in the Right of his Monaſtery*, and not in his Natural but in his Politick Capacity. Co. Litt. 129. a. b.

Ow. 45. ſeems to be S. C. and the Court held the Plea good ; for the Court will not ſuffer that any Enemy ſhall take Advantage of our Law. But Periam J. hærebat aliquantulum whether he could be call'd an Enemy in Law before ſuch Proclamation.—Gilb. Hiſt of C. B. 166. ſays, It has been long doubted, whether an Alien Enemy ſhould maintain an Action as Executor ; for on the one Hand it is ſaid, that by the Policy of the Law, Alien Enemies ſhall not be admitted to Actions to recover Effects which may be carried out of the Kingdom, to weaken ourſelves and enrich the Enemy ; and therefore publick Utility muſt be preferr'd to private Convenience ; But on the other Hand it is ſaid, theſe Effects of the Teſtators are not forfeited to the King by way of Repriſal, becauſe that they are not the Alien Enemy's, for he is to recover them for others ; and if the Law allows ſuch Alien Enemies to poſſeſs the Effects as well as an Alien Friend, it muſt allow them Power to recover, ſince that there is no Difference, and by Conſequence he muſt not be diſabled to ſue for them, if it were otherwiſe, it would be a Prejudice to the King's Subjects who could not recover their Debts from the Alien Executor, by his not being able to get in the Aſſets of the Teſtator. ——New. Abr. 84. in the ſame Words.

11. In *Debt by an Executor*, it was held that Alien Enemy was a good Plea, and tho' no War was proclaim'd between this Kingdom and Spain (whereof the Alien was pleaded to be) and that by Reaſon of open Acts done by the King of Spain as Enemy. Cro. E. 142. pl. 7. Trin. 31 Eliz. Anon.

* This ſeems miſprinted in the Orig. and that it ſhould be (Amie) or (Friend.)

12. An Alien * Enemy ſhall have an Action of *Debt upon a Bond*, and for Perſonal Things. Adjudged. Mo. 431. pl. 605. Hill. 38 Eliz. Watford v. Marſham.

13. The *Law of England* has been *more favourable to Aliens as to perſonal Things than the Laws of other Realms* have been ; for in France or Italy, if Alien acquires Goods, and dies, they are confiſcated, and if he makes a Teſtament it is void, whereas our Law allows them to make a Will of them, or otherwiſe to bring an Action for them, and they ſhall be in better Condition in many Caſes as to their Goods than the natural Subjects ; for the old Statutes have given them a more ſpeedy Remedy to recover them than they have given to others. Arg. 2 Roll Rep. 93, 94. Trin. 17 Jac.

14. An

14. An Alien *Friend* may by the Common Law have and acquire by Gift, Trade, or other lawful Means, any Treaſure or Goods *perſonal* whatſoever, as well as any Engliſhman, and may maintain any Action for the ſame; for it would be otherwiſe in Effect denying them Trade and Traffick. 7 Rep. 17. in Calvin's Caſe.

15. If an Alien *Enemy* comes hither *ſub ſalvo Conductu*, he may maintain an Action; if an *Alien Amy comes* hither *in Time of Peace, per Licentiam Domini Regis*, as the French Proteſtants did, *and lives here Sub Protectione*, and a War afterwards begins between the 2 Nations, he may maintain an Action; for ſuing is but a conſequential Right of Protection; and therefore an Alien Enemy that is here in Peace under Protection, may ſue a Bond; Aliter of one Commorant in his own Country. 1 Salk. 46. pl. 1. Mich. 9 W. 3. C. B. Wells v. Williams. Lutw. 34, 35. S. C. and upon a general Demurrer the Plaintiff had Judgment that Defendant reſpondeat ouſter, becauſe it did not appear, but the Teſtator of the Plaintiff might come into England in the Time of Peace, but tho' he came in Time of War, as he continued here without Diſturbance, it ſhall be intended that he came with Leave.——Lord Raym Rep 282. S C. reſolved accordingly, and that the Neceſſity of Trade has mollified the too rigorous Rules of the Old Law in their Reſtraint and Diſcouragement of of Aliens.

16. Where Aliennee is pleaded in Abatement, it is triable where the Writ is brought; per Holt Ch. J. 1 Salk. 2. pl. 5. Paſch. 1 Ann. B. R. in Caſe of Weſt v. Sutton.

(H) Actions. Plea. In what Actions it is a good Plea.

1. *Alien born is made Prior of a Houſe, and brought Action*, it is no Plea that he is Alien born, Judgment if he ſhall be anſwer'd; for he brought the Action as Prior *in Right of the Houſe*, and not in his own Right. Br. Denizen, pl. 15. cites 39 E. 3. Co. Litt. 129. a. b. S. P.——Palm. 13. Arg. cites S. C.——S. P. accordingly, becauſe he ſues in his corporate Capacity, and not to recover for himſelf or to carry the Goods or Effects out of the Land. Gilb. Hiſt. of C. B. 166.

2. *Alien and Denizen join* in Aſſiſe, and the *Alien was ſummon'd and ſever'd*, and the Tenant ſhew'd that the * other was Alien born, and yet the Writ was awarded good, and yet the Death of him who is ſummon'd and ſever'd after ſhall abate the Writ, as it is ſaid elſewhere. Br. Denizen, pl. 18. cites 11 H. 4. 26. * It ſeems this is intended of him who was ſummon'd and ſever'd.

3. Aſſiſe *by two Barons and their Femes*. The *one Baron*, who was *Alien born, was* * *not ſever'd*, and therefore the Writ was awarded good for the other. Br. Nonabilitie, pl. 13. cites 11 H. 4. 26. * This Word (not) is in both Editions of Brooke, but not in the Year-book; and it ſeems ſhould be omitted.

4. Alien born is no Plea but *in Actions real and mix'd*; for by the Intercourſe in all the World, Merchants Aliens may merchandize, and their Bargains good, and therefore *Ex Æquitate* they ought to have Actions for their Debts and Goods. Br. Denizen, pl. 16. cites 19 E. 4. 6.

5. *Alien born* who was *condemn'd in Information, brought* Writ of *Error upon this Judgment*, and it well lies; for it was not contradicted. Br. Nonabilitie, pl. 54. cites 6 H. 7. 15. Co. Litt. 129. b. S. P. accordingly.——Brownl. 42. S. P.

6. In Treſpaſs it was ſaid in B. R. that to ſay that the Plaintiff is *Alien born*, Judgment if he ſhall be anſwer'd, *is no Plea in Action perſonal*; *contra in* Action *real*. But this has been in Queſtion ſince that Time in the ſame Court, and it was ſaid that Alien born is no Plea, if he does not *ſay further that the Plaintiff is of Allegiance of ſuch an one, Enemy of the King*; for it is no Plea in Action Perſonal againſt an Alien, that he is of Allegiance of ſuch a Prince, who is in Amity with the King. Br. Nonabilitie, pl. 62. cites Trin. 1 E. 6.

Yelv. 198. Tuerloote v Morriſon, S. C. adjudged per tot. Cur.

7. In an Action *for Words* brought by an Alien Merchant, the Plaintiff had a Verdict; and upon its being moved in Arreſt of Judgment that ſuch Action did not lie for him, all the Court, præter Williams, held clearly that it did, and Judgment was enter'd for the Plaintiff. Bulſt. 134. Paſch. 9 Jac. Tirlot v. Morris.

(I) Pleadings. And when to the Writ, or to the Action.

1. IT was ſaid by Shard, that when one who was born out of the Realm brings *Action for Land*, it is a good Anſwer to *ſay that he ought not to be anſwer'd*; for he was not born within the Ligeance of this Land. Thel Dig. 4. lib. 1. cap. 6. S. 6. cites Mich. 13 E. 3. Fitzh. Briet 677.

2. In Aſſiſe it is a good Bar, that the Plaintiff was *not born within the Allegiance of the King of England*, and if the Plaintiff avers that he was born in England, he *ſhall ſhew where*, and thence the Jury ſhall come. Br. Barre, pl. 63. cites 22 Aſſ. 25.

3. In *Aſſiſe by two Barons and their Femes*, the *one Baron and his Feme were ſever'd*, and afterwards it was *pleaded that the Baron* who was *ſever'd was an Alien born*, Judgment of the Writ; but the Writ was awarded good. Thel. Dig. 237. lib. 16. cap. 10. S. 37. cites Mich. 11 H. 4. 36.

4. In *Dower* the Opinion of the Court was, that notwithſtanding the *Tenant pleaded that the Feme* Demandant *was Alien born*, yet if the *Demandant pleads Ability* to purchaſe and ſue *by Act of Parliament*, the *Tenant may demand the View*, becauſe the Tenant in his firſt Plea did not conclude but to the Perſon, notwithſtanding that the Matter goes to the Action; and ſo note that Alien born goes to the Action. Br. Denizen, pl. 1. cites 3 H. 6. 55.

S. C. cited by Anderſon Ch. J. Le. 78. 79.

5. In Debt by J. N. Catesby pleaded Actio non; for he was *born at D. ultra Mare under the King of Denmark, who is Enemy to the King*, Judgment ſi Actio. Per Bryan, if League was between our King and the King of Denmark, which is now broken, peradventure the *Bond* ſhall be *void againſt the Party, but the King ſhall have it*; and for the Trial you ought *to allege that he was born at ſuch a Place in England, without taking any Traverſe*, and *the other ſhall ſay that born at D. in Denmark, abſque hoc that he was born at S. in England, prout* &c. Br. Traverſe per &c. pl. 307. cites 19 E. 4. 6. and the like Matter 19 H. 6.

If I *allege that the Plaintiff was born at D. in Scotland*, Judgment &c. he may *ſay that he was born at D. in England*, and ſhall not take Abſque hoc. Br. Traverſe per &c. pl. 262. cites 21 E. 4. 36. per Vaviſor.

In *Indebitatus Aſſumpſit* the Defendant *pleaded that the Plaintiff was* an Alien Enemy born *at Roan* in France, under the Allegiance of &c. The Plaintiff *replied he was born at Hamburgh*, under the Allegiance of the Emperor, a Friend of the King &c. and *traverſed that he was born at Roan* in France &c. Upon Demurrer the Defendant had Judgment, becauſe by the Traverſe Roan is Part of the Iſſue, which is very immaterial, the Plaintiff *ſhould have traverſed that he was born under the Allegiance of the French King*. 3 Salk. 28 Paſch. 5 W. 3. B R. Progers v. Arthur.——Comb. 212. Anon. S. C. ſays the Traverſe was, that he was born at Roan, *modo & forma* &c. Holt Ch. J. thought the Traverſe ill, and puts

puts an ill Iſſue; for he might have been born at Roan, and yet Infra Ligeantiam Angliæ, As if *attending on an Ambaſſador*, and therefore he ſhould have pleaded Alien Enemy nee &c. Sed adjornatur.

In *Debt for an Eſcape* the Defendant *pleaded that the Plaintiff was an Alien Enemy, born at Roan in France*, under the Allegiance of the French King &c. and the Plaintiff *replied that he was a Natural Subject, born at Weſtminſter* in the County of Middleſex; and *traverſed that he was born in France*; and upon Demurrer the Court held this to be an *immaterial Traverſe*; for the Plaintiff ſhould have reſted, and tender'd an Iſſue upon his being born at Weſtminſter. 3 Salk. 28. in the Caſe of Prodgers v. Arthur, cites Grodeck v. Briggs ——Carth. 265. Brodeck v. Briggs, Hill. 4 W. & M. in B. R. S. C. adjudged accordingly, and if the Defendant had taken Iſſue upon the Plaintiff's being a Denizen, as he might, it ſhould be tried where the Action is laid, becauſe it is but a tranſitory Matter.

6. A Man may plead that the Plaintiff is Alien born, or Monk profeſs'd, *Judgment ſi Actio*; for he may uſe it *to the Perſon or to the Action, at his Pleaſure.* Br. Barre, pl. 100. cites 32 H. 6. 23.

7. In Aſſiſe the Pleading was, viz. Et ſuper hoc idem Thomas Ive, quoad prædictum Johannem Bagot, *petit Judicium brevis Aſſiſæ prædictæ, quia dicit quod idem Jo. B eſt Alienigena genitus, & natus extra Ligeantiam dom' Regis Angliæ, viz. apud Pounthois infra Regnum Franciæ ſub obedientia Caroli nuncupantis ſe Regem Franciæ, adverſarii & magni inimici Domini Regis Angliæ, et hoc parat' &c. unde &c. petit Judicium de brevi* &c. And Bagot maintained his Writ by his Letters Patents, by which he was made a Denizen by King H. 6. and pleaded them in hæc Verba, as appears there. Thel Dig. 5. lib. 1. cap. 6. S. 17. cites Trin. 9 E. 4. 7. Bagot's Caſe.

8. But Hill. 32 H. 6. 23. in Writ of *Treſpaſs of a Houſe broken*, the Defendant pleaded *that the Plaintiff is an Alien born at L. out of the Ligeance of the King, and demanded Judgment of the Writ*; upon which Plea Littleton offer'd to demur, inaſmuch as he *ought to conclude to the Action*, by which the Defendant *added* more to his Plea by ſaying *that the Plaintiff is and was, the Day of the Writ purchaſed, an Alien born in the ſaid Vill of L. under the Ligeance of the King of Denmark, who is Enemy &c. and demanded Judgment ſi Actio.* In the ſame Plea, Aſhton ſaid, if an Alien, as Lombard, Galiman, or ſuch Merchant who comes here by Licence or Safe-Conduct, and takes here in London or elſewhere an Houſe for the Time, if any break the Houſe and take the Goods, he ſhall have Action of Treſpaſs; but if he be an Enemy of the King, and comes in without Licence or Safe-Conduct, it is otherwiſe. Thel. Dig. 5. lib. 1. cap 6. S. 18.

9. Thel. Dig. 5. lib. 1. cap. 6. S. 22. ſays one may ſee in the new Book of Entries in Ejectione Firmæ 7. ſuch a Form of Plea pleaded by the Defendant; *Et dicit quod prædictus querens ad breve ſuum prædictum reſponderi non debet, quia dicit quod idem querens eſt Alienigena in Regno Franciæ in Comitatu de B. ſub Ligeancia Adverſarii Domini Regis Angliæ de Francia de Patre & Matre inimicis ipſius Domini Regis Angliæ, & eidem Adverſario ſuo adhærentibus oriundus, & ingreſſus eſt Regnum Angliæ abſque ſalvo conductu ipſius Domini Regis Et hoc paratus verificare* ubi & quando &c. *unde petit Judicium ſi prædictus quer' ad breve ſuum prædictum reſponderi debeat* &c.

10. If an Alien, born out of the Legiance of the King, ſues an *Action Real or Perſonal*, the Tenant or Defendant may ſay that he was born in ſuch a Country, which is out of the King's Allegiance, and ask Judgment if he ſhall be anſwer'd. Litt. S. 198.

So as the Tenant or Defendant ſhall not plead Alienee neither to the Writ nor to the Action, but *in Diſability of the Perſon*, as in Caſe of Villenage and Outlawry. And Littleton is to be *intended of an Alien in League*; for if he be an *Alien Enemy*, the *Defendant may conclude to the Action.* Co. Litt. 129. b.———Br. Denizen, pl. 3. cites 9 E. 4. 19. Bagot's Caſe, that in pleading Alien born Extra Ligeantiam Regis, the Defendant pleaded it to the Writ, and not to the Perſon per hæc Verba, *Judgment if he ſhall be anſwer'd.*———See Cart. 48. &c. and 191. Richfield v. Udall —— G. Hiſt. of C. B. 166. S. P. as to Alien Friend; and that in caſe of Alien Enemy it muſt be pleaded to the Action, becauſe it is forfeited to the King as a Repriſal for the Damages committed by the Dominions in Enmity with him.———New Abr. 14. in totidem Verbis.

11. The moſt uſual and beſt Pleading in Actions brought by an Alien is both Excluſive and Incluſive, viz. *Extrà Ligeantiam Domini Regis* &c. *& Infra Ligeantiam alterius Regis.* 7 Rep. 16. b. cites 9 E. 4. 7. & Lib. Intrat. Fol. 244.

S. C. cited Cro. C 9. in pl. 6. as adjudged — Any Alien whatſoever may be Executor. Cited by Bridgman Ch. J. Cart. 191. as 11 Jac. Sir Stephen le Sure's Caſe. — And Ibid. 229. Paſch. 19 Car. 2. in Caſe of Richfield v. Udall. Bridgman held, that an Alien Enemy Executor may bring an Action, and he may not be barr'd. And Ibid. 193. the ſame was agreed per Cur.

12. *Adminiſtrator* brought *Debt on an Obligation*; the Defendant pleaded that the Plaintiff was Alien, born under the Allegiance of P. King of Spain, Enemies to the Queen; adjudg'd upon Demurrer that he ſhould anſwer. Cro. E. 683. pl. 16. Trin. 41 Eliz. C. B. Brocks v. Philips.

14. Alienage may be pleaded *in Bar after Imparlance*, as well as to the Writ before Imparlance. Jenk. 130. pl. 64.

15. In Aſſiſe, where Alienage is pleaded to the Writ or in Bar, after the Allegation the Concluſion is that the Defendant *Petit ſi querens reſponderi debet.* Jenk. 91. pl. 77.

* And ſo it muſt be alleg'd in a Real Action. Co. Litt. 261. a. b — 6 Rep. 26. b. 27. a. S. P. in Calvin's Caſe. — S. P. by Anderſon. Le. 78. — Saund. 8. S. P.

16. In Debt for Rent &c. the Defendant *pleaded the Statute* 32 *H.* 8. by which *Leaſes &c. made to Aliens Artificers* are void, *and that he was an Alien born at Paris* &c. and *averr'd* the 3 Points of that Statute, viz. 1ſt, *That this Houſe was a Manſion-Houſe* at the Time. 2dly, *That he is an Alien.* 3dly, That he is an *Artificer.* The Plaintiff *replied that the Defendant is not an Alien Artificer.* Upon Demurrer it was objected that the Replication was double, viz. that the Defendant is not an Alien Artificer, for if he was neither, he was out of the Statute; Sed non allocatur. But becauſe the Replication did * *not allege a certain Place where he was born in England*, it was held ill, and Judgment for Defendant if Plaintiff would not amend on Payment of Coſts &c. Sid. 357. pl. 10. Hill. 19 & 20 Car. 2. B. R. Freeman v. King.

See Co. Litt. S. 195. 127. b.

17. Alien brings *Treſpaſs*, Defendant in his Plea ſhould ſay only *Venit & defendit Vim & Injuriam*, but he muſt *omit (Quando,)* becauſe by that Word Defendant admits a Capacity in the Plaintiff to ſue. Carth. 229. Paſch. 4 W. & M. in B. R. Jentreer v. Jenkins.

18. An Action upon the *Caſe* was brought by *an Executor for Work done*, and Materials found for the Defendant *by the Teſtator* of the Plaintiff. The Defendant *pleads that* the Father of the Plaintiff, who was the *Teſtator, and the Plaintiff, were Alien Enemies* born at ſuch a Place under the Obedience of Lewis the French King; Judgment ſi Actio; to which the Plaintiff demurr'd; and adjudged for the Plaintiff. It is *not ſhewn that* the *Teſtator did not die before the War*; ſo that the Plaintiff might be Executor, and the Action attach in him before the War; and then being dead before he became an Alien Enemy, he might have an Executor; and the Action being *En Auter Droit*, it ſhall be maintained. Skin. 370. pl. 18. Mich. 5 W. & M. in B. R. Villa v. Dimock.

The Pleadings was that the Plaintiff was Alienigena born in France under the Allegiance of the French King adverſarii Domini Regis &c. *nunc & eidem adverſario ſuo adheren' oriundus ingreſſus in Regno Angliæ abſque ſalvo conductu &c. Et hoc paratus eſt verificare ubi quando &c. prout Curia*

19. The Defendant pleaded in *Abatement*, that the Plaintiff was an *Alien Enemy*, born in ſuch a Place in *France.* The Plaintiff replied that he is *Indigena*, and *born* at ſuch a Place in the *Kingdom of England*, & *non Alienigena modo & forma, prout &c. & hoc petit quod inquiratur per patriam.* And upon a Demurrer to this Replication, it was held *per Curiam* to be ill; for that the Plaintiff did not rely upon the firſt Part of it, that he was *born in England*, and ſo conclude with an Averment that an Iſſue might be taken by the other Side, *viz.* that he was *Not born in England*, and that this Matter might be triable by a *proper Viſne*; but here he hath put *Alien, or Not Alien*, in Iſſue, *viz. Non Alienigena modo & forma*, which cannot be tried for want of a *Viſne*; ſo Judgment was given that the *Bill ſhall abate.* Carth. 302. Paſch. 6 W. 3. B. R. Nichols v. Pawlet.

Curiæ dicti Domini Regis & Dominæ Reginæ conſideraverit unde Petit Judicium &c. The Plaintiff replied, *quod ipſe eſt indigena in Regno Angliæ ſub ligeantia dicti Domini Regis & Dominæ Reginæ nunc de Patre & Matre amicis eorundem Domini Regis & Dominæ Reginæ nunc oriundus & natus apud London præd. in Parochia & Warda præd. & non Alienigena prout præd.* (the Defendant) *ſuperius allegavit & hoc petit quod inquiratur per Patriam &c.* The Defendant demurr'd generally, and it was adjudged that the Iſſue was not well taken, becauſe the Plaintiff ought not to have concluded to the Country; for there being new Matter ſet forth in the Replication, he ſhould have given the Defendant Opportunity to rejoin. 4 Mod. 285 Nichols v. Pawlet. —— Nota, if the Plaintiff had concluded his Replication with an Averment only, the negative Clauſe, *Non Alienigena*, had been only *Surpluſage*, and helped upon a General Demurrer. Cartn. 303.

Where Alien-nee is pleaded in Abatement, and the Plaintiff replies Indigena, he may either take Iſſue or conclude Et hoc paratus eſt verificare; but if in Bar, he muſt take Iſſue; Per Holt Ch. J. who ſaid that this was the Reaſon of the Difference of the 2 Precedents in Raſtal. Comb. 394. Mich. 8 W. 3. B. R. Texel v. Hooper.

19. *Indebitatus Aſſumpſit*, the Defendant pleaded that the Plaintiff was *Alienigena in Regno Franciæ ſub Ligeantia adverſarii Domini Regis &c. oriundus.* And upon a Demurrer Exception was taken to this Plea, becauſe it is *not a direct Affirmative* that the Plaintiff was Alienigena; it ſhould have been *Natus*, and not *Oriundus*. Per Cur. in a *Real Action* the Word (*Alienigena*) had been well enough; but ſome Doubt being made whether it was ſo in this Caſe, a farther Day was taken to conſider of it; and afterwards ſome Precedents being cited out of Raſtal, where the Word *Natus* was ſupplied by *Oriundus*, the Plea was held good. 4 Mod. 405. Paſch. 7 W. & M. in B. R. Derrier v. Arnaud.

20. If you plead Alienee *in Bar*, you muſt *lay a Place where he is born*; *but* if *in Abatement* it is *triable where the Action is brought.* 12 Mod. 125. Paſch. 9 W. 3. Ord. v. Howard.

21. A *Scire Facias* was brought *on a Judgment in Aſſiſe for the Aſſiſe of Marſhal*; the Defendant *pleaded in Abatement*, that the Plaintiff was an *Alien Enemy*, Et hoc &c. Plaintiff *replied*, he was a *Subject born*, viz. *at ſuch a Place in England, Et hoc paratus eſt verificare*; Defendant demurred, and per Holt Ch. J. the Plaintiff *ſhould have concluded to the Country*; for where Alien-nee is pleaded in Abatement, it is triable where the Writ is brought; for which Reaſon the Replication muſt conclude to the Country; Aliter where Alien-nee is pleaded *in Bar*; therefore in that Caſe the Replication *muſt conclude, Et hoc paratus* eſt verificare. 1 Salk. 2. pl. 5. Paſch. 1 Ann. B. R. Weſt v. Sutton.

22. Tho' an Alien under the Queen's Protection be enabled to ſue, yet if he brings an Action and Alienage is pleaded againſt him, whether his *Protection* be Special or General he *ought to plead it.* Per Cur. Farr. 150. Hill. 1 Ann. B. R. Silveſter's Caſe.

For more of Alien in General, ſee **Trial**, and other proper Titles.

Alienations.

(A) At Common Law. Licence. The Original, and and the Cauſe, and in what Caſes neceſſary.

In Aſſiſe, it was ſaid, and in a manner not much denied that *before Anno* 20 *H.* 3. the *Tenant of the King might alien as freely without Licence as another Man* might, and ſays See Stat. thereof, *Prerogativa Regis, cap* 4. Br. Alienation, pl. 10. cites 20 Aſſ 17.

1. 9 *H* 3. 32. NO *Freeman ſhall give or ſell ſo much of his Land, that of the Reſidue the Lord of the Fee may not have the Services due to him.*

Note, per Hank. that *no Fine was paid* for Alienations by Tenant of the King *till the Time of King H.* and that in his Time the King's Tenant might alien without making Fine. Brooke ſays, Quære what Henry he intends, and it ſeems H. 3. Br. Alienations, pl 6. cites 14 H. 4. 3.

By this Statute the King took Benefit to have a Fine for his Licence, before which Statute no Fine for Alienation was due to the King; for it is adjudged, That for Alienation in the Time of H. 2. no Fine was due; and it appears in other Books, that if an Alienation had been made before 20 H. 3. no Fine was due to the King for Alienation. Co. Litt. 43. a.——And it is to be obſerved that no Record can be found, that either a Licence of Alienation was ſued, or Pardon for Alienation was obtained for an Alienation without Licence at any Time before the 20th Year of H. 3. and it is held that Licence for Alienation grew from the Statute. Co. Litt. 43. b.

Tenant of the King *in Capite* cannot *alien in Tail* without Licence.

2. 17 *E.* 2. *cap.* 6. Enacted, that *none that hold of the King in Capite by Knight's Service may alien the more part of his Lands, ſo that the Reſidue thereof be not ſufficient to do his Service except he have the King's Licence, but this may not be underſtood of Members and Parcels of ſuch Lands.*

Br. Alienations, pl 22. cites 45 E. 3. 6.——He cannot give in Tail. Br. Alienations, pl. 24. cites 15 E. 4. 12.

3. *Rent* was held of the King, and alien'd without Licence, by which the King ſeiſed. Br. Alienations, pl. 18. cites Fitzh. Avowry, 3 E. 3.

4. *Præcipe quod reddat* is brought *againſt an Abbot*, who *vouched to Warranty*, and the *Vouchee* at another time *made Default after Default*, and it was awareded that the *Demandant recover* againſt the Tenant, *and the Tenant over in Value*, but that Execution ſhall ceaſe till it was *inquired of the Colluſion*, by whichit was *found No Colluſion*, and the Abbot pray'd Execution in Value, and it was doubted by the Court, whether he ſhall have *Execution without Licence by reaſon of the Mortmain*, Quod mirum! where it was found No Colluſion. Br. Alienations, pl. 2. cites 48 E. 3. 29.

S. P. that he may *charge the Land in Fee by Grant of a Rent-charge* in Fee.

5. Tenant of the King may *charge his Land* without Licence of the King, tho he holds in Chief; Quod Nota. Br. Alienations, pl. 12. cites 40 Aſſ. 12.

Br. Alienations, pl. 19. cites 7 H. 6. 3.——*And this is good* againſt the King *after Eſcheat.* Ibid. cites 40 E. 3. 5.

* S. C. cited Le. 8. and ſays, that upon ſuch Grant of the Reverſion the Tenant for Life is not bound to attorn, wherefore it ſeems, that if he does attorn the King ſhall ſeiſe preſently.——* 2 Inſt. 67. S. P.

6. The King's Tenant *cannot leaſe for Life* without Licence, *nor grant the Reverſion without other Licence.* Br. Alienations, pl. 17. cites 45 E. 3. 6.

So

So in the Time of H. 8. he could not alien *for Life* without Licence; for it *alters the Frankfenement*. Br. Alienations, pl. 22.

7. If *Partition* be made *in Chancery between Parceners* who are *Heirs of the King's Tenant*, *which is not equal*, this cannot be redreſſed but by Licence of the King; for the King ſhall be always aſcertained of his Tenant. Br. Alienations, pl. 26. cites 10 H. 4. 5.

8. Where the *King* was *Lord*, and there was *Meſne and Tenant*, the Tenant might alien without Licence; becauſe he was not immediate Tenant to the King; but the *Meſne could not alien his Meſnalty without Licence*; for this is held immediately of the King. Br. Alienations, pl. 27. cites Fitzh. Avowry, 38.

9. If the *King* by his Letters Patents *gives Land* to me and my Heirs &c. *and* he *grants* by the ſame Patent *that I ſhall be as free in this Land as he is in his Crown*, and I afterwards alien without Licence, the King ſhall certainly have a Fine for this Alienation, per Paſton; for this is veſted in him by reaſon of his Prerogative, which cannot paſs out of his Perſon by ſuch general Words. 14 H. 6. 12. b. at the End.

10. The Licence of Alienation is to *aſcertain the King of his Tenant*. Br. Alienations, pl. 9. cites 21 H. 7. 7.

11. Note, that for *Burgage Tenure of the King* a Man may alien without Licence well enough. Br. Alienations, pl. 36. cites 6 E. 6.

12. The *Reaſon of taking the Fine pro Licentia Concordandi* is, becauſe by Means of this Concord the King loſes the Fines or Amerciaments which ſhould have been due to him upon the Judgment or Nonſuit, and other Advantages. 2 Inſt. 511. And it is an ancient Revenue of the Crown. Ibid.

13. Manwood Ch. B. was of Opinion, that this Prerogative to have a Fine for Alienation without Licence *is by the Common Law*, and not by any Statute. Le. 8. 9. in pl. 11. Mich. 25 & 26 Eliz.

14. The Prerogative to have a Fine for Alienation without Licence, had its *Beginning upon the* original *Creation of Seigniories*. Arg. Le. 8. in pl. 11. Mich. 25 & 26 Eliz. in Treſham's Caſe. It was commenced upon this Reaſon, that none ought to enter the Fee of the King, nor to entitle himſelf to become his Tenant without his Licence. Mo. 173 pl. 305. in S. C.

(B) Licence. Purſued How.

1. THE King granted *Licence to alien the Manor of D. rendring 5 l. per Annum*, and he *alien'd the ſaid Manor*, *except* 12 *Acres*, *rendering 5 l. per Annum*, the Licence ſhall not ſerve for the Variance, and alſo Parcel ſhall be charged with the whole 5 l. and alſo the King ſhall be aſcertained who ſhall be his Tenant. Br. Alienations, pl. 23. cites 30 E. 3. 17. and Fitzh. Fine, 53.

2. *Licence to purchaſe Lands or Tenements extends to Advowſon.* Br. Alienations, pl. 35. cites Fitzh. Grants, 102.

3. Where the King *Licences Abbot and Covent to make a Feoffment*, if the *Abbot alone does it*, this is not warranted by the Licence, and yet the Covent cannot make a Feoffment, but only give their Aſſent; and if it be made by the Abbot alone, his Covent may recover again, and then the King ſhall be miſconuſant of his Tenant, and e contra where the Abbot and Covent do it, per Frowike; and Vaviſor J. was of the ſame Opinion. Br. Alienations, pl. 9. cites 21 H. 7. 7. But *contra* of a *Dean and Chapter*, per Frowike and Vaviſor. Br. Alienations, pl. 9. cites 21 H. 7. 7

4. Where

If a Man obtains *Licence to alien* the Manor of Dale, and all his Lands and Tenements in Dale, *he cannot alien by Fine*; for Fine ſhall be certain, ſo many Acres of Land, ſo many of Meadow, ſo many of Paſture &c. and the *Alienation ought not to vary from the Licence*. But it is otherwiſe uſed with *Averment that all is one*. Br. Alienations, pl. 30. cites Paſch. 32 H. 8.

4. Where the King *licences me to make a Feoffment by Deed*, I cannot make it without Deed, nec e converſo. Br. Alienations, pl. 9. cites 21 H. 7. 7. by Frowike and Vaviſor.

(C) Licence. Good or not.

1. IF the *King grants Licence* to his Tenant to alien the Land held *in Capite, and* the King *dies before the Alienation*, the Tenant cannot alien; for now he is Tenant to the new King. Br. Alienation, pl. 25. cites Paſch. 2 E. 3.

2. *But* Licence of one King granted to alien *in Mortmain*, and the King dies before the Alienation, this ſhall ſerve in the Time of another King. Quod nota. Ibid.

(D) Licence. Forfeiture by not having Licence.

Quare Impedit was brought by the *King*, and *made his Title, becauſe J. N. held of him in Capite* the Moiety of the *Manor* of D. *to which the Advowſon is appendant*, and alien'd without Licence. Br. Alienations, pl. 1. cites 47 E. 3. 21.

1. IN Quare Impedit the King made Title to preſent, becauſe the *Advowſon* was *held* of him *in Chief*, and was alien'd without Licence, by which he preſented &c. And admitted for good Title. And yet it is *not alleged that the Alienation is found by Office*; quod nota; and therefore it ſeems that the King may have *Chattle* without Office. Br. Prerogative, pl. 33. cites 2 E. 3. 71.

S. C. cited Sav. 16. in pl. 41.—— 2 Inſt. 66. ſays that ſome did hold, that by Alienation without Licence the Lands were forfeited to the King, by reaſon of the Words of Magna Charta, that no Freeman ſhall give &c. but that others held, that the Land ſhould only be ſeiſed as a Diſtreſs, and a Fine to be paid for the Treſpaſs, which Ld. Coke takes to be the better Opinion.——Jenk. 56. pl. 4. ſays it was a Forfeiture of the Whole before the 1ſt of E. 3. 12.

2. It is ſaid that the *Seiſure is only as a Diſtreſs for a Fine* to the King, and not to give the King the Franktenement, and after Fine made, the Alienee ſhall re-have the Land. Br. Alienations, pl. 10. cites 20 Aſſ. 17.

Till this Statute it remain'd a Queſtion undetermin'd, whether in ſuch Caſe the Land was forfeited, or to be ſeiſed only as a Diſtreſs; and this Act extended to Lands holden of the King by Grand Serjeanty, alien'd without Licence. 2 Inſt. 66.—— By this Statute the Alienation ſhall ſtand, and it is only finable. Jenk. 88. at the End of pl. 72.

3. See Stat. 1 *E.* 3. Parl. 2. *cap.* 12. *That Land held in Capite, which is alien'd without Licence, ſhall not be by this forfeited, but the King ſhall take a reaſonable Fine.* Br. Alienations, pl. 34.

4. *Tenant*

4. *Tenant* of the King *alien'd in Fee, and died, his Heir within Age*, the King ſhall not have the Ward; for *the Alienation is good, ſave the Treſpaſs to the King*, which is only a Fine by Seiſure; but the Alienation is good. *Contra if the Alienor was Tenant in Tail.* Br. Alienations, pl. 29. cites 26 H. 8.

5. If the Alienation without Licence be *found by Office*, the *King ſhall have the Iſſues of the Land from the Time of the Inquiſition taken*, and not before. Br. Alienations, pl. 29. cites 26 H. 8. S. C. cited Sav. 16. in pl. 41.

6. The Fine for Alienation was to be *paid by the Alienee, or thoſe that claim'd by or under him*, and if the Fine was not paid, the Land ſhould be ſeiſed into the King's Hands; and the Intent of a Parliament is always intended juſt and reaſonable, and therefore if a *Diſſeiſor* of Lands in Capite *makes an Alienation without Licence*, and the *Diſſeiſee enters*, the Land ſhall not be ſeiſed for the Fine; for the Diſſeiſee is in by a Title before the Alienation, and ſo in other like Caſes. If he in the *Reverſion levies a Fine* of Lands holden in Capite without Licence, the *Leſſee for Life ſhall not be charged* with the Fine, becauſe that Eſtate was before the Alienation; but yet in a Quid juris Clamat the Leſſee ſhall not be compell'd to attorn, becauſe the Court will not ſuffer a Prejudice to the King in like manner as if the Reverſion had been alien'd in Mortmain, without the King's Licence. 2 Inſt. 67.

7. *Tenant in Capite made Gift in Tail* to J. S. *upon Condition that if he alien'd it ſhould be lawful for him to enter.* J. S. *alien'd.* Tenant in Tail *enter'd* for the Condition broken. It was adjudged that a Fine for the Alienation of the Tenant in Tail was due to the Queen, and that the Queen might charge the Lands, in whoſe Hands ſoever they came, for this Fine; and the Duty was not diſcharged by the Entry of the Tenant in Tail for the Condition broken, but the Tenant of the Land was chargeable for the ſame. Mo. 172. pl. 305. Trin. 24 Eliz. in the Exchequer, Treſham's Caſe. Le 8. pl. 11. Mich. 25 & 26 Eliz. S. C. adjudged accordingly.

(E) Licence. Fines.

1. BY the Statute 1 *E.* 3. Parl. 2. *cap.* 13. it is Enacted, *That Lands held of Honours, and alien'd, ſhall not make Fine*, becauſe the Law does not give Fine for ſuch Alienations; and ſo the Statute is in *Affirmance of the Common Law*; and ſo is Magna Charta. Br. Alienations, pl. 34. It was found by Office, that J. N. purchaſed the Manor of D. which was held of the King in Chief without Licence, and the other ſaid that it was *held of the Honour of Pickering, Parcel of the Dutchy of Lancaſter*; and it was admitted there, that if it be held of the Honour, and not in Capite, he may alien without Licence. Br. Alienations, pl. 11. cites 29 Aſſ. 38.

A Man ſhall not make Fine for Alienation for *Land held of the King of an Honour*, but for Land *held in Capite*; and *Tenure of Honour*, nor a Manor, *is not in Capite*; for it is not of the Perſon of the King. But Brooke ſays Cave; for there are *certain Honours* which *are in Capite*, and there is a Writ that the Eſcheator ſhall not grieve a Man for Alienation of Land held in Capite as of an Honour; for this is *in Capite of the Honour*, and not *in Capite of the Perſon of the King*, and then he ſhall not make Fine for Alienation of it. Br. Alienations, pl. 33. cites the Regiſter, Fol. 184.

2. If a *Biſhop, Tenant of the King in Capite, had leaſed for Life*, he ſhall make Fine for the Alienation. Br. Alienations, pl. 24. cites 46 E. 3. and Fitzh. Forfeiture 18.

Sav 16. in pl. 42. cites S. C. — 2 Inſt. 67. ſays that upon Conference had with the King's Officers and the Judge, it was ordain'd that ſeeing the King's Tenant could not alien without Licence, for if he did he ſhould pay a Fine, that for a Licence to be obtain'd, the King ſhould have the 3d Part of the Value of the Land, which was holden reaſonable, and the Feoffee ſhould pay the Sum, becauſe his Land was otherwiſe to be charged, and rid of the Trouble and Charge by the Writ of Quo Titulo ingreſſus eſt; and if the Alienation was without Licence, then a reaſonable Fine by the Statute was to be paid by the Alienee, which they reſolved to be one Year's Value, which ever ſince conſtantly and continually hath been obſerved and paid.

3. It was ſaid for Law, that the Fine for Alienation is *the Value of the Land alien'd by the Year*, and the ſame Law of Fine for Intruſion upon the King. *But the Fine to have Licence to alien is only the 3d Part of the annual Value of the Land* that ſhall be alien'd. Br. Alienations, pl. 29. cites Paſch. 31 H. 8.

4. *But* for Licence *to alien in Mortmain*, the Fine is the *Value of the Land for* 3 *Years*. Ibid.

5. Tho' the Reſtraint of Magna Charta, as to *Avoidance of the State of the Feoffee* by the Heir, is taken away by the Statute 18 E. 1. of Quia Emptores terrarum, yet that is only Secundum quid, and not Simpliciter; for in reſpect of the King, the Fine for Alienation remain'd due, and herewith agreed conſtant and continual Uſage. 2 Inſt. 67.

6. *Till* the Statute of Wills, 32 *H.* 8. *cap.* 1. *none ever paid Fine in the Hanaper who recovered Land by Sufferance* againſt the King's Tenant who held in Capite; *but by this Statute now he ſhall pay Fine for Recovery as well as for Feoffment.* Br. Alienations, pl. 32.

7. 12 *Car.* 2. *cap.* 24. *takes away all Tenures by Knights Service, and all Fines, Seiſures and Pardons for Alienations, and all Incidents thereto, ſaving Fines for Alienations due by particular Cuſtom of particular Manors &c, other than of Lands holden immediately of the King in Capite, and turns all Tenures into free and common Socage.*

(F) Fines. Pardon of Fines or Forfeiture. Conſtrued How.

Br. Alienations, pl. 20. cites S. C. — Jenk. 92. pl. 79. S. C. ſays this Pardon diſcharges this Alienation, for ſhe enters as Tenant without the King's Licence, and this is an Alienation without Licence, and a Wrong done to the King; By the Juſtices.

1. TEnant of the King made a *Feoffment in Fee*, and *retook to him and his Feme in Tail*, the *Remainder to his right Heirs*, and died, aud the *King pardoned to the Feme all Alienations*, but not Fines for Alienations, nor Treſpaſs, and yet it was held, that by this he ſhall not have Fine for Alienation; but the Feme by this cannot alien; and note, that this Tenant, who alien'd, held of the King in Capite. Br. Alienations, pl. 8. cites 14 H. 6. 26.

(G) What ſhall be ſaid ſuch an Alienation.

1. IT ſeems that *Recovery ſuffered by Default* is a Demiſe or Alienation. Br. Alienations, pl. 32. cites Mich. 4 E. 3.

2. [And

2. [And therefore] if a Man recovers *in Value againſt an Abbot*, the Founder ſhall have Writ of Contra Formam Collationis by the Statute which ſpeaks only of Alienations, therefore ſee there that Recovery is an Alienation. Br. Alienations, pl. 32. cites F. N. B. 211. But till the Statute of Wills 32 H. 8. cap. 1. none ever paid a Fine in the Hanaper who recovered Land by Sufferance againſt the Tenant of the King who held in Capite, but now by this Statute he ſhall pay a Fine for Recovery as well as for a Feoffment, and therefore it ſeems properly no Alienation; but Quære; for it is a good Sufferance to make it to be the Land of another, which is alienum facere, but yet this is ſuppoſed to be by Title. Br Alienations, pl. 32. cites Mich. 4 E. 3.

3. Where an *Advowſon deſcends to* 3 *Coparceners among other Lands* held in Capite, by which the King is poſſeſſed, and *Partition is made in Chancery*, ſo that the *Advowſon is allotted to the one* in Allowance of other Land &c. and *after Livery ſued they make a Compoſition to preſent by Turns*, this amounts to an Alienation of what the King was aſcertained of one ſole Tenant before by Matter of Record, and now all 3 are Tenants by Matter in Fact without Licence. Br. Alienations, pl. 7. cites 21 E. 3. 31. Br. Quare Impedit, pl. 73. cites S. C.

4. In Aſſiſe 3 *Jointenants* were of Land held of the King in Capite, and *the one releaſed to his two Companions*, and pleaded Pardon of it, Quod mirum! For where three Jointenants are, and the one releaſes to the other 2, there needs no Licence nor Pardon, for *the 2 are in by the firſt Feoffor*, and not by him who releaſed, as it is agreed Mich. * 37 H. 8. Br. Alienations, pl. 4. cites 8 H. 4. 8. * Br. Alienations, pl. 31. cites S. C accordingly. ——*And yet* it is ſaid in Aſſiſe of Rent, 40 E. 3. 5. that where two Jointenants of the King are, and the one releaſes to the other, he ought to have Licence, and ſuch Licence was pleaded for ſuch Releaſe in the Aſſiſe of the Duke of York, 8 H. 4. Tit. Licence in Fitzh. 1. but Brooke ſays, Quare if of Neceſſity, for it ſeems to be no Alienation Ibid.

5. *But* where *the one releaſes to the one of the other* 2, there he, who took the Releaſe, is in of the 3d part by him; Contra if he had releaſed to all his Companions, and with this agrees * 33 H. 6. fol. 4. and ſo it is uſed in the Exchequer that this is no Alienation; Quod Nota. Br. Alienations, pl. 4. cites 8 H. 4. 8. * Br. Alienations, pl. 31. cites S. C. accordingly. ——*And* where a Man *releaſes by Fine to the Tenant of the King*, this is no Alienation. Ibid. cites Paſch. 37 H. 8. ——*Contra of a Fine upon Conuſance of Right Come ceo* &c. for this is Eſtate made by Concluſion. Ibid

6. A *Recovery* of the Land *againſt the Tenant ſhall bind the Lord alſo*, and *Recovery of the Services againſt the Lord ſhall bind the Tenant alſo*; Quod Nota; and therefore no Alienation. Br. Alienations, pl. 32. cites 39 H. 6.

7. *Deviſe by Teſtament* was taken to be an Alienation. Br. Alienations, pl. 37. cites H. 3. M. 1.

8. *M. Tenant in Capite covenanted* 4 *Eliz. with A. and B. to ſuffer a Recovery* before Eaſter, *to the Uſe of himſelf for Life*, with *Remainders over, and with Power to revoke and declare new Uſes* by Deed or Will. The *Queen licenced M. to alien to A. and B. without mentioning any Declaration of Uſes. M. ſuffered a Recovery, and in* 34 *Eliz. by Will revoked the Uſes, and declared new* Uſes. Upon Conference with the two Ch. J. and other Juſtices, it was adjudg'd in the Exchequer, that the Queen ſhall not have Fine for this Execution of the Uſes, becauſe the Execution of them was by Statute, viz. 27 H. 8. of Uſes, whereto every one is Party, and ſo cannot do Wrong; and becauſe *all the new Uſes ariſe out of the Poſſeſſion of the Conuſees*, there *needs not any new Licence* for limiting any new Uſe to ariſe out of the ſaid Recovery. 6 Rep. 27. b. Paſch. 43 Eliz. in the Exchequer. Lord Mountague's Caſe.

9. *So*

9. *So* where *S. levied a Fine of Capite Lands without Licence to the Uſes in the Indenture*, viz. to himſelf for Life &c. with a Proviſo to limit by Writing the ſame Lands to any Wife which he ſhould after marry for a Jointure. Afterwards *the Alienation is pardoned by Statute of* 13 *Eliz. and then he marries, and by Writing limits the Lands to his Wife for Life*, and dies. Adjudged that no Fine ſhall be paid for this Limitation. 6 Rep. 28. b. cites it as adjudged in the Exchequer, Paſch. 43 Eliz. Smith's Caſe.

(H) At what Time it might have been by Licence.

S. P. Br. Alienations, pl. 35. cites Fitzh. Grants, pl. 103. —— But ſee elſewhere, that the *Heir* may alien *by Fine before that he has ſued Livery*. But *contra by Feoffment*.

1. IF the *King has Land by Seiſure* of a Prior Alien in Time of War, *or the Temporalties of a Biſhop by Seiſure for any Contempt*, or has Land *of the Heir of his Tenant* who holds *in Capite for Primer Seiſin* &c. in theſe Caſes, if the King *licences the Party to alien*, or make a Feoffment *during the Time that the King has Poſſeſſion*, the Party *cannot alien*, notwithſtanding the Licence, *till he has the Poſſeſſion out of the Hands of the King*; for when the King ſeiſes Land for Alienation without Licence, and licences the Feoffee to make Feoffment, he cannot do it till he has the Poſſeſſion out of the Hands of the King, and not before, and then he may execute his Licence. Br. Alienations, pl. 9. cites 21 H. 7. 7. per Frowike Ch. J. Ibid. cites 21 H. 7. 7.

2. *So* where he has *Land in Ward*, or for Primer Seiſin. Br. Alienations, pl. 9. cites 21 H. 7. 7. per Frowike Ch. J.

3. *So* where the King has a *Term becauſe the Termor is outlawed, and he licences the Leſſor to make a Feoffment*, he cannot execute it during the King's Poſſeſſion, but the other Juſtices ſaid it was a very dubious Caſe, and that they would be adviſed thereof. Br. Alienations, pl. 9. cites 21 H. 7. 7. per Frowike Ch. J.

(I) Pleadings.

1. SCIRE Facias iſſued upon *Office found that* W. was ſeiſed of certain Tenements in B in Fee, and died ſeiſed, and the *Land deſcended to R.* his Son and Heir *an Ideot*, and it was held of the King in Chief, *and N. had entred, who* came and *pleaded a Releaſe of the Heir to M. who enfeoffed M. abſque hoc that he was Ideot*; per Finch, we pray upon his Conuſance that the Land be ſeiſed into the Hands of the King, & non allocatur, becauſe the Writ ſhould ſay why the Land ſhould not be ſeiſed into the Hands of the King for Cauſe of the Ideocy, and *the Alienation is not compriſed in the Writ, and therefore he ſhall not anſwer to the other Point without other Garniſhment for this Purpoſe*; Quod Nota; and it is ſaid there, that upon Alienation without Licence a Man cannot *traverſe the Tenure of the King in Capite till the Office* be found of the Alienation and Tenure, for a Man ſhall not traverſe the Title of the King before it be found by Office. Br. Alienations, pl. 14. cites 50 Aſſ. 2.

2. It

2. It was touch'd by the Serjeants at the Bar, that if the *Land* was *in the King's Hands by* 20 *divers Titles*, the *Party ſhall anſwer to all* the Titles. Br. Alienations, pl. 16. cites 4 H. 7. 5.

For more of Alienations in General, ſee **Conditions, Fines,** and other Proper Titles.

(A) Almanack.

1. WHether ſuch a Day of the Month was on a Sunday or not, and ſo not a Dies Juridicus, is *triable by* the Country or the Almanack. D. 182. pl. 55. Paſch. 2 Eliz. in Caſe of Fiſh v. Brockett. Le. 242. pl. 328. Paſch. 29 Eliz. B R. Page v. Faucett,

it was ſaid that the Court might judicially take Notice of Almanacks, and be inform'd by them; and cited Roberts's Caſe in the Time of Ld. Catline; and Coke ſaid that ſo was the Caſe of Galery v. Banbury, and Judgment accordingly.—— Cro. E. 22'. pl. 12. S. C. and held that Examination by Almanacks was ſufficient, and a Trial per Pais not neceſſary, tho' the Error aſſign'd, viz. that the 16th Feb. on which Day Judgment was ſaid to be given, was on a Sunday, was an Error in Fact; and the Judgment was reverſed.

2. Almanack is *Part of the Law* of England, of which the Court muſt take judicial Notice; per Holt Ch. J. 6 Mod. 41. Mich. 2 Ann. The Queen v. Dyer. S. P. by Holt Ch. J. and ſo is Annus Biſſextilis, and that it

is the ſame in Caſe of Moveable Feaſts, and the Diverſity between them and Fix'd Feaſts is ridiculous; but the Almanack to go by is that annex'd to the Common Prayer-Book. 6 Mod. 81. Trin. 2 Ann. B. R. in Caſe of Brough v. Perkins.—— 3 Salk 69. S. C. but S. P. does not appear.—— The Diverſity of Fix'd and Moveable Feaſts was condemn'd per tot. Cur. For we know neither the one nor the other but by the Almanacks, and we are to take Notice of the Courſe of the Moon. 6 Mod. 159. 160. Paſch 3 Annæ, B. R. in Caſe of Harvey v. Broad.——Ibid. 196. S. C. and Holt Ch. J. ſaid, that at the Council of Nice they made a Calculation moveable for Eaſter for ever, and that is received here in England, and become Part of the Law; and ſo is the Calendar eſtabliſh'd by Act of Parliament.—— 2 Salk. 626. pl. 8. S. C. accordingly per Cur.

3. Whether the *Patent to the Company of Stationers for ſole Printing* of Almanacks be good or not, ſee 10 Mod. 105. The Company of Stationers v. ....

For more of Almanack in General, ſee other Proper Titles.

(A) Almoner.

1. THE Almoner *is accountable* by 6 E. 6. 16. per Mr. Andrews in his Reading on this Statute, Aug. 1628. Cited D. 77. pl. 37. Marg.

2. The Almoner has not any Intereſt, but is Miniſter and has Diſpoſition of the Alms of the King durante bene-placito; and if the Almoner commit Treaſon, and be *attaint*, this is no *Forfeiture* of what is granted to him in the uſual Form, but only during his Life, yet the King may grant it at Will without Recital, becauſe it is a leſs Eſtate than he has, and if he grant the Goods and Chattels of Felo de ſe, he * need not *recite the Grant* of them made to the Almoner, nor to determine his Will as to them. 1 Rep. 50. in Altonwood's Caſe, cites Hale's Caſe.

* D. 77. pl 37. Mich. 6 E. 6. Allington v. Cox, contra. —If a *Felo de ſe is indebted to the King*, ſuch Debt ſhall be paid before the Almoner ſhall diſtribute. Savil. 60. pl. 129.

For more of Almoner in General, ſee other Proper Titles.

Ambaſſador.

(A) Ambaſſador. Who. And How conſider'd. And How far protected and privileged as to himſelf and Servants.

1. THE Opinion of Juſtice Aſhton, 39 H. 6. 39. was, that *no Ambaſſador* ought to be *ſent to the Pope*; but there have been many Precedents to the contrary; for the Pope is a Temporal as well as Spiritual Prince. 4 Inſt. 156. cap. 26.

2. There being *Amity between King H.* 8. *and the French King*, and *Enmity between H.* 8. *and the Pope*, R. Pole, *a Rebel and Traitor to the King of England, flyeth to Rome, whom the Pope*, being in Amity with the French King, *ſendeth as Ambaſſador to* him: The King of England demanded his Rebel of *the French King*, notwithſtanding he was ſent as Ambaſſador; ſed non prævaluit. 4 Inſt. 153. cap. 26. cites it as in the Time of H. 8.

The Queſtion was, an Legatus qui rebellionem contra principem, ad quem Legatus, concitat, legari privilegiis gaudeat, & non ut hoſtis pœnis ſubjaceat. And it was reſolved that he had loſt the Privilege of an Ambaſſador, and was ſubject to Puniſhment 4 Inſt. 152. cap. 26. cites 13 Eliz. The Biſhop of Roſſe's Caſe.

Ambaſſadors *ought to be kept from all Injuries and Wrongs* by the Law of all Countries and of all Nations. They ought to be *ſafe and ſure in every Place*, inſomuch that it is *not lawful to hurt the Ambaſſadors of our Enemies*, and herewith agrees the Civil Law. And if a baniſhed Man be ſent as Ambaſſador to the Place from whence he is baniſh'd, he may not be detain'd or offended there, and this agrees alſo with the Civil Law. 4 Inſt. 153. cites it as reſolved Hill. 12 Jac. Palachie's Caſe.

3. At

3. At this Day there can be *no Ambaſſador without Letters of Credence* of his Sovereign *to another that hath Sovereign Authority.* 4 Inſt. 153. cap. 26. cites it as reſolved Hill. 12 Jac. in Palachie's Caſe.

Omnis Legatus *eſt Agens*, but *omnis Agens* is not *Legatus*; for if he be ſent from a Sovereign Power to another of Sovereign Power to treat between them, altho' in his Letters of Credence he be term'd an Agent or Nuntius, yet he is an Ambaſſador or Legate. 4 Inſt. 153. cap. 26.

4. P. an *Ambaſſador was ſent by the Emperor of Morrocco, then at War with Spain*, to the States of Holland, *and gave him a Commiſſion to take Spaniards and their Goods.* Accordingly he *took* 2 *Spaniſh Ships, and* he together with the Prizes *were driven by Streſs of Weather into England.* The Spaniſh Ambaſſador here *charged him* at the Council-Table *with Piracy*, and the Lords of the Council referr'd it to the Chief Juſtice of England, the Maſter of the Rolls, and the Judge of the Admiralty, who all agreed that by this Taking he is not in Judgment of Law ſaid to be a Pirate, in regard the King of Spain and the King of Morocco were Enemies, and that open Hoſtility is between them, and therefore ſuch Taking from an Enemy is legalis Captio, but admit that P. was no Ambaſſador, yet by reaſon of the Enmity between the two Kings, he could not be indicted as a Pirate before Commiſſioners upon the Statute of 28 H. 8. cap. 15. becauſe one Enemy cannot be a Felon for taking the Goods of another. See 4 Inſt. 152. 153. 154. cap. 26. and 3 Bulſt. 27. 28. Paſch. 13 Jac. Palachie's Caſe.

5. But if a *Foreign Ambaſſador, being Prorex, commits* here *any Crime*, which is *contra jus Gentium*, as Treaſon, Felony, Adultery, or any other Crime which is againſt the Law of Nations, he loſes the Privilege and Dignity of an Ambaſſador, as unworthy of ſo high a Place, and *may be puniſh'd here as any other private Alien*, and not to be remanded to his Sovereign but by Curteſy; And *ſo of Contracts that be good, Jure Gentium*, he muſt anſwer here. But if any thing be *Malum prohibitum* by any Act of Parliament, private Law, or Cuſtom of this Realm, which is not Malum in ſe Jure Gentium, nor contra Jus Gentium, an Ambaſſador reſiding here ſhall not be bound by any of them; but otherwiſe it is of the Subjects of either Kingdom &c. 4 Inſt. 153. cap. 26.

An Ambaſſador is privileged by the Law of Nature and Nations; but if he commits any Offence againſt the *Law of Nature or Reaſon*, he ſhall loſe his Privilege, but not if he offend againſt a *Poſitive Law* of any Realm, as for Apparel &c. Agreed by the Civilians. Roll Rep. 105 pl. 11. Paſch. 13 Jac. B. R. Marſh's Caſe, alias Palachie's Caſe.—3 Bulſt. 27. S. C.

By the Law of Nations, if an Ambaſſador compaſſes or *intends the Death of the Perſon of the King* in whoſe Land he is, he may be condemned and executed for Treaſon; but if he commits any other Treaſon beſides this, it is otherwiſe; but he ought to be ſent to his own Realm; per Bacon, Attorney Gen. Roll Rep. 185. pl. 17. Paſch. 13 Jac. B. R. in Caſe of the King v. Owen, alias Collins.

6. The *Office of an Ambaſſador does not include a Procuration Private*, but Publick for the King, nor for any ſeveral Subject, *otherwiſe than as it concerns the King and his publick Miniſters to protect them*, and procure their Protection in Foreign Kingdoms in the Nature of an Office and Negotiation of State, and therefore they may and ought to mediate, proſecute, and defend for them, or any of them, at the Council-Table, which is as it were a Council of State; but when they come to ſettled Courts, which do and muſt obſerve eſſential Forms of Proceedings, viz. Legitimos Proceſſus, then they muſt be ruled by them, and not confound all Rules, except ſome Precedents could be found in Chancery; per Hobart Ch. J. and Nichols, on a Reference to them by the Ld. Chancellor. Hob. 114 pl. 136. Servienti d'Acuna (the Spaniſh Ambaſſador) v. Bingley.

7 On a *Bill in Chancery againſt an* Engliſh Ambaſſador at the Court of Spain to redeem an old Mortgage, the Court order'd Proceedings to ſtay for a Year and Day from this Time, unleſs Defendant return ſooner; Per Ld.

Ld. Somers. Upon Debate it was agreed a *Protection* lies for an Ambaſſador Quia profecturus, or Quia moraturus, and may at Law caſt an *Eſſoign for a Year and Day*, and may afterwards *renew it*, if the Occaſion continues. 2 Vern. 317. pl. 304. Paſch. 1694. Pilkington v. Stanhope.

* Defendant ſaid that he was a *menial Servant* to the Mecklenburgh Ambaſſador.

3. 7 *Ann. cap.* 12. *S.* 3. *All Proceſs, whereby the Perſon of any Ambaſſador, or publick Miniſter of any Foreign Prince or State, or the* * *domeſtick Servants of any ſuch Ambaſſador &c. may be arreſted, or his Goods diſtrain'd, ſhall be adjudged void.*

It was held that Menial Servants are not within the Act, the Words being (Domeſtick) or (Domeſtick Servants,) who are ſuch as are employ'd in and about the Houſhold Affairs only. Rep. of Pract. in C. B. 134. cites it as 7 Geo. 2. Toms v. Hammond.

The Defendant, a Courier to the Spaniſh Ambaſſador, moved to ſtay Proceedings. The Plaintiff alleged the Defendant was a Trader. It was anſwered, the Trade was ſo very inconſiderable that it could not amount to a Bankruptcy. It was again replied that a probable Cauſe will make a Bankrupt; and it was further alleged, that the Defendant was *no Domeſtick, had no ſettled yearly Wages*, and that being *regiſter'd in the Sheriff's Office was not material*; ſo the Court diſcharged the Rule to ſtay Proceedings. Rep of Pract in C. B. 134. Mich. 10 Geo. 2. De-Ceriſſay v. O'Brian.——— Barnes's Notes in C. B. 281. Hill. 9 Geo. 2. S. C. accordingly; and cites Mich. 10 Geo. 2. B. R. Ward v. Purcell.

A Domeſtick of the Duke of Holſtein, Reſident here, was arreſted, and thereupon gave a Bail-bond; and it was moved upon this Statute to ſet the ſame aſide, all the Terms required by the Act being comply'd with, and thereupon the Arreſt was ſet aſide, and the Bail-bond vacated. 8 Mod. 288. Trin. 10 Geo. 1. Croſſe v. Talbot.

S. 4. *The Perſons ſuing forth ſuch Proceſs, their Attornies and Solicitors, and the Officers executing the ſame, being convicted thereof by Confeſſion of the Party, or by the Oath of one Witneſs before the Ld Chancellor and the Chief Juſtices, or any two of them, ſhall be deemed Violators of the Laws of Nations, and ſhall ſuffer ſuch Penalties and Corporal Puniſhments as they, or any two of them, ſhall judge fit.*

S. 5. *No Merchant or Trader within the Deſcription of any of the Statutes of Bankrupts, putting himſelf into the Service of any Ambaſſador, ſhall have any Benefit by this Act; and no Perſon ſhall be proceeded againſt as having arreſted the Servant of an Ambaſſador &c. unleſs the Name of ſuch Servant be firſt regiſter'd in the Secretary's Office, and tranſmitted to the Sheriffs of London and Middleſex, who muſt hang it up in ſome publick Place in their Office.*

Abr. Equ. Caſes 350. S. C. ſays that this Order was made *after Anſwer put in*, and that the Reaſon of it was, becauſe by the 7th Ann. all Proceſs againſt Ambaſſadors and their Servants are made void, ſo that if the Bill be diſmiſſed, no Proceſs could iſſue againſt him.

10. A *Servant to* the Genoeſe *Ambaſſador brought a Bill in Chancery.* It was moved, that he ſhould not proceed till he *gave Security by Bond in 40 l. Penalty for Payment of Coſts of Suit if awarded againſt him*, in the ſame Manner as where a Plaintiff is beyond Sea; and a Precedent was cited where a like Order was made in the Caſe of an Ambaſſador's Servant Plaintiff in this Court, and dated 25 July, 8th of Ann. And it was ordered accordingly. 2 Wms's. Rep. 452. pl. 142. Goodwin v. Archer.

11. The *Reſident from Venice made Affidavit, that one taken in Execution was by the Secretary*, and that his Name was *entred in the Secretary's Office, though not tranſmitted to the Sheriff of Middleſex till after he was arreſted*, and upon Affidavit that he offered to ſhew his Teſtimonial to the Officer, and that he really exerciſed the Office, and Notice being given of the Motion, the Court diſcharged him. Barnard. Rep. 79. 80. in B. R. Mich. 2 Geo. 2. Ward v. Purcel.

12. To be a *Privileged Servant* to an Ambaſſador within the *Statute* 7 *Ann.* it is not required that the Party *actually live in the Ambaſſador's Houſe*; but neither is it enough that the Party is regiſtred in the Secretary's Office as a Servant, but when he comes for the Benefit of the Act, he

he *muſt ſhew the Nature of his Service*, that the Court may judge whether he is a Domeſtick Servant within the Meaning of the Act of Parliament. Gibb. 200. Hill. 4 Geo. 2. B. R. Wigmore v. Alvarez.

13. An *Affidavit* for Diſcharge of one arreſted, as being an Ambaſſador's Servant, was, *That he was hired in Quality of a Domeſtick Servant* to him, *and did what Services he required of him*, but becauſe he did *not ſay that he actually ſerved him in the Capacity he was hir'd in*, which the Court held neceſſary to have been done, they diſcharged the Rule made for ſhewing Cauſe. Barnard. Rep. in B. R. 401. Mich. 4 Geo. 2. Ball v. Fitzgerald.

14. Defendant was arreſted and held to ſpecial Bail, and moved to be diſcharged on producing a Certificate from the French Ambaſſador, that he was his Maſter of Horſe. It appeared that he *was a Trader, and ſuch a one as a Commiſſion of Bankruptcy might iſſue out againſt*, and ſo the Court diſcharged the Rule to ſhew Cauſe. Rep. of Pract. in C. B. 65. Trin. 5 Geo. 2. Martin v. Sharopin.

For more of Ambaſſadors in general, See **Molloy, lib. 1. cap. 10.** and other proper Titles.

Amendment. [and Jeofails.]

(A) Amendment. At Common Law.

Fol. 196.

1. IF A. brings a Writ of Error upon an Attainder of Murder before the Juſtices of Aſſiſe, and aſſigns for Error, that the Record certified by the Clerk of the Aſſiſes is, that he was indicted before B. and C. Juſtices of Aſſiſe &c. 18 Day of March, 8 Caroli, and that he was tried before the ſame Juſtices 20th. Day of the ſame Month of March, this Certificate of the Clerk of the Aſſiſes cannot be amended by making the Clerk of Aſſiſe to come into Court to amend it according to the Record before the Juſtices of Aſſiſe, it being miſtaken in the tranſcribing, becauſe it is Error in Point of Fact, ſcilicet, whether there was a Continuance between the 18th. Day and the 20th. Day, and therefore the Conſequence being to hang a Man upon ſuch an Amendment, it being ſo penal, it is not to be ſuffered. Hill. 14 Car. B. R. This was * *Sampſon's Caſe*, in which the Court was divided, ſcilicet, Brampſton and Jones, that it ſhould not be amended, and Croke and Barkley e contra. In the Argument of which theſe Books were cited, † 12 H. 7. 25. ‡ 2 R. 3. 9. 22 Edw. 4. 12. 10 E. 4. 15. no Amendment, but in ſeveral of them the Parties diſmiſſed. Co. 4. 48. 8 H. 5. a Writ of Venire Facias iſſued to the Jury in the ſame County to amend.

* Jo. 420. pl. 8 S.C. and Jones J. held, that the ſaying he was tried before the ſame Juſtices aids not the Matter, for they may be the ſame Juſtices, and yet have a new Commiſſion; and takes Notice that the King had certified his Pleaſure, that no Amendment ſhould be, and therefore eſpecially it ought not to be in this Caſe, and Brampſton likewiſe was of the ſame Opinion; but the other two Juſtices held it amendable; & adjornatur.

† Br. Indictment, pl. 32. cites S. C. but S. P. does not appear.——— Br. Cauſe de remover Plea &c. pl. 27. cites S. C. but S. P does not appear.

‡ Br Indictment, pl 50. cites S. C but S P does not appear.——An *Inquiſition* was mentioned to be *taken ad Seſſionem Paris &c. in Cur Sur. tent Die Martis & Die Mercurii &c.* but it was quaſhed, becauſe, tho' the Seſſions may endure 2 or 3 Days, yet the Record ought to mention that the Seſſions were held at a certain Day 4 Rep. 48 pl. 13 Hill. 30 Eliz. Anon.

Br. Error, pl. 68. cites 7 H. 6. 28.

2 Where *Judgment* is *entred in B R. or in C. B. otherwiſe than the Truth is*, or if *Tales* be *awarded and mark'd in the Back of a Writ* or Scroll, *and not entred in the Roll*, all ſuch Things may be amended *the ſame Term*, becauſe the Record is in the Juſtices, and in their Breaſt the ſame Term, and not in the Roll, therefore there they amend the Roll, and it was ſaid that this was not the Record, but in another Term the Roll is the Record, and ſo ſee this Amendment is an Amendment by the Common Law, and not by the Statute of Amendments of Syllable or Letter. Br. Amendment, pl. 32. cites 7 H. 6. 29.

3. It was aſſigned for Error *in Aſſiſe* becauſe the *Roll was Vicecomes South.* without Title, *where it ſhould be Vicecomes South' with Title* [or Dalh;] Halls Juſtice ſaid it ſhall be amended by the Statute, which wills, that where in the Record is Letter or Syllable too much or too little, it ſhall be amended; But per Cheney, it ſhall not be amended by the Statute, but ſhall be amended *by the Common Law*; for *always where the Roll was entred contrary to the Original* &c. (as here) it ſhall be amended, wherefore it ſhall be amended &c. Br. Amendment, pl. 34. cites 7 H. 6. 45.

4. *So of Epus* where it ſhould be Ep'us, or *Dns* where it ſhould be *Dns* with a Title [or Abbreviation.] Br. Amendment, pl. 34. cites 7. H. 6. 45.

5. At Common Law Variance in any Part of the *Record from the Original* was amendable by the Common Law. 8 Rep. 156. b. cites 7 H. 6. 5. a.

Co. Litt. 260. a. S. P that ſo it is, but does not ſpeak of the Common Law.

6. At Common Law the Judges might amend *their Judgment* as well as any other Part of the Record &c. *in the ſame Term*; for during the Term the Record is in the Breaſt of the Juſtices, and not in the Roll. 8 Rep. 156. b. 157. a. cites 7 H. 6. 29. a. b. 9 E. 4. 3. b. 2 R. 3. 11. a. b.

Powell J. cites this Saying of Lord Coke, and ſays,

7. *But* at Common Law the *Miſpriſion of the Clerks in another Term in Proceſs* was not amendable by the Court; for in another Term the Roll is the Record. 8 Rep. 157. a.

This muſt be underſtood of the Award of the Proceſs by the Court upon the Roll, for the Miſpriſion of the Clerk in making out a Writ with a wrong Teſte is not in the Breaſt of the Court, and therefore that Saying muſt be reſtrained to the Award of the Proceſs upon the Roll; For Proceſs is never any otherwiſe in the Breaſt of the Court than as they award it, and therefore there will be no Difference as to this Amendment, whether it be done in the ſame Term or in another. There is no Caſe of Amendments at Common Law, where it has been extended ſo far as to amend Proceſs, but only the Acts of the Court in entring Continuances. 2 Ld. Raym. Rep. 1067. Mich. 3 Annæ.

Br. Amendment, pl. 59. cites 40 Aſſ. 26. that falſe Latin was amended in Caſe of the King.

8. An *original Writ* was not amendable at Common Law in the Caſe of a common Perſon; but in Caſe of the King in Quare Impedit where the Writ was *præſentere* for *præſentare* it was amended, and the Defendant awarded to anſwer. 8 Rep. 156. b.

———Br. Falſe Latin, pl. 74. cites S. C. accordingly. ———G. Hiſt. of C. B. 88 S. P. accordingly, for the Court ſuppoſed the original Conſtitution of the Court was not to deſtroy the King's Prerogative, but this Conſtitution was found to be very inconvenient, becauſe being tied down ſo ſtrictly not to alter their Records, after the firſt Term ſeveral Judgments were reverſed by the Miſpriſion of their Clerks in Proceſſes.

9. 8 Rep.

9. 8 Rep. 156. b. in Blackamore's Caſe cites 20 E. 4. 7. and 10 H. 7. 25. a. b. and ſays there was a Diverſity of Opinions, whether there was any Amendment at Common Law or not; but that it is without Queſtion that at Common Law the *Want of Entry of a Continuance or Eſſoign*, which was the Miſpriſion of the Court itſelf in the Form of the Entry, was amendable by the Court, and cites 5 E. 3. 5. 10 E. 3. 20. and 12 E. 3. Amendment 62. which Books were before any Statute of Amendment.

10. No Amendment was at Common Law. Br. Amendment, pl. 74. cites 18 E. 4. 13. and 20 E. 4. 6. per Brian Ch. J. No original Writ was amendable at Common Law. Arg. Ld. Raym. Rep. 565.

11. *Whatever* at Common Law *might be* amended *in Civil Caſes was at* Common Law *amendable in Criminal Caſes*, and ſo it is at this Day; reſolved by Holt Ch. J. Powell and Powis J. 1 Salk. 51. pl. 14. Mich. 3 Ann. B. R. the Queen v. Tutchin.

12. Tho' a *Miſawarding of Proceſs on the Roll* might be amended at Common Law the *ſame Term*, becauſe it was the Act of the Court; yet if any Clerk at Common Law iſſued out an *erroneous Proceſs on a right Award of the Court*, that was never amended in any Caſe at the Common Law. 1 Salk. 51. pl. 14. Mich. 3 Ann. B. R. reſolved by the Ch. J. and 2 Juſtices in the Caſe of the Queen v. Tutchin.

13. Statutes of Amendment *extend only* to Pleadings of Record, therefore Pleadings, while *in Paper*, are amendable by Common Law. Anciently all Pleas were *Ore tenus* at the Bar; and then, if any Error was ſpied in them it was preſently amended. Since that Cuſtom is changed, the Motion to amend, becauſe all in Paper, ſucceeded in the Room; and it is a Motion that the Court cannot refuſe: But they may refuſe it if the Party deſiring it *refuſe to pay Coſts*, or the Amendment deſired ſhould amount to a *new Plea*. 10 Mod. 88. Mich. 11 Ann. B. R. Ruſh v. Seymour.

14. At Common Law there was very little room for Amendments, and this was from the Original Conſtitution of the Courts, as it appears by Britton; for the Judges were to record the Parols deduced before them in Judgment; and Britton ſays, in the Perſon of Ed. 1. We have granted to our Juſtices to record the Pleas pleaded before them, becauſe we will not ſuffer their Record to be a Warrant to juſtify their own Miſdoings, nor that they eraze their Words, nor amend them, nor record againſt their Inrolment. G. Hiſt. of C. B. 86. 87.

15. That Part of the Count which records the Writ was amendable at Common Law, tho' of a ſubſequent Term, becauſe the Recording of the Writ was Surpluſage; and by the Law which conſtitutes the Court, they were not to record againſt a former, and therefore the Court by that Conſtitution was obliged to ſet ſuch Miſpriſons right. G. Hiſt. of C. B. 87.

(B) Amendment, by 8 H. 6. Default of the Clerk.

1. IF Tippet be return'd in the Venire Facias, and in the Habeas Corpora and Diſtringas Juratores he is named Tipper, yet if his true Name be Tippet, according to the Venire Facias, and Tippet is ſworn, Ow. 61. S. C. and upon Examination it ap-

pear'd that the Perſon ſworn, ſworn, and tries the Iſſue, it ſhall be amended. Trin. 39 Eliz. B. R. between *Hugo and Paine*, adjudged in a Writ of Error.

whoſe Name was Tippet, was ſummoned to appear to be of the Jury, and that he inhabits in the ſame Place where Tipper was named, and that no ſuch Man as Tipper inhabited there, and therefore it was amended.——Hob. 328 pl. 403. Paſch. 14 Jac. Badham's Caſe, is exactly the ſame Point and Name of the Juror, and ſeems to intend S. C. tho' different in Time.

* Hob. 64. pl. 65. Arundel's Caſe, S. C. and Liſney in the Habeas Corpus was made

2. If a Juror be ſworn by a falſe Name, yet this ſhall be amended, if it be depoſed that he was the ſame Man who was return'd upon the Panel. Paſch. 40 Eliz. B. *Marſhal's Caſe*, adjudg'd. Mich. 13 Jac. B. between * *Arundel and Blanchard*, adjudg'd, where he was call'd Liſney in the Venire Facias, and Liſtney with a (t) in the Jurata.

Liſtney, to agree with the Venire Facias, tho' the true Name was Liſney, becauſe they *found alike*—— Brownl. 1-4. S. C. but makes the Difference between (Liſney) and (John Liſney,) without inſerting a (t) in either; but ſays, that upon the Sheriff's Oath that he was the Man return'd in the Venire Facias, it was amended.——G. Hiſt. of C. B. 134. cites S. C. and ſays that he is the proper Judex Facti.

Bridgm 56. S. C. but I do not obſerve S P ——Roll Rep. 200. pl 2. S. C. & S. P accordingly.

3. If upon the Diſtringas a Juror be called Appell, and upon the Jurata Ap-Bell, this is ſuch a Variance between the Names, that it cannot be intended the ſame Man; for this is not the ſame Name in the Welch Language, where this Trial was, and therefore cannot be amended by the Court after the Death of the Sheriff. Trin. 13 Jac. B. R. between *Floyd and Bethell*, per Curiam.

Roll Rep. 200. pl 2. S. C. & S. P. admitted by Coke and Doderidge.

4. But if the Sheriff who made the Return had been living, he might have come into Court and amended it. Trin. 13 Jac. B. R. Per Curiam agreed.

Fol. 197.

* Cro. C. 563. pl. 7. Roll & Bond v. Davis, S. C. and held that it was amendable as well by the Statute of 8 H. 6. as by the Common Law, it being only the Miſpriſion of the Clerk; but that the Stat. of 21 Jac. does not extend thereto but only to Surnames miſtaken; and

5. If in the Venire Facias a Juror be called Samuel Hame, and ſo well named in the Writ of Diſtringas, but in the Nomina Juratorum annex'd to the Diſtringas he is named Daniel Hame, and by this Name ſworn, and this appears by the Record itſelf, and he with the other Jurors at the Niſi Prius gives a Verdict for the Plaintiff, tho' he be miſnamed in the Chriſtian Name, and ſo not within the Statute of Jeofails of 21 Jac. 1. yet when upon the Examination of the Juror himſelf it appear'd that he was the Perſon return'd, and that there is no other of that Name within the Pariſh, and that his Name was Samuel Hame, and that he appear'd, ſuppoſing himſelf to be called Samuel by the Cryer, there being a great Noiſe at the Time he was ſworn, and gave a Verdict; and upon Examination of the Sheriff and his Clerk, it did appear he had the Diſtringas before him, when he wrote the Nomina Juratorum, and miſtook Daniel for Samuel, this ſhall be amended, becauſe the Venire and Diſtringas were well, and this only the Miſtake of the Clerk. Mich. 15 Car. B. R. between * *Rowe and Bond*, per Curiam. Adjudged upon good Advice; Enter'd Mich. 15 Car. R. See Co. 5. 41 & 42. † *Codwell's Caſe*, where it is held, if the Venire Facias be well, and the Miſnomer in the Chriſtian Name in the Diſtringas or Poſtea, it is amendable.

Judgment was affirm'd.——Jo. 448. pl. 13. Bond v. Davis S. C. and Judgment affirm'd.

In the Venire Facias a Juror was return'd by the Name of George Tompſon, and in the Diſtringas he was named Gregory Tompſon, and ſworn; the Verdict was held void, and the Court took the *Difference* between a Miſtake *in the Name of Baptiſm and* in the *Surname*; for a Man may have but one Name of Baptiſm, but may have two Surnames. Cro. E. 57. pl. 7. Paſch. 29 Eliz. B. R. in Caſe of Diſply v. Sprat.——Cro E. 222. pl. 1. Paſch. 33 Eliz. B. R. in Caſe of Farmer v. Dorrington S. P. as to the *Chriſtian Name* was agreed, and cited the Caſe above by the Name of Dousby v. Willot.——Ibid. 256. pl. 29. Mich 33 & 34 Eliz. B. R. Haſſet v. Payne S. P.——Ibid. 866. pl. 47. Mich. 43 & 44 Eliz.

Eliz. S. P. Comb. v. Carew.——So of Conſtantinus in the Venire Facias and Conſtantius in the Diſtringas, there cannot be any Amendment. Cro. J. 116. pl. 5. Paſch. 4 Jac. B. R. Blunt and Farly v. Sneditſon ——If the Names of the Jury be wrong in the Body of the Diſtringas in the Panel return'd, or in the Panel of the Jury ſworn, yet if it can be proved to be the ſame Man that was intended to be return'd in the Venire, having there his right Chriſtian Name, he is the proper Judex Facti, and it may be amended by the Statute. Gilb. Hiſt. of C. B. 134

† Cro. E. 319. pl. 7. Codwell v. Parker S. C ———Cro. C. 203. pl. 6. cites S C. and ſays the Record of it was ſhewn in Court; but [the Book ſays] Note the Miſpriſion was in the Return of the Venire Facias, which was the firſt Proceſs and Return, but where it is in the ſecond, which ought to be guided by the former Proceſs, as in the principal Caſe, the Court doubted thereof; & adjornatur. Mich. 6 Car. B. R. Downs v. Winterflood.

Where inſtead of *Gregory* in the Ven. Fac. the Clerk of the Aſſiſe return'd *George*, which was enter'd upon the Roll, and certified on the Record in B R. The Court ſaid there need be no Amendment, becauſe it was only *in the Tales de Circumſtantibus*, and *not in the Principal Panel*. Winch. 66. Trin 21 Jac. 1. C B. Harvey v. the Hundred of Chelſam.———Cro. J. 677. pl. 13. Harvey v. Chelmsford Hundred, S. C. but S. P. does not appear. ———2 Roll Rep. 394. S. C. but S. P. does not appear.

6. [So] If in the Venire Facias a Juror be call'd Pearſe Thomas, and ſo in the Habeas Corpus, but in the Nomina Jurator' anner'd to the Habeas Corpora he is call'd Peeſe Thomas, and ſworn by this Name, yet if upon Examination it appears to the Court that he was the ſame Perſon return'd, this ſhall be amended. Trin. 42 Eliz. B. R. Rot. 1092. And this being aſſign'd for Error, this Record was ſhewn in Court upon the Debate of the Caſe before between *Rowe and Bond*, and the Judgment was affirm'd, and this Matter amended in the Record.

Jo. 448. in pl. 13. Bond v. Davys, this Caſe was cited by Jones J. and the Record was brought into Court, and was

40 & 41 Eliz. The Caſe of Payne v. Heaton.

7. If in the Venire Facias a Juror be call'd Will. Browne de Hamthorne, and in the Diſtringas or Habeas Corpora Will. Browne de Hampthorpe, who is ſworn, yet this is good, becauſe it may well be that he was of one Place at the Return of the Venire Facias, and of another Place at the Return of the Diſtringas or Habeas Corpora, and it may be that the ſame Place is known by one Name as well as the other, and by the Common Law the Place of the Habitation of a Juror was not of Neceſſity to be expreſs'd, nor was in Uſe till the Statute inflicted a Penalty upon the Sheriff for not doing thereof; but it is a good Panel tho' no Place be expreſs'd. Hill. 20 Jac. B. R. between * *Radford and Ramſey*, adjudged, the which Intratur and then a Record was ſhewn 14 Jac. B. R. between † *Stanhopp and Stanhopp*, Rot. 612. where a Juror was named in the Venire Facias John Collington de Gartlington, and in the Habeas Corpora John Collington de Cortlington, and he was ſworn, and yet adjudged good in a Writ of Error for the Cauſe aforeſaid.

* Palm 336. Ramſey v. Bradford, S. C. The Ven Facias was *Harnthorn*, and the Habeas Corpora was of *Harnthorpe*, and Judgment affirm'd —— Cro. J. 653. pl. 2 Bradford v. Ramſey, S. C. and Judgment affirm'd.

† Cro. J. 457. pl. 1.

Hill. 15 Jac. B R. S. C. and Judgment affirm'd.——Palm. 337. S. C. cited as reſolved that it was not Error.——2 Roll Rep. 111. S. C. cited, and S. P reſolved accordingly, where the Venire Facias was J. S of *Inſlow* with a (w,) and the Diſtringas was J. S of *Inſton* with a (n,) if it appears by Examination that it was the ſame Perſon that was ſworn, and gave his Verdict, it ſhould be amended. Trin. 17 Jac. B. R. Anon.

In the Venire Facias a Juror was returned by the Name of *J. S. of Albotſan*, and in the Diſtringas he was returned by the Name of J. S. of *Abbatſon*, and it was awarded to be amended. Cro. E. 258. pl 39. Mich. 33 & 34 Eliz. B. R. Cotton's Caſe.——So in the Ven. Facias a Juror was named *of Huſt*, and in the Diſtringas was named of *Hurſt*, this was awarded good, and the Plaintiff had Judgment. Ibid. cites it as the ſame Term, Mortimer v. Oger.

8. In a Writ of Dower, if in the Venire Facias a Juror be called Thomas Andrews, and in the Habeas Corpora he is called ſo alſo, but in the Panel of the Habeas Corpora he is call'd Thomas Androſe, and by this Name ſworn, yet if upon the Examination of the Sheriff it appears that this was the ſame Man, it ſhall be amended; for it is

Jo. 315. pl. 2 Brewood v Drake, Paſch. 9 Car. B R. ſeems to be S. C. but

is all one in Sound. Pasch. 8 Car. B. R. between *Prewel and Drake*, in a Writ of Error upon a Judgment in Banco adjudged, this being assigned for Error.

S. P does not appear. ——Cro. C. 300. pl. 3. Pruett v. Drake, seems to be S. C. but S. P. does not appear.

9. If Robert Moore be return'd upon the Venire Facias and Distringas but in the Panel before the Justices of Nisi Prius by Mistake he is named Robert Mawre, and so upon the Postea, yet if it appears upon Examination that his right Name was Moore, so that he was well named in the Venire Facias, this shall be amended; but otherwise it had been if he had been misnamed in the Venire Facias. Co. 5. *Earl of Rutland* 42. resolved.

5 Rep. 42. a. b. Mich. 34 & 35 Eliz. B. R. the Countess of Rutland's Case.—— If a Juror at this Day be *misnamed in the Pannel of the Jenire Facias, tho'* he be *well named in all the Process subsequent*, it cannot be amended. 5 Rep. 42. b. says it was so adjudg'd Mich. 35 & 36 Eliz. B. R. in Cowell's Case.

10. If in the Pannel of the Venire Facias a Juror be named * Paulus Chele, and in the Distringas & Postea Paulus Thele, this shall not be amended upon Examination, because he was misnamed in the Venire Facias, which was the Ground and Foundation of all, but otherwise it had been if he had been well named in the Panel upon the Venire Facias and misnamed upon the Distringas, or in the Postea, for there upon Examination it should be amended. Co. 5. 42. b. † *Codwell's* Case, resolved.

(*) Fol. 198. † S. C. cited Cro. C. 203. in pl. 6.—— Cro. E. 319. pl. 7. Pasch. 36 Eliz. B. R. S. C.—— Goldsb. 184. pl. 124. Hill 43 Eliz. Brewster v. Bewty, S. P. ——In the Venire Facias a Juror was named Jeronimus, with a single (m) and in the Postea Jeronimmus (with an (m) too much.) The Venire cannot be amended; but Coke said, it shall be taken for Jeronimus without any Amendment. Noy. 140. Sommers's Case.——The Venire Facias was *Hieronymus* and the Distringas was *Jeremias*; and therefore Judgment was arrested. Mo. 762. pl. 1059. Trin. 3 Jac. B. R. Anon. ——See pl. 5. and the Notes there.

11. If upon the Note of a Fine the Proclamations are well enter'd, but upon the Foot of the Fine they are enter'd, that * 13 Proclamatio tenta tali & term. 13 Proclamatio, where it ought to have been 14 Proclamatio, this shall be amended. Pasch. 8 Jac. B. per Curiam.

* So it is in the Original of Roll, but seems to be misprinted. —See Fines (B. b. 2) —— See the Division of Amendment of Fines and common Recoveries, Infra.

12. If the Imparlance Roll in Bank, and the Plea Roll vary in Matter of Substance, and the Plea Roll is well, but the Defect is in the Imparlance Roll, altho' the Imparlance being the Warrant for the Plea Roll it cannot be amended by the Plea Roll, yet if it appears upon Examination that the Plaintiff's Attorney gave right Instructions to the Clerk it shall be amended. Hobart's Reports Case 310. between *Lees* and *Arrowsmith* adjudged.

Hob. 246. pl. 312. Mich. 16 Jac. S. C. —— Mo. 892. pl. 1256. S. C. adjudg'd accordingly.— Hutt. 83. Arrowsmith's Case Attorney. —— S. C says that it was amended but makes no Mention of the Examination of the Attorney. ——See (F) pl. 19. S. P.

13. If a Note be deliver'd to the Cursitor, and the Plaintiff A. B. is named Knight, but the Cursitor draws it, and names him A. B. Gentleman, and in all the Process after he is also named Gentleman, yet upon Examination of the Cursitor of the Truth thereof, this shall be amended; for this was the Default of the Cursitor. Mich. 8 Jac. B. between Sir *Lenthrop Franke* and Sir *John Millecent*, adjudged, and there cited also the same Term *Perseval Hart's* Case adjudged. Hobart's Report p 164. between * *Brickhead* and the *Bishop of York*, adjudged accordingly, Vicar pro Vicar. See same Case Mich.

* Hob. 118. pl 147. S. C. The Writ of Qua. Imp. was *Vaccariani* instead of *Vicariam*, and because it appear'd to the Court by the Cursitor's Book

Mich. 8 Jac. B. in Co. 8. 156. *Blackamore's* Case. See Hob. Rep. 171. between || Oglethorpe and Bawd.

that his Instructions were Vicariam, he was order'd to amend it in open Court. ——Hob 197. pl. 250. S. C. but S P. does not appear. ——S C. cited Lev. 2.

|| The Writ of Assise was Ad faciendum Recognitionem illum, whereas it should have been (illam.) The Cursitor made Oath, that a Note by him produced (which was right) was the original Note whereby the Writ was made; but because in Pennington's Case, 11 H. 7. the like Fault in the Writ would not be amended, the Court would be advised. Hob 128. pl. 162. S. C.——Mo. 866. pl. 1196. is a short Note of S. C.——— S C. cited Lev. 2.

14. If an original Writ of Ejectione Firmæ be that J. S. divisit to him such Land &c. for Years &c. where it should be Dimisit, tho' the Word (divisit) be a Latin Word, for it signifies to divide, yet because it appears to be the Default of the Cursitor, he may be suffer'd to come into Court and amend it, and he being decrepit and not able to come his Servant may do it. Pasch. 17 Jac. B. between *Marsh and Sparry* adjudged. Hobart's Report's, Case 324. same Case.

Hob. 249. pl. 326. S. C. says in general that the Word was amended.—— Brownl. 130. S. C. says the Cursitor was order'd to amend it.———So in Ejectment where the Record of Nisi Prius was 6 Acras Parturæ with an (r) instead of (s) it was ruled per Cur. that it should be amended and made Pasturæ according to the Record, it being but the Misprision of the Clerk. Cro. E. 466. (bis.) pl. 23. Pasch. 38 Eliz. B. R. Bedel v. Wingfield.

Action upon the Case upon a Promise in Consideration the Plaintiff would *Affeerare* instead of *Afferre* &c. It was moved in Arrest of Judgment, and the Court gave Directions to see if it was right as to the Roll. And per Twisd *Districtionem* instead of *Destructionem*, and *Vaccaria* instead of *Vicaria*, could not be helped. 1 Mod. 15 Mich. 21 Car. 2. Fettiplace's Case.

15. If G. G. Esq; is bound in a Statute Merchant, and after is made Knight and Baronet, and after a Certificate is made by the Mayor into the Chancery, and upon this a Capias is awarded against G. G. Esq; as he is named in the Statute; and this is return'd in Banco, and and upon this several Extents awarded, which were executed and return'd, where the Capias ought to have been against G. G. Militem & Baronettum, qui per nomen G. G. Armigerum recognovit &c. this cannot be amended because it is not the Default of the Clerk, because this was Matter which ought to come from the Information of the Party. Hobart's Reports 173. Sir G. Grisley's Case, adjudged.

Hob. 129. pl. 168. S. C. accordingly. ——So where a Baronet was sued by the Name of Sir W. H. Knight and Baronet, whereas he never was knighted; the Court held it not amendable. Vent. 154. Mich. 23 Car. 2 B. R Sir William Hicks's Case.——2 Keb. 824 pl. 43 S. C. adjudg'd for the Defendant.

16. In an Action upon the Case upon a Promise for Wares sold, if the Plaintiff declares that he sold tres Virgatas Anglice Silk, and omits the Word Serici, and after a Verdict for the Plaintiff upon Examination of the Clerk that the Word (Serici) was inserted in the Paper Draught, and so the Party not deceived, it was amended by the Paper Draught, for this was merely the Default of the Clerk. Mich. 5 Car. B. R. between *Young and Skipwith*, per Curiam adjudged.

In Ejectment the *Paper Book was right* (viz.) *acram Terræ*, but the *Declaration upon the File was* ill, viz. *clausum Terræ*; this was amended by the Paper-Book, and this Difference was taken, that where there is a *Paper-Book in the Office* which is right, all shall be amended thereby, but if there be no Paper-Book, and the Bill upon the File be ill, there shall be no Amendment. Palm. 404. Pasch. 1 Car. B. R. Todman v. Ward. ——And at another Day the Court agreed that the Amendment should be according to the Paper-Book which was with the Plaintiff's Attorney, (there being no Declaration with the Clerk of the Papers) and thereupon the Attornies on both Sides were appos'd, (the Paper-Book being now right) whether it was amended after the Defendant's Attorney set his Hand to it, who said that it was not, whereupon it was adjudged to be amended. Palm 405. S. C.———Lat. 58. S. C. but not so full, but says it was amended.——— D. 260 b. Marg pl. 24. cites S. C. says the Difference taken was, that it should be amended by the Paper-Book in the Office of the Clerk, but not if it was another Paper Book, and the Bill upon the File ill ———Lat. 86. Trin. 2 Car. Anon. S. P. and seems to be S C but says, that afterwards per Cur. the Amendment shall be by the Paper-Book, which was with the Plaintiff's

tiff's Attorney, becauſe there was no Declaration with the Clerk of the Papers; and thereupon the Attornies both of Plaintiff and Defendant were examined in Court, whether it was amended after the Defendant's Attorney had ſet his Hand to it, and becauſe they ſaid that it was not, Judgment was that it be amended. After the firſt Term you may amend the Imparlance Roll by the Office Paper Book, becauſe that is Inſtructions to the Prothonotary to enter up the Imparlance Roll; and therefore that is equally amendable as the Original is by the Inſtructions given the Curſitor; but this is done on the Oath of the Defendant's Attorney, as in Blackmore's Caſe; [and in] * Chamberlain's Caſe, to amend the Writ, Oath muſt be made that the Paper-Book has not been altered ſince the Defendant's Attorney has put his Hand to it, which he always does when he joins in Iſſue or Demurrer, and this Amendment ſeems to be reaſonable, becauſe the Defendant has not miſled or deceived. In B. R. they will amend both the Bill and the Roll of the Office Paper-Book, becauſe this is Inſtruction for making them both; but they cannot amend from any other Paper-Book, becauſe ſuch Book is not Inſtructions left in the Office to make up the Roll and Bill. But where there is no Office-Book, as where the General Iſſue is pleaded, it ſeems they ſhould amend either the Bill or the Roll, by the Declaration of which they gave the Defendant a Copy, becauſe ſuch Declaration is the only Inſtruction to the Clerk of the Office to enter. G. Hiſt. of C. B. 115. —— * See (F) pl. 16. S. C. in the Notes there.

Hob. 251. pl. 332. Hill 13 Jac. S. C. —Brownl. * Fol. 199. 66. Fetherſton v. Tapſal, S. C. accordingly. —

17. If in a Writ of Debt againſt an Executor upon an Obligation it be laid in the Writ to be made in the County of the City of York, and in the Imparlance Roll the Margin is Civit' Eborum, but the Declaration is that the Teſtator apud villam Novi Caſtri ſuper Tinam conceſſit ſe teneri &c. But in the Plea * Roll it was well, ſcilicet, that the Teſtator conceſſit ſe teneri apud Civitatem Eborum, the Imparlance Roll ſhall not be amended according to the original Writ. Hobart's Reports Caſe 130. between *Fetherſtonhaugh and Topſal*, per Curiam.

The Imparlance Roll cannot be amended by the original Writ, becauſe the original Writ is the Authority on which the Court proceeds, which the Plaintiff muſt proſecute; for otherwiſe he does not proceed in that Cauſe. If the Court varies in Form, the Defendant may plead it in Abatement, for he has abated his own Writ by proſecuting it in a different manner; but if it varies in Subſtance, the Defendant may move it in Arreſt of Judgment, becauſe he has no Authority to proceed, having proſecuted a different Matter from that which the Writ has given Authority to the Court to take Cognizance of. G. Hiſt. of C. B. 116.

Cro. J. 89. pl. 15. Knowles v. Beckinſhaw, S. C. The Venire Facias was return'd in the Queen's Time, and after in King James's Time, an Hab. Corp. was awarded with a Tales, reciting Quod habeat Copora Juratorum ſummonit' in Curia nuper Reginæ, and becauſe the Jurors were never ſummoned, for the Ven. Fa. was the firſt Proceſs, which is not any Summons, it was held to be Error, and the Judgment reverſed, tho' the Error was in judicial Proceſs, and it is not aided by the Stat. 32 H. 8. nor 18 Eliz. For the one Proceſs ought to warrant the other, which is not done here; for it cannot warrant this Tales. ——D. 105 b. Marg. pl. 16. cites C. S. but ſeems not very clear.——S. C. cited Cro. J. 161. and Ibid. 162. pl. 16 the ſame was agreed per Cur. to be good Law; for if the Hab. Corp. is of Jurors ſummoned in Curia noſtra & quod ad illos apponat decem Tales, the Sheriff had no Authority apponere decem Tales, but to the Jurors firſt ſummoned in Curia Regis, and there were not any ſuch; ſo as what he did was without Warrant. But where in the principal Caſe, which was Paſch. 5 Jac. B. R. Comyn v. Kyneto, a Venire Facias iſſued in the Reign of Queen Eliz. and a Diſtringas thereupon, and an Alias Diſtringas iſſued in the Time of King James, Quod diſtringat Juratores nuper Summonitos in Curia noſtra, whereas it ought to have been in Cur. nuper Reginæ, and a Trial was had by the ſame Jurors, Popham and 3 other Judges, contra Williams, held that the Writ was amendable, and Judgment was affirmed.——Jenk. 313. pl 100. S. C. adjudged good and amendable, and affirmed in Error. ——In the Caſe above was cited Goodwin's Caſe, as adjudged in the Exchequer, where a Ven. Fa. was awarded in the Queen's Time, and a *Diſtringas with Niſi Prius* in K. James I.'s Time, reciting Quod diſtringat Juratores nuper Summonitos in Curia noſtra, whereas no Summons had been but in the Queen's Court only, and Trial thereupon, and Judgment, but reverſed for this Cauſe in Error. And four Juſtice held this Caſe to be good Law, but that it differs from the ſaid Caſe of Comyns v. Kyneto; for this Caſe is of a Diſtringas with Niſi Prius, which *is a Special Authority to the Juſtices*, who being Juſtices by that Special Commiſſion, and not having Authority to take any Jury but ſuch as was ſummoned before in Curia Regis, there being no ſuch, the Trial by another Jury was erroneous; whereas in the ſaid Caſe of Comyns v. Kyneto, the Juſtices of Durham (where the Judgment was given) are Original Judges of the whole Record, and had it before them at the Time of the Trial, and the Roll being good

18. If an Habeas Corpus be to have the Jury Summonitos in Curia nuper Reginæ, and after the Diſtringas is to diſtrain the Jury Summonitos in Curia noſtra, and after Judgment is given, this is Error not amendable, for the Jury cannot be ſummon'd upon any other Writ but the Venire Facias, and afterwards they are attach'd and diſtrain'd and not ſummon'd. Tr. 3 Jac. B. R. 7. between *Knowles and Burtenſhawe*, adjudged.

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is a ſufficient Warrant to them for the Trial, and the Writ being variant, it might be amended there, and ſo may well be amended here; and tho' the Trial is there by Part of the Tales, yet that Tales was awarded, and returned by Command of that Court and View of the Roll, and not upon the Writ, and therefore is good enough.

19. But if J. S. is Bail for J. D. in an Action, and he ſues an Audita Querela, and upon this a Scire Facias which recites the Audita Querela, and the Capias againſt the Principal, and the Return thereof which Capias was awarded in the time of Queen Elizabeth, and the Scire Facias recites it to be per breve Dominæ Reginæ AngliæVicecomiti noſtro de S. directum, which is to the Sheriff of the King who is dead; this ſhall be amended; for it is the Default of the Clerk. Paſch. 3 Jac. B. R. between *Barns and Worlich*, adjudged. Yelv. 30. S. C. but S. P. does not appear. —— Yelv. 59. S. C. but S. P. does not appear. —— Cro. J. 25. pl. 2. S. C. but S. P. does not appear. —— Noy. 41. S. C. but S. P. does not appear. —— Jenk. 248. pl. 39. S. C. but S. P. does not appear. —— S. C. & S. P. cited Arg. 2 Ld. Raym. Rep. 1058. and admitted by Holt Ch. J. becauſe it was a bad Writ, and the Fault was in the Body of the Writ.

20. If an Executor brings an Action of Debt upon an Obligation againſt J. Lord Marquis of Wincheſter, and charges him as Son and Heir to his Father W. Lord Marquis, and makes the uſual Declaration againſt him, and in the End thereof ſhews that becauſe the Debt was not paid by J. the Father nor by J. the Son, he hath brought this Action, where it ought to be by W. the Father &c. and after Judgment was given for the Plaintiff, and Error brought, this ſhall be amended. H. 38 Eliz. B. R. between *Fitch and the Lord Marquis of Wincheſter*, adjudged.

21. In a Replevin by Original, if the Defendant in the Writ is named Whorewood with a (W.) and in the Count Horewood without a (W.) this ſhall be amended after Verdict, for this is all one in Sound. (W.) 32. 33 Eliz. B. R. between *Bradly and Whorewood*, adjudged; but it does not appear that it was amended. Cro. E. 204. pl. 38. S. C. that after Verdict it was held good notwithſtanding this Variance; for it is as if there was no Original which is help'd by the Statute; and if it be ſaid a Variance, it may be amended; and the Plaintiff had Judgment.

22. In an Action againſt Henry B. if the Defendant imparles by the Name of Richard, but in the reſt of the Pleadings he is named by his true Name, this ſhall be amended. Hill. 43 Eliz. B. R. *Drury's Caſe*, adjudged. If a Declaration be againſt J. B. and he imparls by the Name of R. B. but pleads by the right Name J. B. this is no material Fault, becauſe it is only a Continuance from one Term to another; and by pleading by the right Name, he acknowledged he imparled by a wrong Name. G. Hiſt. of C. B. 117.

23. But otherwiſe it had been if his Name had been miſtaken in the Beginning of the Plea; for then it had been Matter of Subſtance. Hill. 43 Eliz. B. R. See Cro. J. 13. pl. 17. Paſch. 1 Jac. B. R. Philips v. Hugre, S. P. and held not amendable. —— Yelv. 38. Hughes v. Philips, S. C.

24. In an Action, if in ſome Part of the Record the Defendant be named Segear, and in another Part of the Record Segar, this ſhall be amended, for theſe are idem Sonantia. Mich. 14 Jac. in Camera Scaccarii, adjudged. In the Diſtringas the Defendant was named (*Shacraft*) but in the Venire Facias, and all the other Proceedings, he was truly named [*Shacroft*] and it was ordered to be amended; for per Wray, the Difference here is little, and in ſome Countries (a) is founded for (o) and ſo is not material. Cro. E. 258. pl. 38. Mich. 33 & 34 Eliz. B. R. Denner v. Shacroft.

Venire Facias was *Pouſanby*, and ſo was the Diſtringas, but in the Names of the Jurors returned it was *Pauſanby*, who was ſworn, and therefore it was objected to be another Name than was returned, ſed

fed non allocatur ; for it is not another Name, the Difference being only in the Surname, and there is ſmall Difference in the Sound, eſpecially in the Country where A. is many times ſounded as O. or U. and ſo no material Difference. Cro. J. 353, 354. Mich. 12 Jac. B R. Muſgrave v. Wharton.

*The Return of a Habeas Corpus of one committed ſhewed no Cauſe of the Commitment, and therefore was held inſufficient ;

25. In an Action upon the Caſe by A. if the Plaintiff declares that B the Defendant impoſed the Crime of Felony to the Plaintiff for ſtealing a Mare ipſius A. who was the Plaintiff, but he intended the Defendant, after Verdict for the Plaintiff, yet this ſhall not be amended, becauſe this is * Matter of Fact, for it may be true. Hill. 14 Car. B. R. between *Miller* and adjudged per Curiam, and after, the ſame Term, the Judgment was reverſed for this Cauſe in Camera Scaccarii in a Writ of Error.

and on Motion to amend it Doderidge J. ſaid, that Matter of Form merely in a Return is amendable, but not Matter of Fact which goes in Juſtification of the Impriſonment and Fine. 2 Bulſt. 259. Mich. 12 Jac. Alphonſo v. the College of Phyſicians.

Cro J. 89. pl. 15. Knowles v. Beckinſhaw, S. C. but S. P. does not appear.

26. If a Diſtringas iſſues apponere thereto decem Tales, this is Error not amendable, for they cannot be appoſed but to the firſt Jury ſummoned by the Venire Facias. Trin. 3 Jac. B. R. between *Knowles and Burtenſhaw*, adjudged.

——Cro. J. 161, 162 pl. 16. S. C. cited Arg. and agreed per Cur. to be good Law.—See pl. 18. and the Notes there.

* Fol. 200. In Debt in an inferior Court by John Vita againſt James Vita, the Defendant pleaded Nil debet & de hoc ponit ſe ſuper Patriam, and Iſſue was Et

27. In an Ejectione Firmæ by John Weeks Plaintiff, againſt Thomas Veale Defendant, if the Defendant pleads Not Guilty, and prædictus Thomas (*) ſimiliter, where it ſhould be & Prædictus Joannes ſimiliter, yet this ſhall be amended. Mich. 10 Car. B. R. between *Weeks* and *Veale*, adjudged per Curiam, this being moved in Arreſt of Judgment after a Verdict for the Plaintiff, where the Courſe of the King's Bench is not to enter any Continuances till Iſſue, and after before Judgment to enter all the Continuances upon the Roll, tho' no Continuance be entred after Iſſue before Judgment, but a Judgment is entred without the Entry of them, yet this ſhall be amended, for it is the Default of the Clerk. Tr. 16 Jac. B. Sir *George Trencher's* Caſe, adjudged.

prædictus Jacobus ſimiliter, inſtead of prædict. Johannes. Judgment was given for the Plaintiff, and this aſſign'd for Error; and all the Court held it amendable by 8 H. 6. and Judgment affirm'd. Cro. E. 435. pl. 47. Mich. 37 & 38 Eliz. B. R. John Vita v. James Vita.

In Aſſumpſit found for the Plaintiff it was moved in Stay of Judgment, becauſe the Record was enter'd, *& prædict. Tho Venit per Attornatum ſuum, & prædict. J. per Attornatum ſuum & prædictus Thomas defendit* &c. Et *prædict. Thomas ſimiliter*, and ſo as John never pleaded, and ſo no Iſſue was joined. It was holden by the Court, that it was but the Miſpriſon of the Clerk, and well amendable after Verdict; for it ſhall be intended the Defendant's Plea, and only the Miſentry of the Clerk, and ſo it was amended, and Judgment for the Plaintiff. Cro. E. 904. pl. 7. Mich. 44 & 45 Eliz. B. R. Ruſſell v. Grange.

In Debt againſt John M. as Executor of J. S. he pleaded Plene Adminiſtravit, the Plaintiff replied, *Et prædictus Willielmus dicit quod prædictus Willielmus habet bona &c.* and ſo puts William for John, and Iſſue was joined, Et prædictus Johannes ſimiliter, after Verdict for the Plaintiff all the Court held it only the Default of the Clerk, and awarded it to be amended, and Judgment for the Plaintiff. Cro J. 67. pl. 7. Paſch. 3 Jac. B. R. Birton v. Mandell.——Yelv. 65. Birket v. Manning, S. C. accordingly.——Brownl. 87. S. C. accordingly.

The Condition of a Bond was to ſave harmleſs from Payment to M. S. The Iſſue joined was *Et prædict. M. S. ſimiliter*, inſtead of Et prædict. *Quer* ſimiliter. Per Cur. This being after Verdict, ſhall be amended. Palm. 524. Paſch. 4 Car. 2. B. R. Rigg v. Wharton.

If on an Iſſue tender'd by the Plaintiff the Defendant joins the Similiter by the Plaintiff's Name, or the Plaintiff joins the Similiter by the Defendant's Name to an Iſſue tender'd by the Defendant, this ſhall be amended, there being a Negative and Affirmative before between the Plaintiff and Defendant, which is the Pattern from whence the Joining of the Iſſue is to be taken, there is a ſufficient Copy from whence this may be amended, it being a plain Miſtake, from the Nature of the Thing, of one Man's Name for another. G. Hiſt. of C. B 129.

In Error to reverſe a Judgment, the Error aſſign'd was, that there was *no Iſſue join'd* ; for it was *Et prædict.*

prædictus Josephus similiter, instead of *prædictus Robertus*; and of the same Opinion was Roll Ch. J. and that it could not be amended. Sty. 113. Trin. 24 Car. Pitcher v. Symmons.

28. In Trespass for an Assault, Battery, and Imprisonment Vi & Armis, if the Defendant quoad Vi & Armis pleads quod ipse est inde culpabilis, where it ought to be Non culpabilis, and quoad residuum transgressions, he pleads a Special Plea after Judgment as a Mistake, it shall be amended; for this is but Matter of Form, and the Default of the Clerk. Trin. 7 Jac. Scaccario, between *Nots and Jackman*, per Curiam.

29. In Trespass for a Trespass done ultimo Die Junii 1 Jac. if the Plaintiff in the Replication says Quod prædicto ultimo Die Junii Anno 5 Jac. where it ought to be primo according to the Declaration, after Verdict, and Judgment for the Plaintiff, it shall be amended; for Prædicto ultimo Die Junii had been sufficient without expressing the Year, and then the false Expressing what was not necessary shall not vitiate the Pleading. Trin. 7 Jac. Scaccario. *Louworth's Case.*

30. In Trespass, if the Defendant pleads his Freehold, to which the Plaintiff replies and traverses it, & hoc petit quod inquiratur per Patriam, and it is entred & Querens similiter, where it should be & Defendens similiter, and so no Issue joined, this shall be amended, for this was the Default of the Clerk. Mich. 9 Car. B. R. between *Brown and Cleave*, adjudged after a Verdict. 10 H. 7. 23. b. several Cases there cited accordingly, 11 H. 7. * 2. D. 9 Eliz. 260, 261. adjudged. Co. 8. *Blackamore* 161. b. where it was & prædict' similiter, omitting the Christian Name of the Party who joined the Issue.

In Debt against an Administrator, the Defendant pleaded Fully administer'd. Plaintiff reply'd that he ought not to be barr'd by any thing said per *prædict. Willielmum* (the Defendant;) for he said that *prædictus Johannes haket & die Impetrationis &c. habuit diversa Bona &c & hoc petit &c* This shall be amended; for it is only the Default of the Clerk; per Curiam Yelv. 65 Trin. 3 Jac. B. R. Birket v Manning.

* See (D) pl. 9. and the Notes there.

31. In an Action, if the Venire Facias be Vicecomiti London Salutem &c. Præcipimus tibi quod &c. where it should be Præcipimus vobis; After Verdict this shall be amended, for it is the Default of the Clerk. Mich. 38, 39 Eliz. B. R. Rot. 211. between *During and Retrel*, per Curiam. Hill. 39 Eliz. B. R. adjudged.

Ow. 62. During v. Kettle, S. C. and the Writ was amended; for it being as it were a judicial Writ, it ought to ensue the other Proceedings, and it was held amendable. —— Cro. E. 543. pl. 11. Durming v. Kettle, S. C. and because it was a judicial Writ, it was order'd to be amended, and the Plaintiff had Judgment. —— Noy 61. S. C. accordingly. —— S. P. Comyns's Rep. 580. 581. pl. 252. Trin. 11 Geo. 2. Anon.

The Writ of Inquiry of Damages directed to the Sheriff of London was Quod *inquirat*, where it should be *inquirant*, there being 2 Sheriffs; but it was ordered to be amended, it being only the Default of the Clerk. Cro. E. 677. pl. 6. and 709. pl. 31. Trin. and Mich. 41 Eliz. B. R. Lewson v Riddleston. —— So where the Writ directed to him was Et quod *habeat*, where it should be *habeatis*, it was amended. Cro. E. 618. pl. 5. Mich. 40 & 41 Eliz. B. R. Berry v. Lane.

32 If a Venire Facias be, & habeas ibi hoc breve, without these Words Nomina Juratorum, which ought to be in of Necessity, for else otherwise the Court cannot know who are the Jurors, nor whom to demand to be sworn, yet after Verdict it shall be amended, this being a Judicial Writ. Mich. 32, 33 Eliz. B. R. *Taylor's* Case, per Curiam.

33. If a Venire Facias be dated 7 Julii, and made returnable 6 Julii, a Day before the Date of the Writ, this is not amendable after Verdict. Mich. 32, 33 Eliz. B. R. between *Bennet and Bradish*, per Curiam.

Cro. E. 203. pl. 35. Mich. 32 & 33 Eliz. B. R. Gunnel v. Bradish S. P. and seems to be S. C. and because this was a Judicial Writ, and may be returnable De Die in Diem, it was held it may be well amended. Cro. E. 203. pl. 35. Mich. 32 & 33 Eliz. B. R. Gunnel v. Bradish. —— Cro. J. 162. in pl. 16. Tanfield J. cited S. C. where a Venire Facias bore Teste out of Term, and this being assign'd for Error it was amended and made to accord with the Roll, and the Judgment was affirm'd. —— See Grey v Willoughby S. P.

A Record was of Trinity Term and an Award upon the Roll to try the Iſſue returnable ſuch a Day It was aſſign'd for Error, that the Venire bore *Teſte before Iſſue join'd*, and where the Award upon the Roll is wrong, the Statute of Jeofails will not extend to it Powel J. ſaid, the Stat of *Jeofails will not help the erroneous Award of the Court* This was a Writ of Error, and Error aſſign'd was, That the *Record was of Trinit Term*, and the Venire was awarded returnable *Craſtino Trin'*, which was before the Term; now this being a wrong Award of the Court, it muſt be intended returnable the Year after, which is an erroneous Award of the Court, and then there is nothing to award the Writ by, the Roll being wrong. The Court ſeem'd to be of Opinion that this was Error, and not help'd by the Statutes of Jeofails. Sed adjornatur. 11 Mod. 80. Trin. 5 Ann. B. R. Ld Kingſale v. Compton.

34. If a Writ of Entry dated 14 Februarii be returnable Craſtino Purificationis, ſo that the Teſte is after the Return, it is not amendable. Paſch. 2. 3. W. 129. 62. adjudged.

Ow. 62. Chandſer v. Grills S. C. and Judgment affirmed, for this is aided by the Statute. —Venire Facias bore *Teſte* in December, which was *out of Term*, but *returnable in the next Term.* The Court thought this no Error, but only a miſconveying of Proceſs, and help'd by the Statute of Jeofails after Verdict. Mo. 465 pl. 657 Paſch. 37 Eliz. B. R. Grey v. Willoughby ——Cro. E. 467. (bis) pl. 24. Willoughby v. Grey, accordingly——Ow. 59. S. C. and it ſeemed to the Court good enough; for tho' the Venire Facias was not good, yet if the Diſtringas had a certain Return and Place therein, and the Jury appeared and gave their Verdict, ſo that a Verdict was had, the Statute will aid the other Defects, as in the Caſe adjudged between Marſh and Bulford, where the Venire bore Teſte out of Term. — Noy. 57. S.C. and the Diverſity is between Original and Judicial Writs, and Judgment was affirmed.

35. If a Venire Facias be awarded upon the Roll to be returnable Octabis Trinitatis, and the Writ is made returnable 6 Days after, ſcilicet, a Day out of Term, but the Diſtringas is well without any Fault, and after the Jury impannelled find for the Plaintiff; this Writ of Venire Facias ſhall be amended by the Roll, for it was the Default of the Clerk only; for the Roll is the Warrant of the Writ. Trin. 39 Eliz. B. R. between *Chaundel and Grills*, adjudged in a Writ of Error.

Fol. 201.

Ow. 62. cites Thorne v. Fulſhaw, S. C. accordingly in the Exchequer-Chamber, but ſays, that if the Roll were naught, then it is erroneous, becauſe the Venire Facias is without Warrant, and no Record to uphold it, and that ſo it was held in the Caſe of Hungerford v. Beſie.——S. C. of Thorp v. Fulſhaw, cited by Powys J. Mich. 3 Annæ. 2 Ld. Raym. Rep. 1064.

36. So if the Award of a Venire Facias upon the Roll be well, and the Writ of Venire Facias wrong, yet this ſhall be amended by the Roll, the Roll being the Warrant of the Writ, which is the Act of the Court, and the Default is only the Miſtake of the Clerk. Mich. 38, 39 Eliz. in Camera Scaccarii, between *Thorp and Fulſhaw*, adjudged in a Writ of Error. Cited Trin. 39 Eliz. B. R.

Yelv. 211. S. C.—— Cro. J. 254. pl. 10. Odell v. Moreton, S. C.—— Hob 138. pl. 189. S. C. —Jenk. 306. pl. 81. S. C. but in neither of the above Books does S. P appear.——Bulſt. 129. S. C. and S P. agreed accordingly.——Brownl. 150. Meerton v. Orib, S. C. & S. P. held that it was only the Fault of the Writer, and ſhould be amended.

37. If the Writ of Venire Facias out of the King's Bench be Venire Facias 12 liberos & legales homines coram nobis apud Weſtmonaſterium ubicunque fuerimus in Anglia, but the Roll is well, ſcilicet, without the Words apud Weſtmonaſterium, this being in B. R. the Writ ſhall be amended by the Roll, for this is but Matter of Form, Trin. 11 Jac. B. R. between *Orde and Mooreton*, adjudged.

38. In *Formedon* the Writ was, And that after the Death of the Donees, ann John Son of the Donees, to the Demandant *as Coſin and Heir* of John deſcend' &c. Upon which was ſhewn to the Court a *Titling made by the Demandant to the Clerk of the Chancery, by which John was made Son and Heir* to the Donees &c. and prayed that the Writ may be amended, and the Court took Order that the Clerk ſhould be examined, and if the Default ſhould be found to be in the Clerk, the Writ ſhould

ſhould be amended. Thel. Dig. 225. lib. 16. cap. 6. S. 22. cites Mich. 38 H. 6. 4. and that ſo agrees 22 E. 4. 47.

39. In *Debt*, if the *Clerk* of the Chancery had *had the Obligation with him at the making of the Writ*, it is amendable if there be Variance. But if the Clerk does not give any Addition to the Defendant, it is not amendable. Thel. Dig. 225. lib. 16. cap. 6. S. 23. cites Paſch. 8 E. 4. 4. and 22 E. 4. 21. and 11 E. 4. 2.

40. If an original Writ *wants a legal Form*, this being the Ignorance of the Clerk, it is not amendable by the Statute 8 H. 6. cap. 12. and upon this Reaſon it has often been adjudged ſince this Statute, that *falſe Latin* in an Original ſhall not be amended, as *Habeas Ibi Hos breve* for *Hoc breve*. 8 Rep. 159. b. cites 9 H. 7. 16. b.

Br. Falſe Latin, pl. 78. cites 9 H. 7. 16. S. C. and S P. by Vaviſor; becauſe he may have a New Writ; but that otherwiſe it is in falſe Latin in an Obligation, Record or Plea, becauſe he cannot have a new Obligation, Record nor Plea.——Br. Amendment, pl. 62. cites S. C.

41. M. & Ux. brought *Debt* againſt C. and his Wife, as Adminiſtrators of one Fox. and upon *Plene Adminiſtravit* pleaded, the Plaintiff *replies that they had Aſſets to ſatisfy the aforeſaid Defendant*, (whereas it ſhould have been *Plaintiff*;) and becauſe that it was but the Miſpriſion of the Clerk, it was held that it might be amended, the Record now being brought before them by Error. Het. 119. Mich. 4 Car. C. B. Mercer & Ux. v. Cardock & Ux.

42. If a Clerk *miſ-enters a Thing uſual in Matter of Form*, it is to be amended; but the Error of the Judge is not to be amended; per Roll Ch. J. who ſaid he took it to be a Rule. Sty. 412. cites Mich. 13 Car. Sawyer v. Horton, and Hill. 15 Car. Belch v. Fates.

43. A *Miſtake of a Clerk* thro' *Careleſſneſs*, in an *inferior Court* is amendable; but not if thro' Want of Skill. 12 Mod. 34. Hill. 4 W. & M. Bondler v. Orabb.

44. It was agreed that *Want of Form in an Original* is not amendable, as *Debet and Detinet*, inſtead of *Detinet*, or vice verſa. 12 Mod. 369. Paſch. 12 W. 3.

45. *So* if *Judgment* be *againſt 5*, and *one of them dies*, and *Error is brought, and laid Ad Damnum of 4, without mentioning the 5th*, this was not amended, becauſe it was Want of Skill in the Clerk. 12 Mod. 369. cites Walker v. Stokes.

Comb. 354. Hill. 8 W. 3. B. R. Walker v. Stocoe S. C. reſolv'd and the Writ of Error quaſh'd.——5 Mod. 16. 69. Walker v. Slackoe S. C. The Note from the Attorney to the Curſitor was thus, viz. Inter A. in Treſpaſs and B. C. D. E. and F. Defendants. (Note, F. one of the Defendant's is dead, make out a Writ of Error.) The Court held the Writ not amendable, and quaſh'd it; and they were of Opinion that ſuppoſing it only a Miſtake of the Curſitor, yet it was not amendable, becauſe it was to reverſe a Judgment, and the Statutes were only to amend in Support of them.——Carth. 367. S. C. reſolved accordingly.

46. The *Curſitor had Orders to make out a Writ againſt 5*, but *one being dead, he made it out againſt 4 only*. This was held not amendable, and full Coſts given on quaſhing the Writ of Error. 12 Mod. 370. cites Mich. 11 Geo. 1. Ginger v. Cooper.

(C) Amendment by 8 H. 6. of Judgment in Names.

1. If the Parties are right named in the Record, and in the Entry of the Judgment one of the Parties is miſ-named, this ſhall be amended; for it is the Fault of the Clerk. Mich. 40, 41 El. B. R. per Curiam. Mich. 14 Car. B. R. between *Meriel and Doe*, per Curiam, adjudged in a Writ of Error, and the firſt Judgment affirmed accordingly, which was at the Day in Bank it was enter'd after Verdict, at which Day prædictus Stephanus, where it ſhould be Carolus, ſcilicet, the Defendant for the Plaintiff. Intratur Hill. 10. Rot. 1343.

Cro. E. 609. pl. 11. Skarning v. Shartwell, S. C. and by Fenner and Clench it was held not amendable, becauſe it is Part of the Judgment, and the Act of the Court.

2. If a Man recovers in an Action of Debt againſt Elias Shortwell, and the Judgment is Quod prædictus Georgius Capiatur, where it ought to be Quod prædictus Elias Capiatur, it ſeems this ſhall be amended, tho' it be in a Judgment; for it is the Miſtake of the Clerk. Contra Paſch. 40 Eliz. B. R. between *Skaring and Shortwell*, adjudged.

Brownl. 56. Rogers's Caſe S. C. and the Court amended the Miſtake of the Clerk; but afterwards the Amendment was withdrawn by the Court, and upon further Advice the Roll was made as it was before

3. If in an Action by Ralf Rogers againſt Thomas Lake, the Judgment be quod prædictus Rogerus recuperet, this ſhall not be amended, tho' it be the Miſtake of the Clerk, for this is the Judgment of the Court. Mich. 40 41 El. B. R. between *Rogers and Lake*, per Curiam.

In *Debt by T. W. Executor of J. W.* the Judgment was enter'd Quod *præd. J. W. recuperet*, where it ſhould have been Quod præd. *T. W.* recuperet. Adjudged that it ſhould not be amended as Vitium Clerici; for *the Judgment is the Act of the Court* and not of the Clerk Goldsb. 124. pl 10. Hill. 43 Eliz. Welcomb's Caſe.——Mo 366 pl. 501. S. C. accordingly for the ſame Reaſon, and therefore no Fault in the Judgment is amendable.—Cro. E. 400. pl. 6. Trin. 37 Eliz. B. R. accordingly, and ſo Judgment in C. B. was reverſed.——But Cro. E. 865. in pl. 44. cites Mich. 33 & 34 Eliz. Thomas Wylde v. John Wheeler, where the Judgment was Quod præd. *recuperet verſus præd. Thomam*, where it ſhould be *Johannem*, and it was amended.——Hutt 41. cites Wild v. Wolfe S. P. accordingly, and ſeems to be S. C.——Hob. 325. pl. 400. cites Wylde v. Wheeler, the Precedent whereof was ſhewn that it was amended in the Exchequer-Chamber after a Writ of Error. And ſays alſo that the Precedent of Stephen v. John Morgan Wolf Hill. 42 Eliz. was ſhewn where the Judgment was Quod recuperet verſus præfatum Morgan, and it was amended in another Term.——Cro. E. 864 pl 44. John Morgan Wolf v. Stepney S. C. in Cam. Scacc. and awarded ſo be amended, and Judgment affirm'd——Raym 39. Arg. cites S. C. as amended.——So where in a Judgment in Ireland the Plaintiff's Name was *Robert M.* and the Judgment was enter'd Quod *prædict. Carolus M.* recuperet; the Court in Error brought here held it amendable, as the Default of the Clerk, tho' in the Judgment the Miſpriſion being only in the Name, which was right in the reſt of the Record that was before the Clerk, and ſhould have directed him. Vent. 217. Trin. 24 Car. 2. B. R. Meredith's Caſe——In Action for Words it was alleged that no Iſſue was join'd, becauſe in the Pleading and joining of the Iſſue the Defendant's Chriſtian Name was miſtaken; but the Court will amend that, it being *rightly named in the Record before*. Vent. 25. Paſch. 21 Car. 2. B. R. Henly v. Burſtall.

Mo. 697. pl. 970. Joyner v. Ognell, S. C. The Action was brought by Joyner as Executor of Skinner, which occaſioned the Miſtake, and it was amended.——Cro. E. 865. in pl. 44. cites S. C. and that it was amended by Order.

4. In a Writ of Debt, if the Judgment be quod Humfrey Joiner recuperet debitum &c. nec non damna &c. eidem Humfrido Skinner adjudicata, this ſhall be amended, ſcilicet, Skinner for Joiner between *Ognell and Joyner*, adjudged in a Writ of Error in Camera Scaccarii. Cited Mich. 40, 41 El. B. R. to be lately adjudged.

5. If

5. If a Judgment be Ideo videtur, where it ſhould be Ideo conſideratum eſt, this ſhall not be amended, between *Savaker and the Biſhop of Glouceſter*. Cited Mich. 40, 41 El. B. R. The Caſe of the Biſhop of Glouceſter and Savacre is in ſeveral Books of Reports; but this Point of the (Videtur) does not appear in any —— Yelv. 130. Trin. 6 Jac. B. R. Ventres v. Carter, adjudged Error; and the ſame of Liquet or Conceſſum.

6. If a Judgment be Ideo Defendens in Miſericordia, for Miſericordia, this ſhall be amended. Mich. 10 Jac. B. R. between *Meghen and Dune*.

7. In an Action, if the Declaration be againſt Amias, and in the Reſidue of the Record he is named prædict. Annas, (without any Point ſupra) and the Judgment is given againſt prædict. Annas, yet this ſhall be amended. Mich. 10 Jac. B. R. between *Proctor and Clifton*, adjudged. Cro. J. 307. pl. 4. Cliſon v. Proctor, S. C. but S. P. does not appear. —— Bulſt. 126. Proctor v. Cliſton, S. C. but S. P. does not appear. —— 2 Roll Abr. Tit. Trial, pl. 37. 39. S. C. but not S. P.

8. If in an Original one of the Parties is named Barnabas, and after in the Pleading he is named Barnabias, this ſhall be amended by the Original. Paſch. 17 Jac. 3. between *Marſh and Sparry*, adjudged. Hob. 249. pl. 326. S. C. but S. P. does not appear. Brownl. 130. S. C. & S. P. accordingly.

9. If in an Action againſt Dematy Mowty, in the Venire Facias he is right named, ſcilicet, Dematy; but upon the Panel he is named Demacy, this ſhall be amended. Mich. 17 Jac. B. between *Symons and Mowty*, adjudged.

(D) Amendment *after Verdict*. In what Caſes.

Fol 202.

1. WHERE by the Amendment the Jury ſhould be ſubject to an Attaint, there ſhall be no Amendment. 20 H. 6. 15. Becauſe the Court thought an Amendment after Verdict would be perillous to attaint the Jury, tho' it was the Clerk's Fault, and ſo amendable, it was order'd to be put off till the next Term, and in the mean Time the Court would adviſe. Sty. 207. Hill. 1649. Sanderſon v. Raiſin.

2. If the Record of Niſi Prius does not agree with the original Record, this may be amended after Verdict, if the Amendment does not change the Iſſue. Mich. 10 Car. B. R. per Curiam. Paſch. 14 Jac. B. R. between *Blackborn and Planke*, per Curiam, and otherways e contra. Roll Rep. 371. pl. 25. S. C. not adjudg'd, but it was objected that the thing pray'd to be amended would alter the Iſſue, Quod fuit conceſſum per Cur. and ſo ſeems admitted that it was not amendable. —— And by Coke Ch. J. 3 Bulſt. 161. Trin. 14 Jac. if ſuch Amendment changes the Iſſue, it is plain it ſhall not be amended. ——— See 2 Roll Rep. 312. where Judgment was reverſed, becauſe the Amendment could not be without altering the Iſſue. ——— Roll Rep. 353. S. P. per Coke Ch. J.

3. In Treſpaſs, with a Continuance from ſuch a Day till the Day of the Writ purchaſed, ſcilicet, ſuch a Day, which is miſtaken, after Verdict this ſhall not be amended, becauſe the Jury gave Damages according to the Day alleged, and therefore if it ſhould be amended according to the Date of the Writ, the Jury ſhould be ſubject to the Plaintiff's Attaint for giving too ſmall Damages. Contra 20 H. 6. 15.

4. In

Cro E. 776. pl. 9. S. C. Gawdy and Fenner held clearly, that this Miſnomer of the Feme made it material, and avoided the whole Leaſe, and it is not the ſame Leaſe whereof the Plaintiff declares; but Popham doubted, becauſe the naming the Chriſtian Name is idle, and not material; & adjornatur. But afterwards, Mich. 43 & 44 Eliz. it was reverſed for the Error aſſigned.

4. In an Action, if the Plaintiff makes Title by a Demiſe made by Thomas Bull and Agnes his Wife, and the Parties are at Iſſue, and the Record of Niſi Prius was entred by the Clerk, that the ſaid Thomas Bull and Anne his Wife made a Demiſe &c. and ſo the Record of Niſi Prius differs from the Roll, this ſhall not be amended; for if the Record ſhould be amended, the Jury might be attainted, inaſmuch as they found a Leaſe made by Thomas Bull and Agnes his Wife, and perhaps this Leaſe will not prove a Leaſe by Thomas Bull and Anne his Wife. Mich. 42, 43 Eliz. between *King and King*, per Curiam.

Roll Rep. 353. pl. 1. S. C. and the Court agreed that ſuch Amendment would alter the Iſſue clearly, and therefore it was order'd to ſtay till moved by the other Party.——

5. In an Action upon the Caſe, if the Record of Niſi Prius be that the Teſtator of the Defendant, in Conſideration of ſuch a Thing in certain to him given 30 October 11 Jac. did aſſume to pay ſo many Quarters of Barley before ſuch a Day next enſuing, and for Non-payment the Action is brought, and the Record in Court is, that the Promiſe was made 30 October 10 Jac. to pay the ſaid Quarters at the Day next enſuing. After a Verdict for the Plaintiff, this cannot be amended, becauſe if this ſhould be amended, this would alter the Iſſue, tho' the Miſtake is only in the Day of Payment of the Quarters of Barley. Paſch. 14 Jac. B. R. between *Cooke and Lancaſter*, per Curiam.

3 Bulſt. 161. S. C. and becauſe the Day is a material Part, and makes an Alteration of the Verdict the whole Court held it not amendable, and ſtay'd the Plaintiff's Judgment.

* Br. Amendment, pl. 27. cites S. C. & S. P. For it was Miſpriſion of the Clerk, and the Plaintiff recover'd ſo much as the Jury found, notwithſtanding that others ſaid that the Juſtices of Niſi Prius cannot take the *Inqueſt of more Damages than are in their Record.*——S. C. cited 8 Rep. 162. a.

6. In Treſpaſs, if the Record be to the Damage of 400 l. and the Niſi Prius to the Damage of 40 l. and the Jury find Damage to 400 l. the Record of Niſi Prius ſhall be amended accordingly. 20 H. 6. 15. * 2 H. 4. 6. Co. 8 Black. 157.

Cro. C. 274. pl. 12. S. C. adjornatur. —— Ibid. 278. pl. 17. S. C. and all the Court held it amendable; for the Record being good, and the Clerk having it before him, it is merely a Miſoriſion of him; and the Writ of Diſtringas with the Niſi Prius is ſufficient Warrant to them to proceed, and they all held it directly within the 8 H. 6 cap. 12. and amendable.——Jo 307. pl. 7. S. C. held per Cur. accordingly.—— In Debt upon *Eſcape* the Venire and Diſtringas was Quandam Juratam in placito Tranſgreſſionis, and for this Cauſe Judgment was ſtay'd after Verdict; for it is not aided by the Statute of Jeofails. But if the Ven. Fac. or Diſtringas had been right, it had been otherwiſe. Cro. E. 258. Cottingham v. Griffith & Snow.

7. In an Action of Debt upon 2 E. 6. if all the Record be in placito debiti, but the Jurata in the Record of Niſi Prius, which is in placito Tranſgreſſionis after a Verdict for the Plaintiff it ſhall be amended, for this is only the Default of the Clerk. Mich. 8 Car. B. R. between * *Lemerchant and Rawſon*, adjudged per Curiam, for the Juſtices has Power to take the Niſi Prius by the Writ of Diſtringas and the general Commiſſion to take them.

* Gilb. Hiſt. of C. B. 133. cites S. C.

After a Verdict it was moved to amend the *Jurata in the Record of Niſi Prius*, which *was Ponitur in reſpectu Coram Dom. Rege & Dom. Regina, apud Weſtm.* &c. 20 Die Martii, where it ſhould have been Coram *Dom. Rege only*, and the *Day of Niſi Prius was miſtaken*; for the Aſſiſes were on the 23d of Mar. The *Record was right in both.* The Court held this not amendable; for *in all Caſes where the Record of Niſi Prius hath been amended by the Roll, the Writ of Diſtringas hath been right*, which together with the Niſi Prius is a ſufficient Authority for the Judge to try the Cauſe; but here the *Diſtringas was* wrong; for it was *Gulielmus & Maria* Dei Gratia, *when the Queen was* at that Time *dead.* 5 Mod. 211. Paſch. 8 W. 3. Martin v. Monk.

8. In

8. In Partition against A. and Anthony B. A. confeſſes the Partition, and Judgment given accordingly, ſed ceſſet Executio, and B. pleads to Iſſue, and in the Record of Niſi Prius it is & prædictus ſimiliter, omitting Anthony, but the principal Record was perfect, and the Jurata in the Record of Niſi Prius is between the Plaintiff and A. and B. Defendants, where A. had confeſſed the Action, and Judgment given thereupon, and ſo he is a Stranger to the Iſſue, yet both Faults ſhall be amended, becauſe it is the Fault of the Clerk. D. 9 Eliz. 260. 24. between *Wootton and Coke*, adjudged. D. 261. a. pl. 25. it was held amendable; for as to the Word prædict' it can have no other Intendment but to the Subſtantive which is underſtood, viz. Antonius, and as to the other, both the Record itſelf and the Writ of Niſi Prius declare that the Jury could not be againſt A. becauſe he did not join any Iſſue, and ſuch Miſpriſions in the Records of Niſi Prius have been amended divers Times.——8 Rep. 161. b. 162. a cites S. C. accordingly.——S. C. cited accordingly 3 Bulſt. 161.

9. In an Action upon the Caſe for Words, if the Roll be right, and the Bill upon the File right, and the Niſi Prius wrong, ſcilicet, he (prædictum Willielmum modo quærentem innuendo) is a Thief, whereas William was Defendant; and upon Not Guilty pleaded, the Jury find him guilty, and the Poſtea is endorſed that the Defendant is guilty modo & forma prout the Plaintiff interius allegavit, this Miſtake of the Plaintiff in the Innuendo ſhall be amended, becauſe if the Innuendo was omitted, it would be perfect enough. Paſch. 5 Jac. B. R. between *Pierce and Gore*, adjudged. Fol. 203. Cro. J. 15. pl. 3. Piers v. Gore, S. C. accordly, and the Plaintiff had Judgment.

10. In an Action of Debt upon an Obligation againſt Richard Carey, of which the Condition was That if Richard Carey, or John Carey, do pay ſuch a Sum to the Plaintiff, that then &c. and the Record is further, Et idem Johannes dicit quod ipſe ſolvit the ſaid Sum mentioned in the Condition to the Plaintiff, Et hoc paratus eſt verificare, and the Plaintiff replies Quod prædictus Richardus non ſolvit the ſaid Sum, & hoc petit quod inquiratur per Patriam, & prædict. Richardus ſimiliter, and the Iſſue was found for the Plaintiff; the Word (Johannes) ſhall not be amended and made Richardus, tho' this was the Miſtake of the Clerk; for this will alter the Iſſue; for the Iſſue was joined before other Parties. Paſch. 40 Eliz. B. R. between *Heath and Carey*, per Curiam.

11. If an Iſſue be joined whether J. S. recover'd 200 l. Debt and 30 s. Coſts againſt B. or not, and the Record of the Niſi Prius is ſo alſo; but in the Venire Facias and Diſtringas this is 200 l. Debt and 20 s. Coſts, and the Jury find the Recovery of 200 l. Debt, and 30 s. Coſts, according to the Record, yet the Venire Facias and Diſtringas ſhall not be amended; for it appears that the Jury had no Warrant to find 30 s. Coſts, and the ſaid Writs are the Warrant of the Jury, and therefore if this ſhould be amended, the Verdict ſhould be alter'd. Mich. 18 Jac. B. R.

12. If a Man, being robb'd, brings an Action of Debt upon the Statute of Wincheſter againſt the Hundred, and upon the General Iſſue pleaded the Jury find for the Plaintiff, and the Verdict is enter'd in this Manner, Dicunt pro quærente 222 l. and Damages 12 d. and Coſts 6 d. whereas in this Action all ought to be given in Damages, yet becauſe the Intent appears, this ſhall be amended. Mich. 11 Jac. B. R. *Painter's Caſe*, adjudged.

13. In an Action of Treſpaſs for a Treſpaſs in the Time of K. James, but the Action was brought in the Time of King Charles, and it is contra Pacem dicti nuper Regis, and the Defendant pleads De ſon tort Demeſne, and the Jury find him Guilty, but it is enter'd that he did it of his own Wrong, contra Pacem Domini Regis nunc, this ſhall be amended. Mich. 14 Car. B. R. between *Merick and Doe*, per Curiam, So where a Treſpaſs was done in the time of K. Charles the 1ſt. and in an Action brought af-

terwards the Declaration was Contra Pacem Publicam, and not Contra Pacem Domini Regis, the Court held it only a Miſtake of the Clerk and ſo may be amended, and that as it is there is no Repugnancy in it. Sty. 232. Mich. 1650. B. R. Pindar v. Dawkes

riam, adjudged in a Writ of Error, and the Judgment affirm'd accordingly. Intratur Hill. 10 Car. Rot. 1343.

The Plaintiff declared for ſeveral Treſpaſſes, both in the time of Car 2 and Jac. 2. and had Judgment by Default; After the Return of a Writ of Enquiry Error was aſſign'd for want of an Original. The Cuſtos Brevium certified an Original between the Parties in the Time of Jac. 2. which concluded Contra Pacem noſtram, which was objected could not be the Original in this Cauſe, for it ſhould have concluded Contra Pacem noſtram nec non contra Pacem Caroli Secundi &c. It was moved to amend it becauſe the Inſtructions to the Curſitor were Right; The Court order'd it to be amended; for a Writ of Treſpaſs does not diſtinguiſh Treſpaſſes in one King's Reign or another, but that is only diſtinguiſh'd by the Concluſion, and for that Inſtructions were particularly given according to uſual Manner in ſuch Caſes. 2 Vent. 49. Trin. 1 W. & M. in C. B. Maſſingburn v. Durrant.——2 Ld. Raym Rep. 1058. in a Note there cites S. C. and ſays that all the Difference in the Writs for ſeveral Treſpaſſes, where they are done in one King's Reign, or in more, is in the Concluſion, Contra Pacem of one only, or Contra Pacem of both; which was the Reaſon why the Court in Ventris, held it a Matter of Fact, and not a Matter of Law as was objected, and amendable.

14. In an Action upon the Caſe upon an Aſſumpſit for 43 l. for Arrears due upon an Account, and an Aſſumpſit to pay it, the Defendant pleads Non Aſſumpſit, and this is entred in the Plea Roll, but the Iſſue upon the Niſi Prius Roll is entred Not Guilty, and upon this a Verdict for the Plaintiff, this ſhall be amended; for this is the Miſtake of the Clerk having the Plea Roll before him, out of which he tranſcribed the Niſi Prius Roll, and this does not alter the Verdict, for Not Guilty in an Action upon the Caſe upon a Promiſe hath been held good after Verdict, and Not Guilty is Non Aſſumpſit, and more, for he cannot be Guilty unleſs the Aſſumpſit was made, and ſo the Iſſue is all one in Effect, and this Amendment cannot attaint the Jury. Paſch. 15 Car. B. R. between *Still and Jacob*, adjudged per Curiam. Intratur. Hill. 14 Rot. 376.

Fol. 204.

(E) Amendment per 8 H. 6. cap. 15. [*Defaults in the Venire Facias, Habeas Corpus, and Diſtringas.*]

See (B) pl. 1. 9. 10. and ſee a like Head infra.

1. If the Venire Facias be erroneous, and the Diſtringas good, and the Trial upon the Diſtringas, this ſhall not be amended; becauſe the principal Proceſs is not good, *Hungerford's Caſe*, adjudged. Cites Trin. 38 Eliz. B. R. *Earl of Rutland*, 42 Coke 5.

* This is miſprinted, and ſhould be 5 Rep. 41. b. Rowland's Caſe. —Cro E. 310. pl. 20. Stainer v. James, S. C. accordingly.

2. If upon the Venire Facias the Sheriff makes no Return, nor any Name of the Sheriff appears upon the Back of the Writ, Nec quod Executio iſtius brevis patet in quodam Pannello huic brevi annexo, but this is album breve, this ſhall not be amended by this Statute after Verdict, upon Examination of the Sheriff, becauſe this is the principal Proceſs. Co. 5. * *Roteland* 41. b. adjudged; and there cites † 35 Eliz. B. to be ſo adjudged.

† The Caſe of Barney v. Walkley, cited Cro. E. 310. in pl. 20. as ruled in C. B. ——3 Bulſt. 220. cites Rowland's Caſe, and S. P. held there accordingly. Mich. 14 Jac. Ackerige v Conham.

No Return was made either *upon the Ven. Fac. or Diſtringas*. This was held per tot. Cur. to be good Cauſe to ſtay Judgment after Verdict, and that it is not aided by the Statutes; for they aid Miſreturns or Inſufficient Returns; but here is no Return, and ſo not aided, and Judgment was ſtaid. Cro. E. 587. pl. 20. Mich. 39 & 40 Eliz. B. R. Becknam v. Rye.

The Court refuſed to amend a *Ven. Fac.* which was *album breve*, tho' the *Sheriff's Name was put to the Panel*; but if the Sheriff upon the Venire Facias had *returned that the Execution of that Writ did appear in*

in a certain Panel annexed to that Writ, *and* had not *put his Name* to the Writ of Ven. Fac. but *to the Panel*, in such Case the Court would have amended the Ven. Fac. Brownl. 43. Trin. 15 Jac. Griffin v. Palmer.

3. But if the Venire Facias be well returned, but the Issue is tried upon the Habeas Corpus, and this is album breve, and no Return thereupon, yet in as much as the Venire Facias, which is the principal Process is well, this shall be amended upon Examination of the Sheriff by this Statute, for this is a Default in a Return, as the Statute mentions. Contra my Reports 10 Jac. B. between *Porter and Blunt*, adjudged, and Hobart's Reports 174. between * Wilby and Wansey.

* Hob. 130. pl. 171. Wilby v. Quinsey. Hill. 4 Jac. S. C. that a new Venire Facias was awarded.—— Mo. 868. pl. 1203. cites it as rul'd accordingly, Hill. 12 Jac. Wilby v. Gumy, and seems to be S. C.

4. So if the Venire Facias be well returned, and the Issue is tried upon the Distringas, and this is album breve, and no Return thereupon, this shall be amended upon Examination of the Sheriff, because the principal Process is well, for this is a Default in a Return, as the Statute mentions. Mich. 15 Jac. B. R. between *Churcher and Wright*, adjudged per totam Curiam. Trin. 39 Eliz. B. R. between *Wortley and Broadhead*, adjudged, the Sheriff not being out of his Office, and the Record being in the same Court where it was returned. Contra By Reports, 10 Jac. *Chaplain and Somes*, adjudged.

Assumpsit. The Parties were at Issue, and a *Venire* awarded and returned, and also a Distringas, and the Matter tried by Nisi Prius; but it did not appear upon the Back of the Distringas that it was returned. All the Justices held, that it being *in the same Term* wherein it came in, it may be amended; but if it were in another Term, it could not be amended. Upon Examination of the Sheriff that he intended to return it, it was amended, and Judgment for the Plaintiff. Cro. E. 406. (bis) pl. 21. Pasch. 38 Eliz. B. R. Weare v. Woodliff.

After Verdict for the Plaintiff it was moved in Stay of Judgment, that the Name of the Sheriff was not indorsed to the Writ of Distringas with Nisi Prius, the Court held it to be ill, and not amendable, nor help'd by the Statute 32 H. 8. and 18 Eliz. and said it is all one with the Case of Ven. Fac. where the Name of the Sheriff is not thereto, which had been often adjudged not to be amendable, wherefore ruled the Trial was ill. Cro. J. 188. pl. 10. Mich. 5 Jac. B. R. Holdesworth v. Procter.——— Yelv. 110. S. C.

5. If upon the Return of the Habeas Corpora of a Jury, the Surname of the Sheriff be omitted, as if it be Bartholomæus Miles Sheriff, and (Michell) which was his Surname omitted, this shall be amended. Hobart's Reports 158. between *Kent and Hall*, adjudged.

Hob. 113. pl. 135. Mich. 42 & 43 Eliz. in Case of Kent v. Hall.

Where the *Sheriff's Name* was *not to the Return of the Habeas Corpora*, *nor* of the *Writ where the Decem Tales was returned*, these were held manifest Errors, per tot. Cur. and the Judgment reversible for that Cause. Cro. E. 509. pl. 34. Mich. 38 & 39 Eliz. B. R. Blodwell v. Edwards.

6. In Trespass, if the Venire Facias and Habeas Corpora are in Placito debiti, and thereupon a Verdict is found for the Plaintiff, this shall be amended. Hobart's Reports, Case 306.

Hob. 246. pl. 308. Harris v. Ap-John, S. C. and the Court amended it.———Brownl. 232. S. C. and it was amended, and made De placito Transgressionis; per tot. Cur. ——S. C. cited Arg. 2 Ld. Raym. Rep. 1143. but Holt Ch. J. said that the Case in Hob. had been held otherwise.——— Cro. J. 528. pl. 6. Pasch. 16 Jac. B. R. the S. P. Booth's Case, and a Venire Facias de Novo was awarded.

In Trespass Quare Clausum fregit, the *Venire Facias* was awarded *in placito Transgressionis super Casum*, and the *Issue-Roll* was *in placito Transgressionis only*. It was agreed that it should be amended; for the Issue-Roll is the Warrant for the Clerk. Litt Rep. 54. Mich. 3 Car. C. B. Anon.

7. If a Venire Facias be, and habeas ibi hoc breve, without these Words, Nomina Juratorum, which ought to be in of Necessity, because otherwise the Court cannot know who are Jurors, nor whom to call to be sworn, yet after a Verdict upon this Writ it shall be amended,

* See (B) pl. 32. S. C. —— † Hob. 68. pl. 75. S. C. for the Ven.

Fac. is warranted, and must be amended by the Roll.

mended, this being a Judicial Writ. (It seems to be intended by this Statute. Mich. 32, 33 Eliz. B. R. * *Taylor's* Case, per Curiam. Hobart's Reports, between † *Priddy and Massie*, adjudged.

8. If a Venire Facias be quorum quilibet quatuor libras Terræ, so that this Word (habeat) was omitted out thereof, this shall be amended after the Verdict. Mich. 40, 41 Eliz. B. R. adjudg'd.

Cro. E. 467. (bis) pl. 24. Pasch. 38 Eliz. B. R. S. C. — Mo. 465. pl. 657. S. C.

9. If the Word Duodecim be left out of the Venire Facias, yet this shall be amended after a Verdict B. R. between *Willoby and Gray*, adjudg'd. Cited Mich. 40, 41 Eliz. B. R.

Ow. 59. S. C. — Noy. 57. S. C. but S. P. does not appear in any of those Books.

10. If the Words quorum quilibet are omitted out of the Venire Facias, it shall be amended after Verdict. Mich. 35 Eliz. B. between *Haley and Lawes*, cited Mich. 40, 41 Eliz. B. R.

If the Number of the Qualifications be omitted in the Venire, yet it is sufficient, because that is ascertained by the Law, and amended by the Roll. G. Hist. of C. B. 132.

(*) Fol. 205.

11. If the Words qui nulla affinitate attingunt are left out of the Venire Facias, it shall be amended, because this is a Judicial Writ, and the Fault of the Clerk. Mich. 16 Car. B. R. between *Woodland and* (*) *Danvers* adjudg'd, this being mov'd in Arrest of Judgment.

Cro. C. 595. pl. 12. Sloper v. Child, S. C. accordingly. — Trespass was brought in the County of Salop, and after Issue between the Parties, and Venire Facias awarded on the Roll,

12. After Issue join'd, if upon the Roll a Venire Facias be awarded to the Sheriff of the County of Somerset &c. and upon this a Venire Facias is made in this Manner, Carolus Dei Gratia Somerset salutem &c. leaving out the Word (Vicecomiti) and upon this the Sheriff of Somerset returns a Jury, and thereupon a Verdict &c. this shall be amended by the Roll, because this was the Default of the Clerk merely, having the Roll before him when he made the Writ, by which he was directed to direct the Writ to the Sheriff of Somerset. Mich. 16 Car. B. R. between *Child and Sloper*, adjudg'd per Curiam, in a Writ of Error upon a Judgment in Banco, and the Judgment affirm'd per Curiam. Intratur. Mich. 15 Car. Rot. 651.

(which Award is always general) the *Venire Facias was* (*Vicecomiti*) omitting (*Salop,*) a *Space being left* for it in the Writ, yet it was really executed by the Sheriff of Salop. And Gawdy held that it should be amended; and by Fenner and Williams, *this is as no Writ, because not directed to any Officer*, and then it is aided by the Statute of Jeofails. Yelv. 64. cites it as Pasch. 3 Jac. B. R. Lee v. Lacon. — Brownl. 202. S. C. that it was only the Default of the Clerk, and was amended. — Cro. J. 78. pl 9. S. C. and it being warranted by the Roll, which is well, and it being judicial, it may be amended. — Yelv. 69. S. C. The Court held that the best way is to amend it; and they took this Diversity; where the Action is laid in the County of Salop, and upon pleading Specially the Issue is drawn to a Foreign County, there the Entry and the Award of the Venire on the Roll is Special, viz. to the Sheriff of the County where the Issue is to be tried, and therefore in such Case the Venire with a Blank will not be good, because it stands indifferent to the Sheriff of which County it was intended, and therefore ill, for the Uncertainty. But where the General Issue is taken, or Matter triable in the same County where the Action is laid, there the Venire Facias in the Award upon the Roll is only thus, viz. Fiat inde Jurata, which must necessarily be to the Sheriff of the County where the Action is brought, and cannot be intended otherwise, and therefore is only the Default of the Clerk, which shall be amended, and so it was. — S. C. cited by Powell J. 2 Ld. Raym. Rep. 1067.

(F) Amend-

(F) Amendment per 8 H. 6. 15. of a Judgment.

1. A Judgment may be amended in Matter of Fact, where it is the Mistake of the Clerk. In Debt, the Plaintiff had Judgment to recover 8 l. but in the Entry the Clerk makes it 3 l. but the Mistake was amended in Court, and made to agree with the Record, it being the mere Mistake of the Clerk. Bulst. 217. Trin. 10 Jac. Benton v. Aymes.

Matter of Fact in a Judgment is a naked Entry of the Clerk, which shall be amended; as Misnosmer of one Name for another, or of one Year for another, and shall be amended according to the Residue of the Record; But *Matter of Law* which is the Act and Resolution of the Court, if that be mistaken, tho' it be by the Negligence of the Clerk, it shall not be amended; As (Capiatur for (Misericordia) &c. See Palm. 198. Trin. 19 Jac. B. R.

2. In an Action upon the Case, if the Plaintiff recovers Costs, and further the Record is enter'd that he shall recover per Incrementum assessed per Jur. 10 l. where it ought to be per Curiam, for the Court increases it, and not the Jury, tho' here be but a Letter mistaken, scilicet, an J. for a C. yet because this is in a Judgment it cannot be amended by the Statute. Mich. 38 39 Eliz. [Eliz.] B. R. *Bysop's* Case adjudged in a Writ of Error. Cro. E. 491. pl. 17. Harcourt v. Bishop S. C. and held not amendable; for it is the Default of the Court in the Judgment, which never is amendable; For if it had been omitted by whom they were assessed, it had been clearly ill; and it is the same when enter'd to be assessed by a wrong Person, it is not amendable. ——Goldsb 151. pl. 78. Hill. 43 Eliz. Harecourt's Case S. C the Court at first held that if it was the Default of the Clerk it might be amended; but because the Record was at the first (Jur.) for (Cur) as it was certified the Court held it not amendable, because it is Parcel of the Judgment, and that the Judgment of the Court never was amended here.

3. In an Action upon 2 Edw. 6. of Tithes, if the Plaintiff declares that the Defendant was Occupier of certain Lands, and sow'd it with Buck-Wheat, Barley &c. and after cut the said Wheat, Barley &c. growing upon the said [Lands,] and carried it away without setting out the Tithes, and upon Nil Debet pleaded, a Verdict was given for the Plaintiff for the Wheat, Barley &c. and after Judgment is given to recover the said Debt given by the Jury for the said Buck-Wheat, Barley &c. this shall be amended; for in all the Record no mention is made of Buck, but only that it was sown, and perhaps it did not increase, and the Judgment refers to the Verdict, which was before the Clerk, and so perhaps his Fault. Tr. 1650. between *Gibon and Kent*, adjudged in a Writ of Error upon a Judgment in B. Intratur 24 Car. Rot. 60. Sty. 212 Gibbon v. Kent S. C. but S. P. does not appear

4. If a Judgment be given against the Plaintiff upon a Demurrer, and the Judgment is enter'd in this manner, at such a Day the Plaintiff exactus non venit, ideo nihil capiat per breve, which is the Form of the Entry of a Nonsuit, and not of a Judgment upon Demurrer; for upon the Demurrer it is not Quod exactus non venit, this shall be amended; for this is the Default of the Clerk. Hill. 13 Jac. B. R. between *Wheeden and Sugg*, adjudged. Roll Rep. 309. pl. 19. S. C. and the Court agreed that it might be amended notwithstanding the Error was in another Court, and Judgment was given to amend it. ——Cro. J. 372. pl. 2. S. C. but S. P. does not appear.——G. Hist. of C. B. 141. S. P.

5. If a Jury finds for the Plaintiff, and gives 2 s. Damages, and so much for the Costs, and the Clerk in the Entring thereof says 2 s. for Damages, and so much for Costs, and so much pro Incremento quæ in toto se attingunt to so much, in which Sum the 2 s. is not comprehended, Roll Rep. 272. pl. 45. Anon. S. C. accordingly. ——3 Bulst.

114 in a Nota there ſeems to be S C. and becauſe it

hended, this ſhall be amended, becauſe this is the Default of the Clerk only in miſcasting the total Sum. Mich. 13 Jac. B. R. adjudged.

was in the ſame Term, and the Oniſſion of the Clerk only in the Account, and caſting up the Quæ in toto, which is not very material, the ſame was amended by Rule of Court.——See D 55 b. pl. 8 Trin 35 H. 8 Trewinnarde v. Skewys. where it is held that ſuch miſtaking is the Default of the Clerk.——G. Hiſt. of C. B 141. ſays the Court will amend it by the Judgment Book, becauſe that is a ſufficient Inſtruction to the Clerk to enter the Judgment by; and therefore it was his Miſpriſion not to go according to his Inſtructions which may be rectified and amended. See Tit. Miſcaſting per totum.

6. In Treſpaſs for a Battery, if the Defendant appears and imparls to a Day the ſame Term, and no idem Dies is given to the Plaintiff, tho' it be enter'd that the Defendant habuit Diem &c. uſque &c. per Curiam &c. ſo that this is the Judgment of the Court, and tho' after Judgment be given by Nil dicet againſt the Defendant, yet this ſhall be amended, * being the Fault of the Clerk not to enter the Continuance. Paſch. 10 Car. B. R. between *Margse and Melkuiſh*, adjudged per Curiam, after a Writ of Error brought in Camera Scaccarii thereupon.

* Fol. 206.

So where it was found for the Plaintiff for 10 Meſſuages, 15 Acres of Meadow, and 20 of Paſture, and Not Guilty as to the Reſidue, and this being enter'd thus of Record, the Judgment was that the Plaintiff recover the Meſſuages, and a greater Quantity of Acres than was in the Verdict, and upon Error brought it was reſolv'd by 5 Juſtices, (abſente Hutton) that this is the Default of the Clerk in not entring the Judgment according to the Verdict, and upon View of diverſe Precedents ſo reſolved the Record was amended Jo. 9 Mich. 18 Jac. Anon.——Cro. J. 631. pl. 5. Maſon v. Fox & al'. Hill. 19 Jac ſeems to be S C. and reſolv'd accordingly by all the Judges of B. R. and Barons of the Exchequer, except Tanfield Ch. B. who doubted.

7. In an Ejectione Firmæ for one Meſſuage, two Cottages, and certain Lands, the Jury find the Defendant guilty as to a Moiety of the Meſſuage and Land, and Not guilty for the two Cottages and the other Moiety of the Meſſuage and Land, and Judgment is given Quod querens recuperet Terminum ſuum prædict. de medietate Tenementorum prædictorum, & eat ſine Die for the reſt, tho' it may be intended that this Judgment is given for the Moiety of the two Cottages, of which he is found Not guilty, inaſmuch as it is Tenementorum prædictor' yet it ſhall be amended, being only the Default of the Clerk, having the Poſtea before him when he enter'd the Judgment. Mich. 13 Car. B. R. between *Sawyer and Hawkins*, per Curiam, amended; and they ſaid this was amendable by the Common Law, without the Help of any Statute.

8. In an Ejectione Firmæ of Land, if upon Not guilty pleaded a Verdict is found for the Plaintiff, and Coſts and Damages given per Curiam, and thereupon Judgment is given Quod querens recuperet the Damages and Coſts, and not Quod recuperet Terminum as the Uſe is, this is the Fault of the Clerk, this being the uſual Judgment in this Action, tho' it be but a Treſpaſs in its own Nature, and therefore it ſhall be amended. Hill. 15 Car. B. R. between *Belch and Pate*, per Curiam, amended upon a Motion after a Writ of Error brought in Camera Scaccarii.

Hob. 127. pl. 159. Scaiſe v. Nelſon. Mich. 12 Jac. S. C.—Mo. 869. pl. 1206. Skaifes v. Nelſon, S. C. accordingly.

9. In an Action upon the Caſe againſt Baron and Feme for ſcandalous Words ſpoke by the Feme, and Judgment given for the Plaintiff, and the Feme only in Miſericordia, where the Baron alſo ought to be, and yet if it be right in the Prothonotary's Book, it ſhall be amended. Hobart's Reports 27. between *Scarſe and Nelſon.*

——Brownl. 16. S. C. accordingly——Cro J. 633. in pl. 5. cites Nelſon v. Skeits, S. C. accordingly.——S. C. cited Raym. 39. Arg.——Gilb. Hiſt. of C. B. 142. cites S. C.

10. If

10. If the Mayor, Commonalty, and Citizens of London bring an Action of Debt against B. and recover, and Judgment is given that the Mayor, Commonalty, and Citizens recover the Debt, and 20 s. Costs de Incremento ad Requisitionem Majoris & Communitatis, and it is not Civium, as it ought to be; for Costs de Incremento ought not to be given without the Assent or Request of the Plaintiff, yet if the Docket, which is the Warrant to the Clerk for the Entry of the Judgment, be right, and the Word (Civium) therein, it shall be amended; for it was the Default of the Clerk. Hill. 15 Car. B. R. between the *Mayor and Commonalty of London and Heyling*, after a Writ of Error brought, and this assigned for Error. Cro. C. 574. pl. 15 Beal lys v. the Mayor &c. of London S. C. awarded accordingly. * See 16 & 17 Car. 2. S. 1. where it enacts, that "no Judgment after "Verdict, "Confession by Cognovit Actionem, or relicta Verificatione, shall be revers'd, for that the Increase "of Costs, after a Verdict in an Action, or upon a Nonsuit in Replevin, are not enter'd at the Request of the Party for whom Judgment is given."

The Names of the Plaintiff and Defendant may be amended if the Docquet be right; but if the Docquet Roll and Judgment be both mistaken, Quære whether this will be amended; for the Docquet Roll is the Index to the Judgment, and made at the same Time, in order that Purchasers may find out such Judgments, and be safe; therefore if the Docquet Roll be right, the Judgment will without Doubt be amended, because there is a proper Indication to Purchasers that there is such a Judgment, and there is sufficient in the Record from whence to amend the Judgment, but if the Docquet and Judgment both be wrong in the Names, the Purchasor may be deceived; and Quære, how far the Court will amend the Judgment, tho' there be sufficient Instructions on the Record to amend it by; because a Purchasor may be defeated of his Title by this Amendment, tho' he has done every Thing the Law requires to make him safe in his Title. But since the Stat. 4 & 5 W. 3. cap. 2. the Court will amend the Judgment, but not the Docquet, if the Judgment be right and the Docquet wrong. Before the Statute the Judgment bound the Lands, because the Judgment was the Lien on the Lands, and the Docquet no more than an Index to find the Judgment readily, and the Stranger aggrieved by such misdocqueting had only his Remedy against the Officer for not docqueting them truly. But since the Statute such Judgment does not bind the Purchasor, for a false Docquet is as none. G. Hist. of C. B. 140, 141.

11. In an Action of Debt in the Common Pleas by Bill against an Attorney, (as it ought to be) if Judgment be given upon Demurrer against the Plaintiff, but it is enter'd Quod querens nil capiat per Breve, where it ought to be per Billam, the action being brought by Bill, this shall be amended, because this was the Fault of the Clerk, inasmuch as he enter'd it having the Record before him. Mich. 16 Car. B. R. between *Burbidge and Raymond*, adjudged per Curiam, in a Writ of Error upon such a Judgment in Banco. Intratur Trin. 15 Car. Rot. 1657. and the Judgment in Banco affirmed accordingly. Cro. C. 580. 581. pl. 5 Reymond v. Burbeng S. C. says, it was held a manifest Error, unless it were the Mistake of the Clerk and amendable; but not to be accounted the Entry of the Clerk only. But the Court would be advised. the Court doubted thereof, because it was in the Judgment which is by the Court, and

12. If the Defendant in an Action in B. R. appears and pleads, but does not put in any Bail, the Defendant, after a Verdict for the Plaintiff, shall not have Advantage of his own Default to stay the Judgment; but he shall be compell'd to put in Bail. Trin. 39 Eliz. B. R. between the *Lord Darcy and Tirret*. Adjudged contra Mich. 11 Jac. B. R. per Curiam.

13. But in an Action of Trespass in B. R. against two, if one puts in Bail, and the other not, but both plead to Issue, and a Verdict passes for the Defendants, and after the Plaintiff shews this Matter to the Court that no Bail was enter'd for one of the Defendants, the Defendants shall not after be received to put in Bail, because this was their own Fault. Trin. 16 Jac. B. R. between *Gabriel Dennys*, Plaintiff, *against Smallridge and Bremblecombe*, Defendants, adjudged in Arrest of Judgment per totam Curiam. Fol. 207.

14. If A. recovers against B. but there is not any Common Bail filed for B. and the Attorney of B. is dead, but it appears to the Court that the Attorney had received his Fees for the Entry thereof, and this Roll Rep. 372. pl. 27. S. C. and the Bail was en-

ter'd accordingly —— 3 Bulſt. 181. S. C. accordingly, and Bail was now enter'd as of the ſame Time in which it ought to have been enter'd.

this appears by the Attorney's Book, tho' the Attorney cannot now be examined, yet this ſhall be enter'd upon this Matter. Paſch. 14 Jac. B. R. between *Denham and Cumber*, adjudged.

* Roll Rep. 82. pl. 27. Bolde v. Walter, S. C. accordingly; for there is no Reaſon that the Entry by the Clerk ſhall prejudice the Party, and ſo it has been often ruled.

15. If a Special Verdict be found, and a material Thing is not enter'd in the Record, but this Thing is found in the Notes under the Hands of the Counſel of both Parties for the Special Verdict, this may be amended by the Notes, tho' the Record was made up, and the Judgment given, without the finding of this Thing; for the Jury found all that was in the Notes. Mich. 12 Jac. B. R. between * *Bowlde and Walter*, adjudged. H. 4 Jac. B. R. between *Hill and Prowſe*, adjudged.

Hob. 184, pl. 224. Trin. 15 Jac. S. C.

16. A Record may be amended according to the Book of the Office. Hobart's Reports 249. *Chamberlayne's Caſe*, per Curiam. which was an Action on the Statute of Hue and Cry, and after Iſſue joined and enter'd the Record was of a Robbery done the 30th of October, but upon the Oath of the Plaintiff's Attorney that the Book of the Office was September, and ſhewing the Book, the Court ordered it to be amended.

In B. R. they will amend both the Bill and the Roll of the Office Paper-Book, becauſe this is Inſtructions for making them both; but they cannot amend from any other Paper-Book, becauſe ſuch Book is not Inſtructions left in the Office to make up both the Roll and the Bill. But where there is no Office Book, as where the General Iſſue is pleaded, it ſeems they ſhould amend either the Bill or the Roll, by the Declaration by which they gave the Defendant a Copy, becauſe ſuch Declaration is the only Inſtruction to the Clerk of the Office to enter. G. Hiſt. of C. B. 115.

Lat. 165. Arg. cites S. C. by the Name of Gleſon v. Weſt.

17. In an Ejectione Firmæ, if the Bill be not perfect, but Spaces left for the Quantities of the Land and Meadow, and after the Paper-Book given to the Party is made perfect, and the Plea-Roll, and Niſi Prius Roll, but the Bill upon the File is not yet made perfect, and after a Verdict is given for the Plaintiff, this Imperfection of the Bill ſhall be amended, becauſe the Party is not deceived thereby, becauſe the Paper-Book which he had was perfect, and this was the Neglect of the Clerk not to amend the Bill when the Party gave him Information of the Quantity. Trin. 15 Jac. B. R. between *Leeſon and Weſte*, adjudged.

18. In Debt againſt an Executor, if the Defendant pleads Nothing in his Hands &c. and the Plaintiff replies, Aſſets die impretationis billæ, ſcilicet, and leaves a Blank for the Day, and after in the Paper-Book a Day is put in, and in the Niſi prius Roll, but no Day is in the Bill upon the File, and after it is found for the Plaintiff, ſcilicet, that the Defendant had Aſſets &c. the Plea Roll ſhall be amended according to the Paper-Book and the Niſi prius Roll; for neither the Party nor Jury are deceived thereby. Mich. 12 Jac. in Camera Scaccarii, between *Dame Platt and Goldſmith*, adjudged; Quod vide Mich. 12 Jac. B.

In Trover and Converſion, the Imparlance Roll *wanted the Day and Year of the Poſſeſſion and Converſion*, but upon a Motion after Verdict in Arreſt of Judgmett, the Iſſue Roll was amended. Hutt. 84. Hill. 12 Jac. Parker v. Parker.——Brownl. 9. S. C. ſays it was enter'd with Spaces for the Poſſeſſion and Converſion, but both thoſe Spaces in the Iſſue were filled up and held good.—— Hob. 76. pl. 69. S. C that the Imparlance Roll had Spaces, but the Iſſue Roll and all the Reſt were perfect in this Point; The Court were of Opinion that the Imparlance Roll could not be amended by

19. If the Imparlance Roll in Bank differs from the Plea Roll in Matter of Subſtance, yet this ſhall not be amended by the Plea Roll, but the Plea Roll may be amended by the Imparlance Roll, becauſe the Imparlance Roll is the Ground of all. Mich. 13 Jac. between *Barker and Parker*, per Curiam.

by the Iſſue Roll, becauſe it was the Original, and was to warrant the other, but becauſe upon Not Guilty Verdict was given for the Plaintiff, the Court gave Judgment for him, the Declaration as it was found in the Imparlance Roll being good enough in Matter; for the Trover and Converſion was laid in the preterperfect Tenſe, and ſo before the Action brought, and ſo the Default in the Declaration being only in the Form was holpen by the Statute of Jeofails.——S. C. cited Litt. Rep. 279. by Moyle Prothonotary, who ſaid he feared that it would be amended, and therefore he moved for a Recordatur, and Error brought thereupon—— Het. 143. S. C. cited by Moyle accordingly.——Lat. 165. cites S. C. and ſays, That though a Recordatur was enter'd, yet the Plaintiff had Judgment.——See (B) pl. 12. S. P.

20. In Trover and Converſion, if the Bill upon the File be that he was poſſeſſed of Goods at D. and loſt them, and the Defendant found them, and after converted them to his own Uſe, and no Place is put of the Converſion, nor any Space left for the Place of Converſion; but after the Declaration is made perfect with the Place of Converſion, ſcilicet, D. where the Poſſeſſion and Trover was, and the Paper-Book given to the Defendant, and the Niſi Prius Roll and all the Record was perfect, beſides the Bill upon the File which is not amended, and upon Not guilty pleaded, a Verdict is given for the Plaintiff, and * this being aſſign'd for Error in Camera Scaccarii, was amended per Curiam. Trin. 7 Car. B. R. between *Rouch and Browne*, adjudged, becauſe neither Party nor Jury are deceived thereby, and upon the ſhewing of this Amendment in Camera Scaccarii, the Court there affirm'd the Judgment without a new Writ of Diminution. See (H) pl. 5. S. C. and the Note there. * Fol. 208.

21. If it appears to the Court that in a Venire Facias the Word Chimly is raſed and made Himly, this ſhall be amended. Mich. 10 Jac. B. R. adjudged, per Curiam.

22. In an Ejectione Firmæ upon a Leaſe made the 10 May, and after a Verdict for the Plaintiff, this is raſed and made 11 May, by which it is erroneous, yet if it appears to the Court that it was raſed and made ſo without lawful Authority, it ſhall be amended tho' the Raſure be Felony. Mich. 2 Car. B. R. between *Foſter and Taylor*, adjudged in a Writ of Error, this being alſo amended before in Banco. Poph. 196. S. C. and per tot. Cur. it was amended after Error brought, but nothing is mentioned there of the Felony.

——Lat. 162 S. C. accordingly.——G. Hiſt of C. B. 146. S. P. and ſeems to intend S. C. and ſays that if any Part of the Record be vitiated by Raſure they will reſtore it by Amendment, becauſe the Wickedneſs of any Perſon in corrupting the Records of the Court ought not to obſtruct the Juſtice of the Court, or prejudice any of the Parties.

Judgment was enter'd againſt A. and M. his Wife, but the Word *M. was raſed*, as appear'd plainly upon View of the Record. M. was taken in Execution, and ſhe brought a Writ of Error in the Exchequer-Chamber, for that no Judgment was had againſt her. It was moved that this being an apparent Practice to avoid the Execution the Record might be amended, and a Special Entry made that it was raſed and amended, to which the whole Court agreed. 2 Roll Rep. 80. Paſch. 17 Jac. B. R. Whiting v. Abington.——But it was touch'd by Haughton, that if the Record ſhould be amended and the Judgment made perfect, then the Delinquent could not be impeach'd of Felony for the Raſure; for the Statute is, That if the Raſure was ſuch, that the Judgment be defeated &c. But Mountague Ch. J. and Yelverton J. were of a contrary Opinion clearly, and that the Raſing the Record is the Offence that makes the Felony, and not the annulling the Judgment thereby. 2 Roll Rep. 82. in the Caſe of Whiting v. Abington.

23. In *Aſſiſe*, if the *Plaintiff be eſſoign'd* this Eſſoign ſhall be *enter'd in the Roll of the Aſſiſes and not in the Eſſoign Roll*, and if it be it is Miſpriſion of the Officer, and ſhall be amended. Br. Amendment, pl. 91. cites 30 H. 6. 1.

(G) Per 8 H. 6. In what Caſes it may be.

Br. Amendment, pl 5. cites S. C. and ſays. Sic Vide, that for Default in the Count the Writ ſhall abate and not the Count only.——Br. Count, pl. 12. cites S. C. ——Fitzh. Amendment, pl. 28. cites S. C.——8 Rep. 161. a. cites S. C.

1. IN Treſpaſs in London, the Declaration was enter'd in the Roll, and dies interloquendi given, and becauſe a Space was left for the Pariſh and Ward which were not put in the Roll, the Plaintiff would have amended it, but the Defendant would not ſuffer it, and adjudged that it ſhould not be amended, but Judgment was given againſt the Plaintiff. 20 H. 6. 18.

2. If a thing which the Plaintiff ought to have enter'd himſelf, being a Matter of Subſtance, be totally omitted, this ſhall not be amended; but otherways it is if it be not totally omitted, but only in Part, and miſenter'd. 10 H. 7. 23. b. per Curiam.

Br. Amendment, pl. 113. (112.) cites 11 H. 7. 26. [a. pl. 8.]

3. If in an Aſſiſe the Tenant pleads in Bar, that A. a Stranger was ſeiſed, who enfeoffed B. who died ſeiſed, whoſe Eſtate he himſelf hath, and the Plaintiff claiming in by a Deed of Feoffment &c. upon whom D. enter'd, upon whom the Plaintiff enter'd, where it ſhould be upon whom the Tenant enter'd; ſo that there is only a Miſtake of Plaintiff for Tenant in giving Colour this ſhall be amended becauſe the Fault of the Clerk. 10 H. 7. 23. in a Writ of Error. * 11 H. 7. 2.

* This is at 11 H. 7. 2. a. pl. 7.

4. If a Defence is omitted or an * Averment, ſcilicet, the which Matter he is ready to aver, this ſhall not be amended. 10 H. 7. 23. b.

* But ſee Stat. 16 & 17 Car. 2. cap. 8. which helps the Want thereof after Verdict.——Br. Amendment, pl 113. (112.) cites † 1 H. 7. 23.

† This is a Miſtake and ſhould be according to Roll.

All. 69. Read. v. Palmer S. C.

5. After Verdict in Aſſumpſit it was mov'd, that the Plaintiff had *altered his Count in the Conſideration of the Promiſe, and in the Promiſe itſelf after he had pleaded*, ſo that thereby the ſame Iſſue which is tried is not that which was join'd; for the Action was brought on a Special Promiſe, and not on a Promiſe in Law, as the Alteration would make the Promiſe to be, and therefore it is a material Alteration. And per Roll Ch. J. the thing alter'd is material, and ought not to be amended. Sty. 117. Trin 24 Car. Reader v. Palmer.

6. If a *Clerk miſenters a Thing uſual* in Matter of Form, it is to be amended; *but* the *Error of the Judge* may *not* be amended; held by Roll Ch. J. as a Rule. Hill. 1654. Sty. 412. in Caſe of Barker v. Elmer.

(H) At what Time it may be.

* Cro J. 429. pl. 4. S. P. in the ſame Term and Year, and ſeems to be S. C. —— Error was

1. IF a Writ of Error be brought in Camera Scaccarii upon a Judgment in B. R. and this allow'd, and a Tranſcript of the Record certified (as the Uſe is, for the Record remains in B. R.) yet after this the Judges of the King's Bench may amend the Record, which is there, in a Matter amendable, for thereupon the Party may allege

allege Diminution, and ſo make the Amendment appear in Camera Scaccarii, and ſo be help'd. Trin. 15 Jac. B. R. per totam Curiam adjudged præter Houghton, who held ſtrongly e contra, Mich. 25 Jac. between the Leſſee of *Sir Walter Coap* and another, adjudged per totam Curiam; for when the Record is amended here, the Clerk of the Court may go into Camera Scaccarii and amend the Tranſcript according to the Record. Tr. 19 Jac. B. R. *Sir George Trencher's* Caſe, adjudged.

brought to reverſe *Outlawry in Writ of Debt* which was *againſt J. B. of C. Knight*, and the *Capias was accordingly*, but

the *Alias*, the *Pluries Capias, and the Exigent omitted Knight*, and this was aſſign'd for Error, and by the Opinion of the Court it may be amended by the Stat. of Leiceſter, as well *after the Record is removed for Error* as before. Br. Amendment, pl. 31. cites 7 H. 6. 27.

A *Special Verdict* was amended *after Error brought and Record removed* out of C. B. Trin. 34 Car. 2. B. R. Nailer v. Clarke. 2 Jo. 211. 212.

2. If a Man recovers in Replevin in B. and after a Writ of Error is brought thereupon, and a Mittitur enter'd upon the Record, yet they may after receive a Warrant of Attorney; and it ſhall be enter'd. Trin. 9 Jac. B. R. between *Chalke and Peeter*, dubitatur.

Fol. 209. Godb. 167. pl. 235. S. C. —2 Brownl. 289. S. C.——8 Rep. 136. b. Sir Francis Barrington's Caſe S. C.—— But I do not obſerve S. P. in either of thoſe Books.

3. In an Ejectione Firmæ upon a Leaſe made 10th of May, after a Verdict for the Plaintiff it is made the 11th of May by a Raſure, and thereupon a Writ of Error is brought, and aſſign'd for Error that he hath declared upon a Leaſe made the 11 May, which is plain Error; yet if upon Examination it appears to the Court that it was made bad by a Raſure, it may be amended, and made the 10 May as it was before, tho' this Error be aſſign'd. Mich. 2 Car. B. R. between *Foſter and Taylor*, adjudged and amended, this being alſo before amended in Banco.

See (F) pl. 22. S. C. and the Notes there.

4. In an Aſſumpſit for Wares ſold, the Plaintiff declares that he ſold tres Virgatas, Anglice Silk, and leaves out the Word Serici, and after Verdict and Judgment for the Plaintiff in B. R. a Writ of Error was brought in Camera Scaccarii, and this aſſign'd for Error, and the Court inclined to reverſe the Judgment; but upon Examination of Mr. Pye and his Servant in B. R. it appears that the Paper Book was well, and the Word Serici inſerted therein before Plea pleaded, and thereupon the Record was amended accordingly. And after the Court of Camera Scaccarii cauſed Mr. Wright, the Clerk of the Errors, to bring the Tranſcript of the Record in B. R. and there to amend it by the Record. Mich. 5 Car. between *Young and Skipwith*, adjudged.

See (B) pl. 16. S. C. and the Notes there.

As to mending *after Plea pleaded*, there is no great Matter in that. After a Record has been ſealed up, I have known it amended, even *juſt as it was going to be tried*; per Holt Ch. J. 1 Salk 47. pl. 3. Hill. 8 & 9 W. 3. B. R. The King v. Harris & al'.

Harvert for Harbert (being only vitium Scriptoris) was *amended* upon Motion, tho' *Iſſue was joined*, and the Cauſe enter'd upon Record. Cumb. 4. Mich. 1 Jac. B. R. Anon.

5. In a Trover and Converſion of Goods, if the Bill upon the File in B. R. be That the Plaintiff was poſſeſs'd of Goods at D. and loſt them there, and that the Defendant found them there, and after &c. converted them to his own Uſe, and does not ſet forth any Place of Converſion, but in the Declaration thereupon a Place of Converſion (ſcilicet D. the ſame Place where the Poſſeſſion, Loſs, and Finding were laid) is ſet forth, and Not Guilty pleaded, and all the Record after hath the ſaid Place of Converſion, and alſo the Paper-Book deliver'd to the Party, and after a Verdict for the Plaintiff a Writ of * Error

After the *Record* was *removed, and the Error aſſigned*, it was moved to amend the *Entry after Imparlance*, which was Ad quem diem *Venit*

tam prædictus Thomas, quam prædictus Samuel, per Attornat. ſuos &c. *Et prædict. Thomas defendit vim* &c. ſo that *Thomas was miſtaken for Samuel*, which was alleged to be but the Default of the Clerk, and it was ordered to be amended. Cro. J. 444. pl. 22. Mich. 15 Jac. 1. Leeſer v. Weſt.

ror was brought in Camera Scaccarii, and this aſſign'd for Error, and the Bill certify'd without any Place of Converſion, yet after in B. R. upon ſhewing this to the Court, and that the Party or Jury were not deceived, it was amended there; and upon ſhewing this in Camera Scaccarii the Judgment was affirm'd without any Amendment of the Tranſcript. See (F) pl. 20. S. C.

6. In *Aſſiſe* the Record cannot be amended by Juſtices aſſign'd, *after the Adjournment in Bank.* Br. Amendment, pl. 58. cites 17 Aſſ 2.

It was ſaid that the Matter compriſed within the Writ cannot be amended *after the Challenge of the Party.* Thel. Dig. 223. lib 16. cap. 6. S. 5. cites Trin. 2 H. 5. 8.

7. It was agreed that a *Bill* ſued *in the Exchequer or before Juſtices* may be amended as well *after Challenge of the Party* as before; per Hank. And Perſey ſaid that it may well be, if it has Subſtance. Br. Amendment, pl. 28. cites 2 H. 4. 17.

But in Præcipe quod reddat, that is to ſay *Writ of Entry againſt* 4, and *in the Clauſe* (& *niſi fecerit*) were 3, and *the fourth was left out*, and it was challenged; [but] becauſe it was a ſmall Default, and the Demandant [had] pray'd Leave to amend it *before it was challenged*, therefore it was amended; quod nota; for the Court ſaid that of Cuſtom ſuch Defaults have been amended before Challenge of the Party. Br. Amendment, pl. 35. cites 8 H. 6. 37.——Thel. Dig 223. lib. 16. cap. 6. S. 5. cites Hill. 8 H. 6. 38. S. P. accordingly.

8. It was ſaid that the Juſtices cannot amend their own *Default in Judgment* in another Term; but if it had been in Proceſs, they might have amended it. Br. Amendment, pl. 46. cites 9 E. 4. 3.

9. In *Scire Facias as Couſin and Heir* they were at Iſſue, and *no Coſinage was declared*, and Exception taken in another Term, and the *Coſinage was declared in a Bill, but the Clerk did not enter it*, and becauſe it was *in another Term* it was not amended; but the *Writ was abated after Iſſue.* Br. Amendment, pl. 107. cites 38 H. 6. 39.

10. If the Party pleads Quod *in nullo eſt Erratum*, yet a Thing amendable ſhall be amended after; per tot. Cur. Br. Amendment, pl. 113. cites 11 H. 7. 2.

11. In Replevin the Plaintiff counted of a Taking in *Twinocke.* The Defendant avow'd the Taking in *Turnocke*, abique hoc that he took in Twinocke. The Plaintiff *imparl'd, and all this was enter'd in the Roll* of Record, and afterwards one of the Clerks amended the Declaration, and made it Turnocke, and becauſe the Plaintiff had *not join'd Iſſue*, but imparl'd, the Amendment was allow'd; but if the Plaintiff had reply'd, and an Iſſue join'd and enter'd, then if the Count had been amended after Iſſue join'd, the Court ſaid that they would have made it again as it was at firſt. Dal. 83. pl. 31. 14 Eliz. Anon.

12. In *Waſte* for digging in Lands &c. the *Defendant pleaded* that the Queen by her *Letters Patents under the Great Seal*, granted unto him *that he might dig for Mines of Coal* &c. and pray'd that it might be enter'd Verbatim, and a *Grant under the Seal of the Exchequer* was enter'd, whereupon the Plaintiff demurr'd. By the Opinion of the Court, it could not be amended *after Demurrer enter'd.* Goldsb. 1. pl. 3. Paſch. 28 Eliz. Anon.

Want of Pledges returned by the Sheriff was permitted to be amended by him *after Error brought.* 3 Lev. 344. 345. cites Trin. 5 W. & M. Nicholas v. Chapman.——3 Lev. 361. S. C. in C. B accordingly.

13. It was held that if a *Writ of Error* be brought, and *deliver'd to the Chief Juſtice of C. B. and allow'd* by him *under his Hand* that afterwards the Record cannot be amended by Prothonotary, Attorney, or Clerk of the Court, *though no Record be enter'd upon the Roll*, whereupon the Writ of Error is brought. 4 Le. 51. pl. 133. Trin. 32 Eliz. C. B. Curtis's Caſe.

ingly.——Ibid says a Rule was produced that it was so done in B. R. between Boynton and Morgan.

14. After a Plea enter'd in B. R. the Defendant may either amend his Plea, or put in a new Plea, as he shall be advised, at any Time *before Replication*. This was said to be the Course of B. R. and made a Rule of Court to be observed for the future. Bulst. 186. Pasch. 10 Jac.

15. No Amendment by *striking out or altering* any Thing, or *any Part of a Matter alleged*, can be *after Demurrer*; per tot. Cur. Bulst. 204. Pasch. 10 Jac. in a Nota there.

After Demurrer the Record cannot be made up till Demurrer be joined, and *so long as it is in Paper*, the Parties may amend any Thing without Motion; *and* they may also amend *afterwards, so as the Matter will not much deface the Record.* Sid. 107. pl. 19. Hill. 14 & 15 Car. 2. B. R. in Case of the Queen Mother v. Somersham (Inhabitants.)

On Rule to shew Cause why the Plaintiff should not amend his Declaration on Payment of Costs, and Liberty to plead de Novo, it was objected that the Defendant had demurr'd, and the Plaintiff join'd in Demurrer, and the Roll actually made up; but the Court said that this was only a loose Roll of this Term, and therefore would consider it as all in Paper, and accordingly made the Rule absolute. 2 Barnard in B. R. 65. Mich. 5 Geo 2. Pool v Hamerton.

The Plaintiff declares, and the Defendant pleads, and the Plaintiff replies, and the Defendant demurs, and the Plaintiff joins in Demurrer. The Question was, whether the Plaintiff should amend his Declaration; and the true Distinction upon the Debate of the Judges at Serjeant's Inn seemed to be this, that where there is a Demurrer, if the Cause be still in Paper, upon paying of Costs, and giving the Defendant Liberty to alter his Plea, the Plaintiff may be at Liberty to amend, because the Pleading in Paper came in only instead of the antient Way of Pleading ore Tenus; and in the Pleading ore Tenus the Record was only in Fieri, and therefore tho' a Man had joined in Demurrer, he might come before that was enter'd on Record, and pray to withdraw his Demurrer and amend; but after the Pleadings were enter'd on Record of the same Term, then it could not be amended or alter'd. This was upon the Constitution of Ed. 1. which forbids Judges to alter or change any of the Records or Rolls of the Court; and therefore no Alteration can be made in a Record, unless it be in the same Term, whilst the Record is supposed to be in Fieri; but out of this Rule we must expect all Amendments made by virtue of the Statute of Jeofails; for those enables the Courts to amend at any Time within the Purview of such Statutes. G. Hist. of C. B. 92. 93.

In *Quo Warranto* to know by what Title they enjoy Balastage of Ships upon the River Thames, it was agreed per Cur. that *after Plea pleaded* the Defendant may amend, without paying Costs before Demurrer joined, because the Trials is of the highest Nature, and as *peremptory as in a Writ of Right*; but they thought they could not amend after Demurrer joined. Sid. 54. pl. 21. Mich. 13 Car. 2. B. R. The Attorney General v. Trinity-House.

16. A Writ of *Error* was brought, and *Errors assign'd*, and a Sci. Fac. issued, and *before the Defendant in Error joined in Nullo est Erratum*, it was moved to amend the Judgment, the Entry being the Default of the Clerk; but the Question was, whether the Time for Amendment was not past'd after Errors assigned. Resolved by three Justices (absente Hutton) that the Time was not past'd, but that *so long as a Diminution may be alleged, or Certiorari awarded*, they may amend. Jo. 9. pl. 8. Mich. 18 Jac. C. B. Anon.

After Nul-lo est Erratum pleaded, a Rule of Court was obtained to amend the Error assign'd, but it was discharged on a Motion for that Purpose; for after such Plea, it is never admitted to amend General Errors. 8 Mod. 304 Mich. 11 Geo. 1. Barnsly v. Shrimpton.

17. In Error of a *Common Recovery* the Record *was certified and enter'd in the Roll*, and the *Recovery was pleaded in Bar* of the Writ; *but the alleging* of the *Seisin and Execution* of the Recovery *was omitted* by Negligence of the Clerk and Counsel. And two Terms after, which was the Term after Demurrer joined thereupon, the Defendant pray'd to amend it, and urg'd that without Consent of the other Side the Court might amend it, because it was the Default of the Clerk, who had his Pattern, viz. the Recovery before him, and he had omitted the Sense of it; and Mountague Ch. J. accorded to it; but upon Information that the Course of the Court was otherwise, he changed his Opinion; and all the other Justices agreed, and so it was not amended, because it was *not the Negligence of the Clerk only, but also of the Counsel*, and perhaps this was the

Cauſe of the Demurrer. And Haughton took a *Difference where the Clerk does it as Officer of the Court, and where as Attorney of the Party, and as a Plea in Bar*; and ruled not to amend it. But they all ſaid, that it was a great Diſgrace of Juſtice that ſuch Cauſe ſhould be overthrown without Trial of the Right, but they could not aid it. Palm. 123. Mich. 18 Jac. B. R. Holland v. Ley.

18. No Amendment ſhall be *after Iſſue join'd*, unleſs by Rule of Court, but otherwiſe while the Plea is in Paper; but then the others ſhall have a long Day to plead again, and good Coſts of common Courſe. 2 Roll Rep. 266. Mich. 20. Jac. B. R. Coniers v. Coniers.

Het. 142. Worthly v. Savil, S. C. and Judgment for the Plaintiff. — Jo. 239. pl. 3 Worthy v. Savil, S. C. but S P. does not appear. — Litt. Rep. 278 Trin. 5 Car S C adjudged for the Plaintiff Niſi &c. — Raym. 53. in Caſe of Herbert v. Paget, cites it as reſolv'd in Ld. Savil's Caſe S. C. 4 Car in C B. that a Record may be amended before a Recordatur enter'd upon the Roll.

19. In *Aſſault* &c. the Plaintiff had a Verdict. *No Day or Year was in the Declaration enter'd on the Imparlance Roll, when the Aſſault was committed*, but a *Blank left* for it; and the Plaintiff's Attorney by Night got into the Treaſury, and fill'd up the Imparlance Roll with the Day and Year, the Defendant's Attorney having beſpoke of the Prothonotary a Recordatur, which he was to have the next Day, and this Matter being diſcovered, it was mov'd, that the Roll might be made as before, and reſolv'd by all the Juſtices, that it was *amendable by the Clerks*, ſo as it be not on the Ground of the Action, *until the Recordatur enter'd, and after by the Court*, for it was only *Matter of Form*, and the Court ought to amend it if it had not been done otherwiſe. Lat. 164. Hill. 2 Car. 1. Sir Fran. Worſley's Caſe.

If the *Bill on the File* be with Blanks, *or* the *Imparlance Roll* be *with Blanks* for Dates or Quantities, yet it may be amended by the Paper by the Clerks themſelves, till a Recordatur be ordered of the Verdict return'd on the Niſi Prius Roll, but after ſuch Recordatur it can only be amended by the Court, for the Roll lies with the Prothonotary to be made up according to the Paper Book till the Recordatur of the Verdict be allowed; but if after the Recordatur be enter'd, it is ordered on the Roll in ſtatu quo, and then the Court is ſuppoſed to take Conuſance of it in what Manner it then was; and if Clerks might afterwards alter the Roll after Entry of the Verdict, they might amend it in the Verdict which is in the Niſi Prius Roll, and which was ſettled by the Judges of Niſi Prius, and cannot be altered but by the Rule of Court. G. Hiſt. of C. B. 115, 116.

A Return made to a *Habeas Corpus and Certiorari* for the Body of J. S. who was impriſon'd for not paying a Fine ſet at the Quarter Seſſions, was *filed*, and it was afterwards prayed that it might be amended, but per Cur. that cannot be *after the Filing*, and ſo the Party was diſcharg'd. Vent. 336. Paſch. 31 Car. 2. B. R. Anon.

20. A *Writ of Reſtitution* was granted, directed to the Lord Mayor and Court of Aldermen, to reſtore E. to his Place of Common Councilman of the City of London. After *a Return made and filed*, whether upon Motion or by the Rules of the Court, it cannot be amended; per Roll Ch. J. Sty. 32. Trin. 23 Car. London (City) v. Eatwick.

The Return of a *Commitment on a Habeas Corpus* cannot be amended *after it is filed*. Gibb 266 Paſch. 4 Geo 2. B. R. the King v. Catterall.

21. *Commiſſioners of Sewers* made certain Orders againſt A. which were remov'd by Certiorari into B. R. and upon Motion to amend the *Return*, the Court ſaid it could not be, becauſe the Return was *made the Term before*. Sty. 85. Hill. 23 Car. the King v. Apſley.

22. After Verdict for the Plaintiff in Debt upon Bond, Judgment was enter'd Quod recuperet the Sum *pro Miſis & Cuſtagiis*, where it ſhould be *pro Debito prædicto*; but this was ordered to be amended as the Default of the Clerk, tho' in another Term, the Court having Power over their own Entries and Judgments. Vent. 132. Trin. 23 Car. 2. B. R. Anon.

Ld. Raym. Rep. 183. Paſch. 9 W. 3. S. P. per Cur. — The Court, during the ſame Term, may amend any Part of the Roll, becauſe it is in fieri, and ſuch

23. The Court has Power to amend any Fault in a Record *during that Term* in which it was entred, *tho'* it be *enter'd on the Roll*; per Cur. 5 Mod. 148. Hill. 7 W. 3. B. R.

ſuch Amendments may be made *at Common Law*, without the Aid of any of the Statutes. G. Hiſt. of C. B 114.

24. It was moved to amend *an Officer's Name in a Juſtification*, and to ſtrike out *(John)* and make it *(Anthony,)* but becauſe it was upon Demurrer, and Part of the Fact, viz. who it was that took the Cattle, the Court held that it was Matter of Subſtance, and therefore not amendable. Ld. Raym. Rep. 310. Hill. 9 W. 3. in Caſe of Britton v. Cole.

25. If the Defendant ſhould join Iſſue, the Plaintiff may amend. *After Error brought after Verdict* he ſhall amend, or after a Plea in Abatement, becauſe that is not final; per Holt Ch. J. but not *after Demurrer*. Ld. Raym. Rep. 669. Paſch. 13 W. 3. Fox v. Wilbraham.

26. In a Scire Facias againſt Bail, the Defendants pleaded Payment by the Principal &c. the Plaintiff replied, Non ſolvit &c. & hoc *petit quod Inquiratur per Patriam & prædicti Defendentes ſimiliter*. The Defendant demurr'd, and the Paper-Book was made up without ſtriking out the Words (prædicti Defendentes ſimiliter.) The Court held that it was a Thing of Courſe for the Party that takes the Iſſue to join the Iſſue for the others, on a Suppoſition that they will join in the Iſſue to maintain what they have alleged, and therefore if they will not join in Iſſue but demur, they ought to ſtrike it out, and the leaving it in is a Trick, and therefore the Court gave Leave to ſtrike it out, tho' it was in another Term, and after the Cauſe came on in the Paper. 2 Ld. Raym. Rep. 1337. Paſch. 4 Annæ, Stevens v. the Manucaptors of Hudſon.

27. A *Scire Facias recited, that* whereas *R. had recovered againſt J.* whereas the *Judgment was that J had recovered againſt R.* It was mov'd *after Error* brought to amend this, it being only vitium Clerici in not purſuing his Inſtructions. Holt Ch. J. ſaid, if it was amendable before a Writ of Error brought, it is ſo after; and the Court held it amendable. 11 Mod. 139. Mich. 6 Ann. B. R. Tulley v. the Bail of Vavaſor.

28. In Debt on a Bail Bond, the Defendant pleaded Comperuit ad Diem; It was mov'd to *amend the Iſſue, in which the Condition of the Bail Bond is mitrecited*, and to make it agreeable to the Bond, on Payment of Coſts; which was granted accordingly. Rep. of Pract. in C. B. 26. Mich. 11 Geo. 1. Walpole v. Robinſon.

29. In Indeb. Aſſ. the *Plaintiff counted as Executor, and laid the Promiſe as made to the Teſtator*. The Defendant *pleaded the Statute of Limitations*. The Plaintiff *moved to amend by laying the Promiſe as made to the Plaintiff*; ſed adjornatur. It was objected, that this would alter the Nature of the Action, and that Iſſue was joined, and Notice of Trial given, and ſo the Application is too late. But afterwards the whole Court granted the Amendment; for tho' it varies the Defence, yet it does not vary the Nature of the Action; for it only makes the Declaration agree with the Plaintiff's Evidence. Gibb. 193. Hill. 4 Geo. 2. B. R. the Dutcheſs of Marlborough v. Wigmore.

30. A Motion was made to amend the *Entry upon Record according to the Writs of Scire Facias and Certiorari, and the Returns* thereof after Iſſue joined upon Nul tiel Record. The Court held, that Amendments ought to be made by Common Law without an Act of Parliament *where there is any thing to amend by*, and therefore ordered the Entry upon Record to be amended and made agreeable to the Writs of Scire Facias and Certiorari, and the Returns thereof upon Payment of Coſts, the Entry being made imperfectly by *Miſpriſion of the Clerk*. Barnes's Notes of C. B. 3. Mich. 6 Geo. 2. Hampſon v. Chamberlain.

31.

In *Avowry for Rent*, the *Sum due was miſcomputed*, but Leave was given to amend *on Payment of Coſts*, tho' Demurrer was join'd, and the Cauſe in the Paper for Argument. Barnes's Notes of C. B. 13. Hill 11 Geo. 2. Harry v. Bant.

31. Declaration was moved to be amended on giving an Imparlance; upon ſhewing Cauſe it appear'd that Defendant had demurr'd, and given a *Rule to join in Demurrer*, and therefore Plaintiff cannot amend on giving an Imparlance, but *on Payment of Coſts he may* Barnes's Notes of C. B. 8. Mich. Geo. 2. Taylor v. Bramble.

After Argument upon Demurrer Plaintiff moved to amend the Declaration, which was granted, *the Merits* of the Cauſe *not coming in Queſtion* upon the Argument, *but only the Form of Pleading.* Barnes's Notes of C. B. 14. Paſch. 11 Geo. 2 Farmer v. Burton

But where after *Argument upon Demurrer, and a Rule for a farther Argument*, Defendant moved to amend his *Avowry* by inſerting 3 neceſſary Requiſites to juſtify his Diſtreſs, the Amendment was denied, the *former Argument having been upon the Merits, and* there *not being ſufficient Matter ſet out* in the Avowry *to amend by.* Barnes's Notes of C. B. 14 Trin. 11 & 12 Geo. 2. Woodman v. Inwen.

So in a Prohibition an Amendment was made after the Cauſe in the Paper had been twice ſpoke to. Ibid. in a Note there, cites Mich. 8 Geo. 2. B. R. Middleton v. Crofts.

32. In Replevin the Defendant *avow'd for Rent* Arrear, and ſet forth a Demiſe of the Locus in quo at 7 l. per Ann. payable Quarterly, and that 11 l. 4 s. was in Arrear for a Year and three Quarter's Rent, and therefore the Diſtreſs was made. The Plaintiff demurr'd generally, becauſe *no ſuch Sum* as 11 l. 4 s. *could be in Arrear*, the Cauſe was put in the Paper and ſpoke to, and this Miſtake of 11 l. 4 s. inſtead of 12 l. 5 s. being inſiſted on, it went off, and now the Avowant moved for Leave to amend, and notwithſtanding it had been once ſpoken to, the Court made a Rule for the Amendment, on paying of Coſts. Rep. of Pract. in C. B. 148. Hill. 11 Geo. 2. Horry v. Bant.

(I) By whom it may be done.

Thoſe things which are amendable before a Writ of Error are amendable after a Writ of *Error*, and if the Inferior Court does not amend them the *Superior Court* may. 8 Rep. 162. a.

1. A Variance between the Record of Niſi Prius and the Original Record may be amended as well in B. R. as in Banco, being by Writ of Error removed out of the Common Pleas. 20 H. 6. 15.

Cro. J. 372. pl. 2. Wheadon v Sugg S. C. and it was order'd in B. R. to be amended there and Judgment afirm'd——Roll Rep. 309 pl 19. S. C. and S. P agreed per Cur. ——Jenk. 338. pl 87 S. C——S. C. cited Arg. 2 Ld. Raym Rep. 1059.

2. If a Judgment be miſenter'd in Banco through the Default of the Clerk, this may be amended in B. R. where the Record comes by Writ of Error, as well as it could before in Banco. H. 13 Jac. B. R. between *Wheden and Sugg*, adjudged.

Error of a *Judgment in Ejectment*, and *in the Record a Space was left for the Coſts* not yet taxed. It was moved to amend it, for that the Plaintiff had the Liberty to get the Coſts taxed and to make the *Record* perfect, it *not being yet certified.* Per Hale Ch. Baron, if it had been certified it might have been amended by Rule of Court, and if it ſhould afterwards be removed, the Court there muſt amend it; for the conſtant Practice is, that if a Record is moved out of C. B. into B. R. by Error, and afterwards amended by Rule of that Court, it muſt likewiſe be amended in B. R. becauſe it is in Affirmation of the Judgment, and therefore favour'd in Law. Hardr. 505. Paſch. 21 Car. 2. in Scaccarii, Friend v. Duke of Richmond.

A Miſentry of a Judgment in Ipſ-

3. If a thing be miſenter'd in an inferior Court, which is amendable by the Statutes, yet if a Writ of Error be brought, and thereupon the Record is removed into B.R. or B. this ſhall not be amended there,

there, becauſe it is not uſual to amend Records in inferiour Courts. Mich. 9 Car. B. R. between *Taylor and Norris*, ſaid per Curiam to be the conſtant Practice of the Court.

wich Court was held per tot. Cur. to be amendable by Stat.

8 H. 6. which gives Authority to amend Records removed out of C. B. by Error for Faults which are Per Vitium Scriptoris &c and this Statute extends as well in Equity to the Records of other Courts which are not removed by Error, whereupon it was awarded to be amended, and the Judgment affirm'd. Cro. E. 435 pl. 47. Mich 37 & 38 Eliz. B. R Vita v. Vita.

A *Plaint* was levied in London *by the Name of Adderby*, and the *Bail put in by the Name of Adderby*, but the *Declaration was by the Name of Adderly*, and *all the* Recovery [*Record*] *purſued the Declaration.* After Verdict for the Plaintiff Judgment was given Quod Quærens nil capiat per Billam; but it was agreed that this was *amendable in the proper Court* where the Bail and Declaration was enter'd, but not pleadable nor to be regarded in B. R Mo 407. pl. 548. Trin. 37 Eliz Adderby v. Boothby. ——Cro. E. 458. (bis) pl. 5 Paſch. 38 Eliz. B R. Framſon v. Delamere S. C. the Court thought it only the Default of the Clerk which perhaps might be amended here, if the Record were in B. R. becauſe it is but the Variance of one Letter from the *Plaint* which *is in Nature of an Original*; But cannot now, the Record not being there, and ſo they not lawful Judges thereof.——Mar. 78. pl 124 Mich. 15 Car. the Court would not give way for Amendments in Inferior Courts.

Error was brought in B. R. of a Judgment in an Inferior Court, and the *Record removed contain'd a a Surmiſe*, which never was made in the Inferior Court, but was *contrived after* the Writ of *Error brought*. And this appearing on Examination, the Court of B. R. order'd the Town-Clerk to obliterate ſuch Surmiſe out of the Record, and afterwards reverſed the Judgment. 2 Jo. 103. Paſch. 30 Car. 2. B. R. Harvey v. Holland.

4. As in Action upon the Caſe in an inferior Court after Verdict and Judgment for the Plaintiff, a Writ Error is brought in B. R. where the Record is certified that the Defendant pleaded Non Aſſumpſit, & de hoc ponit ſe ſuper Patriam, & querens, * ſcilicet for ſimiliter without any Dash through it; ſo that this is to be taken for ſcilicet rather than for ſimiliter, and ſo no Iſſue; and tho' this ought to be amended if it had been a Writ of Error upon a Judgment in Banco, yet this ſhall not be amended, it being certified out of an inferior Court. Mich. 9 Car. B. R. between *Norris and Taylor*, adjudged, and the Judgment given in Gravеſend Court reverſed accordingly. Intratur Trin. 9 Car. Rot. 803.

Fol. 210.

G. Hiſt. of C. B. 142. ſays that the Inferior Court from whence the Record is return'd, whether it be C. B. or any other Court of Record, may amend after Judgment, as well after as before a Writ of Error brought; and the Rule of ſuch Amendment is to be certified by the Clerk of ſuch Inferior Court to the Superior; for tho' the Record is removed by Writ of Error and a Mittitur Recordum is enter'd on the Roll; yet the Writ of Error is to ſend the Record in the State, and Condition in which it ought to be by the Law, and that is corrected, as it ought, from all Miſpriſions of the Clerks; for by the Laws they are to correct the Miſpriſions of the Clerks before or after Judgment; and ſuch corrected Records they are obliged to ſend, that the Miſpriſions of the Clerks may not be taken for their Errors; and if they do thus correct the Miſpriſon of their Clerks after the Writ of Error has been brought upon the Record, it is proper to ſend up their Clerks, who are the Officers of the Court, and have the Cuſtody of the Records, or they may allege Diminution, and ſend up the Record amended, as it ought to be, or it may be amended in the Superior Court, if the other refuſeth; becauſe ſuch Miſpriſions are not to alter the Judgment; and therefore the Court that ſuperintends the Inferior Court, ought to correct the Miſpriſions of the Clerks of the Court in the Record ſent to them.

* This is here as it is in Roll, but it ſeems that it ſhould be in the Abbreviation that is to ſay (Sct') otherwiſe it cannot be any ways taken for (Similiter.)

5. The Juſtices of C. B. *after Writ of Error* comes may amend the Roll where Judgment was given the ſame Term, and it is enter'd contrary to the Truth; for the Roll is not the Record in the ſame Term. Br. Amendment, pl. 32. cites 7 H. 6. 28.

Br. Error, pl. 68 cites 7 H. 6. 28.

6. Note that every *Bill in the Chancery and elſewhere of Debt between Party and Party*, by Courſe of the Common Law there ſued, *ought to have the County or City where the Cauſe ariſes in the Teſte or Margin of the Bill*; and becauſe *Bill* was put in which *wanted it*, therefore it *was amended after Verdict, and in another Court*, viz. in B. R. quod nota. Br. Bille, pl. 35. cites 2 R. 3. 12.

7. If the Sheriff or Clerk makes Miſpriſion *in the Return, Entry*, or the like, the Court may make *this Clerk or another Clerk* to amend it. And if the Sheriff be after removed, or dead, yet they may make the *New Sheriff* or his Clerk, or the *Old Sheriff, if he be alive*, to amend it by the Statute; quod nota. Br. Amendment, pl. 9. cites 33 H. 6. 42. per Priſot and Cur.

8. A *Writ of Aſſiſe* was amended in the Exchequer-Chamber before Portman and Whiddon Juſtices of Aſſiſe for Salop. Br. Amendment, pl. 72. cites 5 E. 6.

9. Error was brought in the Exchequer-Chamber to reverſe a Judgment and a Certiorari to remove the Record; the Error aſſign'd was, that the *Declaration on the File and the Roll varied as to the Number of Cloſes*; the Court differ'd as to its being amendable or not, but the Rule of Court was, that if it be amendable, the Judges in the Exchequer are to direct the Amendment of it. 2 Bulſt. 149. Mich. 11 Jac. Ewer v. Chamberlain.

Palm. 198. 199. 200. Trin. 19 Jac. Anon. ſeems to be S. C. notwithſtanding the Difference of Time; and ſee there theſe Points debated. — And Cro. J. 631. pl. 5. Hill. 19 Jac. B. R. Maſon v. Fox, Stephenſon and Thorpe, ſeems to be S. C. but the Point as to the Time of the Amendment does not appear there.

10. A Writ of *Error* was brought to reverſe a Judgment given in C. B. and *after a Certiorari and Errors aſſign'd*, they in *C. B. amended the Record*. And by the whole Court (Crooke only abſent) they cannot do it; for after a *Tranſmittitur*, they have not the Records before them. And Barckley ſaid, that the *Difference* ſtands *betwixt C. B. and B. R. and betwixt B. R. and the Exchequer*. For the Record remains always in this Court notwithſtanding a Writ of Error brought in the Exchequer-Chamber; and therefore we may amend after. Wherefore the Court ſaid that if the thing were amendable, they would amend. But the Court of C. B. cannot. Mar. 72. pl. 109. Mich. 15 Car. Anon.

2 Mod. 307. Paſch. 30 Car. 2. C. B. S. C. but S. P. does not appear.

11. A Plea was *Puis darrein Continuance pleaded at the Aſſiſes*, to which the Plaintiff demurr'd, and the Plea being certified on the Back of the Poſtea, the Plaintiff gave a Rule to join in Demurrer, which Defendant refuſing, he enter'd Judgment. The Court held that the Plea could not be amended here; but might, during the Aſſiſes, be amended before the Judge of Niſi Prius. Freem. Rep. 252. pl. 267. Paſch. 1678. Abbot v. Rugeſley.

12. What is *not amendable* by the Clerk *without Order* of the Court, if *done by him*; and if *according to Law*, the Court cannot alter, but may puniſh him. Skin. 46. pl. 18. Paſch. 34 Car. 2. in Caſe of Birch and Lingen.

13. Miſnoſmer was in a *Writ, and in all the after Proceedings*, as (Weſtly) for (Weſtby.) On Motion the *Curſitor* was order'd to attend, who ſatisfied the Court the Inſtructions were right, and ſo they order'd the Original to be *amended in Court*, and this without any Application to Chancery, or Order from thence, and they amended all the Proceedings after. 2 Vent. 152. Hill. 1 & 2 W. & M. in C. B. Weſtby's Caſe.

(K) How

(K) How, and what is to be done in Order thereto.

1. WHere Variance is, the *Clerk who writ it*, or the *Sheriff who return'd* it *ſhall be examined*, and upon this found it ſhall be amended. Br Amendment, pl. 67. cites 2 E. 4. 7. See (B) 3. 4. 5. 6.

2. Miſpriſion of the Clerk ſhall be amended, as in *Debt upon an Obligation*, if the *Clerk of the Chancery has the Obligation*, or a Copy of it, and varies from it, there upon Examination of the Clerk it ſhall be amended. Br. Amendment, pl. 78. cites 22 E 4. 20.

(L) Amendment by Statutes of E. 3. H. 5. and H. 6.

1. 14 *E. 3. cap.* 6. *Enacts that by the* Miſpriſion of a Clerk *in any Place whereſoever it be, no Proceſs ſhall be annulled or diſcontinued by Miſtake, in* writing one Syllable or one Letter too much or too little, *but as ſoon as the Thing is perceived by* * *Challenge of the Party, or in other Manner, it ſhall be haſtily amended in due Form, without giving Advantage to the Party that challenges the ſame becauſe of ſuch Miſpriſion.* In *Detinue of Writings*, one of the Writings *was omitted in the Continuance.* It was held that all the Proceſs was diſcontinued notwithſtanding this Statute, which enacts the Proceſs ſhall be amended. 8 Rep. 157. a. cites 15 E. 3. Amendment 58.

In *Præcipe* quod reddat *by John Martel of Sleford*, they were at Iſſue, and *in the Venire* Facias *Sleford was omitted*, and the Jury paſs'd for the Demandant, and this Matter was alleged in Arreſt of Judgment, and it was amended by the Statute of 14 *E* 3. Br. Amendment, pl. 50 cites 39 E. 3. 21.

Coſinage of the Manor *of Tybynry-brooke*, and the *Writ was* of the Manor of *Tybynry* and (brooke) was left out, and the Opinion was, that it may be well amended, and yet the Statute ſays, where Syllable or Letter is too much or too little in a Word, but if part of the Word be wanting, the Word is wanting. Br. Amendments, pl. 18. cites 40 E. 3. 34.

Miſpriſion of the Clerk, where he made *Writ of Execution of* 100 *Pounds*, where the *Roll was but* 100 *Marks*; and per Thorpe, the Plaintiff ſhall not have it, * [but] till 100 Marks are levy'd. Br. Amendment, pl. 25. * Br. Elegit, pl. 2 cites 44 E. 3 10. S. C. and with the Word (but.)

Treſpaſs by Executor, and *Damages tax'd by Inqueſt to* 100 *l.* and the Proceſs was continued between ſuch a one and another Executor, and the *Roll was* 100 *s* where it ſhould be 100 *l.* and it was challenged for Diſcontinuance, & non allocatur; but the Proceſs was amended, and Judgment for the Plaintiff. Quod nota. Br. Amendment, pl. 24. cites 45 E. 3. 19.——Fitzh. Amendment, pl. 52. cites S. C.——S C. cited 8 Rep. 157. a.

By this Statute the Juſtices had Liberty on Challenge of the Party to amend the Proceſs where the Clerk had miſtaken one Syllable or Letter, and the Judges afterwards conſtrued the Statute ſo favourably, that they *extended it to a Word*, but they were not ſo well agreed, whether they could make theſe Amendments as well after as before Judgment; for they thought the Authority touching that Place was determined by the Judgment; and therefore to put an End to the Diverſity of Opinions by 9 H. 5. cap. 4. it is declared, that the Judger ſhall have the ſame Power, as well after as before Judgment, as long as the Record in Proceſs is before them; and this Statute is confirmed by 4 H. 6. cap. 3. with an Exception, that it ſhall not extend to Proceſs on Outlawry. G. Hiſt. of C. B. 88.

* Ld. Raym. Rep. 669. Paſch. 13 W. 3. it was ſaid Arg. that thoſe Words (*Challenge of the Party*) muſt be underſtood of a Demurrer; but Holt Ch. J. contra, that Challenge of the Party is for *Arreſt of Judgment.*——1 Salk. 50. pl. 11. S. P. in S. C. by Holt Ch. J. accordingly.

2. *By* 9 *H. 5. cap.* 4. *The* Juſtices before whom ſuch Plea or Record *is made, or* ſhall be depending, *as well by Adjournment as by way of Error, or otherwiſe, ſhall have Power to amend ſuch Record and Proceſs, as well after Judgment as before.* *Several Things* may be amended *before Judgment, which cannot be amended after*; for then the *Party ſhall loſe the Advantage*, and ſo it ſeems here, that where *Writ of Error is juſtly given to the Party*, it ſhall not be taken from him. Br. Amendments, pl. 47. cites 9 E. 4. 14. per Littleton.

they

They may amend *Miſpriſion* as well *after Judgment* as before *upon Examination of the Sheriff* &c. Br. Amendments, pl. 47. cites 9 E. 4. 14

Record may be amended *after Verdict, and* after *Judgment*. Br. Amendments, pl. 67. cites 2 E. 4. 7. per Choke.

Bill in Chancery of Debt, *leaving out the County in the Margin* was amended after Verdict, and in another Court. Br. Bille, pl. 35. cites 2 R. 3. 12.

Error was brought to reverſe Outlawry in Writ of *Debt*, which was *againſt J. B. of C. Knight*, and the *Capias was accordingly*, but the *Alias*, the *Pluries Capias, and the Exigent omitted the Word* (*Knight*) and this was aſſigned for Error, and by the Opinion of the Court it may be amended by the * Stat. of Leiceſter, as well *after the Record is remov'd for Error* as before. Br. Amendments, pl. 31. cites 7 H. 6. 27.——Br. Variance, pl. 60. cites S. C. * The Year Book ſays this Stat. was made 3 H. 6. but it ſeems to be 4 H. 6. 3 by the Words cited.

3. 4 *H* 6. *cap.* 3. Enacts, that *the ſaid Statute of* 14 *E.* 3. *cap.* 6. *and alſo the Statute of* 9 *H.* 5. *cap.* 4. *ſhall hold Strength, Force, and Effect in every Record and Proceſs of the ſame*, as well after Judgment given upon a Verdict *paſſed* as upon a Matter in Law pleaded, *provided not to extend to Records and Proceſſes in Wales, nor whereby any Perſon ſhall be outlaw'd.*

In this Stat. you ſee that Writ original is ſpecially expreſſed, but the Juſtices have no greater

4. 8 *Hen.* 6. *cap.* 12. *S.* 1. *For Error in any Record, Proceſs, or Warrant of Attorney,* * *Original Writ or Judicial, Panel, or Return, in any Places* raſed *or* interlined, *or* Diminution *found in any ſuch Record &c. which Raſings &c. at the Diſcretion of the Judges of the Courts, in which the ſaid Records and Proceſs, by Writ of Error or otherwiſe, be certified, do appear ſuſpected, no Judgment nor Record ſhall be reverſed or annulled.*

Power by this Stat. to amend *Writs* than they had before, but after that Judgment has been given &c. Thel. Dig. 224 lib. 16. cap. 6. S. 7.

Tho' the Statutes (mentioned before) gave the Judges a greater Power than they had before, yet it was found that they were too much cramp'd, having Authority to amend nothing but *Proceſs*, and they did not conſtrue this Word in a large Signification, to comprehend all Proceedings in Real and Perſonal Actions, and in Criminal and Common Pleas, but *confined it to the Meſne Proceſs and Jury Proceſs*; wherefore to enlarge the Authority of the Judges, this Stat. 8 H. 6. cap. 12. gives them Power by them and their Clerks to amend what they ſhall think in their Diſcretion to be the Miſpriſion of their Clerks in any Record, Proceſs, and Plea, Warrant of Attorney, Writ, Panel, or Return. G. Hiſt. of C. B. 89.

There are only two Statutes of Amendments, viz. the 14 E. 3. and 8 H. 6. the reſt are reckon'd to be Statutes of Jeofails, and not of Amendments, per Powell J. 1 Salk. 51. pl. 14 Mich. 3. Ann. B. R. in Caſe of the Queen v. Tutchin.——And Ibid. he held that the 8 H. 6. was only to inlarge the Subject Matter of 14 E. 3. and that 14 E. 3. extends only to Proceſs out of the Roll, viz. Writs that iſſue out of the Record, and not to Proceedings in the Roll itſelf; but that the 14 E. 3. extends not to the King, becauſe of theſe Words (Challenge of the Party.) And the Stat. 8 H. 6. has always been conſtrued in Imitation of the Act of E. 3. and the Exception in the Stat. of H. 6. was only Ex abundanti Cautela; and all Judges and Sages of the Law in all Ages have taken it not to extend to the Crown. And the Caſes on the other Side are not to be relied upon.

S. 2. *The Judges of the Courts, in which any Record &c. ſhall be, ſhall have Power to examine ſuch* Record &c. *and to* amend in Affirmance of Judgments, *all that in their Diſcretion ſeemeth to be* Miſpriſion of the Clerk, *except Appeals, Indictments of Treaſon and Felonies, and Outlawries of the ſame, and the* Subſtance of proper Names, Surnames, *and* Additions, left out in original Writs, and *Writs of* Exigent, *according to the Statute* 1 *Hen* 5. *cap.* 5. and in other Writs containing Proclamation; *and if any* Record &c. be certified defective, *otherwiſe than according to the Writing which thereof remaineth in the Places from whence they be certified, the Parties, in Affirmance of the Judgments, ſhall have Advantage to* allege Variance *betwixt the ſame Writing and the ſaid Certificate; and, that being found and certified, that ſame Variance ſhall be by the Judges amended according to the firſt Writing.*

S. 3. *If any ſuch Record &c. ſhall be* exemplified in Chancery, *and ſuch Exemplification there inrolled, without any raſing, then for any Error aſſigned in the ſaid Record &c. contrary to the ſaid Exemplification and Inrollment, there ſhall be no Judgment reverſed.*

5. 8 *Hen.*

5. 8 *Hen.* 6. *cap.* 15. *The Juſtices before whom any Miſpriſion or* Default *ſhall be found* in any Records and Proceſs *hanging before them, as well by way of Error as otherwiſe*, or in the Returns *of the ſame made by Sheriffs, Coroners, Bailiffs, or any other, by Miſpriſion of the Clerks, or of the Sheriffs &c. ſhall have Power to amend ſuch Defaults and Miſpriſions by their Diſcretion, and* by Examination *thereof by the Juſtices; this Statute not to extend to Wales, nor to Proceſſes and Records of Outlawries of Felonies and Treaſons.* Quære if this Stat. be in Force in Wales or not. See the Stat. of the Ordinances for Wales made Anno 27 H. 8. cap. 6. it ſeems that it is of Force notwithſtanding this Proviſo. Thel. Dig. 224. lib. 16. cap. 6 S. 9.

For further Explanation of theſe Statutes, ſee the proper Diviſions under this Head.

(M) Statute of 32 H. 8. cap. 30.

6. 32 *H.* 8. *cap.* 30. *Enacts, that if any* Iſſue *be* tried by the Oath of 12 Men, As the Statutes before only extended to what the Juſtices ſhould interpret the Miſpriſion of their Clerks, and other Officers, it was found by Experience, that many juſt Cauſes were overthrown for want of Form and other Failings, not aided by thoſe Statutes, tho' they were good in Subſtance; wherefore for the further Relief of Suitors this Statute was made. G. Hiſt. of C. B. 89.

A Judgment by *Nihil dicit* is not within the Intent of the Statute of Jeofails, which ſpeaks of Verdicts; for this ſhall not be had a Verdict; for a Verdict is that which is put in Iſſue by the joining of the Parties; agreed per Cur. Goldsb 49 pl. 9 Paſch. 29 Eliz. Anon.

A Judgment given upon a *Retraxit* is not aided by the Stat. of Jeofails as it would be if given on the Verdict. Cro. J. 211. pl. 3. Mich. 6 Jac. B. R. between Beecher and Shirley.

It aids not Diſcontinuances after *Failure of Record* on Nul tiel Record pleaded. Cro. J. 303. 304. pl. 5. Trin. 10 Jac. B. R. Miles v. Pratt. —— 11 Rep. 7. a. b. 8. a. cites S. C. adjudged. accordingly.

This Statu edoes not help *imperfect Verdicts*. Arg. 2 Le. 196. in pl 245 cites this Caſe, An Information was brought againſt B. for Entry into a Houſe, and 100 Acres of Land in S. he pleaded Not Guilty, but the Jury *found him guilty as to the* 100 *Acres, but ſaid nothing as to the Houſe*; whereupon Error was brought, and Judgment reverſed, ſays it was a great Caſe argued in the Exchequer, and was Bracht's Caſe, and Coke, who cited it ſaid, that it was not a Diſcontinuance, but no Verdict for part. —— Goab. 57. pl. 69. cites S. C.

For the Party Plaintiff or Demandant, or for the Party Tenant or Defendant, in any Courts of Record, Judgment ſhall be given, In Præcipe quod reddat one is vouched, who enters into the Warranty and pleads to Iſſue, which is miſjoin'd, or other like Default, and the Iſſue is found againſt the *Vouchee*, and Judgment is given againſt him, he † may have Writ of Error notwithſtanding the Stat. 32 H. 8. cap. 30. by all the Juſtices of C. B. For the Statute does not provide for this Caſe For the *Vouchee* is neither Plaintiff or Demandant, Tenant or Defendant And. 26, 27. pl. 60. Anon. —— Bendl. 37. pl. 67. Mich. 1 & 2 P. & M. Anon. S. C. that he ſhall have a Writ of Error —— Kelw 207 b. pl. 5. S. C. in totidem Verbis —— S. C. cited 11 Rep. 6. b —— Hob. 281. S. C cited by Hobart Ch. J. ſays, that he does not very well like the Opinion in this Caſe, for he ſays, ſurely the Vouchee is a Party both to the Suit and Iſſue; and the Common Law, (which is the Mother and Patron of Reaſon to a Statute) allows him a Party to take a Releaſe from the Demandant as well as the very Tenant; but he is no Party to the Original Writ, which, he ſays, is true that originally he is not, but by Subſtitution of the Party allowed by Law, and he may plead in Abatement, tho' he may alſo extort the Warranty of the Tenant, having not taken Pleas in Abatement; The Statute ſays, Plaintiff or Demandant generally, not ſaying againſt the Party Tenant or Defendant; and then why may not the 2 Clauſes for the Tenant or Defendant be inlarged to anſwer the reciprocal Intent of the one number, rather than reſtrain the former by the latter, eſpecially ſince it is clearly true that the Iſſue found for the Vouchee is found in Effect for the Tenant, and the Demandant thereby clearly barr'd.

† Orig. is (cannot have) and ſo miſprinted.

Any miſpleading, lack of Colour, inſufficient Pleading, *or* Jeofail, *Where the Bar or* any *other Matter apparent in the Record, as Writ, Count, Replication, Rejoinder, Iſſue, Proceſs*, or the like *before the Judgment is vicious*, this was Cauſe to replead before the Statute of 32 H. 8. Br. Repleader, pl. 14.

In Writ of *Account of divers Receipts*, the Defendant *pleaded to Iſſue to all but one, and as to that* he pleaded *Nothing*, and found for the Plaintiff; It was moved that the Plea was diſcontinued becauſe he did not plead to that Parcel according to 7 E. 4. 24. b. and 7 H 6. 5 a. &c. and that this was not remedied by this Stat. no Anſwer being given as to one Parcel, and the Plaintiff cannot have Judgment of Part; for of the Parcel to which no Anſwer was made, no Judgment can be given; but reſolved and affirm'd in B. R that the Statute extends to it by the Words (*any Diſcontinuance &c. notwithſtanding.*) And Judgment was given accordingly of ſo much as was found by the Verdict. 11 Rep 6. b. 7. a. cites Mich. 28 & 29 Eliz B R. Gomerſal v. Gomerſal.——Godb. 55. pl. 69. S C. and S. P. argued, but no Judgment.——2 Le. 194 pl. 245. S.C. in totidem Verbis.——1 and. 331 pl. 6 Trin. 15 Car. 2 in the Exchequer in Caſe of Workman v. Chappel, a Difference was taken that where a Plea is *pleaded to the Whole* (as in the principal Caſe there) *and is naught*, there ought to be a Repleader, but where the Plea was pleaded *to Part only* as in the Caſe cited 11 Rep. in Heydon's Caſe, and ſo was a Diſcontinuance, it is holpen by the Statute after Verdict.

In *Replevin*, the *Plaintiff was Nonſuit after Evidence and before Verdict*, but the Jury gave a *Verdict for the Damages*; but the Court held that this Verdict for the Damages is but in Nature of an Inqueſt of Office, and therefore is a Diſcontinuance not help'd either by this Stat. or that of 18 Eliz. a Diſcontinuance after Verdict would be. Cro. E. 339. pl. 4. Mich. 36 & 37 Eliz. B. R. Ireland's Caſe.—— Cro E. 412. pl. 2. Mich 37 & 38 Eliz. B. R. cites Buſty v. Ireland S. C. and the S. P. was held there accordingly, Courtier v. Barret.

This Statute helps all *Diſcontinuances* as well *after Verdict* as before; Per Gawdy and Fenner J. Cro. E. 489. pl. 5. Mich. 38 & 39 Eliz. B R. in Caſe of Halman v. Collins. ——Cro E. 320. pl. 8. Paſch. 36 Eliz B. R. in Caſe of Walſh v. Wallinger, it was held by the Juſtices that a Diſcontinuance after Verd ct is not help'd by any Statute.—Cro. C. 236. in pl. 17. Mich. 7 Car. B. R. ſaid e contra Arg. and ſeems admitted by the Court.

Treſpaſs. The *Venire* Facias *and the Pannel were wanting, but the Diſtringas Jurat', and the Panel annexed to it remain'd*; it was adjudged to be help'd by the Statute. Cro. E. 259. pl. 43. Mich. 33 & 34 Eliz. B. R. Welſh v Upton.

In an Action of *Battery and Wounding*, the Defendant *juſtified as to the Battery*, but *ſaid Nothing as to the Wounding*; the Defendant had a Verdict and Judgment, becauſe it was only a Diſcontinuance upon the Point of Wounding, which is holpen after Verdict. Hob. 187. pl. 227. Mich. 11 Jac. Freeſtone v. Bowyer.—— G. Hiſt. of C. B. 128. 129. S. C.

In Treſpaſs for *entring into his Houſe and his Cloſe*, the Defendant *juſtified*; the Plaintiff *replied and traverſed as to the Houſe, but ſaid Nothing as to the Cloſe*, and found for the Plaintiff; but per tot. Cur. Judgment ſhall be for the Plaintiff for that Point which is found, and the Diſcontinuance for the other is aided by the Statute. Cro. J. 353. pl. 7. Mich. 12 Jac. B. R. Wats v. King.—4 Le. 57. Watts v. King is not S C —— G Hiſt. of C B. 126 S. C.— Mar. 21. pl. 47. Paſch. 15 Car. Buckley v. Skinner of Treſpaſs Cum Equis Porcis & Bidentibus, and Defendant juſtified as to the Horſes, but ſaid nothing as to Porcis & Bidentibus. The Book ſays the Opinion of the Court was that the Plea was inſufficient for the whole; and that Jones J. ſaid that in ſuch Caſe the whole Plea is naught, becauſe the Plea is intire as to the Plaintiff; but that Barkley J. held the Plea naught, Quoad &c. only, and that Judgment ſhould be given for the other.——2 Roll Rep 161. Paſch 18 Jac B. R. Jennings v. Plaiſtr S. P. and Verdict for the Defendant, and the Court held it a Diſcontinuance of this Part of the Action only as to what was not anſwer'd to, and the Verdict ſhall ſtand good for the Reſidue by the Stat. 32 H 8. and 18 Eliz. and the Defendant had Judgment.——Cart. 51. Hill. 17 & 18 Car. 2 Ayre v. Gloſſom S. P. Windham J. ſaid it is a Diſcontinuance in Pleading, and that is help'd by the Statute; But Bridgman Ch. J. ſaid that as to the Queſtion of Diſcontinuance he was never ſatisfied in it; that Diſcontinuance in Pleading he thought is not aidable, but Diſcontinuance in Proceſs is; and he doubted whether it was the Intent of the Statute; that in Sir John Barrington's Caſe a Diſcontinuance in Pleading was not help'd; and that he had always been of Opinion, and ſome of the Judges ſeem to be of that Opinion, that a Di continuance in Pleading ſhall not be help'd by the Stat. of Jeofails; and a Venire Facias de Novo was awarded.

In *Debt for Rent* on a Leaſe of Lands, *Part Freehold and Part Copyhold.* The Defendant *pleaded an Eviction from all* by the Plaintiff's Teſtator; the Plaintiff replied *Proteſtando, that the Defendant was not evicted from the Copyhold, pro Placito dicit, that the Freehold was intailed, and therefore the Demiſe void.* The Defendant *traverſed the Entail*, upon which they were at Iſſue, and the Plaintiff had a *Verdict for the whole Rent.* It was objected that here was a Diſcontinuance as to the Copyhold, and it may be the greater Part was Copyhold; and if ſo, then the Defendant is charged with the whole Rent for the Freehold, which is the leſſer Part. It was agreed that the Rent iſſues out of the Whole, but this Diſcontinuance is cured by the Stat. of H. 8. 3 Lev. 39. Hill. 33 Car. 2. B. R. Randall v. Brees.—— 2 Show. 399. pl. 371. S. C ——S. C. cited G. Hiſt. C. B. 126.

In *Debt* on Bond, *after Iſſue joined in a Corporation-Court* the *Mayor was removed, and another choſen*, but *no Day was given to the Parties*, nor any other Court held; but after this a Venire was awarded, and the Iſſue tried. Upon a Writ of Error brought in B. R. it was objected that the Stat. 32 H. 8. cap. 30. did not extend to inferior Courts, and that it help'd only Diſcontinuances of Pleas or Proceſs, and not of the Court. But per Holt Ch. J. it is a remedial Law, and ſhall be conſtrued to *extend to all Diſcontinuances, and* that *as well in inferior as ſuperior Courts*; and indeed inferior Courts have moſt Need of ſuch Aſſiſtance. Gregory's Caſe, which is of a Penalty given by Statute to be recover'd in any Court of Record, which muſt be taken ſtrictly for thoſe at Weſtminſter, differs; for that is a Penal Law, and the Courts at Weſtminſter are thoſe which the King's Attorney-General attends. 1 Salk. 177. pl. 2. Trin. 3 W. & M. in B. R. Walwin v. Smith.——4 Mod. 86. Hill. 3 & 4 W. & M. the S. C. and the Court was of Opinion

Opinion that Diſcontinuance of Proceſs or in Pleading was help'd by the Statute; but where the Cauſe is diſcontinued and out of Court, as in the Beginning of this Reign, for not holding of Hillary-Term all Cauſes were then diſcontinued, which could not be aided by any Statute of Jeofails, without a particular Act of Parliament for reviving thoſe Cauſes and Proceſs.———Carth. 206. S. C. There was no Dies datus, nor any Court return'd to be held in a Quarter of a Year together; but the Return was, that ſuch a Day (ſo long after the Parties came into Court, & ſuperinde &c. But per Cur. This being after a Verdict the Diſcontinuance is cured by the Stat. of Jeofails, which Statutes do extend to inferior Courts of Record.——Ibid. ſays the like Judgment was given this Term in a Writ of Error between Boſon and Phyler, where a Diſcontinuance was aſſign'd for Error after a Verdict and Judgment in the Court of the City of Exon, and the Judgment was affirm'd in both Caſes.——It was admitted Arg. that the Stat. of Jeofails do not extend to aid Courts Baron. Show. Parl. Caſes 69. in Caſe of Smith v. the Dean and Chapter of Paul's and Rugle.

* *Conſpiracy againſt ſeveral*, who *pleaded Not Guilty*, the *Plaintiff took one Venire Facias againſt all* whereas he might have ſeveral Venire Facias's, and the *Sheriff did not return the Writ*, by which the *Plaintiff took ſeveral Venire Facias's againſt them*, and after the Jury paſs'd, this was good Matter in Arreſt of Judgment before the Statute of Jeofails made Anno 32 H. 8. but now it is not material after Verdict upon Iſſue by this Statute. Br. Repleader, pl. 40.

An *Information* upon the Statute of Uſury was commenc'd *in C. B. by Subpœna*, and upon Iſſue join'd it was found for the Informer. It was moved, that the Court is not to hold Plea by Proceſs of Subpœna, but by Original, and that this is not aided by the Statute of Jeofails; for this is not a miſconveying of Proceſs, but a diſorderly Award thereof; beſides, it is *not alleged* in the Declaration *by whom, nor to whom, nor where, nor how much Money was lent, nor againſt the Form of what Statute*, and yet Judgment was given for the Plaintiff. And 48. pl. 122 Mich 16 & 17 Eliz. Topcliff v. Waller. ——D. 246 b. pl. 9. S. C. adjudg'd.———Bendl 251. pl. 269. S. C. with the Objections, and ſays, that the Proceſs in this Caſe is no more miſconvey'd than if a *Petit Cape* ſhould be awarded *in an Ejectment*, or a *Diſtreſs or Attachment in a Real Action*, and that theſe Diſorders were never meant to be remedied by the Statute.———Bendl. in Kelw. 214. a. b. pl. 27. S. C. with the ſame Objections in French.

Error of a Judgment in Ejectment in Angleſey, becauſe the *Venire was quorum quilibet habeat* 4 l. whereas the Statute of 27 Eliz. cap. 6. extends not to *Wales*. It was the Opinion of the Court, it was no Fault at Common Law, it being for the Benefit of the Parties to have the better Trial, and if it be a Fault it is help'd by the Statute of Jeofails 32 Hen. 8. For that extends to all Courts of Records. Cro. E 257. pl 32 Mich. 33 & 34 Eliz. B. R. Morris v. Thomas.

Error of a Judgment in Debt, that the *Venire* was *awarded upon the Roll Trin. 28 Eliz. returnable Mich. 28 & 29 Eliz.* and the *Trial was* by Niſi Prius 4 July *before the Return* of it. It was the Opinion of the Court becauſe the Jury is taken before the Return of it, and ſo without Warrant, it was ill, and not helped by the Statute. Cro. E. 257. pl. 33. Mich. 33 & 34 Eliz. B. R. Calthorp v. Woodward.

In Trover after Verdict for the Plaintiff it was mov'd, that the *Diſtringas with the Niſi Prius bore the ſame Date with the Ven. Fac* but ruled that it was aided by Stat. 32 H. 8. Mo. 623. pl. 852. Mich. 42 & 43 Eliz. B. R. Gumbleton v. Grafton.

Miſconveyance of Proceſs is, where one Writ is awarded in Place of another to an Officer that of Right ought not to execute that Proceſs, and he returns it. This is helped after a Verdict by the Statute. But if a Writ be awarded to an Officer who ought not to execute that Proceſs, and he returns it, this is a Miſtrial and not help'd by the Statute. and Warburton ſaid, that Dyer, folio 367. [pl. 40] to the contrary is not Law. Brownl. 134. in Caſe of Cradock v. Jones.

* Lack of Warrant of Attorney *of the Party againſt whom the Iſſue ſhall be tried*, In Treſpaſs, the Defendant *appear'd by Higgins attornatum ſuum*, and this being aſſign'd for Error, the Court held it No Appearance; For there may be diverſe Attorneys named Higgins; But Wray ſaid *if there was any Warrant of Attorney, and his Name appears there* it may be amended, but not as it is. Cro E. 153. pl. 32. Mich. 31 & 32 Eliz. B. R. Hill. & al' v. Mallet.——Le. 175. pl. 246. Tempeſt v. Mallet S. C.

This Statute tho' much more extenſive than the other, and tho' it very much enlarged the Authority of the Judges in Amendments in Miſtakes, yet it *remedied no Omiſſion but one, viz. that the Party's own Neglect in not filing his own Warrant ſhould not after Verdict prejudice* the Right of the Party that had prevail'd; therefore to remedy the Omiſſion which the prevailing Party might be guilty of, as well as the other Side the Stat. of 18 Eliz cap. 14. was made. G. Hiſt. of C. B. 89. 90.

Or * other Negligence *of the Parties, their Counſellors or Attornies*, *Debt againſt J. N. of S. Husbandman*, and the *Iſſue in the Record was, if he was Husbandman the Day of the Writ* or not, and the *Record of Niſi Prius wanted* theſe Words (*Die brevis*) and yet the Juſtices took the Verdict, if he was Husbandman the Day of the Writ; and at the Day in Bank, the Plaintiff would have amended it by the Statute according to the Roll, which was well, and was not ſuffer'd; For as here the Inquiry of the Juſtices of Niſi Prius was without Warrant, becauſe it was not in their Record, Quære if it be aided now by the Stat. of Jeofails 38 *H.* 8. it ſeems that it is; For it is not the Default of the Party his Attorney nor Counſellors; But the Default of the Officers. Br. Amendment, pl. 82. cites 11 H. 6. 11.

If any *Default* be in *any original Writ, or* in *the Return thereof, or* in the *Verdict, or* in the *Judgment, or* in the *Count*, ſo that it *plainly appears by the Count, that the Plaintiff has no Cauſe of Action*, and if a Verdict and Judgment is given upon ſuch Originals for the Plaintiff, yet the Defendant ſhall have Writ of Error, notwithſtanding this Statute, and theſe Defaults are not remedied by it. Bendl. 37. pl. 67. Mich. 1 & 2 P. & M. Anon. ——And. 27. pl. 60 S. P.—— Kelw. 207. b. pl 5. S. C——But ſee 18 Eliz. cap. 14.

*the * Judgment ſhall ſtand according to the ſaid Verdict, without Reverſal.*

For further Explanation of this Statute, ſee the proper Diviſions of this Head.

(N) Statute of 18 Eliz. cap. 14.

The *Want of Vi & Armis* was reſolved to be but Form, and not Subſtance, and aided by this Statute.

1. 18 *Eliz. cap.* 14. *Sect.* 1 IF *any* Verdict *of* 12 *Men or more ſhall be given in any Action in any Court of Record, the Judgment thereupon ſhall not be ſtay'd or reverſed by reaſon of any* Default *in Form*, or Lack of Form, *touching* falſe Latin, *or* Variance from the Regiſter, or other Defaults in Form in any Writ *Original or Judicial*, Count, *Declaration*, Plaint-Bill, *Suit, or Demand*;

Cro. J. 130. ſays a Precedent was cited of Trin. 23 Eliz Rot. 723.——S. P. held accordingly per tot. Cur Cro. J. 443. pl. 19. Mich. 15 Jac. in the Exchequer-Chamber, Taylor v. Welſted.——S P. accordingly per tot. Cur. Cro. J. 526. pl. 1 Paſch. 17 Jac. B. R. Willis v. Neilder.——S. P. and tho' it was in the Writ, and in the 2d Declaration, yet being omitted in the firſt Declaration, is Matter of Subſtance, and cannot be amended; per tot Cur. Cro. J. 536. pl. 3. Trin. 17 Jac. B. R. Ford v Ford.—— 2 Roll Rep 107. S. C. accordingly.——Cro. C. 407. pl. 7. Paſch. 11 Car. B R. S. P. accordingly, Mayo v Clogſhill.——So in a *Scire Facias on a Recognizance for the Good Behaviour*, the Judgment was ſtay'd after Verdict, for want of Vi & Armis. Cro. J. 412. pl. 12. Mich. 14 Jac. B. R. The King v Hutchins.

The *Meaning* of this *is, that the Giſt of the Action muſt be ſubſtantially alleged*; *but* any *other Circumſtances relative to that Action ſhall be ſuppoſed by the Verdict*; for it was not to the Intention of the Statutes perfectly to deſtroy the Allegata; for this would have ruin'd all Proceedings in the Courts of Juſtice; but the Deſign was to cure any Inſufficiency that was not of the Eſſence of the Plaintiff's Action. What is Subſtance, and what not, muſt be determined in every Action according to its Nature, and that ſeems properly to be the Eſſence of Action, without which the Court would have no ſufficient Grounds to give Judgment in the ſame manner; that is of the Eſſence of a Plea, where the Court has ſufficient Ground to diſmiſs the Defendant on ſuch Plea found for him. G. Hiſt. of C. B. 67.

After Verdict and Judgment for the Plaintiff in Ejectment, it was aſſigned for Error, that upon the *Venire Facias* is *return'd Summonitus eſt*, where it ought to have been *Attachiatus eſt*; ſed non allocatur, being only Matter of Form, which ſhall not hurt after Verdict; and Judgment was affirmed. Cro. C. 90. 91. pl. 13. Mich. 3 Car. in Cam. Scacc. More v. Hodges.

A *Plaint* was enter'd *againſt Francis*, and the *Proceedings* were *againſt John*; per Roll Ch. J. it is not good; for a Plaint is in Nature of an original Writ, and therefore if that be erroneous, it cannot be help'd, though after a Verdict, and Judgment niſi Cauſa. Sty. 115. Trin. 24 Car Brereton v. Monington.

In a common *Judgment in Debt* by Confeſſion *Attachiatus fuit* was by Miſtake enter'd *inſtead of Summonitus fuit*, and tho' the Court at firſt made ſome Difficulty, yet afterwards they made a Rule to amend the Record. Rep. of Pract. in C. B. 9. Trin. 1 Geo. 1. Rayner v. Arnold.

As to the Want of Vi & Armis, ſee 16 & 17 Car. 2. cap. 8.

After a Venire Facias was *awarded in the Exchequer, and returned, a Diſtringas* Juratores *was awarded, where it ought to be Hab. Corpus.* This being aſſigned for Error, all the Barons and Clerks held that this is the *Courſe of that Court*, and no Habeas Corpus ever was awarded in that Court; and Wray ſaid that it was the ſame in B. R. but that otherwiſe it is in C. B. and the Courſe of the Court muſt be purſued; beſides it is aided by the Statute of 18 Eliz. cap. 14. it being only a Miſawarding of Proceſs. Sav. 36. pl. 85. Mich. 24 & 25 Eliz. in the Exchequer-Chamber, Venalio v. Woodroffe.

Or for Want of any Writ Original or Judicial,

Error was aſſigned, that there was *no Habeas Corpus or Diſtringas*; whereas the Trial was by Verdict, as was certified upon a Certiorari awarded; but held that this is aided by the 18 Eliz. "That after "Verdict Judgment ſhall not be reverſed for want of Writ Original or Judicial;" but they all held, That if there never was a Habeas Corp. or Diſtringas awarded, this ſhall not be aided by the Statute; for

for then they had no Authority to take the Jury, and they could not know if they were the Jurors returned upon the firſt Writ; but it ſhall be here intended that there were ſuch Writs, becauſe the Jury was taken, and it cannot be intended that they would or could call them without ſuch a Writ, and ſo it ſhall be *intended that there were ſuch Writs, but that they are embezzled*, and this is directly aided by the Statute. Cro. E. 215. pl. 10. Hill. 33 Eliz. B. R. Damport v Thatcher.——2 Le. 1. pl. 2. Thatcher v. Damport, S. C. but S. P. does not appear.

After Verdict it was moved in Arreſt of Judgment, That the *Venire Facias* was *returnable* 3 *Days after the Term*, and the Diſtringas awarded, and the Jury taken thereupon, which was ill, becauſe the firſt Venire Facias was ill. But per Gawdy, if there were no Ven. Facias it were help'd by the Statute, but an *ill Venire* upon the Record is not help'd. Cro. E. 605. pl. 2. Paſch. 40 Eliz. B. R. Worceſter (Earl) v. Padden.

Where there is *not any Writ at all*, it is aided by the 18 Eliz. but not where there is a good *Writ*, but it *warrants not the Declaration*; ſo if it be an *ill Writ* it is not holpen by the Statute. Cro. E. 722. pl. 52. Mich 41 & 42 Eliz. C. B. Greenfield v. Dennis.——Same Diverſity per Cur. 5 Rep. 37. Paſch. 34 Jac. [but ſeems miſprinted, and that it ſhould be Eliz.] B. R. Biſhop's Caſe.——Le. 210. pl. 295. Mich. 32 & 33 Eliz. C. B. Biſhop v Harcourt, S. C. but S. P. does not appear.——And. 240. pl 256. Paſch. 32 Eliz. S. C. but S. P. does not appear——S. P. as to no Writ, but a *Writ inſufficient in Matter* is not holpen; but a Writ inſufficient *in Form and ſufficient in Matter* is holpen; and in every Writ of *Formedon* there are two Things requiſite, viz. the *Gift, and the Conveyance to the Demandant*, and if either of theſe fail, the Writ is inſufficient in ſubſtance, and is not holpen by the Statute; per Popham Ch. J. Goldsb 126. pl. 16. Hill. 43 Eliz. Downall v Caresby——Same Diverſity accordingly, between a vitious Original and no Original. Yelv. 109 Mich. 5 Jac. B. R. per Cur. Harriſon v. Fullſtow.——Same Diverſity, 3 Bulſt. 224. Mich. 14 Jac.—Same Diverſity, Sid. 84. Trin. 14 Car. 2. B. R. in pl. 12.

An *Action* was *commenced* 35 *Eliz.* and the *Venire Facias* to try the Iſſue *was dated* 33 *Eliz.* After a Verdict this was aſſigned for Error. Gawdy J. ſaid that here is no Venire Facias, and ſo aided after Verdict by 18 Eliz. But Tanfield ſaid that this very Caſe was York's Caſe, and adjudged in this Court that it was not holpen by the Statute. Goldsb. 188. pl. 133. Hill. 43 Eliz. Boyer v. Jenkins.——Mo. 410. pl. 557. Trin 37 Eliz. Bowyer v. Jenkins, is not S. P.

The *Venire Facias was John* Percy, and *the Roll was Peter* Percy, and the *Poſtea was according to the Roll, which was the Plaintiff's true Name.* It was held, that in caſe no Venire Facias iſſues, it is holpen by the Statute of Jeofails; and in this Caſe it is in Effect as if no Venire Facias had iſſued, and ſo it was adjudged. Godb. 194. pl. 277. Trin. 10 Jac. C. B. Percy's Caſe.——Brownl. 78 Milton v. Pearſe, ſeems to be S. C. and the Court held the Venire as none.——So where the Declaration and Proceſs was Mathias W. and the Venire was Matheum W. Coke Ch. J. held this remedied by the Statute; for if the Chriſtian Name be miſtaken, it is all one as if there was no Venire Facias, which is remedied by the Statute. Roll Rep 22. pl. 30. Paſch. 12 Jac. B. R. Grubb v. Willoes.——Where no Venire Facias is, it is holpen by the Statute; but an erroneous Venire Facias is not. Mar. 26. Paſch. 15 Car. pl. 60. Anon.

Caſe &c. The Plaintiff *laid his Action in Dorſetſhire*, and afterwards *proceeded in London*, and had a Verdict. It was reſolved upon Motion in Arreſt of Judgment, That here upon the Matter is Want of an Original, and aided by the Statute of Amendments. Palm. 394. Mich. 21 Jac. B. R. Cottrell v. Furnival.——2 Roll Rep. 382. S. C. and the Exception was not allow'd. And Ley Ch. J. cited Culpepper's Caſe, adjudged within a Year before, where in Treſpaſs of Battery Bill was laid in Middleſex, and after declared in London, and Verdict for the Plaintiff; and upon Motion in Arreſt of Judgment, the Court gave Judgment againſt the Plaintiff; but afterwards the ſame Term, upon better Advice, they gave Judgment for the Plaintiff, becauſe upon the Matter there was a Want of Original, and therefore remedied by the Stat of Amendments; and the Reporter ſays he well remember'd the Caſe.——S. C. cited by the Ch. J. accordingly. Palm. 394.

In *Ejectment* it was moved after Verdict, That there was *no Bill filed*, and the Court ſaid it was aided by the Stat. of 18 Eliz. and therefore Judgment was given for the Plaintiff, notwithſtanding the Exception. Cro. C. 282. pl. 24. Mich. 8 Car. B. R. Parker v. Grigſon.——Jo. 304. pl. 13. Grigs v. Parker, S. C. and reſolved accordingly per tot. Cur. For the Bill upon the File is in Nature of an Original, and Want of an Original is help'd; and in the ſame manner the Want of a Bill, and Judgment for the Plaintiff.

In *Treſpaſs againſt* 3, *one pleaded Not Guilty*, upon which they were at Iſſue, and the *Defendant had a Verdict*. There was *Judgment by Default againſt the other* 2, and a Writ of Inquiry, *and they only brought a Writ of Error, and aſſigned* for Error the *Want of an Original*, and that this is not cured by the Verdict for the one Defendant; but it is now as if the Action had been brought againſt the 2 only; but if the Verdict had been for the Plaintiff againſt that one Defendant, this had been aided by the Statute; For the Want of an Original Quoad all is cured, where any Verdict is for the Plaintiff, and the other 2 may bring a Writ of Error without the 3d; for he cannot be joined becauſe he is acquitted, and therefore cannot ſay that the Judgment is to his Damage; and ſo held all the Court, except Twiſden, who held that the Writ of Error ſhould be brought by all three. Lev. 210. Paſch. 19 Car. B. R. Cannon v. Abbot.

The Court took a Diverſity between *no Venire Facias* at all, and an *ill Venire*; for tho' it be as bad as may be, yet ſince it is a Venire Facias it is not help'd by the Stat. of Jeofails; but if there had been none, the Statute had made the Trial good without it; and accordingly Judgment was afterwards affirmed. Sty. 8. Hill. 22 Car. B. R. Broome v. Evering.——S. P. by Gawdy J. Cro. E. 605. in pl. 2.

In *Ejectment by Original* in B. R. it was moved in Arreſt, That the Original was *Summonitus fuit* &c. whereas it ſhould be *Attachiatus fuit*, viz. Pone per Vadios &c. it being an Action of Treſpaſs, and that an ill Original is not aided. After Search made, and no Original Writ being to be found upon the File.

the Court ſaid they would intend after Verdict that there was a good Original, which now is loſt, and that the Plaintiff's Clerk had miſtook in the Recital thereof; but had there been a vitious Original upon the File, they would not intend another good Original, unleſs the Plaintiff ſhew'd it, and Judgment for the Plaintiff. Saund. 318. Mich. 21 Car. 2. B. R. Redman v. Edolph.——Sid. 423. pl. 3. S. C. but no Judgment.——Mod. 3. pl. 12. S. C. and it being certified by Mr. Liveſey that there was no Original at all, the Plaintiff had Judgment, tho' in his Declaration he recited the Original.——G. Hiſt. of C. B. 96. cites S. C.

Ven. Facias was awarded to and returned by the Coroner, and afterwards a *Tales* was awarded and *returned by the Sheriff*, and a Verdict was given. This is not aided by the Stat. 32 H. 8. or 18 Eliz. and Judgment reverſed. Cro E. 574. pl. 15. Trin 39 Eliz. in the Exchequer-Chamber, Morgan v. Wye.——Mo. 356. pl. 482. S. C. adjudged accordingly; tho' Dyer 367. [a. pl. 40. Mich.] 21 & 22 Eliz. ſays it was held that it was remedied after Verdict by the Stat 32 H. 8.——But 5 Rep 36. b. this Caſe being cited as the Caſe of Goodwin v. Franklin, by Wray Ch. J. accordingly, the Reporter, ſays Wray, ſaid true; for he was of Counſel with Franklin in the Caſe, but the principal Caſe in Dyer was held good Law, becauſe the Venire Facias was awarded *Ex aſſenſu Partium*, & omnis Aſſenſus tollit Errorem.——See Trial (H. e) pl. 19

Or by reaſon of any imperfect or inſufficient Return *of any Officer*,

In Dower the *Venire Facias on the Roll was awarded returnable* 15 *Paſch* but the Writ itſelf was *made returnable* 15 *Trin.* and ſo no Venire Facias warranted by the Roll. This is within the 18 Eliz. and Judgment ſhall not be ſtay'd for ſuch Miſpriſon after a Verdict. Cro. E. 758. pl. 28. Paſch. 42 Eliz. C. B. Ford v Rider.

Venire Facias was *awarded returnable* upon the Roll *Die Sabbati poſt* 15 *Martini*, and the Writ itſelf *was returnable Die Jovis poſt* 15 *Martini*, ſo as it varies from the Roll, and is not warranted thereby. But the Court held it to be no Error; for in regard a *Diſtringas was awarded upon* it, and the *Trial is upon the Diſtringas*, the Verdict is good; and if not, it is holpen by the Stat. of 18 Eliz. of Miſawarding of Proceſs, wherefore the Judgment was affirmed. Cro. E. 767. pl. 7. Trin. 42 Eliz. B. R. Parks v. Jackſon.

Error of a Judgment in Debt *in Norwich*, for that the Record was *Attachiatus eſt*, where it ought to be *Summonitus eſt*; for that ought to be as an Original, and for want thereof it is Error. It was objected that the Defendant having appeared and pleaded to Iſſue, and Verdict and Judgment given, it is not now aſſignable for Error; for it is but the Want of an Original which is aided by the Stat. of 18 Eliz. But Popham and Williams only in Court, held it is not aided; for that Statute is intended only of Original Writs, which are ſued out of Chancery returnable in C. B. or B. R. but *extends not to Proceſs, which is only in the Nature of an Original*; and the Judgment was reverſed. Cro. J. 108. pl. 4 Hill. 3 Jac. B. R. Pratt v. Dixon.

After Verdict and Judgment it was aſſigned for Error, that there was *no Return upon the Habeas Corpus*, and ſo *Album breve*, and therefore not aided by the Statute; for this is all one as a Venire Facias. Quod fuit conceſſum per Coke. Roll Rep. 295. pl. 13. Hill. 13 Jac. B. R. Buckle v. Scarth.

Judgment againſt the Principal, and a *Scire Facias and Judgment againſt the Bail* by Nil dicit; and upon Error brought it was aſſigned for Error, That there was *no Warrant of Attorney filed* for the Plaintiff; adjudged that this was not within the Stat. of 18 Eliz. For that helps only after a *Verdict*, and where there is no Warrant of Attorney, but not after a *Judgment by Confeſſion, or non ſum Informatus*; and here being no Warrant of Attorney, the Court cannot order the making one; but if there had been one, they might have *order'd the Filing it*. Mar. 121. pl. 201. 129. pl. 209. Mich. 17 Car. Fairborn v. Cruſo.

Or for Want of any Warrant of Attorney,

* After a Verdict and Judgment it was aſſigned for Error, That there were *no Continuances from Eaſter to Michaelmas* Term. Adjudged this was Error, and not help'd by this Statute, tho' it was after a Verdict, becauſe that Statute muſt be intended where the Judgment is had upon a Verdict, which was not done in this Caſe but upon Defendant's Confeſſion of Aſſets, and the Verdict was nothing to the Purpoſe, but only to make the Defendant's Confeſſion more ſtrong. Brownl. 106. Hill. 7 Jac. Mollineux v. Mollineux.——Cro. J. 236. pl. 7. S. C. accordingly; and the Stat. 18 Eliz. is to be intended when the Trial by Verdict is the Occaſion and Cauſe of the Judgment.——Yelv. 169. S. C. accordingly, and Brownl. ſeems only a Tranſlation of Yelverton.

Or by reaſon of any * Default in Proceſs, upon or after any Aid or Voucher.

A Writ of *Raviſhment of Ward* according to the Statute of Weſtm. 2. cap. 35. is a Penal Law as was agreed by all the Judges, and 3 of them held that it is ſuch a Penal

S. 2. This Act ſhall not extend to *any* Appeal of Felony or Murder, *nor to any* Indictment *or Preſentment of Felony, Murder, Treaſon, or other Matter, nor to any Proceſs upon them, nor to any* Action upon any Popular or Penal Statute.

Law

Law as was within the Proviſo of this Statute, but Haughton J. e contra; He agreed it to be within the Letter, but held it to be out of the Exception which intends ſuch Actions as the King may have and a Subject too, ſo as they are partly Popular and partly Penal as upon the Statute of *Perjury* which gives Action to the Party grieved, this is penal, becauſe a certain Pain is inflicted by that Statute, and given to the Party grieved. But a Statute that gives Recompence to the Party who hath ſuſtain'd Damages as Action of *Waſte*, which is for a Wrong done in the Land, and ſo of *Forcible Entry*, and upon the Statute of 2 E. 6. of *Tithes*, becauſe theſe are Remedies given for the Party's Right, and ſo not within this Proviſo; But if it be a Pain ſet and impoſed without any Reſpect of Recompence for Damages, then it is within the Proviſo. 3 Bulſt. 275. &c. Hill. 14 Jac. Huſſy v. Moor.——Roll Rep 445. pl. 9. S. C. and ibid. 447. 448. S. P. accordingly by Haughton J. and as to the Action of Waſte and upon the * 2 E. 6. of Tithes, the ſame were agreed per tot. Cur. But as to the principal Caſe of Raviſhment of Ward Mountague, Crooke, and Doderidge ſeem'd e contra, becauſe it is not an Action given only *in Satisfaction of Damages*, but alſo Impriſonment and Baniſhment are added to puniſh the Tort; But Crooke and Doderidge agreed, that if this Action had only *increaſed the Damages* it had not been within the Proviſo, becauſe then it would be in Satisfaction. And Crooke ſaid that an Action of *Forger of Falſe Deeds* is within this Proviſo, becauſe of the corporal Puniſhment.—— Hob. 101. S. C. and S. P. accordingly ——2 Saund. 258. in Caſe of Greene v. Cole, the Reporter infers from that Caſe that an Action of *Waſte*, tho' treble Damages are recover'd therein, is not ſuch Penal Action as is excepted out of the 21 Jac. [cap. 13. where there is the like Proviſo as Here.]

* If in Debt on the Statute of 2 E. 6 there had been any Miſpleading, or Miſtrial, the Court held clearly that it was aided by 32 H. 8. and 18 Eliz. cap. 14 and cannot be quaſh'd after Verdict. Cro. J. 318. pl. 1 Hill 18 Jac. B. R. in Caſe of Arnold v. Bidgood —— 2 Bulſt. 66. S. C. accordingly.

For further Explanation of this Statute, ſee the proper Diviſions under this Head.

(O) Statute of 21 Jac. 1. cap. 13.

1. 21 *Jac. cap.* 13. ENacts, That *after Verdict for the Plaintiff or Demandant, or for the Defendant or Tenant, Baily in Aſſiſe, Vouchee, Prayee in Aid, or Tenant by Receipt, in any Court of Record, the Judgment thereupon ſhall not be ſtaid or reverſed by reaſon of any* Variance in * Form *only*, between the original Writ or Bill and the Declaration, Plaint, or Demand, *or lack of an* † Averment of any Life *of any Perſon, ſo as upon Examination the Perſon be proved to be in Life,*

* See the firſt Note upon the Statute of 16 & 17 Car. 2. cap. 8.——In *Ejectment* the Plaintiff *declared of a Leaſe for 3 Lives, if A. ſo long lived*, but did *not ſhew that A. was alive.* This being moved in Arreſt of Judgment, the Court held that being after Verdict it is made good by the Stat. 21 Jac. cap. 13. if Ceſty que Vie be yet alive, which may be examined by the Sheriff &c. Sid. 61. pl. 30. Mich 13 Car. 2. B. R. Anon.——Keb. 176. pl. 135. Tubb v. Walwin, S. C. ſays the Inquiry may be by the Sheriff, or other, as the Court thinks fit. And Foſter cited Lady Morley's Caſe, where after Verdict the like Rule was made before the Statute.

2. *Or by reaſon that the* Venire Facias, Habeas Corpora, or Diſtringas *is* awarded to a wrong Officer;

Venire Facias and other Proceſs were directed *Vicecomitibus de Canterbury*, and the *Return is made by one Sheriff only*; but upon Adviſement the Court amended it at Common Law, and not upon the Statute of Jeofails; but upon the 39 H. 6. Fol. 40 viz. they *ſwore the Sheriff here in Court, that there was only one Sheriff in Canterbury, and* then *made an Indorſement on the Writ accordingly*, viz. that there was not any other Sheriff. Sid. 244. Paſch. 17 Car. 2. B. R. The King v. Percival & al'.

3. *Or by reaſon the* Viſne is in ſome Part miſawarded, *ſo as ſome one Place be right named, or by reaſon that any of the* Jury *is* miſnamed, *ſo as upon Examination it be proved to be the ſame that was meant*;

The Statute of 21 Jac. aids only where the *Venire Facias* is *from one Place where it ſhould be from two*, or e converſo; but not where there is *no Place* from whence the Viſne ſhould come; per Doderidge & Whitlock J. Lat. 194. Hill. 1 Car. in Caſe of Taylor v. Tolwin.

This

This Statute *aids not Miſtrial only in two Caſes*, 1ſt, It aids not but where *the Venue ought to be from ſeveral Places*. 2dly, or *where one* of the Places *is truly named*; per the Ch. J. Sid. 20. pl. 1. Hill. 12 Car. 2 C. B. in Caſe of Hill v. Bunning.

In an Action of *Waſte* brought *in London* the *Venire Facias* was *awarded to the Beadles of 4 Wards*. After Verdict and Judgment, it was moved and reſolved that the Verdict and Judgment were erroneous, becauſe it was awarded at the Petition of the Defendant to the Beadles of 4 Wards, which are *not ſaid to be the next Wards to the Place waſted*, and that 2 of them do not appear to be ſo, and ſo it was a Trial not according to the Cuſtom. But upon Error brought in Parliament, it was reſolved by the major Part of all the Juſtices and Barons, that tho' it was a wrong Venire, yet it was aided by the 21 Jac. cap. 13. For 2 of the ſaid Wards appear to be next to the Place waſted, and ſo the *Venire was miſawarded in Part only*, and ſo the Lords affirm'd the Judgment. 2 Saund. 252. &c. Mich. 22 Car. 2. Greene v. Cole.—— From hence the Reporter infers and ſays, Ex hoc Nota, that the ſaid Statute *extends to Inferior Courts* and is not reſtrain'd to the Courts of Weſtminſter. 2 Saund. 258. in Caſe of Greene v. Cole.—— Ibid. The Reporter ſays, he thinks it doubtful whether the Caſe be aided by the ſaid Statute 21 Jac. or not, for the Statute extends only to aid thoſe Proceedings, which were at the Common Law, where the Venire was miſtaken in Part by the Award of the Court; but when an Iſſue is not to be tried by a Jury de Vicineto of the Place where the Iſſue ariſeth according to the Common Law, but is to be tried by a Jury of 4 Wards adjoining, according to a Special Cuſtom, which would be erroneous at the Common Law, (the Venire not being awarded De Vicineto) unleſs it was ſupported by a Special Cuſtom; then when the Cuſtom (which takes away the Common Law) is not purſued, methinks the Statute doth not extend to aid it; But it was adjudged ut ſupra &c

Debt againſt the Heir upon a Bond of his Father, he *pleaded Riens per Deſcent beſides a Reverſion of Lands in Herefordſhire and Worceſterſhire expectant upon the Death of J. S.* An Iſſue was taken and tried by a Jury of Herefordſhire, and after a Verdict for the Plaintiff, it was moved in Arreſt that this was a Miſtrial, for it ought to have been tried by both Counties, and upon this Judgment was ſtay'd. 2 Lev 178 Mich. 28 Car. 2. B. R. Hore v. Ld Dorſet.——The Reporter adds a Nota, that this ſeems to be cured by the Statute 21 Jac. which ſays that it ſhall be well where the Venue is of one Place, when it ought to be of more, and does not ſay in the ſame County, ſo that it may well extend where the Places are in ſeveral Counties. Quære de eo. Ibid.

In a Writ of Error upon a Judgment in the Palace-Court at Weſtminſter, the Error aſſigned was, that the *Habeas Corpus* Juratorum was *not returned ſerved, but only a Panel of the Names annexed to it.* It was objected, that the Statute extends only to ſuch as are by Writ, and in this Court it is by Precept, and not by Writ; but adjudged, that it is within the Intention of the Statute, which provides Amendment in any Action, Suit, Plaint &c. All. 64. Paſch 24 Car. B R. Morefield v. Webb. ——Sty 39. S. C. but S P. does not appear.

4. *Or by reaſon that there is* no Return upon any of the Writs, ſo as a *Panel of the* Names of Jurors be returned, and annexed to the Writ;

It was agreed that the Statute of Jeofails, which provides Amendment by Examination of the Clerks &c. ſhall *not extend to inferior Courts* in theſe Points. All. 64. Trin. 24 Car. B. R. in Caſe of Morefield v. Webb.

5 *Or for that the* Sheriff's Name is not ſet to the Return, *ſo as upon Examination it be proved that the Writ was returned by the Sheriff &c.*

This Statute helps after Verdict where the *Plaintiff* is within Age, and ſues by Attorney, but not where he is *Defendant*. Jenk. 301. pl. 68. Trin. 18 Jac. Stone v. Marſh.——Bulſt. 24. S. C. & S. P. accordingly, where he is Plaintiff.——Cro J. 580. pl. 11. S. C. where he was Plaintiff, but the Court would adviſe.——But where he was Defendant the Judgment againſt him was reverſed. Cro. E. 569. pl. 5. Trin. 39 Eliz. B. R. Sedburrough v. Raunt.——Cro. J. 581. cites S. C. that the Infant Defendant confeſſed the Action by Attorney.

6. *Or by reaſon that the Plaintiff in an Ejectione Firmæ, or in any Perſonal Action, being an* Infant, *did* appear by Attorney, *and the Verdict paſs for him.*

If an Infant appears by Attorney where he ought to appear by Guardian, it is Error, and not help'd by the Stat. 21 Jac. becauſe it is more dangerous for an Infant to appear in Propria Perſona, or per Guardianum than by Attorney; for againſt an Attorney he may have Remedy, but not againſt himſelf or his Guardian; and this is Caſus omiſſus out of the Statute; per Roll Ch. J. Sty. 218. Trin. 1650. in Caſe of Dawkes v. Payton.

The Statutes made before were only extended to the Courts above, but the ſubſequent Statutes carry to all Courts of Record, and remedy ſeveral Defects and Omiſſions not included in the former Jeofails. G. Hiſt. of C. B. 90.

7. This Statute *extends to Courts made after.* Reſolved in Error on a Judgment given in the Palace-Court at Weſtminſter, which was erected by Letters Patents 6 Car. and upon good Deliberation Judgment was affirmed. All. 64. Paſch. 24 Car. Morefield v. Webb.

8.

8. *S.* 3. *This Act ſhall not extend to any Appeal of Felony or Murder, nor to any Indictment or Preſentment of Felony, Murder, or Treaſon, nor to any Action upon any Popular or Penal Statute.*

One was ſu'd upon the *Statute of Inmates*, and the *Diſtringas* Jurata *bore Date on a Sunday, and out of Term*; Roll Ch. J. held, that the Statutes 18 Eliz. and 21 Jac. extend not to penal Laws, altho' it is ambiguouſly penn'd, nor to any Proceſſes grounded upon them, for the Proviſo exempts the original Action, and by Conſequence all Proceſſes depending upon it are excepted, ſo that here is no good Trial, but there ſhall be a Ven. Fac. de Novo, Niſi. Sty. 307. Mich. 1651. Theoballs v. Newton.

Information of Perjury is not nam'd in this Proviſo, and therefore remains at Common Law. Sic dictum fuit. Sid. 66. pl. 39. Mich. 13 Car 2. B. R. in Caſe of the King v. Reede.

An *Information for a Riot* and Battery *upon one of the King's Meſſengers* in his Journey is not within this Proviſo, but remains at Common Law. Sid. 243, 244. pl. 4. Paſch. 17 Car. 2. B. R. the King v. Percival & al.

For further Explanation of this Statute, ſee the proper Diviſions under this Head.

(P) Statute of 16 & 17 Car. 2.

1 16 & 17 *Car.* 2. *cap.* 8. *S.* 1. *IF any Verdict be given in any Action or Demand in his Majeſty's Courts of Weſtminſter, or in the Counties Palatine, or in the Great Seſſions, Judgment ſhall not be ſtaid or reverſed for* Default in Form, *or by reaſon that there are not* * Pledges, *or but one Pledge to proſecute, returned upon the Original Writ; or becauſe the* Name of the Sheriff *is not returned upon ſuch Original Writ; or for* Default of entring Pledges *upon any Bill or Declaration; or for Default of* alleging the † bringing into Court any Bond, *Bill, Indenture, or other Deed mentioned in the Declaration or other Pleading*; or *for Default of Allegation of bringing into Court* Letters Teſtamentary, or *Letters* of Adminiſtration; *or by reaſon of the* Omiſſion of ‡ Vi & Armis, *or* || contra Pacem;

The main Deſign of the Stat. 21 Jac. cap. 13. was to help any Miſtake in the Jury Proceſs; but there were ſeveral Things ſtill to be ſupplied, and ſeveral others to be adjudged Form which are always conſtrued to be Matters of ¶ Subſtance, and conſequently not aided by any of the former Statutes, wherefore 16 & 17 Car. 2. cap. 8. was made. G. Hiſt. of C. B. 91.

¶ Matter of Subſtance is whatever is eſſential to the Giſt of the Action; for it was not the Intent of the Statute of Jeofails to ſupply a Thing that is eſſential to the Action that is not put in Iſſue, it might have been found againſt the Plaintiff, and a Verdict will not help that which was never put in the Iſſue; for the Action may be ill founded notwithſtanding that Verdict, if ſomething eſſential to maintain the Plaintiff's Action was not put in Iſſue; but if the Verdict be upon a *Matter Collateral to the Plaintiff's Action*, and all the Eſſentials to the Action are well alleged, there no Advantage can be taken, becauſe when the Cauſe is tried the whole Weight of it is put in the Point in Iſſue; and where the Parties had been at the Expence of a Trial, it was the Intent of the Statute that the Verdict ſhould determine the Cauſe, and the wrong Pleading of ſuch Collateral Matters ſhould not turn to the Diſadvantage of any of the Parties; for the Benefit of ſuch Collateral Matters are waived, when they have put the Streſs of the Controverſy on the Point in Iſſue. G. Hiſt. 109. 110.

As if *Treſpaſs* be brought for chaſing the Plaintiff's Beaſts, the Defendant ſays the Place where &c. is this Franktenement. The Plaintiff preſcribes for Common pro magnis Averiis in the Place where, Levant and Couchant in Dale. The Plaintiff in his Replication does not ſhew they were Magna Averia, or † that they were Levant and Couchant in Dale; yet if the Preſcription be in Iſſue, and that be found for the Plaintiff, he ſhall have Judgment, becauſe the Iſſue being on the Right of Common, which is Collateral to the Injury done by the Beaſts, and the Right being found for the Plaintiff, the Defendant has waved all other Benefit of the Replication, and therefore the Statutes hinder him from taking any Benefit after Verdict; for the Defendant by his Iſſue confeſſes the Injury in chaſing the Beaſts, if there be no Right of Common, and waves the Advantage he might have taken on Demurrer for the Plaintiff's not bringing himſelf within the Preſcription of what was eſſential, to ſhew an Injury in chaſing the Beaſts. G. Hiſt. of C. B. 110. 111.——See Saund. 226. Paſch. 20 Car. 2. Stennel v. Hogg, S. P.

† S. P. held aided by the Statute of Jeofails, and Judgment for the Defendant. Cro. J. 44. pl. 12. Mich. 2 Jac. B. R. France [or Prance] v. Tringer.——S. C. cited Ld. Raym. Rep. 168.——S. P. and aided after Verdict. Vent. 34. Trin. 21 Car. B. R. Anon.

In Caſe for Words by Attachment of Privilege, the Defendant *demurr'd to the Court for want of Pledges.* Per Cur. This is Subſtance, the Defendant having demurr'd ſpecially for this Cauſe, and the Plaintiff having joined in Demurrer, and put this ſpecially on the Court; ſo that though otherwiſe Pledges may be found at any Time pending the Plea, yet not now after Demurrer joined, but [Judgment] ſhall be given againſt the Plaintiff. But afterwards on the Importunity of Counſel and Payment of Coſts, the Declaration was amended, and Pledges entred. 3 Lev. 39 Hill. 33 & 34 Car. 2. C. B. Hardy v. Gilding.

In *Debt upon a Judgment obtained* 34 Car. 2. ſetting forth the ſaid Judgment &c. *ſicut per Recordum & Proceſſum inde Remanen' in eadem Curia nuper Domini Regis coram ipſo Rege apud Weſtm' plenius liquet.* The Defendant *demurr'd*, for that he ſhould have declared Coram ipſo nuper rege apud Weſtm. *ſed jam coram Dom. Rege nunc* &c. *plenius liquet* &c. The Court held it was but Matter of Form, but being upon a Demurrer, it was not amendable. 3 Mod. 235. Trin. 4 Jac. 2. B. R. Franſhaw v. Bradſhaw.

In Debt on Bond by J. A againſt J. B. for Payment of 50 l. to E. ſuch a Day, and to indemnify the Plaintiff, who was Surety for the Defendant in another Bond to E. for Payment of the ſame Sum, the Defendant pleaded Solvit ad Diem, and the Plaintiff replied Quod prædict. J. B. non ſolvit prout idem J. B. ſuperius allegavit, & hoc petit quod Inquiratur per Patriam & prædict. J. B. ſimiliter. After Verdict for the Plaintiff, the Defendant (upon whom the Iſſue lay) having made no Defence, it was moved in Arreſt that they relied on the Miſpriſion, and therefore made no Defence; and that the Stat. 17 Car. 2. cap. 8. extends not to this Caſe; for that aids a Miſtake of the Name where Plaintiff or Defendant has been right named before only, where that might be ſhewn for Cauſe of Demurrer, which could not be done here; and to this the Court agreed; but they held it amendable by Stat. 8 H. 6. and it was amended. Comyns's Rep. 250. pl. 139. Trin. 2 Geo. 1. C. B. John Abrahat v. John Bunn.

* See Tit Pledges.

† See Tit. Faits (M. a) &c.

‡ See Tit. Treſpaſs (Q. a. 3) (Q. a. 4)

|| See Tit. Treſpaſs (Q. a. 5)

* See Tit. Record (O)

2. *Or the* miſtaking of the Chriſtian Name or Surname of the Plaintiff or Defendant, *Demandant or Tenant*, * Sums of Money, Day, Month, or Year, *by the Clerk, in any Bill, Declaration, or Pleadings, where the right Name &c.* in any Record *preceding, or in the ſame Record, are* once rightly alleged, *whereunto the Plaintiff might have demurr'd, and ſhewn the ſame for Cauſe; nor for* want of the Averment of Hoc paratus eſt Verificare, or *Hoc paratus eſt Verificare* per Recordum; *or for not alleging* † *Prout patet* per Recordum; *Or for that there is* no right ‡ Venue, *ſo as the Cauſe were tried by a Jury of the County or Place where the Action is laid,*

‡ See tit. Trial (H. a. 2) &c.

Debt in London on a Bond condition'd for Enjoyment of a Walk called Shrub-walk in Whittlewood Foreſt in the County of Northampton, and the Venue was of Shrub-walk, and the Cauſe was tried in Northampton. After a Verdict for the Plaintiff it was mov'd, that here was a Miſ-trial, becauſe the Venire Facias could not come from a Walk in a Foreſt, † which is only an Office or Liberty, and the Court inclin'd that it was not aided by the 16 & 17 Car. 2. but afterwards all the Court beſides Twiſden held it within this Statute; and as to the Words in the Statute, viz. (*County where the Action is laid*) they conſtrued it to be (the *County where the Iſſue is triable*) and ſo tho' all agreed that Ven. Fac. cannot be of a Walk, eſpecially here it being nam'd only collaterally as an Aſſignment of a Breach of Covenant, and not as a Lieu conus, but that it ought to have been from the Foreſt, yet it is aided by this Statute, and Judgment for the Plaintiff Sid. 325, 326. pl. 5. Paſch. 19 Car. 2. B. R. Strike v. Banes. ——— † Lev. 207. Stirke v. Bates, S. C. adjudged accordingly by all but Twiſden, that being tried by a Jury of the County where the Matter in Iſſue aroſe it is within this Statute, and that it would deſtroy all the Law touching Juries to try it in a County foreign to the Iſſue who could not know any thing of it; and the rather, becauſe the Statute ſays further, that (*in this and other like Caſes* &c.) and here the Action being laid in London is well tried in the County of Northampton where the Matter in Iſſue is.

In *Covenant*, the Action was *laid in London*, and Iſſue was joined *upon a Feoffment in Oxfordſhire of Lands in that County*, and the Cauſe was *tried in London.* After a Verdict for the Plaintiff it was mov'd in Arreſt of Judgment, that this was a Miſ-trial, becauſe a Feoffment of Lands in Oxfordſhire is local, and therefore the Cauſe ought to have been tried there; ſed per Curiam, this is help'd by Statute 17 Car 2. being tried in the *County where the Action was brought.* 3 Salk. 364. pl. 11. Anon.

In *Covenant for Non-payment of Rent upon a Demiſe of Allom Works [in Lancaſhire.]* Defendant *pleaded that Plaintiff incloſed the Mines ſo that he could not enter to work them*, and Iſſue thereupon was *tried in London*, where the Covenant was alleged to be made. After Verdict Defendant mov'd, that this was a Miſ-trial; but whether it was aided by 16 & 17 Car. 2. cap. 8. Curia adviſare vult. 2 Jo. 82. Mich. 29 Car. 2. B. R Aynſworth v. Chamberlaine. ———3 Keb. 654. pl. 7. S. C. the Court divided, & adjornatur. ———Ibid. 675. pl. 46. S. C. the Court divided, & adjornatur. ———Ibid. 691. pl. 17. Aynſworth v. Champion, S. C. per Cur. this is not aided by the 16 & 17 Car. 2. cap. 8. which never intended to ouſt the Juriſdiction of the County Palatine, [in which it ſeems according to 3 Keb 654. the Lands lay] and Judgment ſtay'd, Wyld præſente, [who with Twiſden before held the contrary.]

Seiſin of Lands in Kent, Cambridgeſhire, and Hertfordſhire, was *tried in London where the Action was brought*, and found for the Plaintiff, and this being aſſigned for Error, the Court ſeem'd to incline that it was well enough after a Verdict by the Statute 16 & 17 Car. 2. cap. 8. ſed adjornatur. Raym. 392. Trin. 32 Car. 2. B. R. Horton v. Nanfan.

A *Trial* was *in Middleſex, and on a Traverſe in Surrey*, and this moved in Arreſt of Judgment, and Holt of Opinion to ſtay Judgment, for that a wrong County is not remedied by the Statute, but only a wrong Venue in a right County; but Dolbin, Gregory, and Eyres J. e contra. And Eyres ſaid, if it had been res integra he ſhould be of another Opinion, but all Reſolutions being otherwiſe he accorded. 12 Mod. 7. Trin. 3 W. & M. Chew v. Briggs ——S. C. cited 3 Lev. 394. Paſch. 6 W & M. in C. B. and ſaid to have been determined the laſt Term in the Exchequer Chamber, by the Opinion of 4 Juſtices againſt 3, that it was cur'd by the new Statute; and therefore in the principal Caſe there, which was Hunt's Caſe, and was Debt for Rent in London of Lands in Eſſex, the Defendant as to part pleaded Nil debet, and as to the Reſiduc an Entry and Expulſion; whereupon Iſſue and Verdict for the whole intirely and Damages, and it was mov'd that the Iſſue as to the Expulſion was local to be tried in Eſſex, and therefore the Verdict intire for Debt and Damages ill in toto, but by reaſon of the Caſe of Briggs v. Chew above the Court would not reverſe the Judgment in the principal Caſe, but affirm'd it, tho' (as the Reporter obſerves) ſome of the moſt conſiderable Judges now there, and alſo the 3 in the other Court being alſo the moſt conſiderable were of the contrary Opinion; but that in both Caſes the Judgments were given per Majoritatem Numero, non Pondere.

In *Debt in Middleſex on a Bond* conditioned to pay 50 l. *at ſuch a Place in London.* The Defendant, after Oyer of the Bond and Condition, *pleaded Payment at the Day* &c. and on Iſſue joined it was tried in Middleſex, before the Lord Ch. J. Holt, and Verdict for the Plaintiff. It was mov'd in Arreſt of Judgment, that this ought to have been tried in London. But Powell, Powis, and Gould J. abſente Holt, held, that according to the Caſe of Croft and Boite in 1 Saund 246. and Jew v. Briggs, 3 Lev. 394 and Dame Calverly v. Leving, it was aided after Verdict. 2 Ld. Raym. Rep. 1212. Mich. 4 Ann. Maitland v. Taylor.

3. *Nor any Judgment after Verdict, Confeſſion by Cognovit Actionem, or Relicta Verificatione, ſhall be reverſed for* want of Miſericordia or Capiatur; *or that a* Capiatur *is* enter'd for a Miſericordia, or a Miſericordia for a Capiatur; *nor for that* Ideo Conceſſum *eſt per Curiam is* enter'd for Ideo Conſideratum *eſt per Curiam; nor for that the* Increaſe of Coſts *after a Verdict in an Action, or upon a Nonſuit in Replevin, are* not enter'd to be at the Requeſt *of the Party; nor by Reaſon that the* Coſts *in any Judgment are* not enter'd to be by Conſent of the Plaintiff; The Plaintiff laid 4 *Counts*, and Defendant *demurr'd to one*, and Plaintiff join'd in Demurrer, *and had Judgment*, and then *entred a Nolle Proſequi as to the other* 3, but *without a Miſericordia*, whereupon Defendant brought Error, and aſſigned this Matter, and cited Co. Ent. 676. to which it was anſwered, that by 16 Car. 2. cap. 8. no Judgment after Verdict &c. ſhall be reverſed for want of a Miſericordia, and that by 4 & 5 Ann. cap. 16. no Judgment ſhall be reverſed &c. by reaſon of any Matter which would have been aided by any Statute of Jeofails in Caſe of a Verdict ſo as an original Writ &c. be fil'd, and therefore the Judgment is not to be reverſed for want of that Word. But per Cur. if the Entry had been neceſſary at Common Law, there is no Statute of Jeofails which cures the want of ſuch Entry; for thoſe Statutes extend to Judgments enter'd by Confeſſion, Nil dicit, or Non ſum Informatus, but *the principal Judgment is* neither of theſe, for it is a Judgment *upon a Demurrer joined.* Now at Common Law there was no need of entring a Miſericordia in ſuch Caſes, becauſe ſuch Entry is only pro falſo clamore, and here is *no Colour of any falſe Complaint, becauſe the Plaintiff ſays, Non vult ulterius proſequi*; and as for that Caſe in the Ld. Coke's Entries, many of them have been condemned; ſo the Judgment was affirm'd. 8 Mod. 198. Mich. 10 Geo. 1724. Anon.

4. *But all ſuch Omiſſions, Variance, Defects, and all other Matters of like Nature, not being againſt the right of the Matter of the Suit, nor whereby the Iſſue or Trial are alter'd, ſhall be amended by the Courts where ſuch Judgments are given, or whereunto the Record is removed by Writ of Error.* In *Treſpaſs for fiſhing in his ſeveral Fiſhery & Piſces cepit.* After Verdict it was moved that he ſhould have alleged what Kind of Fiſh, and the Number. But it was anſwer'd that this was help'd by the Oxford Act, and that the Words, *That Judgment ſhall not be arreſted for any other Exception that does not alter the Nature of the Action or Trial of the Iſſue* ſhall extend to this Caſe. But per Cur None of the Acts have aided this Caſe, *the Number of the Fiſh not being expreſſed*; As if one ſhould bring Treſpaſs for taking his Beaſts, and not ſay what. Vent. 272 Trin. 27 Car. 2. B. R. Anon.——Vent. 329. Trin. 30 Car. 2. B. R. Hovel (alias Howell) v Reynolds S. P. and 2 Jo. 109. S. C. and Judgment Quod Querens nil capiat &c.——See Tit. Treſpaſs (I. 2) pl. 5. S. C.

In Ejectment, the Verdict was *Jacens proximum ad Meſſuagium modo F. N.* and the Judgment was Jacens proximum *ad Meſſuagium in Occupatione F. N.* This being aſſign'd for Error, Raymond J. held that if this Variance be not amendable by the Common Law, it is not within any of the Statutes of Jeofails unleſs the Words of 16 & 17 Car. 2. will help it, viz. " But that all ſuch Omiſſions, Vari-" ances, Defects, and all other Matters of like Nature, not being againſt the Right of the Matter of " the

" the Suit ſhall be amended &c." But he thought that (of) and (in the Occupation of) are the ſame. Et adjornatur. Raym 598. Trin. 32 Car. 2. B. R. Norris v. Bayfield.

5. S. 2. *This Act ſhall not extend to any Appeal of Felony or Murder, nor to any Indictment or Preſentment of Felony, Murder, Treaſon, or other Matter, nor to any Proceſs upon them, nor to any Action upon any Penal Statute, other than concerning Subſides of Tonnage and Poundage.*

For further Explanation of this Statute, ſee the proper Diviſions under this Head.

(Q) Statute of 4 & 5 Ann.

In Debt on a Bond, the Defendant cognovit Actionem, but in Bar of Execution as to his Perſon &c. pleaded that he was a Priſoner &c. & debito modo diſcharged Juxta Formam Statuti for Relief of Inſolvent Debtors The Plaintiff demurr'd, and inſiſted that it did not appear that he petition'd, and that Defendant ought to ſhew his Qualifications, and that he is within the Act, and that it ought not to be put upon the Plaintiff to do it. The Defendant, without pretending to make his Plea good, inſiſted upon this Act, viz. that Judgment ſhould be given as the Right appears. It was inſiſted for the Plaintiff that here appear'd no ſufficient Cauſe of Diſcharge, but a good Cauſe of Action for the Plaintiff; And per Powell J. this Act does not help Subſtance; and that if this Sort of Pleading be made good, the Court can never know when particular Juriſdictions act with Authority and when not; Quod Holt Ch. J. conceſſit, and ſaid that this Expoſition was to take away the Party's Iſſue from him. See 2 Salk. 521. pl. 24 Turner v. Beale Paſch. 5 Ann. B. R. and Ibid. pl. 25. Hill. 5 Ann. B. R. Woodrington v. Deverill.

4 & 5 *Ann. cap.* 16. *Sect.* 1

WHere demurrer *ſhall be* join'd *and enter'd in any Suit in any Court of Record, the Judges ſhall give Judgment, according as the very Right of the Cauſe and Matter in Law ſhall appear without regarding any* Imperfection, Omiſſion *or* Defect, in any Writ, Retorn, Plaint, Declaration, or other Pleading, Proceſs or Courſe of Proceeding, except *thoſe only which the Party demurring ſhall* ſpecially ſet down *with his Demurrer as Cauſes of the ſame, notwithſtanding that ſuch Imperfection &c. might have heretofore been taken to be Matter of Subſtance, and not aided by the Statute* 27 *Eliz. cap.* 5. ſo as ſufficient Matter appear in the Pleadings, upon which the Court may give Judgment according to the right of the Cauſe; *and no Advantage ſhall be taken of an* immaterial Traverſe, *or of the Default of* entering Pledges, *or of the Default of* alleging the bringing into Court any Bond *or other Deed mention'd in the Pleading; or of the Default of alleging of the bringing into Court* Letters Teſtamentary, *or Letters of Adminiſtration; or of the* Omiſſion of Vi & Armis & Contra Pacem;

By this Statute no Advantage can be taken upon a General Demurrer of ſuch Faults in Form as would be cured by Verdict. See 10 Mod 252

Adminiſtrator brought Debt in the Debet & Detinet againſt the Heir of the Obligor, *and concluded ad Damnum ipſius the Plaintiff* &c. After Verdict on Nil debet this was mov'd in Arreſt of Judgment. It was confeſs'd to be a Fault in Form, but that it was cur'd by the Verdict by Stat. 16 & 17 Car. 2 and by this Statute; and per Cur. this Statute does not relate to obſtruct this Judgment; for the Court are to proceed to it notwithſtanding any Default in Form, unleſs Advantage is taken of ſuch Fault upon a ſpecial Demurrer, which not being done in this Caſe the Plaintiff had Judgment. 8 Mod. 356, 357. Paſch. 11 Geo. Newland v. Filer.

Error aſſign'd was, that in the Declaration it was Collins *per ... Busby Attornatum ſuum* without any Chriſtian Name. Holt Ch. J. ſaid, that he remember'd a Caſe, where it was aſſign'd

Or of the Want of Averment of Hoc Paratus eſt Verificare, or *Hoc Paratus eſt Verificare* per Recordum, *but the Court ſhall give Judgment according to the very right of the Cauſe without regarding any ſuch Imperfections, or any other Matter of like Nature except the ſame ſhall be ſpecially ſhewn for Cauſe of Demurrer.*

aſſigned for Error, that the Attorney by whom the Party appeared was *no Attorney of that Court*; but it was diſallow'd for Error, and that is not the Merits of the Cauſe, and may be help'd by the late Act, it being after Verdict. Judgment affirmed. 11 Mod 219. pl. 8. Paſch. 8 Ann. B. R. Nelſon v. Collins.

In Action of *Debt upon a Recognizance* of Bail, the *Defendant pleaded Payment*; the *Plaintiff replied Nonpayment, and concluded with an Averment inſtead of to the Country*, whereto *Defendant demurr'd generally* and the Queſtion upon the Argument was, whether this was help'd by the Statute for the Amendment of the Law 4 & 5 Ann. The Court gave Judgment for the Plaintiff niſi, but the Plaintiff afterwards, upon adviſing with his Counſel, mov'd to amend upon Payment of Coſts. Barnes's Notes of C. B. 7. Paſch. 7 Geo. 2. Sharp v. Starye.

S. 2. All the Statutes of Jeofails *ſhall be* extended to Judgment entered upon Confeſſion, Nihil dicit, or Non ſum Informatus, *in any Court of Record; and no ſuch Judgment ſhall be reverſed, nor any* Judgment upon any Writ of Inquiry of Damages *executed thereon be ſtay'd or reverſed, for any thing which would have been aided by the Statutes of Jeofails in Caſe a Verdict had been given in the Action*, ſo as there be an Original Writ or Bill, and Warrants of Attorney, duly filed.

But where after Judgment on Demurrer the Want of a Bill was aſſign'd for Error, and the Chief Juſtice certified that no Bill was filed in that Term, it was inſiſted that it ſhall not be filed in another Term, and this Statute enacting that all Statutes of Jeofails ſhall extend to Judgment by Confeſſion, Nil dicit &c. and that no ſuch Judgment ſhall be reverſed ſo as an Original Writ or Bill is filed, it imports that if no Bill is filed the Judgment ſhall be reverſed. And the Court ſeem'd of Opinion that after ſuch Certificate by the Ch. J. a Motion for filing a Bill was improper. 8 Mod. 283. Trin. 10 Geo 1. Martin v. Budgell.

9 *Ann. cap.* 20. Enacts, that *the Statute of* 4 & 5 *of Ann. cap.* 16. *of Amendment of the Law, and all Statutes of Jeofails ſhall be extended to Writs of* Mandamus *and Informations in Nature of* Quo Warranto, *and Proceedings thereon for any the Matters in the ſaid Act mention'd.*

For further Explanation of theſe Statutes, ſee the proper Diviſions under this Head.

(R) Statute of 5 Geo. 1. cap. 13.

By 5 Geo. 1. cap. 13. IT *is enacted that all* Writs of Error *wherein there ſhall be any* Variance from the Original Record, or other Defect, *may and ſhall be* amended *and made agreeable to ſuch Record*, by the *reſpective* Courts where ſuch *Writ or* Writs *of Error* ſhall be made returnable; *and that where any* Verdict *hath been or ſhall be* given *in any Action, Suit, Bill, Plaint, or Demand*, in any of his Majeſty's Courts of Record, *the Judgment thereupon ſhall not be ſtay'd or reverſed for any Defect or Fault, either in* Form or Subſtance, in any Bill, Writ Original or Judicial, or *for any* Variance *in ſuch Writs* from the Declaration or other Proceedings.

E. recovered Judgment in Scire Facias againſt P. Q. R. and S. in the Marſhalſea *as Bail* for one C. and afterwards *P. and Q. only brought a Writ of Error*, which was ill, and the Record not removed thereby; it was moved to amend the Writ by this Statute; But the Court held it not amendable the other Defendants not joining in the Writ; and the Writ of Error was quaſh'd. 2 Ld. Raym. Rep. 1532. Trin. 2 Geo. 2. Elkins v. Paine.

The Plaintiffs in *Error* ſet forth that D. the Defendant in Error had brought an *Ejectment* for Lands *againſt the Plaintiffs and one F. E.* and ſet forth the whole Proceedings againſt them and F. E. and then *ſhew the Death the Death of* the ſaid *F E.* and then *conclude* that the ſaid Judgment was *Ad grave Damnum of the Plaintiffs and Cujusdam M. E. Filiæ & Hæredis prædicti F. E.* and the *Plaintiffs and M. E. join in the Aſſignment of Errors.* The Court held this Caſe plainly within this Act which amends all Variances and Defects which vary the Writ from the Record. Now the Suggeſtion of the Death of F. E. is right and neceſſary, for otherwiſe the Writ would be wrong; then the Ad grave Damnum of M. E. &c. is the only Variance from the Record, as not being warranted by it, and therefore amendable;

the Plaintiffs had alſo Liberty to withdraw the Aſſignment of Errors in which M. E. had joined, as it was ſtill in Paper, and that the Defendant had not pleaded. Gibb. 201. 202. pl. 13. Hill. 4 Geo. 2. B. R. the Hollow Sword-Blade Company v. Dempſey.

Per Cur. where an Amendment of a Writ of Error is pray'd upon the Statute of 5 Geo 1. cap. 13. it is to be *without Coſts*; but if the Prayor be alſo *to amend the Aſſignment of Errors*, the Rule is *with Coſts*, becauſe then the Party comes for a Favour of the Court. Gibb. 268. pl. 14. Paſch. 4 Geo. 2. B. R. Marret v. Gardiner.

S. 2. Provided, that nothing in this Act ſhall extend to any Appeal of Felony or Murder, or to any Proceſs, or any Indictment, Preſentment, or Information, of or for any Offence or Miſdemeanor whatſoever.

(S) Statute of 4 Geo. 2. cap. 26.

But by Stat. 6 *Geo.* 2. *cap.* 6. *S.* 1. this Act ſhall *not extend to the Court of the Receipt of his Majeſty's Exchequer.*

4 *Geo.* 2. *cap.* 26. *S.* 1. ENacts that, *All Writs, Proceſs, Pleadings, Rules, Indictments, Records, and all Proceedings in any Courts of Juſtice within England, and in the Court of Exchequer in Scotland, ſhall be in the Engliſh Tongue.*

S. 2. Miſtranſlation or Miſtake in Clerkſhip in Proceedings begun before the 25th of March 1733, *being part Latin and part Engliſh ſhall be no Error, but may at any Time be amended, whether in Paper or on Record, before or after Judgment, upon Payment of Reaſonable Coſts.*

S. 4. Every Statute for amending Jeofails ſhall extend to all Forms and Proceedings (except in Criminal Caſes) when the Proceedings are in Engliſh, *and this Clauſe ſhall be taken in the moſt beneficial Manner.*

(T) Variance of Names and Things in the Writ, Count, or Specialty.

Br. Repleader, pl. 16. cites S. C. —— In an Action upon the Caſe, the *Writ was* for *Raiſing the Yard*, and the *Declaration was* for *Exalting the Yard and making a Gutter there*, and ſo more comprized than was in the Writ. After Verdict this was held by the Court to be ill, and not aided by the Statute. Cro. E. 829. pl. 34. Paſch. 43 Eliz. C. B. Norton v. Palmer.

1. IN Treſpaſs it paſſed for the Plaintiff, the Defendant alleged in Arreſt of Judgment that the *Writ* is *Arbores ſuccidit, cepit & aſportavit*, and *in the Count (ſuccidit) is left out.* But per Strange the Writ is good, and the Count may be amended by the Statute; by which he awarded that the Plaintiff ſhall recover. Br. Amendment, pl. 30. cites 7 H. 6. 26.

In an *Action* on the Statute *for the Tithes of* 20 *Acres* de quibus quidem *Triginta* Acris no Tithes had been paid &c. After Verdict for the Plaintiff, it was moved to amend and make it (Viginti) according to the firſt Part of the Declaration; but all the Rolls being Viginti, it was held that it could not be amended; but being after Verdict, the Court inclined that it was well enough, and the (triginta) only *Surpluſage*; for de quibus quidem Acris is good enough, and cannot be intended of more than 20 Acres. Sid. 135. pl. 9. Paſch. 15 Car. 2. B. R Fanſhaw v. Mildmay.—Lev. 97. S. C. and per Cur. there being no 30 before, the 30 is void, and Judgment for the Plaintiff.

Br. Bille, pl. 5. cites S. C. —If *Writ*

2. Bill of *Debt of* 100 *Marks* by Attorney in C. B. &c. and *demands* 100 *Marks, in as much as he acknowledged himſelf indebted to the Plaintiff*

tiff in 100 *l.* and it was abated without Amendment. Br. Amendment, pl. 33. cites 7 H. 6. 36.

of Debt varies from the Obligation, it

is the Default of the Clerk who ſees the Record and the Specialty, and if this Matter be found by Examination of the Clerk, it ſhall be amended, per Fairfax; *But* per Pigot, *a Thing which ought to come by Information of the Party, as the Will, Miſtery*, or the like, ſhall not be amended. Br. Amendment, pl. 48. cites 9 E. 4. 15.

3. In *Treſpaſs* the Plaintiff *counted* Quod Tranſgreſſionem prædictam *Continuando till the Day of the Writ*, that is to ſay, the 18*th Day of March*, where the *Teſte was the* 10*th Day of January*. The Defendant pleaded other Iſſue which paſs'd againſt him, by which he prayed Amendment; and per Newton, this is reaſonable, for it is only a Miſpriſion of the Clerk, but Forteſcue contra, for then the Jury have given too little Damages, and then Attaint lies; Quære; for the Plaintiff recovered, but Writ of Error was brought immediately. Br. Amendment, pl. 3. cites 20 H. 6. 15.

Br. Replead. er, pl. 3. cites S. C. — In Treſpaſs, the *Original was Teſte* 3 *Jan.* 6 *Jac.* and in the *Declaration ſuppoſed the Treſpaſs to be done* 20 *Jan.* 6 *Jac.* which is after the Teſte of the Original; agreed that this ſhall not be aided by the Statute of Jeofails. 2 Brownl. 273. Mich. 7 Jac. Anon.

4. *Audita Querela againſt* W. *Langwat* upon Indenture of Defeaſance, and becauſe *the Indenture was Langawat*, and the *Writ was Langwat*, leaving out (a) therefore ill, but becauſe it was Miſpriſion of the Clerk, therefore it was amended. Br. Amendment, pl. 38. cites 21 H. 6. 7.

So in Debt upon an Obligation where the Writ varies *from the Obligation.*

Br. Amendment, pl. 38. cites 21 H. 6. 7 ——— Debt upon an Obligation, the *Plaintiff was named* R. *Hill* in the Writ, and R. *Hull* in the Obligation, and it was amended, tho' it be Original; *contrary*, it was ſaid, *peradventure, if* it was the *Defendant* who *was miſnamed*; Quære Diverſity; but the Statute is that for a Syllable or Letter too much or too little no Writ ſhall abate, and if the Letter (i) be added to R. Hill it will be R. Hull, therefore it was amended. Quod Nota bene. Br. Amendments, pl. 40. cites 22 H. 6. 43.

5. Where the *Writ was Jo. Littleton*, and the *Patent W. Littleton*, and where the Patent was Will' Hals and Ric' Niveton, and the Writ Will' Has and Ric' Newton, thoſe ſhall not be amended; for the *proper Names of Juſtices or of Parties* cannot be amended. Thel. Dig. 224, lib. 16. cap. 6. S. 16. Trin. 27 H. 6. Amendment 34.

6. Writ of *Forger* of falſe Deeds was *diverſa falſa Facta* & Minumenta, and the *Count was but one Deed of Feoffment, and one Letter of Attorney*, and therefore the Count ill, and could not be amended, unleſs ex aſſenſu partium, becauſe the Count was of another Term. Br. Amendment, pl. 15. cites 35 H. 6. 37.

7. In *Forcible Entry* the *Certainty of the Land was omitted in the Count*, and was abated, and not amended. Br. Amendment, pl. 106. cites 38 H. 6. 1.

8. *Debt* upon Indenture *againſt the Abbot of W.* where the *Specialty is Abbot of Mary*, if it be found by Examination that the Clerk who made the Writ had the Indenture, then the Writ original ſhall be amended. Br. Amendment, pl. 73. cites 11 E. 4. 2.

Debt upon an Obligation *againſt the Abbot of C alias dict' J. S. Clerk*,

and *in the Count J. S Clerk was omitted*, and therefore the *Defendant pleaded the Variance to the Count*, and becauſe the Declaration was enter'd this ſame Term, therefore it was amended per Judicium; Quod Nota. Br. Amendment, pl. 69 cites 14 E. 4. 25.

Where the Declaration varied from the Original in the *Defendant's Name and Addition*, it was ſaid, that the Curſitor or Clerk that made out the Writ may be order'd to attend, and if his Inſtructions were right, to amend the Writ by them. 2 Vent. 46. Paſch. 1 W & M. in C. B. Anon.

9. In a *Formedon* brought *upon a Patent of H.* 7. the *four capital Letters of the four firſt Words were omitted*, viz. H. R. A. F. for Henricus Rex Angliæ, Franciæ &c. on Purpoſe that there might be the more room

S. C. cited accordingly, per Cur. 2 Rep. 17. a.

to

Mich 28 & 29 Eliz in Lane's Case. —— S. C. cited 9 Rep. 48 a. by the Reporter in a Nota. ——S. C. cited Arg Godb. 415.

to flouriſh and beautify them with Gold. The Ld. Keeper ſaid he would cauſe the ſame to be amended if the Juſtices of C. B. would certify that he might; but afterwards the Patent was allowed in C. B. to be good, as it was by reaſon of the Number of Patents that are ſo. D. 342. a. pl. 53. Trin. 17 Eliz. Digby v. Mountford.

Roll Rep. 432. pl. 26. S. C. & S. P. —— S. P. Arg and ſeems admitted per Cur. Cro. J. 674, 675. Mich. 21 Jac. C. B. in pl. 8.

10. Reſolved per tot. Cur. that where the original *Writ varies from the Declaration* it is not remedied by any Statute of Jeofails. 5 Rep. 37. Paſch. 34 Jac. [but ſeems miſprinted for Eliz.] Biſhop's Caſe.

Bulſt. 217. Fox v. Jux, S. C. but S. P. does not appear. S. C. cited as the Biſhop of Worceſter's Caſe. Cro. C. 272. in pl. 8.——Roll Rep. 432. pl. 26. the Biſhop of Rocheſter v. Long, S. C. and tho' it was objected that the Point of the Writ was the Waſte for which the Action was brought, and that the Time of making the Leaſe was not material, and that it was not like Biſhop's Caſe, as had been urg'd, for there the Variance was material, becauſe Chriſtopher and John could not be one and the ſame Perſon; but the Court held this all one with Biſhop's Caſe; for the Leaſe by the Predeceſſor cannot be intended the Leaſe made by the Succeſſor; and they reverſed the Judgment.

11. In *Debt* for 800 l. the Plaintiff *declared* upon a Statute Obligatory *ſolvendum on Requeſt*, and it *appeared to be payable at a certain Day*; this was held by the whole Court to be a Fault incurable. Cro. J. 316. pl. 20. Mich. 10 Jac. Fox v. Inkes.

12. The Plaintiff was a Biſhop, and *declared upon a Leaſe made by himſelf*, and the *Original was, of a Leaſe made by his Predeceſſor*; adjudg'd that this is a material Error, and tho' it was after a Verdict, it was not help'd by the Statute of 18 Eliz. and therefore the Judgment was reverſed. 3 Bulſt. 224. Mich. 14 Jac. Young v. Biſhop of Rocheſter.

13. In Warrantia Chartæ, the Plaintiff *counted upon a Feoffment* made by Dedi & Conceſſi *ad D.* in Norfolk, whereas the *Land was laid to be in another Town*, and upon Demurrer this groſs Fault appear'd, and it was denied to be amended, becauſe it was *pleaded without a Serjeant's Hand*. Hob. 249. pl. 322. Hill. 16 Jac. Barret's Caſe.

Aſſault and Battery was laid apud Illington in Com. Middleſex, but in the Bill on the File it was laid in London, but it being after a Verdict, the Court held that it was aided by the Statute as the Want of an original Writ is, and that this Bill in London is as no Bill at all for this Action brought and tried in Middleſex. Cro. J. 654. pl. 4. Hill. 27. Jac. B. R. Calthorp v. Culpepper.——Palm. cites 428. S. C.

14. Error of a Judgment in Aſſault in Battery, the *Writ* was *directed to the Sheriff of Middleſex*, and in C. B. the Plaintiff *declared upon an Action in London*, and ſo there was Variance between the Writ and Declaration. The Court held it to be erroneous. It is true, where there is no Original it is help'd by the Statute, but a vitious Original is not help'd, wherefore the Judgment was reverſed; for the Court is certified that this is the Writ in this Plea betwixt the ſame Parties, and the Court will not intend another Writ, or that it was without Writ. Cro. J. 479. pl. 3. Paſch. 16 Jac. B. R. Pollard v. Blight.

15. In Treſpaſs; the original *Writ was* of Treſpaſs in *Ruddlelow*, and the *Declaration was* of Treſpaſs in *Boxe*; It was certified that this was the Writ on which the Declaration was founded, and upon Sci. Fa. two Nihils returned, tho' it was known to one of the Judges that Ruddlelow was an Hamlet of Boxe, yet the Court not knowing it, it was held a Variance in Subſtance not help'd by any Statute, and Judgment was revers'd. Cro. J. 664. pl. 17. Hill. 20 Jac. B. R. Hendy v. Thirſt.

16. In

16. In Debt on Account, the Writ was recited in the Declaration, and the *Account* was *ſet forth to be apud Exon*, whereas the original *Writ was certified Devon.* It was moved in Arreſt of Judgment, for that tho' the Statute helps after Verdict where there is no Original, yet when there is an *Original which varies from the Declaration*, and does not warrant it, it is not aided by the Statute; but per Cur. this is not any Original for this Action in the County of Exon, and ſo it ſhall be *taken as if there was no Original*, and ſo be within the Purview of the Statute. Cro. J. 674, pl. 8. Mich. 21 Jac. C. B. Reynel v. Kelſey. Palm. 428. Reynall v. Trelawny, alias, Kelly, S. C. the Court divided.—— Lat. 116. Trelawney v. Reynel, S. C. no Judgment.—— Ibid. 225. S. C. and the Court divided.

17. In Error brought to reverſe a Judgment in an inferior Court, for that the *Plaint* was enter'd *againſt Francis*, and the *Proceedings* were *againſt John.* By Roll J. The Plaint being in the Nature of an Original Writ, it cannot be help'd, though it be after a Verdict. Sty. 115. Trin. 24 Car. Brereton v. Monington.

18. Judgment in Ejectione Firmæ was reverſed, becauſe the Words *Vi & Armis* in the Writ were omitted in the Declaration. Cro. C. 407. Paſch. 11 Car. B. R. in Caſe of Mayo v. Cogſhill. See Stat. 16 & 17 Car. 2. cap. S. at (P)

19. *Debt upon the Statute* of Hue and Cry againſt the Hundred was by Original, and at the Niſi Prius the Plaintiff was nonſuit, becauſe the *Original was (Edward,)* when it ſhould be *(Edmund.)* A Rule was made for the Curſitor to attend, and that if he had right Inſtructions then to amend it, which he did in open Court. Sid. 412. pl. 8. Paſch. 21 Car. 2. B. R. Parker v. Hundred of Little and Leſney. 2 Keb. 483. pl. 21. Carder v. the Inhabitants of Leſeleſs. S. C. adjornatur.—— Ibid. 487. pl. 31. S. C. adjornatur.——Ibid. 498. pl. 58. The King v. the Hundred of Little and Leſnes, S. C. The Court ordered an Amendment.

20. The *Original* in Treſpaſs was *Quare Clauſum fregit*, and the *Declaration was Quare Clauſum & domum fregit*; and after a Judgment for the Plaintiff in C. B. and a Writ of Error brought, this Variance was aſſigned for Error; but it was argued that this Original being certified 3 Terms ſince, and no Continuances, it could not be the Original to this Action, and ſo a Verdict may be intended without any Original, which is aided by the Statute of Jeofails, and the Judgment was affirmed. 3 Mod. 136. Trin. 3 Jac. 2. B. R. Taylor v. Brindley. *Ejectment of 6 Meſſuages, 100 Acres of Land, 300 Acres of Paſture* &c. After Verdict it was moved that this Suit is by original Writ, and the Writ does not warrant the Declaration; for the *Original is of one Meſſuage and 60 Acres of Land.* Per Cur. abſente Richardſon, This ſhall not be *intended* the Original upon which the Plaintiff declared, but *that there was another Original which is imbezzled*; 1ſt, becauſe the Writ bears Teſte 18 Aprilis, returnable 15 Paſch. and this Declaration is in Trinity Term, and here is no Continuance upon this Writ. 2dly, The Writ is againſt the Defendant and a Copyholder, and in this Declaration there is no Name of the Copyholder; and ſo this Want of an Original is aided by the Statute of Jeofails, and Judgment for the Plaintiff. Cro. C. 327. pl. 10. Mich. 9 Car. B. R. Johnſon v. Davy.

(U) Variance between Count and Count, where there are ſeveral, amended.

1 DEBT upon an *Obligation of* 12 *Nov.* after Imparlance, and in the next Term the Plaintiff *declared anew* upon an Obligation of 12 *Feb.* and upon *Nihil dicit* had *Judgment.* Upon Error brought the Court were divided whether this ſhould be amended. Golds. 136. pl. 36. Hill. 43 Eliz. Wilkinſon's Caſe.

Brownl 57. Burrel v. Bowes, S. C. ſays that at firſt it was denied to be amended, becauſe the Defendant had pleaded to it, and by ſuch Amendment his Plea would be alter'd, and ſo the Trial would go againſt him; but afterwards it was granted to be amended per tot. Cur. For the Imparlance was enter'd Hill. 1 Jac. and the Iſſue was Paſch. 2 Jac. but the Defendant was admitted to plead De novo at his Pleaſure.——See 3 Bulſt. 227. Mich. 14 Jac. Milward v Maby, like Point; and the better Opinion of the Court ſeem'd to be, that the Judgment was well given, and not erroneous.——And ſee Ibid. 228, 229. Milward v. Watts, and Cro. J. 415. pl. 4. S. C.

2. In *Debt upon Obligation dated* 13 *Feb.* after Imparlance a 2*d Declaration was* made, which was *of Obligation dated* 15 *Feb. After* Non eſt Factum pleaded and *Iſſue enter'd*, the Variance was diſcover'd, and pray'd to be amended and made agreeable to the firſt Declaration, and ſo it was order'd per Cur. For the firſt is the Principal; and all the Prothonotaries ſaid that this is no Inconvenience to the Defendant; for his *Plea always refers to the firſt Declaration*, and is enter'd as to the firſt. Cro. J. 105. pl. 41. Mich. 3 Jac. B. R. Burrel v. Bowes.

3. In *Ejectment* the Plaintiff declared upon a *Demiſe of* 25 *March* 6 *Jac.* by virtue whereof he enter'd, and was poſſeſs'd until the Defendant poſtea, viz. Anno ſexto ſupradicto, ejected him. After Imparlance the Plaintiff made a *ſecond Declaration*, and therein the Ejectment was ſet forth to be *Maii* Anno ſupradicto, which was right, and ſo found againſt the Defendant; but whether this was erroneous, becauſe no Day of Ejectment was mentioned in the firſt Declaration, was the Queſtion. It was agreed per Cur. that if any Matter of *Subſtance* be *omitted in the firſt* Declaration, which is the principal and material Declaration, it *cannot be aided* or amended *by the ſecond*; for that is but a mere Recital of the firſt. Cro. J. 311. Mich 10 Jac. Merrell v. Smith.

4. The Plaintiff declared that the Defendant *Die Auguſti aſſaulted* &c. *omitting the Day of the Month*; but the *Declaration upon the Imparlance-Roll was perfect*. After a Verdict and Judgment, it was aſſign'd for Error, and took a Difference where the *firſt Declaration* is *perfect*, *and the* 2*d defective*, that this is not Error; for the Court is to adjudge upon the firſt Declaration only, the 2d being only a Recital of the firſt, and begins with an Alias prout patet &c. The Court held the firſt Declaration imperfect and void, and that the Omiſſion of the Time is Matter of Subſtance, and reverſed the Judgment. 2 Roll Rep. 152. 153. Hill. 17 Jac. B. R. Bicroft's Caſe.

5. In a *Declaration deliver'd by the By*, the Plaintiff's Chriſtian Name was miſtaken *John*, where it ſhould be *Peter*. Powis and Gould J. (being only in Court) held it not amendable, becauſe there is *no Writ which it can be amended by*. 2 Ld. Raym. Rep. 771. Trin. 1 Ann. B. R. Poitvin v. Tregeagle.

6. In Aſſault and Battery, the firſt Count was of a Battery by the Defendant on John B. and the 2d and 3d Counts were of a Battery by the Defendant on the ſaid Sam. (which was the Defendant's Name inſtead of the Plaintiff's.) After Verdict for the Plaintiff, this being moved in Arreſt of Judgment, the Court held that it was aided by the 16 & 17 Car. 2. which helps all Miſtakes of the Chriſtian and Surname of the Parties who are once rightly named before in the ſame Record, and here *John* is named right in the firſt Count. Comyns's Rep. 557. Hill. 10 Geo. 2. C. B. Blacklock v. Mariner.

(W) Va-

(W) Variance of Names and Things in the Writ, and Re-attachment &c. amended.

1. IN *Annuity* the *Defendant pray'd in Aid*, and the *Prayee was eſſoign'd*, and *at the Day of Adjournment the Defendant's Attorney was eſſoign'd*, and the *Name of the Plaintiff varied from the Eſſoign*, and becauſe it was a *common Eſſoign* it was amended. Br. Amendment, pl. 26. cites 2 H. 4. 4. 8 Rep 156. b. cites S. C.

2. In Entry upon the Statute of R. the *Original* was *to the Sheriff of S. againſt J. B. of C. in the County of B. Gentleman*, and was *ſine Die by Demiſe of the King*, and *Re-attachment to the Sheriff of S. againſt J. B. of C. in Com. tuo, Gentleman*; and per Danby, Choke, Davers, and Moyle J. it ſhall not be amended; for then J. B. of C. in the County of B. is not attach'd. But per Aſhton, Laicon, and Danby mutata Opinione, it ſhall be amended. Br. Amendment, pl. 67. cites 2 E. 4. 7. *But* if *the Original was J. B.* and the *Re-attachment W. B.* this ſhall not be amended; for it is not the ſame Perſon, and then the Defendant is not re-attach'd; per Danby, Choke, Davers, and Moyle J. Br Amendment, pl. 67. cites 2 E. 4. 7. ——*But* if one be named J. *Hitchet* in the Original, and J. *Hitchcocke* in the Re-attachment, this ſhall be amended; for it may be intended one and the ſame Perſon, and known by both Names. Ibid.

3. *Writ of Adjournment of a Term made mention only of Common Days* of the Term, *as Actions and Proceſs returnable Oct. Trin.* 15 *Trin.* &c. *had Day* 15 *Mich. A Plea had ſpecial Day upon Bill in B. R. the Monday after Oct. Trin.* and was at Iſſue, and paſs'd for the Plaintiff, and was diſcontinued for *want of mentioning ſpecial Day in the Writ of Adjournment*, and could not be amended; quod nota; by which the Writ of Adjournment and the Roll of it were amended by a ſpecial Act of Parliament. Br. Amendment, pl. 70. cites 4 E. 4. 41. Br. Diſcontinuance, de Proceſs, 36. cites S. C—— Br. Parliament, pl. 54. cites S. C.

(X) Variance of Names and Things in the Writ, Imparlance-Roll, or Plea-Roll, or Niſi Prius Roll, amended.

1. DEBT for *buying* 64 *Combs of Grain*, and this contra formam Statuti. The Defendant ſaid that *he did not buy the ſaid* 60 [*Combs*] Modo & Forma, and ſo to Iſſue, and *did not anſwer to the* 4, and it was moved to have it amended; but per Cur. it cannot be; for *then this is not the Plea of the Defendant* for Part, and this is Matter and Subſtance, and the Act of the Party, and not Miſpriſion of the Clerk. Quod nota. Br. Amendment, pl. 1. cites 27 H. 8. 1.

2. A *Declaration* was *of a Treſpaſs done the 12th of Jan.* 45 *Eliz.* and the Record of *Niſi Prius was of a* Treſpaſs *the 12th of Jan.* 25 *Eliz.* The Verdict found the Defendant Guilty. At the Day in Bank the Plaintiff pray'd Amendment of the Niſi Prius; but the Court held it not amendable. Mo. 681. pl. 935. Anon.

3. In *Ejectment* brought *of two Houſes*, the *Bill* filed *was only for one*; but the Defendant by the Paper-Book pleaded to both the Meſſuages Not Guilty, and the *Roll* and *Record of Niſi Prius were two Houſes*. After Verdict and Judgment enter'd for the Plaintiff, a Writ of Error was brought, Yelv. 164. S. C and Brownl ſeems to be

only a Tranſlation thereof.

brought, and before the Record was removed, the Plaintiff moved that the Bill upon the File might be amended and made two Meſſuages. It was reſolved by the whole Court, that becauſe the Defendant's Plea was of two Meſſuages, and the Roll and Record accordingly, the Bill ſhould be amended; for the Bill which mentions only one Houſe could not be the Ground of all the Proceedings afterwards, but it was as if no Bill had been filed and therefore it ſhould be ſupplied, and ſo it often had been done before the Record was renew'd [removed.] Quod Nota. Brownl. 144. Mich. 7 Jac. [B. R.] Saunders v. Cottington.

Het. 164. S. C and ſeems to be only a Tranſlation of Litt. Rep.

4. Action was brought againſt *W. Malin of Langley*; and the Record of *Niſi Prius was* W. *Langley of Malin.* But per Cur. it ſhall be amended, for it is a plain Miſtake of the Clerk, for *the whole Record beſides is Right*, and the Record of Niſi Prius ought to be amended by the Record in Bank according to 44 E. 3. But *if the Iſſue had been miſtaken* it had been otherwiſe. Litt. Rep. 349. Mich. 6 Car. C. B. Malin's Caſe.

Hutt. 81. Wade's Caſe S. C. accordingly, and a Difference was taken that when the Niſi Prius is ſo miſtaken that the amending it would prejudice the Jury by falſifying their Verdict, it ſhall not be amended, but in this Caſe it is but the Writ by which the Jury is warn'd to appear.

5. In *Aſſumpſit*, the *Writ and Declaration were* againſt Ann, Executrix of Sir William Wade, and the Iſſue, Record, and Venire Facias were accordingly; but the Writ of Hab. Corpora Jurat' were between the Plaintiff and the Lady Wade, Executrix of Sir Henry Wade Knt. and therefore it was moved in Arreſt of Judgment that it was a Trial without Warrant. But per tot. Cur. becauſe the Iſſue, the Record of Niſi Prius, and the Venire Facias were good, the Miſpriſion in the Hab. Corp. was but the Fault of the Clerk, and well amendable. Cro. C. 32. pl. 3. Paſch. 2 Car. 1. Ann Smith v. Ann Lady Wade.

Treſpaſs and *Ejectment againſt* 7 Defendants, who *all appear'd and pleaded, and join'd Iſſue on the Plea Roll*; the Jurat' & Diſtringas was againſt all 7, only the *Iſſue on the Niſi Prius Roll was joined by five only, Verdict* at the Aſſiſes *againſt* 7. And after ſeveral Motions in Arreſt of Judgment it was reſolved by the whole Court, That the Niſi Prius Roll was in this Caſe amendable; here the Judge has an implied Authority; for here is an Iſſue joined on the Record by all 7. *If one Iſſue had been joined by the* 5, *and another by the other* 2, it had been otherwiſe. The *Jurata and Diſtringas are againſt all* 7, to try this Iſſue of Not Guilty; ſo that the *Judge has plainly an implied Authority* to try the Iſſue between the Plaintiff and the 7; and that Omiſſion is plainly a Miſpriſion of the Clerk, and therefore ſuch a Miſtake in all Actions and Caſes is amendable, and eſpecially in this Action of Ejectment, where all 7 are bound by Rule of Court to confeſs Leaſe, Entry, and Ouſter. 12 Mod. 107. Mich. 8 W. 3. White v. the Biſhop of Worceſter.——S. C. & P. and nothing is to come in Queſtion but the Title; and Rookby J. ſaid the Rule implies a Conſent that it ſhould be amended. Comb 393. Mich. 8 W. 3. B. R. Tynet v. the Biſhop of Worceſter.——Ld. Raym. Rep. 94. Tite v. the Biſhop of Worceſter, S. C. and amended accordingly.

6. The Writ of Niſi Prius is amendable by the Statute 8 *H.* 6. and to be made according to the Record, but with this Caution, viz. that the *Record* of Niſi Prius *has ſufficient Matter in it either Expreſs or Imply'd to give Authority to the Juſtices* of Niſi Prius *to try the Iſſue*; for they cannot try any Iſſue by Force of the Statutes thereof made without Authority given to them by Writ of Niſi Prius. 8 Rep. 161. in Blackamore's Caſe.

Ld. Raym. Rep. 329. Doberteen v. Chancellor S. C. accordingly, and ſays that all the Practiſers in B. R. and all the Prothonotaries of C. B. certified that the conſtant Practice is to have the Plea in Abatement enter'd in the Niſi Prius Roll.——S. C. cited Carth. 499. in Caſe of Harper v. Davys.——S. C. cited Ld. Raym.

7. The Defendant pleaded in Abatement, and there being a Judgment to anſwer over, Iſſue was join'd, and it was tried in the Country, and the Plaintiff had a Verdict. It was moved to ſet aſide this Judgment, becauſe the Plea in Abatement was not enter'd on the Niſi Prius Roll, the Plea Roll was right, but the Niſi Prius ſhall not be amended by that; and for this Reaſon the Court ſet aſide the Judgment. 5 Mod. 399. Paſch. 10 W. 3. Durbartine v. Chancellor.

Raym. Rep. 510. in B. R.——S. C. cited 12 Mod. 274. Hill. 12 W. 3. in S. C. of Harper v. Davis, which was thus, viz. *Assumpsit*; the *Plea was enterd in Easter-Term*, the *Memorandum* was *of a Bill* enter'd *in Hillary-Term*. On Issue joined it was tried by Nisi Prius, and the Verdict was set aside, and a *new Trial* granted, and tried this Term in London; and *in the new Nisi Prius Roll the Placita were of this Term*, and that the Party appeared and pleaded this Term, and Verdict thereon; and now Judgment was arrested, because the *Issue on the Plea Roll is of Easter Term*, and the *new Trial is but a Continuance of the same Cause*, and so the Record of Nisi Prius differs from the Plea Roll. 12 Mod 274. Hill. 11 W. 3. Harper v. Davys.——Carth. 498. S. C.——Ld. Raym. Rep. 510. S. C. accordingly.

8. In Trover the Plaintiff had described the Parcels of Goods in the Nisi Prius Roll different from what he had in the Copy of the Issue. A Rule was granted to shew Cause why the Nisi Prius Roll should not be amended by the Copy of the Issue, and afterwards (absente the Ch. J.) was made absolute. Barnard. Rep. in B. R. 441. Pasch. 4 Geo. 2. Blackford v. Hudson.

(Y) Variance of Names and Things in the Writ, Records of Nisi Prius, Posteas, and other Records, amended.

1. VAriance was beween the *Record* and the Writ of *Certiorari*; for the one was *H. Grene* and the other was *H. de Greene*, and therefore they would not proceed. Br. Record, pl. 42. cites 28 Ass. 52.

2. The *Record of Bank was J. B. Gent.* and *in the Record of Nisi Prius (Gent.) was omitted*, and it was amended without repleading. Br. Amendment, pl. 105. cites 39 E. 3.

3. *In all Cases where the Roll is enter'd contrary to the Original*, or the like, it shall be amended. Br. Amendment, pl. 34. cites 7 H. 6. 45. 8 Rep. 156. b. cites S. C. that in all such Cases it was amendable by the Common Law.——In Debt, the Defendant in *the Original was named J. S. of Eston*, and the *Roll and all the Process was J. S of Weston*, and the Parties were at Issue, and it passed for the Plaintiff by Nisi Prius, and *at the Day in Bank this Matter was pleaded in Arrest of Judgment*; & non allocatur, but it was amended according to the Original by Assent of the Court. Br. Amendment, pl. 56. cites 19 H. 6. 15.

4. *Debt against J. N. of S. Husbandman*, and *the Issue in the Record was if he was Husbandman die brevis* or not, and the *Record of Nisi Prius wanted* these Words, *die brevis*, and yet the Justices took the Verdict, if he was Husbandman die brevis, and at the Day in Bank the Plaintiff would have amended it by the Statute according to the Roll which was well, and was not suffer'd; for as here the Inquiry of the Justices of Nisi Prius was without Warrant, because it was not in their Record. Quære if it be aided now by the Statute of Jeofails 32 *H.* 8. It seems that it is not; for it is not the Default of the Party, his Attorney, nor Counsellors, but the Default of the Officers. Br. Amendment, pl. 82. cites 11 H. 6. 11. Fitzh. Amendment, pl. 25. cites S. C.—— S. C. cited 8 Rep. 161. b. and says it is to be observed as to the Writ of Nisi Prius that the Misprision of the Clerk of the Treasury who writes it, is therein amendable by this Statute (of 8 H. 6.) and to be made according to the Record, but with this Caution, viz. that the Record of Nisi Prius *has sufficient Matter in it, either express or implied, to give Authority to the Justices of Nisi Prius to try the Issue*; for they cannot try any Issue by Force of the Statutes thereof made without Authority given to them by the Writ of Nisi Prius, and that so it is adjudg'd in the said Case of 11 H. 6. 11.

5. If the *one Party is enter'd in the Record for the other*, it may be amended. Br. Amendment, pl. 113. cites 1 H. 7 23.

6. Iſſue was *whether Goods were deliver'd between two Feaſts*, and indorſed upon the Panel (Dicunt pro Querente) and yet the Poſtea certified, and the Rolls alſo made it that the Delivery was *at the Feaſts*, and upon this Matter alleged in B. R. and the Error in this Point aſſign'd and certified out of C. B. the Record removed by the Writ of Error was was amended by Award, and the Word (at) razed out and the Word (between) written inſtead thereof, according as it appear'd by the Note on the Back of the Panel, that it ought to have been. Poph. 102. ſays a Precedent was ſhewn of this as Trin. 35 H. 8. Whitfield v. Wright.

7. Error was brought in the Exchequer-Chamber upon a Judgment given in B. R. where the *Indorſement* upon the Back of the Writ was *(Pro Quer)* and the *Poſtea and Roll was that the Plaintiff was Guilty*, and it was amended. Poph. 102. Hill. 38 Eliz. cites it as a late Caſe.

9. Iſſue in C. B. was *whether J. S. were taken by a Ca. Sa. or not*, the Jury found for the Plaintiff, viz. that he was not taken by the ſaid Capias, and upon the *Back of the Panel* enter'd *(dicunt pro Quer')* but on the Back of the *Poſtea* the Clerk of the Aſſiſes *certified* the Panel thus, viz. that the Jury ſay *that no Capias was awarded*, which was otherwiſe than the Iſſue was, and found by Jury; And the *Roll of the Record was according to the Poſtea*, and ſo Judgment for the Plaintiff. Error was brought and aſſign'd this Variance between the Iſſue and Verdict, but upon this Matter certified out of C. B. the Court of B. R. awarded the Record ſent out of C. B. to be amended according to the Indorſement on the Panel, which is the Warrant for certifying the Poſtea, and ſo this is a Warrant over to him that makes the Entry on the Roll. Poph. 102. Hill. 38 Eliz. Wood v. Matthews.

In Action for Words, the Plaintiff had a Verdict, but *part of the Words found by the Jury ſpecially, were not enter'd*, which appearing upon Examination to be the Default of the Clerk of Aſſiſe, the Words were ordered to be inſerted, the Plaintiff paying Coſts to the Defendant in a Writ of Error brought by him; becauſe as the Verdict was firſt enter'd, he had juſt Cauſe to ſue a Writ of Error. The Record was amended, and Judgment affirmed. 2 Jo. 212. Trin. 34 Car. 2. B. R. Nailer v. Clarke.

9. In Aſſumpſit the Verdict was enter'd, Quod *aſſident Damna occaſione Aſſumptionis prædict'*, and this was awarded to be erroneous, but upon Motion that the *Note given by the Jury to the Clerk was* well, viz. that they found for the Plaintiff, *Et aſſident Damna* without more, and that what was added was the Miſentry of the Clerk; it was ordered by Fenner and Clarke (only in Court) to be amended. Note this was after In nullo eſt erratum pleaded; But this Error was not aſſigned upon the Record, but Ore tenus &c. Cro. E. 677. 678. Trin. 41 Eliz. B. R. Madox v. Dawſon.

10. The *Defendant* being an Attorney of C. B. *appeardd in propria Perſona*, and being at Iſſue, the Record of the Niſi Prius was, quod *tam præd' (the Plaintiff) quam præfat' Defend' appeared per Attornatos ſuos*; this being but a Miſ-entry of the Clerk was amended. Cro. J. 265. pl. 29. Mich. 8 Jac. 1. Heyward v. Hayward.

11. In *Ejectment* againſt A. B. C. and D. the Jury *found A and B. Not Guilty, and C. Guilty as to one Meſſuage* &c. *and D. as to* 60 *Acres of Land* &c. but in entring the Judgment the Clerk *miſtook the Parcels, and enter'd, that C. was Guilty as to the* 60 *Acres &c. and D as to the Meſſuage* &c. Upon a Writ of Error in B. R. this was adjudg'd amendable, becauſe it is only a Miſpriſion of the Clerk in *Matter of Fact*, when he had the Record before him, by which he might be directed, but if it had been Miſpriſion in Matter *of Law* it could not be amended. Palm. 258. Mich. 19 Jac. B. R. Maſon v. Molineux.

12. In the Ven. Fac. one of the *Jurors* was *return'd* by the Name of *Edmund*, and it appears in the Poſtea that he was *ſworn by the Name of Edward*. It was inſiſted that this cannot be intended to be the ſame Per-

Perſon; but by Roll Ch. J. it may be amended by the Notes of the Clerk of the Aſſiſes by which he made the Poſtea, and ordered him to be examin'd. Sty. 110. Trin. 24 Car. Norton's Caſe.

(Z) Variance of Names and Things in the Writ and Exigent, amended.

1. *Exigent in Appeal* was ſued *as againſt a Principal*, and the *Count was as againſt Acceſſory*, and it was amended. Br. Amendment, pl. 101. cites 7 H. 4. 27.

2. *Debt againſt J. N.* and the *Capias and all* other *Proceſs, and the Exigent was R. N.* and therefore the Defendant was diſmiſs'd per Judicium, becauſe tho' the Capias may be amended, yet *Exigent cannot be amended*; for then J. N. ſhall ſtand outlaw'd where he never was proclaim'd in the County, but R. N. Quod Nota. Br. Amendment, pl. 4. cites 20 H. 6. 18.

So, and for the ſame Reaſon where in Debt *the Original and other Proceſs was* againſt T. *Senjohn*, without any (t) in the Middle, and *the Exigent was* T. *Seintjohn* with (t) and the Outlawry was revers'd without Amendment; and it was ſaid, that there is a great Difference between the County of Hereford and the County of Hertford. Br. Amendment, pl. 89. cites 2 R. 3. 13.

3. Variance between the Original and the Exigent *ſhall not be amended, tho' it be Miſpriſion of the Clerk.* The Reaſon ſeems to be, becauſe then the Defendant is not this Perſon who was proclaim'd by the Exigent; for where he was *named with Alias Dictus in the Original, in the Exigent the Alias Dictus was put before the firſt Name in the Original.* Br. Amendment, pl. 55. cites 38 H. 6. 3.

The Caſe was thus; *J. B of C. in the County of C.* Gent. *alias dictus J. B. of C. in the County of O Gent.* and the Exigent was *J. B. of O. in the County of O. Gent.* alias dictum J. B. *of C in the County of C.* Gent. and the Outlawry was return'd, and by the Juſtices it is reverſable; for that which was before in the Original was behind in the Exigent, and there was no Mention of Amendment. It ſeems that it ſhall not be amended at the Exigent. Br. Variance, pl. 60. cites S. C.

4. Error aſſigned was, that the Original *Writ was* 20 *l. and ſo* was *all the meſne Proceſs*, but *when the Defendant appeared at the Exigent*, the *Entry was*, that *obtulit ſe in placito debiti* 10 *l.* when it ought to have been 20 l. upon View of the Record, it appeared that *no Original was certified*, and therefore it could not be amended. Goldsb. 133. pl. 32. Hill. 43 Eliz. Stangiſton's Caſe.

5. P. was *indicted for a Murder* in Eſſex, and outlaw'd &c. and the *Outlawry* being *certified* into B. R. it *appeared to be erroneous*, becauſe it was *Exactus eſt ad Comiatum, without ſaying* (*meum*) whereupon the Attorney General ſhew'd the Court, that the King had ſeiſed the Lands, and therefore, to prevent Reverſal of the Outlawry, pray'd a Certiorary to the Coroners to certify, whether it was Exactus ad Comitatum &c. and if ſo, then upon his Return to amend it, and it was awarded accordingly. Palm. 480. Trin. 3 Car. B. R. Plumm's Caſe.

Lat. 210. Plume's Caſe, S. C. reported in the ſame Words.

As to Defects by Variance between Writ and Count &c. see (T) and as to Defects by Omiſſion ſee (O. a)

(A. a) Defaults and Miſtakes in Writs Original and Judicial, amended.

1. SCIRE *Facias upon a Fine levied by King E. 2. reddend' eidem Regi & Hæred' ſuis* 10 *s. per Ann' tenend' de nobis & Hæred' noſtris*, where it *ſhould be de E. 2. quondam Rege & Hæred' ſuis*, and becauſe it was a Writ Judicial, therefore it was not abated. Br. Amendment, pl. 104. cites 39 E. 3.

2. *Scire Facias* upon Office of Mortmain was challenged for the King, becauſe in the Claim there was *falſe Latin* &c. but it did not appear in what &c. et non allocatur; but it was amended in the Preſence of the Chancellor there; Quod Nota; And the Writ was *Claim* where it ſhould be *Clamat*. Br. Amendment, pl. 59. cites 40 Aſſ. 26.

3. *Scire Facias upon a Fine* was *Quare Terra querentis deſcendere non debet*, where it ſhould be *Executionem habere debet*, and yet well, but was not amended, becauſe it was a *Writ Judicial*; for per Fincheden, *Writ Original* which wants Form ſhall abate, and ſhall not be amended, becauſe it is made in the Chancery, and pleadable here; but Writ Judicial which is made here, ſhall not abate for want of Form if it has Matter ſufficient. Br. Amendment, pl. 20. cites 41 E. 3. 14.

Thel. Dig. 223. lib. 16. cap. 6. S. 3. cites S. C. accordingly.

4. *Scire Facias upon a Fine to execute the Remainder*, was *Quare præfato J. N. deſcendere non debet*, which implies Execution; for it ſhould be *remanere* non debet, and therefore was amended. Br. Amendment, pl. 23. cites 44 E. 3. 18.

5. In *Scire Facias out of a Record* the *Name of the Defendant was miſtaken*, and therefore he was not warned, by which it was not amended; for this is in Subſtance; contrary if it had been in Form. Br. Amendment, pl. 99. cites 3 H. 4. 8.

Br. Eſſoign, pl. 37. cites S. C.

6. In *Præcipe quod reddat of Rent*, the *Eſſoign was de placito Annui Reditus*, where it ſhould be *de placito Terræ* of *Rent of Inheritance*, and therefore was amended. Br. Amendment, pl. 29. cites 11 H. 4. 43.

S. P. in Writ of Conſpiracy; for there is no ſuch Latin

7. In *Forger* of Deeds the *Writ was Imaginavit* for *Imaginatus fuit*, and was amended by Award of the Court. Quod nota in falſe Latin. Br. Amendment, pl. 81. cites 11 H. 6. 2.

Word as (Imaginavit,) and it was ſaid that this Amendment was by Force of the Statute. Thel. Dig. lib. 16. cap. 6. pl. 11. cites 11 H. 6. 17.——But ſee Stat. 4 Geo. 2. cap. 26. at (S)

8. *Formedon* of a *Gift made to Ro. and to his Feme, and to the Heirs of the Body of Ro.* &c. The *Writ was, that after the Death of Ro. to the Demandant deſcendere &c. as Son and Heir* &c. *without ſuppoſing the Death of the Feme*, and it was abated, and could not be amended by the Statute; for they cannot know if the Feme be alive or not. Thel. Dig. 225. lib. 16. cap. 6. S. 29. cites Paſch. 11 H. 6. 34.

If *Formedon in Deſcender by Baron and Feme*, is *quod deſcendere debet to the Baron*

9. In *Formedon* by two Barons and their Femes, the Writ was, and that *after the Death of the Donee to the Barons and to their Femes, ut Filiabus & Hæredibus of the Donee deſcendere debet* &c. The Writ was amended by Judgment, and the Deſcent made *to the Femes only*; for Priſot took it as an apparent Miſpriſion of the Clerk. But *otherwiſe* it ſhould be *if the Writ had been* to the Barons and their Femes ut hæredibus deſcendere

cendere &c. *without* laying *Filiabus.* Thel. Dig. 224. lib. 16. cap. 6. S. 21. cites Mich. 35 H. 6. 10. 13. and 2 H. 7. 11. agreeing, and 9 H. 7. 19. *and Feme,* this may be amended. Br. Amendment, pl. 60. cites 2 H. 7. 11. Per Hulley.

11. A Man *recover'd in* Writ of *Annuity*, and the *Record came into the Reſceipt*, and *Certiorari iſſued to certify Tenorem Recordi coram nobis in Cancellaria* &c. *which was in Curia Domini E. nuper Regis Angliæ tertii coram R. Thorp, & ſocius ſuis Juſticiariis noſtris*, where the Writ ought to be *Juſticiariis ipſius nuper Regis E. tertii*, and not (Noſtris;) and the beſt Opinion was, that it ſhall be amended; for it is Miſpriſion of the Clerk. But Danby contra, and that it ſhall not be amended; for the *Clerk had only the Copy of the Record to make the Certiorari*; for the Record itſelf remains in the Reſceipt; for it is not like to an Obligation, for there the Clerk may have it before him; and therefore if he fails, and upon his Examination confeſſes that he had the Obligation before him, there the Miſpriſion ſhall be amended; but where he had not but a *Copy*, then e contra; for then it *is only the Information of the Party himſelf*, which is at his Peril. Quod nota. Br. Amendment, pl. 52. cites 37 H. 6. 27.

12. Land was *given by Fine to Baron and Feme, and to the Heirs of their Bodies*, and *Certiorari iſſued* to remove the Record out of the Treaſury into the Chancery; and now it came into C. B. by Mittimus, and the Plaintiff brought *Scire Facias* upon it *as Heir to the Baron and Feme of their Bodies*, and *in the Mittimus he made himſelf Heir to the Baron only*, and *in the Scire Facias he had made himſelf Heir to the Baron and Feme*; and the Opinion was that the Scire Facias ſhall abate; for the *Fine warrants the Mittimus*, and the *Mittimus warrants the Scire Facias*, and therefore they *ought to agree*. And by Vaviſor, Rede, and Fineux, it ſhall be amended, becauſe it is *founded upon Record*. *Contra* of Scire Facias, which is *founded upon Surmiſe*. Note the Diverſity. Br. Amendment, pl. 63. cites 9 H. 7. 1. 8.

13. A *Scire Facias upon a Judgment in Aſſiſe*, where *one of the Plaintiffs was knighted after the Judgment*. The *Writ was* brought *by A. B. Mil. and B. C. Mil.* and the *Recovery was recited to be by A. B. Mil. and B. C. modo Mil.* whereas the *Record* of the Judgment *was by A. B. Mil. and B. C. without naming him Miles*; and the Court held that the Writ was ill, becauſe it ought to have been *Cum A. B. Miles, and B. C. modo Miles, per nomen A. B. militis, and B. C. recuperaverunt* &c. but that it was but the Miſtake of the Clerk in miſreciting the Record, and therefore it ſhould be amended. 2 Ld. Raym. Rep. 1058. Arg. cites 11 Hen. 7. 25. a. Br. Pleadings, pl. 169. cites S. C. & S. P.

14. If Writ Judicial *varies from the Original*, this ſhall be amended. Br. Amendment, pl. 48. cites 9 E. 4. 15.

15. Choke J. ſaid that he ſaw *Writ upon the Statute 5 R. 2. that the Defendant enter'd Vi & Armis* ubi ingreſſus non datur per Legem, *where Vi & Armis is not in the Statute*, and it was amended. But Catesby ſaid that the Original was made by the *Information of the Party*, and therefore ſhall not be amended. Br. Amendment, pl. 72. cites 10 E. 4. 11.

16. Where Writ of *Warrantia Chartæ* is *Unde Pactum habet*, where it ſhould be *Unde Chartam habet*, this ſhall not be amended; for Form ſhall not be amended. Br. Amendment, pl. 78. cites 22 E. 4. 20.

17. *So* of *Præcipe quod ſolvit*, where it ſhould be *Præcipe quod reddat.* Ibid.

18. *So* in *Quare Impedit*, quod *permittat nominare*, where it ſhould be *preſentare*, this ſhall not be amended. Ibid.

19. A *Scire Facias* was brought to have Execution *of a Judgment recovered by A. and B.* Sulyarde for the Defendant pray'd that the Writ may abate, becauſe the *Judgment was recover'd by A. only*; but the Court amended Br. Amendment, pl. 77. cites S. C.

amended the Writ, becauſe it was but Vitium Clerici. 2 Ld. Raym. 1058. Arg. cites 22 E. 4. 6. b.

Jenk. 218. pl. 64. S. C. that it is not amendable; for Erronice emanavit.

20. A *Mandamus* was awarded out of the Court of Wards *to the Eſcheator* of the County of S. who took a Verdict; and *before the* ingroſſing and *ſealing the Verdict*, which was agreed to be done *at another Day* and Place, a *Superſedeas came* to him, at the Concluſion of which was wrote *Superdeas* inſtead of *Superſedeas*. It was held by the Court that the Writ was not amendable. D. 170. pl. 2. Mich. 1 & 2 El. Ld. Powis's Caſe.

21. In a Writ of Error to reverſe a Judgment, the Error aſſigned was that the Writ was in *the Debet only*, where it ought to have been in the *Debet & Detinet*; and it was moved that this being only Miſpriſion of the Clerk, it might be amended; but held per Cur. that it was *Matter of Subſtance*, and therefore not amendable. 5 Rep. 36. Trin. 30 El. Walcot's Caſe.

22. In *Quare Impedit* by the Queen, Exception was taken to the Writ becauſe the Words were Quod permittat ipſam præſentare *ad Rectoriam*, where it ſhould be *ad Eccleſiam*. The Court awarded that the Writ ſhould be openly amended in Court by a Clerk of the Chancery. 4 Le. 12. pl. 47. Paſch. 37 Eliz. C. B. Anon.

Cro. E. 462. pl. 9. Smith v. Freeman S. C. held per Cur. not amendable, the Word their being (Diſtrictionem.)——— S. C. cited out of 5 Rep. by Doderidge J. 2 Bulſt 51.———S. C. cited Hutt. 56.

23. Error, for that the Writ, which was on the Statute of Glouceſter, was Quod nullus faciat Vaſtum, Venditionem & *Deſtrictionem* &c. inſtead of *Deſtructionem*; Reſolved, that this being Matter of Subſtance, Deſtrictio being a Latin Word, alters the Senſe of the Statute, and Matter of Subſtance in an Original Writ ſhall not be amended. 5 Rep. 45. Paſch. 41 Eliz. B. R. Freeman's Caſe.

24. In *Aſſiſe* the *Writ was Ad faciendum Recognitionem illum, inſtead of illam*; and it was moved to be amended. The Curſitor made Oath that the Note which he now produced (which was right) was the original Note, whereby the Writ was made; but the Court would adviſe. Hob. 128. pl. 162. Oglethorpe v. Mawde.

25. In Formedon the Writ was *Conſanguineus*, where it ſhould be *Conſanguineo*. It was ſaid by all the Juſtices, that this may be amended by the Statute. Het. 78. Hill. 3 Car. C. B. in Caſe of Jenkins v. Dawſon.

26. B. *recovered in the Marſhalſea* againſt D. *and thereupon brought Debt in C. B.* and D. *pleaded Nul tiel Record.* A *Certiorari was awarded* for a Record between D. and B. and it came into Chancery, and by Mittimus into C. B. but the *Mittimus miſtook the Name of C. for D.* It was rul'd per tot. Cur. that it ſhould be amended, and Judgment affirm'd. But by Doderidge, if the Certiorari had been ill it ſhould not be amended. Lat. 217. Mich. 3 Car. Doily v. Broughton.

S. C. cited Lev. 2.—— G. Hiſt. of C. B. 95. cites S. C.

27. Quare Impedit to preſent ad Eccleſiam de W. It was moved that the Writ might be amended, becauſe the Plaintiff's Title was to the Vicarage of the ſaid Church, and not to the Parſonage, and becauſe it was a Writ Original, and in Point of Subſtance, the Court much doubted if it ſhould be amended; for it is clear that the Writ was miſtaken; for the Words Ad præſentandum *ad Eccleſiam*, *always intend Right of Advowſon of the Parſonage*; but when the Title is to the Vicarage only, there is a ſpecial Writ Ad præſentandum ad Vicariam, and cited F. N. B. 32. and 15 Eliz. D. 323. but becauſe the *Attorney gave a Note to the Curſitor to draw a Writ Ad præſentandum ad Vicariam Eccleſiæ de W.* and becauſe it is *a peremptory Action in a Qua. Imp. the firſt ſix Months being paſt*, the Party being a Purchaſor of the Advowſon, and the Miſpriſion happening by Default of the Clerk in not purſuing his Maſter's Directi-

ons,

ons, it was ordered to be amended. Cro. C. 74. Trin. 3 Car. C. B. Turner v. Palmer.

28. Plaintiff in a *Qua. Imp.* againſt the Defendants, who had preſented to the Church of having *miſtook the Name of the Defendant*, pray'd an Amendment, becauſe the 6 Months being laps'd, they could not bring a new Writ without Loſs of this Preſentation; but the Court denied to grant it, and ſaid that it appears clearly that this was the *Default of the Party*, and not of the Clerk. Freem. Rep. 69. pl. 83. Hill. 1672. C. B. the Lady Eſſex v. Key's College in Cambridge.

29. After an *Extent and Liberate* the *Writ was Habere facias Terras & Tenementa, inſtead of Liberari facias*, which was moved to be amended, and the Court order'd it accordingly. 2 Vent. 171. Paſch. 2 W. & M. in C. B. Anon.

30. The Plaintiff obtained *Judgment in an Ejectment for two Houſes*, and *brought a Scire Facias* on that Judgment, to ſhew Cauſe why he ſhould not have Execution *of one Houſe*; the Defendant *pleaded Nul tiel Record*, and the Plaintiff perceiving the Fault, moved to amend it. Sed per Curiam, this Scire Facias is a good Writ, there is no Fault in it to amend, and the Court will not alter it to fit it for the Plaintiff's Purpoſe in this Judgment, when it is probable there may be another Judgment in Ejectment for one Houſe, and the Defendant having taken Advantage of it, it ſhall not be amended to falſify his Plea. 3 Salk. 32. Mich. 3 Ann. B. R. Williams v. Hoskins.

6 Mod. 310. S. C. held accordingly. ——Ibid. 263. S. C. by the Name of Buxom v. Hoskins, held accordingly, and the Court took a Diverſity,

where a Writ is bad and vitious upon the Face of it, and where it is good in the Frame of it, but not fitted to that particular Purpoſe, and ſaid that there would be ſome Colour to amend in this Caſe if the Defendant had appear'd and pleaded ſome other Plea, or had not taken Advantage of this Slip, ſo as the Proceedings would have been vitious without Amendment; and they agreed that where-ever an Original was amendable, there a Scire Facias would be ſo too.——1 Salk. 52. pl. 16. S. C. accordingly. ——2 Ld. Raym. Rep. 1057 S. C. and ibid 1060. the Reporter ſays Quære of this Caſe, becauſe the Caſes cited by Mr. Williams [who argued for the Plaintiff in Error, as the Reporter did for the Defendant in Error] ſeem to be ſtrong to the Purpoſe, and the Court (as the Reporter ſays he thought) rul'd the Matter Hæſitanter.

31. If a *Formedon* be made *for* 10 *Acres* where the *Inſtructions given* are *for* 20, Holt Ch. J. ſaid he doubted that it could not be amended; for the Statute is to cure only Miſtakes of Clerks, which would endanger the reverſing of Judgments, and not to *alter Matter of Fact* by extending it farther than it was before. 6 Mod. 264. Mich. 3 Ann. B. R. obiter.

S. P. mention'd, and Holt and Powell doubted. 2. Ld. Raym. Rep. 1059. in S. C.

32. A *Sci. Fac.* out of the Petty-bag retorned in B. R. *to repeal the Queen's Letters Patents* granted to Wells was amended, and *Sping*, a Man's Name, was *amended*, and made *Spring*, by the Inſtructions given to the Clerk of the Petty-bag, and the Clerk of the Petty-bag, who made out the Writ, was ſent for to amend it, becauſe he who made it ought to amend it, and the Court examined him as to the Truth of the Inſtructions. 2 Ld. Raym. Rep. 1060. Arg. cites Brewſter v. Wells.

6 Mod. 229. Mich. 3 Ann. B. R. Brewſter v. Weld, S. C. but S. P. does not appear. —— The laſt Day of Hill.

Term, 3 Ann. (abſente Holt Ch. J.) upon Motion a Scire Facias was amended; and where the Judgment was recited as a Judgment of the 3d Year of the Queen, that was amended and made the firſt, agreeable to the Record; but in both theſe Caſes the Amendments were made before Plea pleaded immediately upon the Return of the Scire Facias. 2 Ld. Raym. Rep. 1060.

33. In a *Scire fieri Inquiry* in the Recital of the Judgment, *Curia Domini Regis* was miſtaken for *Nuper Oliveri*, and was amended, becauſe it was a Judicial Writ, and the Miſtake in the Recital of the Record which the Clerk had before him. 2 Ld. Raym. Rep. 1058. Arg. cites 2 Keb. 175. Williams v. Moore.

2 Keb. 175. pl. 62 Hill 18 & 19 Car. 2. B. R. the S. C. and per Cur. it was amendable without the Help of the late Statute of 17 Car. 2. cap. 8. it being a Judicial Writ.

34. In

34. In a Sci. Fac. on a Judgment the *Plaintiff's Name* was inſerted *inſtead of the Defendant*'s; it wrs mov'd to amend it, as only a Miſtake of the Clerk, but denied, for there is no Fault in the Writ itſelf, and it is poſſible there may be ſuch a Judgment. 1 Salk. 52. Hill. 6 Ann. B. R. Vavaſor v. Baile.

35. The Court was mov'd to amend an *Elegit*, that *ſets forth, that Judgment was given upon the 9th. of January*, when in Fact *it was given the 23d of October, and ſigned the 9th. of January*. The Court was of Opinion that it was not amendable, becauſe it might occaſion an Alteration in a Verdict upon a Writ of Inquiry, for between the 23d. of October, and the 9th. of January, he might have Lands that he had not the 9th. of January; ſed adjornatur. 10 Mod. 67, 68. Mich. 10 Ann. B. R. Dummer v. ....

36. A *Sci. Fac. againſt the Pledges* in a Plaint in *Replevin* is in Nature of a Declaration, and conſequently amendable. 8 Mod. 313. Mich. 11 Geo. 1. Weldon v. Buckler.

S. P. and Leave given to amend upon Payment of Coſts, tho' the Court ſeem'd to think the Amendment unneceſſary. Barnes's Notes of C. B. 17. Paſch. 12 Geo. 2. Maſon v. Littlehales, Attorney.

38. A *Bill* was filed *againſt* the Defendant as *an Attorney* of the Court, and the Bill by Miſtake of the Plaintiff's Attorney *did conclude & inde producit ſectam* &c. inſtead of & inde *petit Remedium* &c. The Judges ordered it to be amended upon Payment of Coſts, and to be taxed Niſi Cauſa, and the Rule was afterwards made abſolute upon an Affidavit of Service. The *Inſtructions* here given to the Plaintiff's Attorney *were to file a Bill*, which he hath not done; but *he has made it a Declaration by this wrong Concluſion*, and not a Bill according to his Inſtructions. Barnes's Notes of C. B. 3. 4. Mich. 6 Geo. 2. Clarke v. Cotton an Attorney.

38. A *Scire Facias againſt a Bail, and all the Proceedings* thereupon were ordered to be amended by the Record in the Original Action, by *inſerting the Word (Merchant) inſtead of (Mercer.)* being *the Defendant's Addition, after Iſſue joined upon Nul tiel Record*. Barnes's Notes of C. B. 6. Hill. 7 Geo. 2. Swetland v. Beezley & Browne.

39. On Motion to amend the original Writ and Declaration, by making the Plaintiff a Co-Adminiſtrator inſtead of Executor, it was ſaid per Cur. the Doctrine of Amendment of original Writs (which is not by the Common Law, but per Stat. 8 Hen. 6.) is ſettled in the Books; 1ſt, No Amendment of an Original can be made, unleſs for *Neſcience or Miſpriſion of the Clerk*. 2dly, There *muſt be ſomething to amend by*. In this Caſe both theſe Requiſites are wanting. The Court will take care that the Suitor ſhall not ſuffer by the Officer's Error; but had the Miſtake been the Attorney's, the Party muſt be put to his Remedy againſt him; the Court could not amend it. Here the Writ is agreeable to the Inſtructions, ſo there is nothing to amend by. Barnes's Notes of C. B. 15. 16. Mich. 12 Geo. 2. Lamb v. Gibſon.

(B. a) Teſte and Returns of Writs amended.

1. IN *Treſpaſs Diſtreſs iſſued 15 Trin. returnable 15 Mich.* and the *Roll was from 15 Trin. to 15 Hill.* and *at 15 Mich. the Plaintiff appear'd and pleaded to the Iſſue*, and found for the Plaintiff; and this Matter alleged in Arreſt of Judgment, and were awarded to replead, and was not amended. Br. Amendment, pl. 111. cites 46 E. 3. 19.

2. *Proceſs*

2. *Proceſs iſſued to the Coroners, and four returned the Ven. Facias, and* 3 only returned the Habeas Corpora. It ſeems to be ill, but it was admitted there, becauſe he appeared. Br. Repleader, pl. 13. cites 14 H. 4. Br. Return de Briel, pl. 42. cites 14 H. 4. 34 —— Br. Office & Off. pl. 11.

cites S. C. —— Error was aſſigned that the *Venire Facias* was *returned by two Coroners*, whereas at the Time of the Writ awarded there were 2 other Coroners, and the Return *ought to have been in the Name of the 4 Coroners*; but adjudged this was aided by the Statute, which aids Miſreturns and Inſufficient Returns, and this was but a Miſreturn. Cro. J. 383 pl. 12. Mich. 13 Jac. in the Exchequer-Chamber, Lamb v. Wiſeman.

3. *Witneſſes were return'd dead.* The *Defendant ſaid that they were alive*, and *pray'd that the Sheriff be examined*, and ſo he was, and *ſaid that he nor his Under-ſheriff did not return it, but ſuch a Clerk*, by which he was *ſuffer'd to amend it*, and return'd them ſummon'd. Br. Examination, pl. 34. cites 37 H. 6. 11.

4. Where Writ of *Exigent* is *returnable Menſe Mich.* and the *Roll is 15 Mich.* or e contra, there the Writ ſhall be amended, and made to accord with the Roll. Br. Amendment, pl. 71. cites 7 E. 4. 15.

5. In Treſpaſs *Diſtreſs with Niſi Prius* was *returnable 15 Michaelis*, and the *Roll was Menſe Michaelis*, and the Inqueſt by this was taken in Pais, which Matter was alleged in Arreſt of Judgment; and by the Opinion of the Juſtices the Writ of Niſi Prius ſhall be amended, and Reaſon good; for *the Roll is the Warrant of the Writ*, therefore the Writ ſhall be amended according to the Roll or Record, and not the Roll; for *the Roll ſhall not be order'd by the Writ, but the Writ by the Roll.* Br. Amendment, pl. 71. cites 7 E. 4. 15.

6. If *Diſtringas* Juratores be *return'd 15 Paſch.* and the *Roll is Tres Septimanas Paſchæ*, and the Jury at 15 Paſchæ, this is Error, and ſhall not be amended; for this is *not Miſpriſion of the Clerk, but* Miſpriſion *of the Juſtices*, who ought to have regarded the Roll, and not the Writ; for this is the Record for the Original; and the *Docket of the Prothonotary* is not of Force but during the Term for which it ſhall ſerve, and *after the Term ended the Roll is the Record, and not the Docket.* Br. Amendment, pl. 87. cites 2 R. 3. 11. Br. Record, pl. 77. cites S. C. —— 8 Rep. 157. a. cites S. C.

7. Where a Venire Facias is *returned by the Coroner*, when it ought to be returned by the Sheriff, the Trial is wrong, and not remedied by any Statute of Jeofails. 5 Rep. 36 in Baynham's Caſe, ſaid per Wray to be adjudged in the Caſe of Goodwyn v. Franklyn. If on Suggeſtion on the Roll, Proceſs be awarded to the Coroners, and then the Sheriff either returns the Panel or Tales, it is erroneous, becauſe not collected by the proper Officers, and therefore they are not the proper Juſtices Facti of that Cauſe, and it appears on the Record that the Return is otherwiſe than the Court has directed. G. Hiſt. of C. B. 135.

8. In Covenant a Writ of Inquiry was *awarded, by the Roll returnable 15 Paſch.* and it was made returnable *Menſe Paſch.* and the *Inquiſition taken before 15 Paſch.* And upon Judgment for the Plaintiff in C. B. Error was brought in B. R. and after good Deliberation awarded that the Writ be amended by the Roll, and Judgment affirm'd. Cro. E. 761. in pl. 33. ſays the Precedent was ſhewn as Paſch. 30 Eliz. in B. R. Jeff v. Willon. Mo. 712. pl. 998. cites S. C. accordingly —— In Error of a Judgment in Aſſumpſit, it was aſſign'd that the Writ of *Inquiry of Damages* was *awarded by the Roll returnable Die Martis* poſt Tres Trin. and the Writ was returnable *Die Mercurii* poſt Tres Trin. and the Writ was return'd ſerved, and the *Inquiſition taken 26 June, which was Die Martis poſt* Tres Trin. and ſo varied from the Roll, and the Judgment erroneous. But it was anſwered, that it was the Default of the Clerk to make it returnable variant from the Roll, which is the Warrant thereof; and all the Juſtices and Barons, on View of the Record of Jeff v. Willon, awarded that it be amended by the Roll. Cro. E. 760. pl 33. Paſch. 42 Eliz. in Cam. Scacc. Wolley v. Moſely. —— Mo. 711. pl. 998. S. C. and the Court held it the Default of the Clerk, and amendable by the Stat. 8 H. 6. —— S. C. cited Arg. 2 Ld. Raym. Rep. 1059. accordingly; but that otherwiſe it had been if it had been executed upon Die Mercurii, the Day the Writ was returnable.

Cro E. 183. pl 6. S. C. says it is help'd by Stat. 32 H. 8. and Judgment was affirmed.

9. Error was assign'd, that in Trespass the *Venire Facias bore Teste on a Sunday*; but it was held that this was remedied after Verdict by Stat. 18 Eliz. Mo. 684. pl. 944. Hill. 32 Eliz. in the Exchequer-Chamber, Short v. Hellyar.

—— S. C. cited by Tanfield J. by the Name of Short v. Arundel, as amended after Trial. Cro. J. 162. in pl. 16. ——S. C. cited Mo. 465. in pl. 657. ——S. P. cited per Cur. as ruled accordingly. Cro. E. 467 (bis) pl 24. ——Cro. E. 203. pl. 35. it was said that it is usual in C. B. if a judicial Process bears Teste upon Sunday, to amend it. ——S. P. where a Venire Facias was Teste of a Sunday, and held amendable; it being only the Default of the Clerk, and misawarding of Process, which is aided by Stat. 32 H. 8. and 18 Eliz. and Judgment for the Plaintiff. Cro. J. 64. pl. 3. Pasch. 2 Jac. B. R. Dolphin v. Clarke.

10. If a Ven. Facias bears *Teste the Day that it is returnable*, this is amendable by the Roll. Mo. 599. pl. 826. Trin. 37 Eliz. Adams v. Albon.

Cro. E. 433. pl. 42. Hungerford v. Veisey. S C. and it was held clearly to be erroneous Sed adjornatur.

11. *Venire Facias* was *returned the first Day of the Term*, and the *Roll gave Day before the Term*, and Issue was joined and tried thereupon. Per Cur. The Roll is the Warrant for the Writ, and the Writ issued without Warrant of the Roll, and is not aided by Stat. 18 Eliz. For the Statute aids Discontinuance, Miscontinuance, and Misconveying of Process. Mo. 402. pl. 535. Pasch. 37 Eliz. Besey v. Hungerford.

—— But if it does not appear that any Writ was awarded, it is aided by the Statute; but not an Ill Writ. Ibid. —— G. Hist. of C. B. 131. says that the Award of the Venire must be to a Day in the same Term, or the next Term; but however it must be in Term, otherwise it is erroneous, because this is not such a Discontinuance as is aided by the Verdict, since it is an Error in the Court in awarding the Process, which makes it utterly uncertain when or where the Parties should appear to receive Judgment, and it is an Act of the Court which is erroneous, and not a Misentry of the Clerk, which the Statutes do not intend to aid.

12. In Debt the Venire Facias was *awarded* upon the Roll *returnable Die Martis post 15 Trin.* and the Writ was in Facto *return'd Die Jovis post 15 Trin.* and this was assigned for Error. Sed non allocatur, because it was only misawarding of Process, and remedied by the Statute of Jeofails, and the Judgment was affirmed. Mo. 696. pl. 967. Mich. 38 & 39 Eliz. in Cam. Scacc. Falsowe v. Thornye.

A Writ of Proclamation on an Exigent was return'd served, but the Sheriff's Name was not put thereto. Adjornatur. Mo. 65. pl. 176. Trin. 6. Eliz. Anon.

13. Where the *Christian Name of the Sheriff* was *omitted in the Return of an Original Writ* the Court refused to amend it, the *Record being made up, and* because an *Erroneous Outlawry would be reversed thereby.* Goldsb. 113. pl. 3. Mich. 39 & 40 Eliz. Broughton v. Flood.

A Blank for the Return of the Venire Facias was *left in the Record of Nisi Prius*, and this being moved in Arrest of Judgment a Rule was made to shew Cause, which, on hearing was discharged. For it is constant Practice to leave a Blank; the Award of the Venire Facias is no Part of the Issue, and is amendable by the Venire Facias itself. Barnes's Notes in C. B. 345, 346. Pasch. 12 Geo. 2. Bryan v. Smith.

14. A *Venire Facias was* awarded *upon the Roll* thus, viz. *Ideo præceptum est Vicecomiti quod Venire Facias* 12 *quod sint hic* and left a *Blank* for the Day of the Return, so as there was no Day for the Return upon the Roll, tho' the Day of Return was expressed in the Venire Facias. Popham and Fenner, held that the Venire Facias ought to have a Day certain upon the Roll, for that is the Warrant for the Venire Facias, and if it differs from it, it is Error and not amendable; but Gawdy held it amendable. Et adjornatur. But afterwards the Judgment was affirm'd. Cro. E. 553. 554. pl. 5. Pasch. 39 Eliz. B. R. Shere v. Dickenson.

S. C. cited by Powis J.

15. The *Venire Facias* was *returnable Die Sabbati post Octab. Trin.* and the *Distringas issued bearing Date the Day after Craft. Trin.* and Trial there-

thereupon, and Verdict for the Plaintiff; And this was moved to be ill, becauſe it was without Warrant, being before the Return of the Venire Facias. *But becauſe by the Roll the Venire Facias was awarded returnable Craſt. Trin.* which is the Warrant to make the Venire, and was well awarded, and it was the Default of the Clerk who did contrary to the Roll, *it was* ruled to be *amended.* But Popham ſaid, that if the Trial had been upon the Venire it was erroneous and not amendable. Cro. E. 572. pl. 11. Trin. 39 Eliz. Rogers v. Bird. 2 Ld. Raym. Rep. 1064.

16. The *Diſtringas Jurat. bore Teſte the ſame Day with the Venire Facias*, tho' in its Nature it iſſues after the Venire Facias returned, yet it was amended in this Point alſo; for it was only the *Miſpriſion of the Clerk.* Yelv. 64. Paſch. 3 Jac. B. R. Nevil v. Bates.

17. The Venire Facias was made *returnable Quid. Hill.* and bore *Teſte* 12 *Feb.* which is the laſt Day of Hillary Term. And yet per Curiam, it ſhall be amended in the Date of the Teſte, viz. to iſſue out before the Return of it, and this in Favour of Trials; for it is only the *Default of the Clerk.* Yelv. 64. Paſch. 3 Jac. B. R. Nevil v. Bates. S. C. cited by Powell J. 2 Ld. Raym. Rep. 1067. —Ibid. 1069. S. C. cited by Holt Ch. J. to be a plain Miſtake of the Clerk, and the Teſte being after the Return was ill, being to diſtrain Jurors not ſummon'd.

Verire Facias bare *Teſte* 26 *June*, which was *the laſt Day of Trin. Term*, and ſo the *Return is before the Teſte*, and the Diſtringas ill awarded; but reſolved that being only a Default in a Judicial Proceſs it ſhould be amended. Cro. J. 442. pl. 15. Mich. 15 Jac. B. R. Harriſon v. Metcalf.

Error aſſign'd was that the *Venire Facias bore Date* 12 *Feb. and* was *returnable Die Sabbati poſt Octab. Purificationis*, which is *before the Teſte.* Sed non allocatur; for being a Judicial Writ, and the Fault of the Clerk, it ſhall be amended. Cro. C. 38. pl. 4. Trin. 2 Car. in the Exchequer-Chamber, Ayleſworth v. Chadwell.

18. The *Teſte* of a Venire Facias *was* 12 *June returnable Tres Trin.* which was *the ſame Day that the Teſte was*, and after Verdict it was moved to be amended and made according to the Roll, and it was amended accordingly. 2 Brownl. 102. Mich. 9 Jac. C. B. Anon.

19. In *Account* the Venire Facias was return'd by the Coroners thus, viz. Executio iſtius Brevis patet in quadam Scheduſa huic Brevi annexa, and the Panel and Names of the Jurors between the E. of Cumberland Plaintiff and T. H. Defendant in a Plea of *Debt inſtead of in a Plea of Account*, and yet after Verdict Day was given to the Coroners to amend their Return. 2 Brownl. 108. Mich. 9 Jac. Earl of Cumberland v. Hilton.

20. F. was *indicted and traverſed it*, and found againſt him; Exception was taken becauſe upon the Back of the Writ of *Diſtringas it was returned Executio iſtius brevis &c.* but the *Sheriff's Name was not put to it*; but ruled good and awarded to be amended, if it was not good. Cro. J. 527. pl. 5 Paſch. 17 Jac. B. R. Fitz-Hughe's Caſe.

21. In Debt, the Parties being at Iſſue the awarding of the *Roll was of a Venire Facias, returnable Die Martis poſt Craſtin. Purificationis, but it was made returnable Die Sabbati poſt Octab. Purific.* After Judgment this was aſſign'd for Error. Sed non allocatur; for being a Judicial Writ, and the Fault of the Clerk, it ſhall be amended. Cro. C. 38. pl. 4. Trin. 2 Car. in the Exchequer-Chamber, Ayleſworth v. Chadwell.

22. An *Attorney directed his Clerk to make a Ca. Sa. returnable in Trinity Term*, the *laſt Return whereof was on the 25th of June*, and the *Clerk by Miſtake wrote the 25th of July.* Glyn Ch. J. held that if it ought to be amended it muſt be by the Common Law, and he thought there was no Colour for the Amendment of it. 2 Sid. 7. 12. Mich. 1657. Smithsby v. Lenthill. A *Fieri Facias* bore Teſte on a *Day out of Term*, and whether it was amendable or not, was the Queſtion; and it was granted that a *Writ of Enquiry* is amendable. Godb 78. for there is the Roll by which it may be amended; ſo a *Venire Facias* &c. for there is an Award by which it may be amended, and in the preſent Caſe the Court would amend the Fieri Facias if it could; but there is *no Award upon*

upon the Roll for the Fieri Facias by which the Amendment can be made. Comyns Rep. 60 pl 39. Trin. 11 Will. 3. B. R. Juxon & Ux' v Naylor.

The *Teſte bore Teſte* 24 *Feb.* which is *out of Term returnable in the Term*, and was amended. Yelv. 64. in Caſe of Nevil v. Bates, ſays that a Precedent was ſhewn to that Purpoſe.

23. A *Fieri Facias* was *teſted* 7 *Feb.* 26 *Car.* 2. by Miſpriſion of the Clerk, it being *Teſte F. North*, whereas Sir F. North *was not Chief Juſtice before Hillary Term* 27 *Car* 2. It was amended by Order of the Court. 2 Jo. 41. Mich. 27 Car. 2. C. B. Smith v. Harward.

24. In *Homine replegiando* of one in whom the Defendant, claim'd Property, the Sheriff *return'd that he had replevied the Body*, but does *not ſay*, the Body *in which the Defendant claim'd Property*; whereupon the Sheriff was order'd to amend his Return. 3 Mod. 120. Hill. 2 & 3 Jac. 2. B. R. Sir Tho. Grantham's Caſe.

25. In *Action for Words*, after Declaration deliver'd the Defendant, on ſearching for *Plaintiff's Inſtructions* to the Curſitor, found they *varied materially from the Original*, and thereupon pleaded the Statute of Limitations. The Maſter of the Rolls upon Petition granted a new Original, which ſhould warrant the Declaration, and it was filed in Court, but the Commiſſioners of the Great Seal ſet the ſame aſide, and *order'd an Original to be taken out according to the firſt Inſtructions to the Curſitor*; and on Motion the Court of C. B. order'd the laſt Original to be filed. 2 Vent. 130. Hill. 1 & 2 W. & M. in C. B. Chaſe v. Etheridge.

26. The Teſte of an *Original Writ* is not amendable; Per Powel J. 2 Ld. Raym. Rep. 1066. and ſaid that it was ſo reſolved in the Houſe of Lords, with the concurrent Opinion of all the Judges in the **Caſe of my Ld. Jefferies**, and that upon Conſideration of Gage's Caſe in 5 Rep. 45. b. and adds in a Crotchet [that a Judgment given in Wales upon the Authority of Gage's Caſe was reverſed; and that upon that Occaſion the Record of that Caſe was ſearch'd for, and found not to warrant the Report. And Holt Ch. J. ſaid that the Record of that Caſe is in Co. Intr. Tit. Err. p. 9. 250. and the Judgment of the Court is contrary to the Report, for the Writ was not amended, but the Fine was reverſed. And as I have heard Twiſden J. ſay, the Eſtate is enjoy'd under that Judgment ever ſince.]

27. It was moved to amend the Writ of *Habeas Corpora Jurator'* after Trial *returnable on Wedneſday next after* 8 *Days of the Purification*, *inſtead* of Wedneſday in 15 *Days of Eaſter*; Court made a Rule to ſhew Cauſe, which was afterwards made abſolute upon hearing Counſel on both Sides. Barnes's Notes of C. B. 7. Paſch. 7 Geo. 2. Waldo v. Hariſon.

28. It was moved after Trial to amend the *Jurata* in the Record of Niſi Prius *by making the Return in the Award of the Habeas Corpora of a Day certain*, inſtead of a General Return; a Rule was made to ſhew Cauſe, but afterwards diſcharged, the Court ſaying that it need not be amended, for it is remedied by the Statutes of Jeofails; but on further Conſideration the Judges gave their Opinion ſeriatim, and declared that the Jurata might be amended by the Habeas Corpora, and order'd the ſame accordingly. Rep. of Pract. in C. B. 101. Paſch. 7 Geo. 2. Walthoe v. Harriſon.

(C. a) Miſ-

(C. a) Miſnoſmer, and other Defects in the Count, amended.

See (B) pl. 20. 25.—See (T) ſupra.

1. IN *Quare Impedit* the *King counted of Reſignation by the Hands of J. Biſhop of W. Ordinary of that Place*, and did *not ſay then Ordinary of that Place*, and it was amended per Judicium. Br. Amendment, pl. 109. cites 38 H. 6. 33.

2. In *Rationabili parte* Bonorum *againſt three Executors*, Catesby demanded *Judgment of the Count*; for the *Cuſtom is* there, *that if the Baron dies without Iſſue the Feme ſhall have the Moiety of the Goods, and if he has Iſſue then, but the third Part, after the Debts and Funeral Expences paid*; and the Feme Plaintiff has demanded the Moiety, and *has not alleged that the Baron died without Iſſue*, and by Favour of the Juſtices it was amended. Br. Rationabili Parte, pl. 5. cites 7 E. 4. 20. 21.

3. In *Aſſumpſit againſt B. ſenior and B. junior*, after Verdict it was alleged in Arreſt that the *Declaration upon the File ſuppoſes the Promiſe* to be *made by B. ſen. only*; but the Roll and the Record of Niſi Prius, and all the After-Proceedings were well laid to be by both, and that ſo was the Paper-Copy under the Counſellor's Hand. All the Court, præter Fenner, held it amendable; for as Brian ſaid 10 H. 7. 25. Papers are now as Records; ſo as when it appears that the Paper-Declaration is good that the Promiſe was by both, it is the Fault of the Clerk to enter it on the File to be done by one, and ſo adjudged to be amended. Cro. E. 258. pl. 37. Mich. 33 & 34 Eliz. B. R. Ramſey v. Bird Sen. & Bird Jun.

4. *Tenant in Tail demiſed to A. and his Aſſigns* for *the Lives of* 3 *Perſons*. Afterwards A. made an Under-Leaſe to B. and his Aſſigns to the Uſe of C. for 99 Years, if the ſaid 3 Lives ſhould ſo long live, Virtute cujus quidem Dimiſſionis idem C. poſſeſſionatus fuit &c. After a Verdict in Ejectment it was moved in Arreſt of Judgment, that the Plaintiff ſets forth virtute cujus Dimiſſionis he was poſſeſs'd, whereas he came into the Poſſeſſion by Limitation of an Uſe, and therefore he ſhould have ſaid Et vigore Statuti &c. and theſe were held to be Faults in Subſtance, and not in Form, and Judgment for the Defendant. Cro. E. 407. pl. 19. Trin. 37 Eliz. B. R. Baker v. Seale.

5. Motion in Arreſt of Judgment in Ejectment, becauſe the Declaration was That the *two Defendants intravit, dejecit* &c. the Plaintiff, where it ſhould have been *intraverunt*, dejecerunt &c. All the Juſtices (abſente Fleming) held it to be amendable, it being *apparent Miſpriſion of the Clerk*. Cro. J. 306. pl. 1. Mich. 10 Jac. Odingſells v. Derbie & Jackſon.

Yelv. 224. S. C. adjudged accordingly. —2 Bulſt. 35. Odington v. Darby, S. C. adjudged by 3 Juſtices, abſente Fleming Ch. J ——— Brownl. 149. S. C. adjudged accordingly.——Jenk. 325. pl. 42. S. C adjudged and affirmed in Error.———S. C. cited 2 Ld. Raym. Rep. 1068. by Powell J. who ſaid that it does not appear certainly what the Miſtake was, and the ſingular Number for the plural might be very material.

In Covenant againſt 2, the Plaintiff declared Quod *teneat Conventionem*, inſtead of *teneant*. The Court ordered it tobe amended; and it was ſaid, that of late Days it had been done in Caſe of a Word miſtaken in an *Original*, as in Ejectment *diviſit* for *demiſit*. 2 Vent. 173. Paſch. 2 W. & M. in C. B. Cook v. Rumney.

6. Aſſumpſit by J. T. Executor, *in Conſideration that N. the Teſtator would deliver to the Defendant upon Requeſt* 40 *l. he promiſed to repay it at ſuch a Day*, and the *Declaration was* Quod *idem N. (inſtead of J. the Plaintiff) dicit in Facto, quod ipſe idem N. delivered to him the* 40 *l.* &c. Reſolved that the Declaration was ill, and inſenſible, Quod idem N. dicit

S. C. Gilb. Hiſt of C. B. 111.——*Debt by* A. as Adminiſtratrix of

G. upon a Charter-Party, in which were ſeveral Covenants between him and the Defendant. in Facto, becauſe he is a dead Perſon, and it being the Matter and Subſtance of the Declaration, and no precedent Matter to induce thereto, it cannot be amended, and therefore adjudged againſt the Plaintiff, Quod nihil capiat per Billam. Cro. J. 587. pl. 9. Mich. 18 Jac. B. R. Thomas v. Willoughby.

The Declaration was right till ſhe came to the Aſſignment of the Breach, and then it was Idem in Facto dicit, inſtead of Eadem A. Upon Demurrer it was objected, that here was no Breach aſſigned by this Miſtake of the *Name of G. the Inteſtate*, for the Name of *A. the Adminiſtratrix.* But the Court held clearly, that as all the Declaration beſides was right, and concluded right, Quod eadem A. profert in Curia literas Adminiſt' it was merely a Fault of the Clerk, and amendable by the Statute of H. 6. 2 Lev. 117. Mich. 26 Car. 2. B. R. Rea v. Barnes.——S. C. cited Comyns's Rep. 567. pl. 244. Paſch. 10 Geo. 2. C. B. in the Caſe of Harvey v. Stokes, and S. P. admitted; but it was there held per Cur. that tho' a Miſnoſmer of the Plaintiff or Defendant be amendable, yet the Miſtake of the Name of a 3d Perſon is not aided or amendable.

7. In *Treſpaſs* the Plaintiff *ſet forth that the Locus in quo &c. was Copyhold, whereof J. S. was ſeiſed in Fee by Copy, and* that the Land *deſcended to his Daughters, who leaſed to the Plaintiff.* The *Iſſue was joined upon a Collateral Matter*, and Verdict for the Plaintiff; and tho' it was adjudg'd that the Plaintiff had *not made out a good Title to J. S. becauſe he did not ſhew a Grant of the Copyhold* to him, yet this being but Matter in Form, was help'd by the Statute of Jeofails. Cro. C. 190. pl. 19. Paſch. 6 Car. B. R. Sheppard's Caſe.

8. The Plaintiff *declared of a Demiſe to the Defendant for* 13 *Years, rendring* 40 *l. Quarterly, not ſaying Annuatim.* Upon Non eſt Factum pleaded the Plaintiff had a Verdict; but after the Plea the Plaintiff amended the Declaration by putting in the Word (Annuatim.) Upon a Motion for the Defendant to have it examined, it was held by Keyling Ch. J. and Wyndham J. that it was no more than what was implied before. And by Twiſden J. the Defendant ſhould have demanded Oyer of the Deed; but having pleaded Non eſt Factum, he is not prejudiced by this Amendment. Raym. 160. Hill. 18 & 19 Car. 2. B. R. Rymes v. Baker.

9. The Declaration was, Willielmus *Patiſon queritur de Will. Milton* &c. pro eo videlt' quod cum Willielmus *Patiſon (inſtead of Milton) indebitatus fuit Willielmo Patiſon.* After a Verdict for the Plaintiff it was moved to amend it, for it was a plain Miſtake of the Clerk, to make the Plaintiff indebted to himſelf; and the Court ordered it ſhould be amended accordingly. 4 Mod. 161. Hill. 4 & 5 W. & M. in B. R. Patiſon v. Milton.

5 Mod. 523. S. C. argued, but no Judgment.—— Carth. 401. S. C. and the Court denied to amend it.— Comb. 394. S. C. but no Judgment;

10. After Verdict in Ejectment the Plaintiff moved to amend his Declaration, wherein he had *counted of a Demiſe* 10 *April* 1697, inſtead of 1696; For 1697 was not come at the Time of the Trial; but it was denied, becauſe if it ſhould be granted it alter'd the Iſſue, and made another Title. But the Court agreed, that in a *Judgment by* * *Confeſſion on a Warrant of Attorney* it might be amended in Ejectment, becauſe without ſuch Amendment the Agreement and Intent of the Parties could not be fulfill'd. 1 Salk. 48. pl. 6. Paſch. 9 W. 3. B. R. Puleſton v. Warburton.

but ſays the Plaintiff did not proceed upon this Verdict; for that the Counſel in the Cauſe aſſured the Reporter that they were ſatisfied it was a fatal Error, and not amendable.——12 Mod. 125. S. C. ſays the Court would have amended it if they could, but the Inconveniences of doing it would be very great, and Judgment was ſtaid; but that after it was agreed by Conſent to amend, and the Judgment to be for Security as to the Coſts &c. and the Defendant to take a new Declaration, and Defendant to deliver Poſſeſſion if Verdict be againſt him, and not bring a new Writ of Error.

* Carth. 401. in the Caſe above, ſays a Rule of Court was produced in a Caſe of Parr v. Cawley, where after Error brought on a Judgment by Confeſſion in Ejectment, ſuch Amendment was made in the Declaration; but that being a Judgment by Conſent of Parties, was held to be no Authority in the principal Caſe.

11. Aſſump-

11. Aſſumpſit &c. *againſt J. G. Knight.* The Defendant *pleaded* in Abatement *that he is a Knight and Baronet.* The Plaintiff *replied that he is a Knight* [* *only*] &c. and moved to amend his Declaration upon Payment of Coſts, all being in Paper, and that the *Action being by Bill* the Addition was not material, it not being within the Statute of Additions; but it was denied, becauſe there was *nothing to amend by*, and the Defendant had taken Advantage of the Fault. 1 Salk. 50. pl. 12. Paſch. 2 Ann. B. R. Lepara v. Germain.

* 3 Salk. 235. pl. 1. S. C. accordingly. — * 2 Ld. Raym. Rep. 859. Lapiere v. Germain, S. C. accordingly.

12. Upon a common Clauſum fregit the Plaintiff *declared againſt the Defendant as Adminiſtrator*, and he pleaded *that Adminiſtration was never committed to him.* The Plaintiff's Attorney moved in the Treaſury, that the Plaintiff might amend his Declaration upon Payment of Coſts, by declaring againſt the Defendant as Executor, which, upon hearing Defendant's Attorney, was ordered. Barnes's Notes of C. B. 67. Hill. 7 Geo. 2. Brown v. Shipman.

(D. a) Miſnoſmer, and other Defects in Pleadings, amended.

See (B) pl. 27.

1. *ASSISE by J. S. and W. N.* The *Defendant pleaded that J. N. died after the laſt Continuance*, where it *ſhould be W. N.* and the beſt Opinion was that it ſhall not be amended; for the Statute was made in Favour of Clerks and Officers, ſo that Miſpriſion of the Clerk ſhall be amended; but contra of *Plea of the Party*; for this is made by himſelf and his Counſel, and is no Default of the Clerk. Br. Amendment, pl. 74. cites 18 E. 4. 13. and 20 E. 4. 6.

2. Sulyard ſaid that a * *Treſpaſs* was ſued [*Traverſe was tender'd*] *in Chancery by* 3, and after *they ſhew'd Feoffment made to* 4, to have the Land in Farm; and by all the Juſtices, this is Miſpriſion; for the Feoffment was by Deed; but it did not appear if the Clerk ſaw the Deed or not. Br. Amendment, pl. 74. cites 18 E. 4. 13. and 20 E. 4. 6.

* All the Editions of Brooke are (Trns' fuit ſue,) which is (Treſpaſs was ſued;) but all the Year-books are (Traverſe fuit tend'.)

3. Miſnoſmer of the *Chriſtian Name of one of the Defendants in the* Attorney-General's *Replication in an Information*, was moved after Verdict for the Defendants to be amended before Judgment enter'd, to prevent Error in the Judgment. But the Court thought it could not be, becauſe they conceived there was no Iſſue joined. Sty. 167. Mich. 1649. Birmingham-Town's Caſe.

4 In Aſſault and Battery there had been 2 *ſeveral Pleas of Son Aſſault*, and *Iſſue was join'd in the laſt, but left out of the firſt*, the Court held it amendable by the Statute of Jeofails, becauſe it appears to be the Clerk's Miſtake, and beſides, as the Iſſue is join'd in the latter Plea, that may alſo have Reference to the firſt. Rep. of Pract. in C.B. 106. Trin. 7 & 8 Geo. 2. Eaſon & Ux. v. Wilkins & Ux.

Ibid. in a Note there ſays, the like Reſolution was in an Action on 2 Bonds, where Iſſue was join'd as to one Bond, and not as to the other. Lyne v. Green.

5. It was mov'd to amend a *Plea in Abatement*, by putting in *Culpabilis* inſtead of *Capitalis*, for that it appears to be only a Miſpriſion of the Clerk. But by Eyre Ch. J. Pleas in Abatement have generally been denied to be amended, becauſe they are dilatory, and go not to the

the Right of the Action, and it will be dangerous to make a Precedent, and therefore the Amendment was denied. Rep. of Pract. in C. B. 29. Pasch. 12 Geo. 1. Dockary v. Lawrence.

See (X) supra.

(E. a) Misnomer, and other Defects in the Plea, Imparlance, and Nisi Prius Rolls, amended.

1. *Respass against M. and G.* and the *Process* was continued *against M. and H.* and *G. omitted*, and because the Roll at the first Day of the Process was good, therefore the *Roll was amended*; Quod Nota. And yet per Chelr. Judicial Writs which vary are often amended, but seldom the Roll. Br. Amendment, pl. 22. cites 44 E. 3. 18.

Br. Relation, pl. 41. cites 11 H. 6. 27.

2. *Præcipe quod reddat against R. T.* who *pleaded in Bar the Deed of one R. S.* with Warranty, *which Deed the same R. in Curia profert*, and after Nisi Prius passed, it was pleaded in Arrest of Judgment, that this same R. who made Profert of the Deed, shall be *intended the last R.* viz. he whose Warranty was pleaded. And per Cur. because Bar shall be taken by reasonable Intendment, so that *it shall be taken this R. who was Tenant*, therefore per Cur. it was amended, and enter'd per Chartam quam R. T. the Tenant profert; Quod Nota, Bar amended. Br. Amendment, pl. 83. cites 11 H. 6. 22.

3. In *Writ of Mesne* the *Plaintiff prescrib'd in the Acquittal against the Defendant and his Ancestors whose Heir he is, and it was enter'd accordingly in one Roll*, and *in another Roll (cujus Hæres ipse est) was wanting*, and it was amended. Br. Amendment, pl. 108. cites 39 H. 6. 31.

4. In a *Writ of Partition* against 2, one pleaded to Issue, and on the Record of Nisi Prius his *Name*, by the Negligence of the Clerk, was *left out*, but the principal Record was perfect. This was held to be amendable. Pasch. 9 Eliz. D. 260. Wotton v. Cook & Temple.

5. In *Trover* &c. the Plaintiff declar'd, that he was possess'd de uno Spadone, una Equa pretii 53 Shillings and 4 Pence, so that there was no Price added to the Gelding. The Court was divided, 2 held it Matter of Form, and 2 held it Matter of Substance, but upon viewing the Roll it appeared to be *de uno Spadone & de una Equa pretii 53 Shillings and 4 Pence*, so that the Price extends to both, and so the Record of Nisi Prius was amended by the Roll. Cro. J. 129. pl. 2. Mich. 4 Jac. B. R. Wood v. Smith.

Yelv. 218. Hill. 9 Jac. S. C. but S. P. does not appear. ——Hob. 4. pl. 7 S. C. but S. P. does not appear. —— Cro. J. 331. pl. 13. Wharton v. Musgrave,

6. A *Challenge* being made *to the Sheriff* after Issue, and confess'd, the *Ven. Fac. was awarded to the Coroner*, but the *Roll of Nisi Prius was, that the Ven. Fac. was awarded to the Sheriff*, and the Distringas was awarded to the Sheriff, and Trial thereupon had, which cannot be, because the Ven. Fac. was awarded to the Coroners, and therefore it was mov'd in Arrest of Judgment; but held, that because the Roll of Nisi Prius was a *Misprision*, and ought to be warranted by the Record, (tho' in Truth it is a Record made after the Nisi Prius and the Trial) it should be amended, and Judgment for the Plaintiff. Cro. J. 353, 354. pl. 8. Mich. 12 Jac. B. R. Musgrave v. Wharton.

S. C. but S. P. does not appear. —— Jenk. 291. pl. 32. S. C. but S. P. does not appear.

Hob. 134. pl. 178. Wike v.

7. The Plaintiff exhibited a Bill against the Defendant one of the Clerks of B. R. and after a Verdict it was moved in Arrest of Judgment,

ment, for that the *Bill* was *not filed*; the Court seemed inclined that this was not help'd by the Statute. Brownl. 81. Weeks v. Wright.

Wright, S.C. says there was

no Resolution whether this was within the Equity of the Stat. 18 Eliz. of want of an Original Writ, (which the Bill is in this Case, being against an Attorney;) for it was prov'd by Oath that there was a Bill, and that the Defendant had accepted and subscrib'd it, and it was enter'd in Hæc Verba on the Roll.——S. P. but tho' the Bill was not fil'd, yet it appeared to the Court that the Tenor of the Bill was enter'd of Record in hæc Verba; the Court thought this remedied by the Statute of Jeofails as being *in Nature of Want of an Original* after Verdict; but because it had been rul'd otherwise in Rood's Case, the Court would advise. But there is a Nota that it had been since adjudg'd in C. B. and also in the Exchequer Chamber upon Error out of B. R. upon want of a Bill there, to be cur'd by Verdict, yet the Words of the Statute are (Want of an Original Writ.) Hob. 130 pl. 169.—— The Want of a *Bill being the Original* was taken to be within the Intent and Meaning of the Statute 18 Eliz. and remedied by the Equity thereof. Hob. 264. pl. 344. adjudg'd in Cam. Scacc. Trin. 17 Jac. Willis v. Woodhouse.———S. C. cited by the Name of Wells v. Woodhouse, by Hobart Ch. J. as resolved accordingly, and said that it had been often so adjudg'd in C. B. in the Case of an Attorney Plaintiff or Defendant. Hob. 281, 282.

After a Verdict it was mov'd in Arrest of Judgment, that there was *no Bill upon the File.* But per tot. Cur. this is help'd by the Stat. 18 Eliz. for the Bill on the File is *in Nature of an Original*, and the Want of this is help'd by the Statute, and Judgment for the Plaintiff. Jo. 304. pl. 13. Mich. 8 Car. B. R. Griggs v. Parker.———Cro. C. 282. pl. 24. Parker v. Grigson, S. C. adjudg'd for the Plaintiff.

8. If the *Plea Roll* be *right*, the Roll of *Nisi Prius may be amended*; for the *Plea Roll shall controul the Nisi Prius Roll*; and it is usual to amend the Nisi Prius Roll, and to give the true Judgment; agreed without Question. 2 Roll. Rep. 211. Mich. 18 Jac. B. R. in Case of Hunt v. Athill.

9. *Trover and Conversion alleged* to be *in London*, and the *Trial was in Middlesex*, but it seems the *Declaration upon the File was of a Conversion in Middlesex*, and the *Imparlance Roll was right, and* so was *the Issue Roll, but the Nisi Prius Roll was wrong*; whereupon the Plaintiff prayed that the Nisi Prius Roll might be amended. Per Hale Ch. B. if the Bill be right upon the File, and the Imparlance Roll right, the *Issue Roll or the Nisi Prius* may be amended by them, for they *are but Transcripts of the other*; but if the Difference be such as to *alter the Issue*, there they cannot be amended; for then it is another Thing that is tried than ought to be tried. Freem. Rep. 325. pl. 404. Trin. 26 Car. 2. Vernon v. Yeeds.

10. The *Memorandum* was *General of Easter Term last* past, which referr'd to the 1st Day of the Term, and so the *Action appeared to be brought before the Cause of Action accru'd.* It was mov'd to amend it, and make it Die Mercurii proxime post Mensem Paschæ (which was after the Cause of Action accru'd) upon *Affidavit that all the Process issued after the 1st. of May.* But the Court denied to amend it, tho' *all was on Paper*, because it came after the *Defendant had pleaded in Abatement, and a Respondeas Ouster awarded* thereupon, *and a Demurrer* by the Defendant for this Cause, so that it is now too late. Ld. Raym. Rep. 324. Hill. 9 W. 3. Burgess v. Periam.

In Debt for practising Physick without Licence, Exception was taken that the Action was brought Hill. 5 W. & M. and the Entry was Mich.

S which was 2 Years after the Queen's Death, and the Memorandum was that they prosecute for the King and the late Queen; but Holt Ch. J. answer'd, that it was no Part of the Declaration, and might be amended. Ld Raym. Rep. 683. Trin. 13 W. 3. the President and College of Physicians v. Salmon.———1 Salk. 451. pl. 2. S. C. but S. P. does not appear. ——5 Mod. 327. S. C. but S. P. does not appear.

11. The Imparlance Roll cannot be amended by the Plea Roll or Nisi Prius Roll; for the Imparlance Roll is the original Declaration, and the Plea Roll is no more than a Recital of the Imparlance Roll, and therefore it begins with an Alias prout patet, and it is no more than the Count of the 2d. Term, to which the Defendant pleaded Ore tenus; and the Nisi Prius Roll is but a Transcript of the Plea Roll to carry the Issue into the Country. G. Hist. of C. B. 116.

The Plea Roll may be amended by the Imparlance Roll, because it is but a Recital, but not by the Nisi

Prius Roll which is but a Transcript from the Plea Roll, if the Plaintiff or Defendant be well named

in the Beginning of the Record, but afterwards be miſtaken, and the Name is idem Jonaus, this ſhall be amended, becauſe that is but a Miſtake in Syllable by the apparent Vitium Scriptoris, which is the Intent of the Statute to amend. G. Hiſt. of C. B. 117.

Carth. 506. S. C accordingly; for if it was amendable, then the Ch. J had no Authority to try the Cauſe. —— 12 Mod. 274. S. C but per Holt Ch. J. tho' the Day of the Return of the Poſtea ſhould be miſtaken, yet if the Cauſe was tried on the right Day, it would be good; but here the Day of Niſi Prius being an impoſſible Day, and the Authority of the Judge confined to it, a Trial on another Day will be without Authority, and therefore not amendable. If the Diſtringas and Jurata had been right, the Niſi Prius Roll might have been amended, as was in Sir R. Barnard's Caſe, wherefore here the Trial was ſet aſide. —— Ld. Raym. Rep. 511. 512. S. C & S. P by Holt Ch. J accordingly, and in much the ſame Words. And Holt ſaid he remember'd one Pooley's Caſe a long time ago, where in Trover and Converſion the Day of Niſi Prius was Die Lunæ in Menſem Paſchæ, being Sunday, and for that reaſon after a Trial had, and Verdict was ſet aſide.

12. The *Diſtringas and Jurata were returnable a Die Sanctæ Trinitatis in tres Septimanas niſi Johannes Holt miles* &c. 27 *Die Junii* &c. *prius venerit*; the 27th. Day of June was the Morrow after Tres Trin. (ſo as the *Niſi Prius was after the Day in Bank)* but the Plea Roll was right, the Award there being Tres Mich. The Court held this not amendable, but agreed that *where the Diſtringas or Jurata are right*, the Niſi Prius Roll may be amended by the Plea Roll, ſo as it does not alter the Point in Iſſue. 1 Salk. 48. Mich. 11 W. 3. B. R. Child v. Harvey.

13. It was moved to amend the *Entry of Bail in the Filacer's Book* by making it agreeable to the Inſtructions, viz. Inſult' inſtead of Aſſ', and orderd'd to be amended, Niſi. Rep. of Pract. in C. B. 74. Mich. 6 Geo. 2. Fagget v. Van Thiennen.

14. And the *Recognizance* taken between the ſame Parties being *in Caſe*, it was moved to amend it and make it *in Aſſault* agreeable to the Writ; and the Court order'd the ſame accordingly. Rep. of Pract. in C. B. 75. Mich. 6 Geo. 2. Fagget v. Van Thiennen.

See (B) 18. 26. 32. 33. 35. 36. 37. (E) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11. and ſee (X) ſupra.

(F. a) Miſnoſmer and other Defects in Venire Fac. Hab. Corpora and Diſtringas Rolls, amended.

Br. Retorn de Brief, pl. 49. cites S. C.

1. IN Writ of Entry a *Juror* was *return'd* by Name of *J. Hod*, and in the Habeas Corpora he was named *J. Horde*, and upon him the Sheriff return'd Nihil, and when the Default was perceived, they awarded a new Hab' Corpora by the right Name, and the Sheriff was not amerced; for now no Default is in him, quod nota, and therefore, as it ſeems, the *Roll ſhall be amended.* Br. Amendment, pl. 37. cites 19 H. 6. 39.

2. *Proceſs* continued againſt the Jury till the Diſtreſs, *and Iſſues return'd upon W. N.* 10 s. and the Writ of Diſtreſs and all the reſt of the Proceſs was *R. N.* and by this Name he was demanded, and the Under-Sheriff who made the Panel was examined, who ſaid that R. N. was warned, and is the ſame Perſon that he intended, and that his Clerk had miſtaken the Iſſues, by which ex Licentia Curiæ the Under-Sheriff *amended the Name and return'd the Iſſues upon R. N.* Quod nota. Br. Amendment, pl. 39. cites 22 H. 6. 35.

Where the Sheriff re-

3. In Venire Facias in Debt *a Juror was named W. B.* and the *Habeas Corpora was J. B.* and the Sheriff diſtrain'd W. B. and the Opinion was that

that the Proceſs againſt the Jury was *diſcontinued* and could not be amended, contrary of *Miſcontinuance*, note the Difference. Br. Amendment, pl. 92. cites 27 H. 6. 5.

turn'd *A. B. in the Venire* Facias, and *in the Diſtreſs T. B.*

there upon Examination as above, if the very Juror was ſummon'd, and it is only the Negligence of the Sheriff, and that his Intent was to return him, this ſhall be amended. Br. Amendment, pl. 51. cites 37 H. 6. 12. ——— Br. Return de Briefs, pl. 58 cites S. C.

A Juror was *J. B. in the Panel*, and R. B in the Habeas Corpora, and upon the Examination of the Sheriff it was amended according to the Venire Facias, becauſe it was one and the ſame Perſon, and they have good Authority to amend the *Miſpriſion of the Sheriff* as well as of other Miniſter. Br. Amendment, pl. 47. cites 9 E. 4. 14. per Danby.

4. In Debt they were at Iſſue, 34 *were return'd upon Venire Facias*, and *upon the Habeas Corpora and in all the other Proceſs one was omitted*, by which all after the Venire Facias was held void, and could not be amended, and therefore a new Habeas Corpora was awarded upon the ſame Venire Facias, and the Tales was taken alſo void; and notwithſtanding the Array of the Principal was affirm'd it was alſo void, and ſhall not make Parcel of the Record. And the Plaintiff pray'd new Tales and was denied; for it is no otherwiſe now but as if the Venire Facias had been now return'd, and all, done after it, is void. Nota. Br. Amendment, pl. 10. cites 34 H. 6. 20.

Br. Diſcontinuance de Proceſs, pl. 4. cites S. C.

5. In *Information*; *at the Diſtreſs* return'd *three of the Jury who were firſt return'd were left out*, and the Jury remain'd for Default, unleſs thoſe three might be demanded and ſworn. And the Court by Advice of C. B. *examined the Sheriff*, upon which *it appear'd that it was his Negligence, and that they were ſummon'd, and that his Intent was to have them return'd*, by which *the three Jurors were examined* if they were ſummon'd, who ſaid, Yes, and this by the Bailiff of the Hundred of C. in Pain of 40 *s.* And it was amended, for it is Miſpriſion of the Sheriff's Clerk, and ſo within the Statute. Br. Amendment, pl. 51. cites 37 H. 6. 12.

Br. Return de Brief, pl. 58. cites S.C.

6. Where the *Sheriff returns Octo Tales upon Writ of Decem Tales*, there upon ſuch *Examination* and Negligence found it ſhall be amended, and the Sheriff ſhall be demanded and ſhall have the Writ again, and ſhall amend it, and ſhall bring it into Court again. Br. Amendment, pl. 51. cites 37 H. 6. 12.

Br. Return de Briefs, pl. 58. cites S. C.

7. If the *Jurata* is *Wrong* and the *Habeas Corpora right* the Judges cannot proceed to Trial, but they may make the Sheriff amend it, and then &c. Per Yelverton and Hutton. Litt. Rep. 253. in Caſe of Blackamore v. Clotworthy.

8. The Plaintiff in Replevin had a Venire Facias *in Mich. Term returnable in Hill.* and afterwards *in Hill. took an Alias returnable in Paſch. and ſo awarded it in the Roll of Mich.* to the Intent the Trial ſhould not come on at the Aſſiſes in Kent; but the Court upon the Prayer of the Avowant Defendant, amended the Roll, it being awarded in the ſame Term. and order'd the Alias returnable the ſame Hill. Term. Goldsb. 31. pl. 3. Mich. 29 Eliz. Boſſe v. Hawley.

9. If the Venire Facias has an *ill Teſte*, or an *ill Return*, or is *wanting*, this is aided by the Statute after Verdict. Held per Cur. Cro. E. 257. in pl. 33. Mich. 33 & 34 Eliz. B. R.

10. The *Panel* of the Jury was *annex'd to the Venire Facias but no Return* was endorſed thereon, *or any Sheriff named*, but the *Poſtea mention'd the Return to be by the Sheriff* per Mandatum Juſtic' this is not remedied by any Statute. 5 Rep. 45. Mich. 35 & 36 Eliz. B. R. Rowland's Caſe.

It was moved in Arreſt of Judgment, becauſe the Name of the Sheriff was not endorſed

on the Diſtringas; Per tot. Cur. it was held not amendable, and not aided by any Statute. Cro. J. 288. Mich. 5 Jac. B. R. Holdeſworth v. Sir Stephen Proctor.

But

but where the *Diſtringas* was *blank, and no Return or Name of the Sheriff* thereto, *but the Venire* Facias was well return'd and *had* the Name of the Sheriff thereto, the Court held it amendable; and ſo held that it differ'd from Rowland's Caſe; for there the Sheriff's Name was wanting upon the Venire Facias, which guides the reſt of the Proceſs. Cro. J. 443. pl. 18. Mich. 15 Jac. B. R. Churcher v. Wright.——S. P. Cro. J. 528. in pl. 5. per Cur.

11. Upon awarding a Venire Facias upon the Roll, the *Day of the Return was omitted* on the Roll. This was aſſign'd for Error, ſed non allocatur after Verdict. Mo. 710. pl. 993. Mich. 38 & 39 Eliz. Dickenſon v. Shere.

Upon the Venire Facias there were but 23 *Jurors return'd*, and the *Trial was by* 10 *of the principal Panel, and* 2 *of the Tales*

12. Error aſſign'd was that there were *but* 23 *of the Jurors Names return'd upon the Panel*, and that the *Trial was by* 10 *of them and* 2 *Tales Men*; but becauſe this *Default was in the Return* of the Jurors Names *upon the Hab. Corp. and not upon the Ven. Fac.* in which Writ were 24 Names it was order'd to be amended. Cro. Eliz. 586. pl. 17. Mich. 39 & 40 Eliz. Pawlett v. Chriſtmas.

; Upon Conference with all the Judges of both Serjeants-Inns, the greater Part of them conceived this to be only a Miſreturn of the Sheriff, and ſo aided by the Statute 18 Eliz. 14. and adjudg'd accordingly. Cro. C. 223. pl. 11 Trin. 7 Car. 1. B. R. Sankill v. Stocker. ——Jo. 245. pl. 4 S. C. and there is no Difference in Tales; for it is the Default of the Sheriff, and a Verdict by 12; by 3 Juſtices, Crooke e contra; and Judgment accordingly.

G. Hiſt. of C. B. 132. mentions S. P. and ſeems to intend S. C.

13. In *Ejectment* it was moved in Arreſt of Judgment that the Ven. Fa. was *Ad faciend' jurat' in Placito Tranſgreſſionis*, whereas it ſhould be *in Placito Tranſgreſſionis & Ejectionis Firmæ*; the Court held this not amendable, for non Conſtat, but that there may be an Action of Treſpaſs depending, and that this Ven. Fac. is awarded thereupon; And tho' it was ſaid that Ejectment is only a Plea of Treſpaſs in its Nature yet the Actions are ſeveral, and therefore the Ven. Fac. ought to be accordingly. Cro. E. 622. pl. 14. Mich. 40 & 41 Eliz. B. R. Clerk v. Clerk.

S. C. cited by Powell J. 2 Ld. Raym. Rep. 1066. and ſaid it was the Neſcience of the Clerk to make the Teſte of another Day than the Award of the Court was; for he ought to know that

14. In Debt the *Venire Facias* was awarded bearing *Teſte after the Judgment*, (it being dated a Year after;) but held that it being after Verdict, and the Trial is upon the Diſtringas with the Niſi Prius, ſo as if no Venire at all had been, the Statute would have help'd it, and it ſhall not be intended that this was the Venire in this Suit; nor would the Court take it to be the Venire in this Suit, tho' certified to be ſo, but rather that there was no Venire at all, [and then] the Trial and Judgment thereupon are good. But they held that the Teſte of a Venire Facias can never be amended, but the Return thereof may, becauſe the Roll warrants it, and this being variant from the Roll may be amended; but the Rolls make no mention of the Teſte, as 2 Ma. D. 121. ſo the Judgment was affirmed. Cro. E. 820. pl. 15. Paſch. 43 Eliz. B. R. Carew v. Mercer.

the Writ ſhould be teſted when the Court awards it; but ſays that the later Books have gone contrary to this Caſe of Crooke, where the Writ was an ill Writ, As if teſted out of Term.

Venire Facias bore *Teſte before the Appearance of the Defendant in Court*, and it was ruled to be naught. Cited Noy 58. as the Caſe of Moulton v. Hall.——Mo. 465. pl. 657. cites S. C. adjudged that it is Error not remedied by the Statute.

15. After Verdict Exception was taken that the *Appearance and Iſſue were in Hillary-Term* 1 Jac. and the *Venire Facias* to try the Iſſue *was* dated *Jan.* 23. which was before the Appearance and the Iſſue; but the *Roll was right.* The Court held it was amendable; for the Ven. Facias ſhall be amended by the Roll, which is the Warrant for it, and ſhall be made ſubſequent to the Iſſue. Cro. J. 64. pl. 3. Paſch. 2 Jac. B. R. Dolphin v. Clark.

It was aſſigned for Error in Ejectment that the Iſſue was joined Trin. 2 Car. and the *Ven. Fa. bears Date* 4 Die Maii, which was *before the Iſſue joined*, and upon a Certiorari upon Diminution alleged, it was *certified* that the Venire and Diſtringas were of the Date of 4 May, which was after Eaſter-Term.

Sed

Sed non allocatur; for it is but Miſ-ſuing of the Proceſs at the moſt, and the Court ſhall intend there was another Venire Facias, according to the Roll of awarding the Venire Facias, and the miſdating of it can cauſe no Stop of the Judgment, wherefore the Trial is good, and Judgment was affirmed. Cro. C. 90. pl. 13. Mich. 3 Car. in Cam. Scacc. Moor v. Hodges. ——— The Caſe of Hodges v. Moor is in ſeveral Books; and tho' by the Time it ſeems to be S. C. yet S. P. does not appear in any of them.

16. A Diſtringas was *awarded a long Time after the Trial*, yet the Roll being good, it was amended. Cited by Tanfield J. Cro. J. 162. in pl. 16.

17. The Ven. Facias was *De Vicineto de Hartford*, where it ſhould have been *De Caſtro* de Hartford. It was held by all the Judges and Barons to be ill; for Caſtrum Hartford is a *diſtinct Name of a Place*, as Manerium de D. and ſo, as it was ſaid, are all the Precedents where Things are alleged to be done apud Caſtrum Ebor. apud Caſtrum Norwic. there the *Venites are de Caſtro.* Cro. J. 239. Paſch. 8 Jac. Cuningham v. Hare. The *Jurata* was *apud Caſtrum Oxon. in Civitate prædicta*, and the *Habeas Corpora* was *apud Guildhall* &c. And Yelverton and Hutton held the Trial void; for the Judge that ſhall ſit at the Caſtle had no Warrant to take this Trial, and ſo Coram non Judice, and they held it not amendable now after Trial. Litt. Rep. 253. Paſch. 5 Car. C. B. Blackamore v. Clotworthy.

18. In Treſpaſs upon the General Iſſue pleaded, *one only of the Jurors of the principal Panel appear'd at the Aſſiſes*, and upon the Prayer of the Plaintiff a *Tales was awarded*, and the *Sheriff returned a Panel* thus, viz. *Nomina decem Talium, and under it* he *returned the Names of* 11 *Jurors.* It was reſolved that this was only a Miſpriſion of the Sheriff, and ſhould be amended by putting out the Word (decem,) and then the Title would be good and formal. 10 Rep. 102. Mich. 10 Jac. Denbawd's Caſe. Cro. J. 316. pl. 19. Denbaugh v. Woodley, S. C. & S. P. held accordingly. —— Tho' the Statute 35 H. 8. cap. 6. which gives the Tales, mentions the adding it to thoſe, (viz. in the plural Number,) yet by the Equity of that Statute it ſhall be granted for one. The Statute is for the Advancement of Juſtice. Jenk. 288. pl. 14. S. C.

19. In *Treſpaſs* of taking Goods in W. the Defendant *juſtified by the Cuſtom of the Manor of T.* and the Venire Facias was awarded *De Vicineto de W. & Manerio de T.* but the Sheriff returned his Pannel De Vicineto de W. only. This was denied to be amended, though it was moved that the Award by the Roll was De Vicineto de W. and the Manor both, and that the Venire Facias might be amended by the Roll; for the Venue ſhould not be from W. at all, the Taking being confeſs'd on both Sides, and ſo required no Trial; but the Thing in Diſpute was the Cuſtom only, and tho' the Roll had been right de Manerio only, ſo that the Venire Facias might be amended by it, yet when it appears that the Trial was not had by ſuch a Jury as the Roll and the Law required, the Venire Facias ſhall not be amended. Hob. 77. pl. 97. Banks v. Parker. Brownl. 233. Hill. 12 Jac. Banks v. Barker, S. C. and held not amendable.

20. Venire Facias was made in this Form, (viz.) Liberos & Legales homines de B. and it ſhould have been de Vicineto de B. and it was notwithſtanding held good, and amendable by the Roll; for it ſhall be intended that the Jurors are inhabiting in the Town of B. altho' the Sheriff returns the Jurors of other Places, and none of them are named of B. and the Ven. Facias was returned by A. B. Ar. without naming him Vic. and it was amended by the Court. Brownl. 43. Bullen v. Jervis. Hutt. 53. S. C. but S. P. does not appear. —— Win. 58. Bulloigne v. Gervis, S. C. but S. P. does not appear.

21. The Court refuſed to amend a *Venire Facias* which was *Album Breve*, tho' the *Sheriff's Name was to the Panel*; *but if* the Sheriff upon the Venire Facias had *returned that the Execution of that Writ did appear*

in a certain Panel annex'd &c. *and* had *not put his Name to the Writ of* Ven. Facias, but to the *Panel*, it ſhould have been amended. Brownl. 43. Trin. 15 Jac. Anon.

In Debt the *Iſſue was joined Paſch.* 21 *Car.* and the *Venire Facias* certified to be in Placito præd &c. *was teſted Paſch.* 20 *Car.* And this being aſſigned for Error, it was adjudg'd that it was help'd by the Stat. 18 Eliz. 14. as if there had been no ſuch Writ, becauſe it was impoſſible that this ſhould be the Writ in that Action. Allen 20. Trin 23 Car. B. R. Brown v. Evering.——Cro. C. 90. pl. 13. More v. Hodges, in the Exchequer-Chamber, Mich. 3 Car. S. P.

22. *Bill* was *filed Die Mercurii prox' poſt Octab. Pur'*, which was the *12th of Feb.* and the *Venire Facias bore Date* 10 *Feb.* which was *two Days before the Filing the Bill*, and ſo before any Iſſue could be joined. This was aſſigned for Error; but all the Juſtices and Barons held, that this is as if there had been no Venire Facias; for it cannot be intended a Ven. Facias in this Action, which was not then commenced, and is contrary to the Roll, which mentions it to be awarded after Iſſue joined; and tho' in the Action (which being joined the ſame Term, and by the ſame Roll) the Award was of a Venire Facias returnable alſo Die Mercurii poſt Octab. Purificat. (which was the Day that the Bill was filed and he pleaded) yet it was held good enough, and the Judgment affirmed. Cro. J. 458. pl. 4. Hill. 15 Jac. in Cam. Scacc. Marſham v. Bulwer.

In the Venire Facias one of the Jury is called *Cargenter*, and in the Diſtringas *Carpenter*, and it was ſtay'd for this Fault. Sty. 374. Trin. 1653. in Kitchinman's Caſe.

23. Where the *Venire Facias* is *good*, and well return'd, a Fault in the *Diſtringas ſhall be amended by it*, by the Sheriff. Agreed per tot. Cur. 2 Roll Rep. 111. Trin. 17 Jac. B. R. Anon. And Browne ſaid that ſo it had been adjudged before in Wright's Caſe.

In *Debt* it was moved in Arreſt of Judgment, that the *Diſtringas was with a Blank*, and the Word (*Debiti*) *omitted*, ſo it was Diſtringas in another Cauſe; but held per Cur. that *this was as no Diſtringas at all*, and ſo aided by the Verdict, and amendable; but an ill Diſtringas is not. 2 Salk 454 pl. 1. Paſch. 4 Ann. B. R. Bullock v. Parſons ———2 Ld. Raym Rep. 1143. S. C. and the whole Court held the Diſtringas amendable, and gave Judgment for the Plaintiff.

24. In Ejectment againſt *two Defendants*, they both *pleaded Not Guilty*. The *Award upon the Roll was againſt both.* The *Hab. Corp. was againſt both*, but the *Ven. Fa. againſt one of them only.* The Plaintiff had a Verdict againſt both. The Court held it amendable, and to be made agreeable with the Plea-Roll, which was Inter partes prædictas, and the Omiſſion here is only *Vitium Clerici.* 3 Bulſt. 311. Mich. 1 Car. B. R. Cranfield v. Turner & Collins.

Jo. 302. pl. 6. Fines v. North, S. C. accordingly. ——G. Hiſt. of C. B. 131. S. C.—— But where 23 only were return'd, whereof 12 appear'd and gave their Verdict, it was reſolved upon great Deliberation, that it was remedied by the 18 Eliz. cap. 14. 5 Rep. 37. a. Paſch. 31 Eliz. B. R. Gardiner's Caſe.

25. In the Ven. Facias there were but 23 *Jurors returned*, and *in the Hab. Corp.* there *were* 24, *(viz.) the* 23 *returned on the Ven. Fa. and one W. L. who was ſworn with* 11 *of the others*, and the Iſſue was tried by them. The Court deliver'd their Opinions ſeriatim, that this was a manifeſt Error, and not aided by any of the Statutes, nor can it be aided by Examination of the Sheriff, and ſo reverſed the Judgment in C. B. Cro. C. 278. pl. 18. Mich. 8 Car. B. R. Fines v. Norton.

S. C. cited Comyns's Rep. 283. and ſays it is uſual in ſuch Caſes to amend Writs by the Roll.——Gilb. Hiſt of C. B. 133. S. P. and ſeems to intend S. C

26. Upon a Motion in Arreſt of Judgment it was inſiſted, that *the Day on which the Aſſiſes were to be held, and the Place where, were left out of the Diſtringas*, and ſo a Miſ-trial. Sed per Curiam, if there had been no Diſtringas the Trial had been good, becauſe the Warrant to try the Cauſe is the *Jurata*, and that *being right the Diſtringas ſhall be amended by it.* 3 Mod. 78. Paſch. 1 Jac. 2. B. R. Jackſon v. Warren.

27. If

29. If there be *ſuch a Fault in the Venire as makes it a perfect Nullity, ſo that it has no Relation to the Cauſe*, yet if there be a *good Diſtringas*, that being one of the Jury Proceſſes, the Omiſſion of the former is cur'd; for the Omiſſion of any Judicial Writ is aided by the Statute, and a Venire, that is a Nullity, and has no Relation to the Cauſe, is as if there had not been any, and ſo of a Diſtringas where there is a proper Venire. G Hiſt. of C. B. 134.

30. *London* was *in the Margin*, but *in the Body* of the Declaration the *Venue was laid at Tame in Oxfordſhire*, and tried there, and obtained a Verdict; Defendant mov'd in Arreſt of Judgment, for that the Venire Facias being awarded to the Sheriffs in the plural Number muſt ſignify the Sheriffs of London, and the Court muſt take judicial Notice that there is but one Sheriff of Oxfordſhire. Per Cur. had there been no *proper Venue in the Body* of the Declaration the Margin muſt have been reſorted to, but in this Caſe *the Margin muſt be rejected*; the Word (Sheriffs) for (Sheriff) is amendable, and here the Ven. Fac. is return'd by the Sheriff of Oxfordſhire. Barnes's Notes in C. B. 343. Trin. 11 & 12 Geo. 2. Sheers v. Bartlett.

31. It is *conſtant Practice to leave a Blank in* the Record of *the Niſi Prius for the Return of the Ven. Fac.* and the Award of the Ven. Fac. is no Part of the Iſſue, and is amendable by the Ven. Fac. itſelf. Barnes's Notes in C. B. 345, 346. Paſch. 12 Geo. 2. Bryan v. Smith.

(G. a) Miſnoſmer, and other Defaults in Records of Niſi Prius, Poſteas, and other Records, amended.

As to Variance ſee (Y)

1. IN Treſpaſs they were *at Iſſue upon Villeinage regardant to a Manor in a foreign County*, and *Pais awarded of the foreign County by Aſſent of Parties*, and becauſe the Words (*Ex aſſenſu Partium*) were *not enter'd in the Record*, it was amended in another Term; Quod Nota. Br. Record, pl. 11. cites 44 E. 3. 6.

Br. Amendment, pl. 21. S. P. and cites S. C. —— Br. Viſne, pl. 15. cites S. C.

2. *All the Term in which Judgment is given, or Roll made*, the *Record is in Breaſt of the Juſtices*, and *they may change it if it be enter'd contrary to Truth*, or if Tales be awarded and mark'd upon the Scrowle, and not enter'd in the Roll, or falſe Latin &c. they may amend it the ſame Term, contra in another Term; for then the Roll is the Record. Note the Diverſity. Br. Record, pl. 20. cites 7 H. 6. 30.

Br. Error, pl. 68. cites 7 H. 6. 28. S. C. —— Br. Amendment, pl. 32. cites 7 H. 6. 29. S. C.

3. Where *Damages in the Record are* 100 *l.* and the *Niſi Prius and the Verdict is* 10 *l.* yet the Plaintiff ſhall recover; for this *does not change the Iſſue*. Br. Amendment, pl. 113. cites 10 H. 7. 25.

4. Where *Eſſoign* is *caſt after Iſſue Unde Judicium*, where it ſhould be *Unde Jurata*, or e contra, this ſhall be amended; for *that which is of Record* ſhall be amended. Br. Amendment, pl. 113. cites 10 H. 7. 25.

5. Where the *Record is enter'd otherwiſe than the Papers are*, there by Examination of the Clerk, and View of the Papers, it may be amended. Br. Amendment, pl. 113. cites 10 H. 7. 25.

6. In Aſſumpſit it was found for the Plaintiff, but in the Poſtea the Verdict was *not certified that the Jury found that the Plaintiff ſuſtain'd Damage by reaſon of the Non-performance of the Promiſe in the Payment* of the Money, for which the Plaintiff had Judgment, but the Court order'd the Poſtea to be amended, and affirm'd the Judgment. Mo. 689. pl. 952. Paſch. 36 Eliz. Sackford v. Phillips.

Cro. E. 455. pl. 3. Phillips v. Sackford S. C. but S. P. does not appear. —— Ow. 109. S. C. but S. P. does not appear.

7. Error

7. Error to reverſe a Judgment, for that the Writ of Enquiry was directed to the Sheriffs of London Quod *Inquirat*, when it ſhould be Quod *inquirant*. It was order'd by the Court to be amended, for it was but the Default of the Clerk. Cro. Eliz. 657. Trin. 41 Eliz. B. R. Lewſon v. Rudleſton.

8. The Plaintiff *declared for a Treſpaſs done* 12 *Jan.* 45 *Eliz.* and the *Record of Niſi Prius was of* a Treſpaſs 12 *Jan.* 25 *Eliz.* The Verdict found the Defendant Guilty, prout. At the Day in Bank the Plaintiff pray'd Amendment of the Record of Niſi Prius, but the Court held it not amendable. Mo. 681. pl. 935. Anon.

Roll Rep. 374. pl. 30. S. C and Doderidge ſaid that it could not be amended, but the Queſtion was, if the Trial was not good

9. In Ejectment the *Diſtringas* was between Richard Fowkes and *John Child*, but the *Panel* annexed between Richard Fowkes and *William Child*; the Truth was, there were *two Records* of Niſi Prius, the one between Richard Fowkes and William Child, and the other between Richard Fowkes and John Child, and the *Sheriff by Miſtake annexed the Panel* between R. Fowkes and William Child, to the Diſtringas between R. F. and John Child; but reſolv'd that it was aided by the Statute of Jeofails, and was as if there had been no Writ at all. Cro. J. 396. pl. 1. Paſch. 14 Jac. Fowks v. Child.

without any Amendment, and after at another Day it was rul'd not to be any Writ in Judgment of Law, and aided by the Statute of Jeofails ——3 Bulſt. 179. S. C. and rul'd accordingly by 3 J. but Haughton J. differ'd in Opinion, that the Trial was not good.

10. The Declaration omitted to allege *the very Day on which the Robbery was done*, for he ſhew'd, that it was committed in October, when in Truth it was in September. It was mov'd, that the *Record* which was *taken out for Trial, but not given in* [*to the Clerk of Aſſiſe*] *might be amended*; becauſe the *Notice given to the Hundred, as the Record is, would appear to be before the Robbery*; and the Court order'd it to be amended. Brownl. 156. Trin. 15 Jac. Camblyn v. Tendring (Hundred)

11. When a *Record* is *remov'd into the Exchequer-Chamber*, if there is a *Fault in the Tranſcript by the Negligence of the Clerk*, the Courſe is to ſend for the Clerk of the Court, and amend it in the Exchequer-Chamber; but if the principal Record which remains in Court be falſe, then to amend it, and thereupon to allege Diminution, and upon Certificate thereof, the Tranſcript ſhall be alſo amended, if it appears to be only the Negligence of the Clerk. Cro. J. 429. pl. 4. in a Nota there; Trin. 15 Jac. 1. B. R.

12. Treſpaſs. In the Poſtea there was *no Aſſociation to the Juſtice of Aſſiſe expreſs'd*, as was objected there ought to be; but Roll Ch. J. ſaid, that this is the Fault of the Clerk of the Aſſiſe, and therefore order'd him to attend and ſhew Cauſe why the Poſtea ſhould not be amended. Sty. 191. Hill. 1649. Poynes v. Francis.

In B. R. Declaration was on a Bail Bond, the Memorandum was of Trin. Term,

15. Writ of Error to reverſe a Judgment upon a Mutuatus, for that the *Memorandum* was Die Veneris &c. which was *before the Debt became due*. It was moved for Leave to amend the Memorandum, and to make it another Day, that it might agree with the Judgment; but per Cur. it was denied. 4 Mod. 367. Mich. 6 W. & M. in B. R. Ruſh v. Tory.

and the Aſſignment was not till November following; and it was objected, that the Plaintiff of his own ſhewing had no Cauſe of Action at the Time of the Action brought, the Plaintiff prayed to amend, and it was objected that there was nothing to amend by; but the Court gave them Leave to file a new Bill as of Mich. Term, which is inſtead of the original Writ, and to amend the Memorandum by that Bill. G. Hiſt. of C. B. 93.

16. Indebitatus *Aſſumpſit* was brought *againſt the Executor upon th Aſſumpſit of the Teſtator*. The *Plea-Roll was*, that the *Teſtator non Aſſumpſit*; but the *Poſtea was*, that the *Defendant* non Aſſumpſit generally,

and

and Verdict for the Plaintiff, and moved that the Poſtea might be amended, and it was granted; for per Cur. the Jury have found the Defendant guilty, as the Plaintiff has declared, which is upon a Promiſe of the Teſtator, the Plea-Roll being right; but if the Defendant had pleaded Quod ipſe non Aſſumpſit, a Repleader ought to have been granted. Ld. Raym. Rep. 133, 134. Mich. 8 W. 3. Walker v. Brooke.

15. Error of Judgment in an Inferior Court, the Plaintiff had a Verdict and 3 *l. Damages*, 1 *s. Coſts*, *and* 5 *l.* 10 *s. de incremento*, and *Judgment that he recover the aforeſaid Sums attingen' ad* 7 *l.* &c. The Court ſaid they would not ſuffer them to amend any *Error in Knowledge* or Skill by their Minute-Book, *but* only *Errors in Fact* in the Record by the Minute-Book, if it appears upon Examination to have been originally right in the Book, and not made for this Purpoſe. 6 Mod. 165. Paſch. 3 Ann. B R. Gawdy v. Pickerſdale.

16. *Debt* for Money lent at a Play call'd, All-Fours. The Defendant pleaded *Nil debet.* The Plaintiff in the Record of *Niſi Prius omitted* the Words, *Et præd' quer' Scilicet* [*Similiter.*] After Verdict for the Plaintiff Judgment was arreſted, and now the Plaintiff moved that the Record of Niſi Prius ſhould be amended by the original Record, and the Court granted it, for the Omiſſion was only the Miſpriſion of the Clerk. Comyns's Rep. 376. pl. 187. Mich. 10 Geo. 1. C. B. Walker v. Leſter.

17. On a Motion to amend the Record of an *Iſſue of Nul tiel Record by the Writ of Scire Facias*, all the Court, after much Debate, were of Opinion that it might be done, and order'd the Amendment accordingly. Rep. of Pract. in C. B. 76. Mich. 6 Geo. 2. Hamſon v. Chamberlain.

18. The Writ of *Habeas Corpora Jurator'* being *wrong in the Day of Niſi Prius*, had been order'd to be amended; And it was *moved to amend the Jurata in the Record of Niſi Prius.* The Court, after Conſideration, were of Opinion that as the Writ was amendable by the Stat. * 5 Geo. cap 13. and was amended, and the Day of Niſi Prius thereby rightly appointed, the Jurata, which is not an Award of the Court, but only to annex the Proceedings, and which is wrong by Miſpriſion of the Clerk, ought to be amended and made agreeable to the Writ; and order'd accordingly. Barnes's Notes of C. B. 8. Trin. 7 & 8 Geo. 2. Waldo v Hariſon.

* See (R) ſupra.

19. Amendment of a Record *by ſtriking out the Entry of a View* was denied, and the Court ſaid ſuch Alteration could not be made, unleſs by ſome Entry to amend it by. Rep. of Pract. in C. B. 131. Trin. 10 Geo. 2. Cartwright v. Gardiner.

(H. a) Miſnoſmer and other Defects in Verdicts, amended.

1. IN Ejectment, the Caſe was *J. W. Biſhop of G. being ſeiſed* of &c. *demiſed the ſame to the Plaintiff, reciting the Confirmation of the Dean and Chapter*, but that was *of a Leaſe made by R. W.* The Jury did *not find that the Dean and Chapter did confirm any Leaſe made by J. W. but* they *found expreſsly* that *J. W. made a Leaſe* of &c *to the Plaintiff*, who now moved that the Confirmation of the Dean and Chapter of a Leaſe made by R. W. might be amended, and made J. W. and that the Note

given to the Clerk of the Aſſiſes was, that they intended to find the Confirmation expreſsly, and of a Leaſe made by J. W. But the Court held clearly that after Verdict return'd to the Court, it cannot be amended by any ſuch Suggeſtion; for then all Verdicts may be pray'd to be amended; And Judgment for the Plaintiff. Cro. E. 111. pl. 8. Mich. 30 & 31 Eliz. B. R. Mornington v. Trye.

2. After Judgment in Aſſault and Battery, it was aſſign'd for Error, That after the Words, *Per Sacramentum proborum & legalium (Hominum)* was left out. Per Coke Ch. J. this is well amendable, it being in a Judicial Proceſs. 3 Bulſt. 208. Trin. 14 Jac. Pipe v. Alger.

If the Jury *find a certain Verdict*, and it is *enter'd uncertainly on the Record*, if the *Judge*, who tried the Cauſe, *remembers certainly how the Jury found it*, it ſhall be aſcertain'd by the Memory of the Judge and the Verdict be made certain as the Jury found it. G. Hiſt. of C. B. 140.

3. In *Debt for Rent*, the Plaintiff *declared on a Leaſe of Copyhold* Lands &c. *rendering* 38 *l. per Ann. and* upon a *Leaſe of Freehold* Lands *rendering* 20 *s. per Ann.* Rent by equal Portions at Michaelmas and Lady-day, and for 19 l for half a Year of the Copyhold and 10 s. of the Freehold the Action was brought. Upon Nil debet pleaded, the *Jury found for the Plaintiff, quoad the* 10 *s. for the Freehold; and for the Defendant, quoad the* 19 *l. for the Copyhold.* The *Poſtea* was *return'd, that it was found for the Plaintiff, quoad* 10 *s. Parcel of the ſaid* 19 *l.* 10 *s. and quoad the* 19 *l. Reſidue of the ſaid* 19 *l.* 10 *s. that the Defendant non debet.* It was moved, that the Verdict was uncertain which of the Rents was unpaid; but *the Judge, before whom the Iſſue was tried, remembring that the Jury had found for the Copyhold Rent for the Defendant, and for the Freehold Rent for the Plaintiff*, by the Rule of Court the Return of the Poſtea was amended accordingly. Cro. C. 338. pl. 25. Mich. 9 Car. B. R. Elliot v. Skipp.

4. Caſe &c. for Words, in which the Plaintiff laid a Colloquium between the Defendant and one T. S. concerning the Plaintiff. The Jury *found the Defendant guilty of ſpeaking the Words, Modo & Forma, as the Plaintiff had declared*, but [as it ſeem'd by the Entry] did not find that J. S. ſpoke the Words precedent, and, without Reference to theſe Words, what the Jury had found was inſenſible; afterwards it appear'd to the Court that thoſe precedent Words were found by the Jury, and that it was the Miſpriſion of the Clerk of the Aſſiſe in not entering them; and it was order'd that the Words be inſerted upon Payment of Coſts to the to the Defendant. 2 Jones 211. Trin. 34 Car. 2. B. R. Nailer v. Clerke.

Ld. Raym. Rep. 138. S. C. and ibid. 141. S. P. by Holt Ch. J. that a Special Verdict cannot be amended by the Notes in Felony, as it might in Civil Caſes.——The Special Verdict may be amended according to the Minute or Note, becauſe the *Minute* is the Inſtructions taken at the Aſſiſes for the entring it up; but *nothing can be added* to the Minute, *tho' never ſo ſtrongly proved* by the Evidence, becauſe that would be to ſubject the Jury to an Attaint for a Fact that was never found by them; which is contrary to Juſtice to do. G. Hiſt. of C. B. 139, 140.

5. Adjudg'd that a *General or Special Verdict may be amended by the Notes of the Clerk of Aſſiſe* in Civil *but not in Criminal Actions*; a Special Verdict may be alſo amended by the *Notes of the Counſel in the Cauſe*, after Error brought. 1 Salk. 47. pl. 4. Hill. 8 & 9 W. 3. B. R. the King v. Keat.

A Special Verdict may be *amended* by Notes taken by the Clerk at the Trial, or on Proof of the Certainty of what was then given in Evidence, and ruled accordingly on Payment of Coſts 8 Mod. 49. Trin. 7 Geo. 1. 1722. Mayhoe v. Archer.

It was moved for a Rule upon the *Aſſociate to give* them *a Copy of the Minutes of a Special Verdict.* But the Court ſaid, the Judge that tried the Cauſe is to ſettle the Special Verdict, and therefore the proper way of proceeding would be to take out a *Summons to order the Aſſociate to attend before the Judge*; and if he does not attend upon it, then the Application will be neceſſary to be made to the Court. So rejected the Motion. 1 Barnard. Rep. in B. R. 191. Trin. 2 Geo. 2. —— v. Revel.

5. In

6. In *Trover againſt* 15 *Defendants*, and *counts that the Goods came to the Hands of all*, but *when he comes to the Converſion he omits the Name of one of them. All the* 15 *Plead by Name*, and Evidence given againſt all; and Judgment for the Plaintiff. The Court held this Omiſſion only Vitium Clerici It was objected that the Jury could not find the 15th Man Guilty, but only as the Plaintiff had charged him, and that was with Trover only; But per Cur it cannot be intended that the Jury would find find him guilty of Nothing; For finding Goods without converting them is no Crime; And Amendment was order'd on Payment of Coſts. Ld. Raym. Rep. 116. Mich. 8 W. 3. Smith v. Fuller & al'.

7. *Information* was in the Exchequer *for ſelling Lace and Silk* &c. The Jury *found* the Defendant Guilty *as to the Lace, but* ſaid *nothing as to the Silk.* Upon Error brought this Omiſſion was aſſign'd, whereupon a Motion was made in the Exchequer for Leave to amend, but it was denied as not being amendable, and ſo Judgment reverſed in the Exchequer-Chamber. Ld. Raym. Rep. 324. Hill. 9 W. 3. Miller v. Tretts.

8. At Niſi Prius before the Lord Ch. J. a Verdict was taken by Miſtake of the Aſſociate for the Defendant Jones inſtead of finding him * Not guilty. As to the other Defendant, a Verdict was found for the Plaintiff, and Damages 200 l. Plaintiff moved that the Return of the Poſtea as to Jones, might be amended, which was order'd on hearing Counſel on both Sides. The Return of the Poſtea is the Act of the Ch. J. and muſt be made as it ought to be; It was urged by Defendants Counſel, that the Verdict, as to the other Defendant, was contrary to Evidence; but be that ſo or not, the *Verdict* being *right in Part cannot be ſet aſide.* Barnes's Notes of C. B. 9. Paſch. 8 Geo. 2. Williams v. Jones and another.

* So it is in the Orig. but ſeems miſprinted, and that it ſhould be (Guilty) and the (Not) omitted.

(I. a) Miſtakes in or relating to Judgments, amended at Common Law, or Now.

1. PRæmunire in B. R. the *Judgment* was enter'd in the laſt Term, and and the Juſtices did not remember it, and it was *enter'd in the Roll of the Filizer* where it ought to be in the Roll of the Prothonotary. And it was ſaid that they cannot amend their own Default in Judgment in another Term; but if it had been in Proceſs they might have amended it. Br. Amendment, pl. 46. cites 9 E. 4. 3.

2. *Record of Writ of Dower* was certify'd out of C. B. into B. R. by Writ of Error, becauſe it *ſaid that the Baron was not ſeiſed Die ſponſalium & unquam inde Poſtea*; and by Examination of the Clerk of C. B. it appear'd that the Record there was *Nec unquam inde Poſtea*, and therefore it was awarded in B. R. by the Statute. Br. Amendment, pl. 79. cites 22 E. 4. 46.

3. Error on a Judgment, becauſe it was *Quod recuperet verſus E. S.* and did *not* ſay *prædict. E S.* All the Juſtices agreed that this was amendable. Golds. 89. Paſch. 30 El. The Lord Seymour v. Sir John Cliſton. Cro E. 9. pl. 14. S. C. ſays the Error aſſigned was, becauſe the Iſſue was joined that J C. hoc petit quod inquiratur per Patriam, & E S. ſimiliter, but ſaid not (prædictus;) but no other E. being named in the Record, and ſo cannot be intended another Perſon, and the Word (prædict') being Form and not Subſtance, it is aided, and was amended, and Judgment affirmed.

4. No

8 Rep. 158. b S. P.—Gilb. Hiſt. of C. B. 140. S. P.

4. No Statute gives Amendment *in Defeaſance of Judgments or Verdicts*, but only in Affirmance of them; per Cur. Le. 134. pl. 184 Hill. 30 Eliz. C. B.

G. Hiſt. of C. B. 145. cites S. C.

5. A Repleader was awarded, and the Award enter'd thus, viz. *Et quia Placitum illud in modo & forma placitat eſt ſufficiens in Lege*, inſtead of *(minus)* ſufficiens &c. The Court awarded that the Parties ſhould replead. Per Cur. This cannot be amended by the Paper-Books after Judgment for the Plaintiff upon repleading, becauſe the Fault is in the Judgment itſelf, which is the Act of the Court. Glanvile ſaid it is no Error in the Judgment, but the Error is in the Judgment [Inducement] to the Judgment, and may be well amended, and of the ſame Opinion was Popham. Ow. 19. Hill. 36 Eliz. B. R. Walter's Caſe.

6. If the Judgment be enter'd *that the Defendant ſit in Miſericordia*, where it ſhould be Quod *Querens*, it is not amendable. Mo. 366. pl. 501. Mich. 36 & 37 Eliz. in Welcombe's Caſe.

Cro. E. 497. pl. 17. Harecourt v. Biſhop, S. C. mentions it to be per Jurat. inſtead of per Curiam, and held not amendable, and Judgment reverſed.

7. Error upon a Judgment, which was *that* the now *Defendant recover* 20*l. aſſeſs'd to him per Jur. and alſo* 10*l. aſſeſs'd to him hic per Jur.* where it ſhould have been *per Cur.* The Court would not allow it to be amended, being Parcel of the Judgment of the Court, which never was amended. Goldsb. 151. pl. 78. Hill. 43 El. Harcourt's Caſe.

Cro. E. 434. pl. 44 S. C. and held a manifeſt Error.—Sty. 477. Devereux v. Jackſon, S. P.

8. In *Error* on a Judgment the Error aſſigned was, that the *Original Writ was* 20*l.* and *all the meſne Proceſs was ſo likewiſe*, but when the Defendant appeared at the Exigent, the Entry was Quod defendens *obtulit ſe in placito Debiti of* 10*l.* where it ought to be 20 l. but it was not amended, becauſe it appear'd on View of the Record that *no Original was certified.* Goldsb. 133. pl. 32. Hill. 43 Eliz. Staughton v. Newcombe.

Bulſt. 107. S. C. accordingly.

9. It was aſſigned for Error of a Judgment in Debt, that the Entry of the *Bail was ſub Pœna Executionis in Adjudicatione Executionis*, ſo that it was enter'd for the Execution only, and not for the Judgment, whereas it ought to have been *ſub Pœna Condemnationis.* Per Cur. The Bail being once taken, ſtands as well for the Judgment as the Execution, and ordered it to be amended, and made *ſub pœna Executionis Judicii* as well as for the Execution. Cro. J. 272. pl. 5. Hill. 8 Jac. B. R. Hampton v. Courtney.

10. In *Debt* upon an Obligation the *Defendant, after Iſſue of Dureſſe*, at the Niſi Prius, Relicta Verificatione *dicit* quod ipſe *non poteſt dicere Actionem nec quin ipſe fuit ſui Juris*, & ſcriptum prædictum fuit voluntarium. Judgment was enter'd thereupon, and the Error aſſigned was, that it was enter'd Quod non poteſt *(dicere)* Actionem, inſtead of *(dedicere.)* Per Cur. This made all the Sentence vitious and inſenſible, and was not amendable, and of that Opinion were the whole Court. Cro. J. 343. pl. 10. Paſch. 12 Jac. 1. Anon.

Hob. 327. Paſch. 18 Jac. S. C. that it was amended, tho' it was objected that the Judgment was not given by this Court, but by the Juſ-

11. In a *Quare Impedit to preſent to a Vicarage* the Plaintiff had a Verdict, and a Writ was awarded to the Biſhop; but upon Error brought, it was aſſign'd that the *Judgment was* enter'd, (viz.) *Quod* prædict' (the Plaintiff) *recuperet &c. præſentationem ſuam ad Eccleſiam præd.* when it ought to be *Ad Vicariam Eccleſiæ.* But the Court reſolved, and awarded that it be amended, becauſe the *Verdict is general, and they found for the Plaintiff*, and the Judgment ought to agree with the Verdict; and it was only the Miſpriſion of the Clerk; for the Record precedent in every Part, and in the Iſſue and Verdict, it is Vicariam Eccleſiæ; and by 8 H. 6. cap. 15. it is amendable, tho' it be in the Judgment, it being

the

the Miſpriſion of the Clerk. Hutt. 41. Mich. 18 Jac. Sherley v. Underhill. tices of Aſſiſe.—— S. C. cited

Cro. J. 633. Hill. 19 Jac. B. R. in Caſe of Maſon v. Fox, & al'.——S. C. cited Palm. 199. Trin. 19 Jac. in Caſe of Chapleyn v Alleyn.——S. C. cited Litt. Rep. 50. That it was Ad Eccleſiam Vicariæ, and amended; and in the principal Caſe there of a Diſturbance to preſent to a Vicarage, the Original was Quare non præſentaret ad Eccleſiam, and adjudged that it could not be amended, if Inſtructions to the Curſitor were Ad Eccleſiam; for that ſhall always be intended of the Parſonage, and ought to be Ad Vicariam. Trin. 3 Car. C. B. in the Caſe of Quare Impedit.

12. In Debt upon the 2 E. 6. for Tithes, the Plaintiff was nonſuited, and in the Judgment theſe Words, viz. *Quod eat inde ſine Die*, were omitted, and yet it was amended. Raym. 39. Arg. cites Mich. 4 Car. B. R. Everard v. Boſvile. Sid. 70. pl. S. Arg. cites S. C.—— In Replevin the Defendant avow'd,

and the Plaintiff pleaded an ill Plea in Bar, and in the Judgment theſe Words, *Ideo Conſideratum eſt quod prædict. the Plaintiff nil capiat per Breve ſuum, ſed ſit in Miſericordia pro falſo Clamore ſuo, Et prædict. the Defendants eant inde ſine Die*, were totally omitted, yet the Record was amended by inſerting theſe Words, and thereupon Judgment was affirm'd abſolutely. 2 Saund. 289. Hill 22 & 23 Car. 2. Poole v. Longvill & al'.——G. Hiſt. of C. B. 144. cites S. C. ſays this Omiſſion ſhall be amended, becauſe there is no Judgment returned on the Record ſent in Anſwer to the Writ of Error; and then the Writ of Error itſelf is not anſwer'd, unleſs the Judgment be ſent with the Roll; for the Writ of Error is Judic' inde reddit' ſit, unleſs the Judgment be tranſcrib'd upon the Roll in Error. The Plaintiff in Error muſt be nonſuit, and therefore it is for the Advantage of the Plaintiff in Error, as well as for the Defendant, in whoſe Behalf the Judgment paſs'd below, that this Judgment ſhould be tranſcrib'd upon the Record; becauſe if there be no Judgment, the Plaintiff in Error cannot be hurt by ſuch Non-Entry, nor has he whereof to complain, and therefore for both their Advantages the Judgment ought to be enter'd on Record. G. Hiſt. of C. B. 144.

13. Error of a Judgment. The *Record certified the Defendant in Miſericordia*, which was aſſigned for Error, becauſe the Defendant being an *Infant, and appearing by Guardian*, ought not to be amerced. It was amended in C. B. and *made Nihil in Miſericordia quia Infans*, and was ſo certified into B. R. that it might there be amended, which the *Court* agreed to, becauſe they *would not intend* that the Judgment was *miſenter'd at firſt, but miſrecited*. Cro. C. 410. pl. 5. Trin. 11 Car. Smith v. Smith.

14. Debt upon *Obligacion* of 100 l. That *if H. H. or R. H. the Defendant, paid 51 l. 6 s. 8 d. to J. N. ſuch a Day, it ſhould be void*. The Defendant *pleaded Solvit ad Diem*, and *found againſt him*, and Judgment, Quod quer' *recuperet Debitum & Damna &c. againſt R. & prædict. H. in Miſericordia*, whereas it *ſhould have been & prædict. R. in Miſericordia*, H. being no Party to the Record. Per tot. Cur. This Entry is but the Miſpriſion of the Clerk, and ſhall be amended, and the Judgment affirmed. Cro. C. 594. pl. 8. Mich. 16 Car. B. R. Pelham v. Hemmings.

15. Judgment was enter'd *Quod quer' & plegii ſui ſint in Miſericordia.* It was moved that it might be amended by ſtriking out *plegii ſui*, becauſe they ought not to be amerced. The Court took time to conſider of it. Raym. 42. Mich. 13 Car. 2. B. R. Delabar v. Yardley. Keb. 125. pl. 40. S. C. The Court conceived that this is Part of the

Judgment, and not Surpluſage, and that the Pledges be amerced; but adjornatur. And Ibid 155. pl. 97. S. C. adjornatur, to ſearch Precedents.

16. In *Debt on Bond*, after a Verdict for the Plaintiff, the Judgment was enter'd Quod *recuperet the Sum, pro miſis & cuſtag.* inſtead of Pro *Debito præd.* But this was ordered to be amended, as the Default of the Clerk, tho' in another Term, the Court having Power over their own Entries and Judgments. Vent. 132. Trin. 23 Car. 2. B. R. Anon.

17. Judgment was given for 2 *Plaintiffs*, but the Entry was *Quod recuperet* in the ſingular Number, and this was aſſign'd for Error; ſed non allocatur; for this is only the Miſpriſion of the Clerk, and ſhall be amended. 2 Jo. 199. Paſch. 34 Car. 2. B. R. Devoren v. Walcott.

Carth. 95. S. C. but S. P. does not appear. ——Ibid. 167. S. C & S. P. and

18. Judgment was enter'd with a *Miſericordia inſtead of a Capiatur*, ſed per Curiam, this is now remedied by the Statute 16 & 17 Car. 2. cap. 8. which enacts, that Judgment ſhall not be ſtay'd after a Verdict for want of Miſericordia or Capiatur. 4 Mod. 6. 2 W. & M. B. R. Chettle v. Lees.

ſays, that 2 Rules were produced one between Linch and Lucy, when Pemberton was Ch. J. where the Judgment was amended in this Point, viz. by the Entry of a Miſericordia inſtead of a Capiatur, and the other Rule was between Coke and Grimes, where Miſericordia was ſtruck out, and a Capiatur inſerted by the Direction of the Court, but in the principal Caſe the Court would make no Rule to amend.

If there be a *Miſtake* or Error in the Judgment, *in any* ſuch *Matter in which the Clerk has no Inſtructions, as* if a *Capiatur* be enter'd *for a Miſericordia or e converſo*, this was Error in the Judgment, becauſe before 16 & 17 Car. 2. it made Fine to the King, and a Difference in the Execution, and there was no Inſtruction in the Record itſelf in the Judgment Book whereby to amend it, & non conſtat, whether it was the Error of the Clerk in entring, or of the Court in giving Judgment. G. Hiſt. of C. B. 142.

Cumb 397. S. C. but S. P. does not appear.

19. A *Sci Fa. againſt Bail was ſeveral*, but *Judgment* was given for the Plaintiff *to have Execution de prædict' Separalibus ſummis of* 2000 *l. and* 2000 *l. againſt the Defendants jointly*; this is Error, and all the Juſtices agreed that it is not amendable; but if the Motion for Amendment had been made the ſame Term in which the Judgment was given it might have been amended. Ld. Raym. Rep. 182. Paſch. 9 W. 3. Villars v. Parry and Moor.

Ld. Raym. Rep. 695. S. C. but S. P. does not appear. ——2 Ld. Raym. Rep. 895. S. C. & S. P. accordingly, and this and

20. In *Debt upon a Mutuatus*, the *Judgment was enter'd as of Hillary Term*, 1700, whereas *the Borrowing appeared to be 2d. April* 1701. Upon Writ of Error brought, a Motion was made to amend the Judgment by the *Paper-Book* ſigned by the Maſter, which *was 2 January*, 1700, the Court allowed it to be done, for it was but a Slip of the Clerk, who ſhould have peruſed the Paper-Book ſigned by the Maſter, which is authentick enough to amend by. 1 Salk. 50. pl. 13. Mich. 2 Ann. B. R. Parſons v. Gill.

another Amendment pray'd, viz. to inſert the Words (Per J. S. attornatum ſuum) were granted on the Defendant in Error's paying Coſts, and conſenting that the Judgment ſhould be affirm'd without Coſts, becauſe there was a good Error at the Time of the Error brought.——Comyn's's Rep. 117. S. C. but S. P. does not appear.

2 Salk. 676. S. C. but not S. P. —— Gilb. Equ. Rep. 16. S. C. but not S. P. —— 11 Mod. 210. S. C. but not S. P.

21. The Court was moved to amend a *Judgment enter'd* Hill. 3 & 4 J. 2. *againſt John* Earl of Angleſea, and that *James* might be enter'd inſtead of John, and the Releaſe of Error was produced which was made by James; ſed negatur, per Cur. becauſe as the Matter now ſtands there is no Judgment againſt James, and to make *ſuch an Amendment may poſſibly affect a Purchaſer upon valuable Conſideration, and* may *make the Executor guilty of a Devaſtavit* by paying inferior Debts, tho' no Judgment was ſtanding out againſt the Teſtator which would be unreaſonable. MS. Rep. Trin. 12 Ann. C. B. Anon.

22. It was mov'd after Error brought & in nullo eſt Erratum pleaded, to amend the Judgment Roll by *ſtriking out* that the *Plaintiff* (*ought to recover*) and inſerting that the *Plaintiff* (*do recover*) which was order'd on Payment of Coſts, provided Defendant do not farther proſecute his Writ of Error. Barnes's Notes of C. B. 118. Paſch. 10 Geo. 2. Foſter v. Blackwell.

(K. a) Defects in Writs of Error, amended. In what Cases.

See Stat. 5 Geo. 1. cap. 13. at (R) supra.

1. W. T. *recovered*, and *Writ of Error* was ſued, by which the *Record was certified in the Name of E. T.* and becauſe it appeared that the firſt Writ and Count was good, and *this Certificate was only Miſpriſion of the Clerk*, the Record was amended by Advice of all the Juſtices of B. R. for it was ſaid, that now all the Record was before them, and nothing in the Bank of Record. *Br.* Amendment, pl 53. cites 21 H. 7. 31.

2. *Writ of Error* was ſued *to remove a Record out of C. B. into B. R. between an Abbot and J. N.* the *Warrant of Attorney varied in the Roll in the Name of the Abbot*, and was amended after Judgment, and if they had not amended it, they ſaid that thoſe of *B. R.* would amend it. Br. Amendment, pl. 85. cites Paſch. 23 H. 8.

3. It was mov'd to quaſh a Writ of Error on an Exception taken to it as it was enter'd in the Record, but becauſe it was only a *Miſ-entry, the Record itſelf being right*, the Record was order'd to be amended by the Writ. Sty. 218. 219 Trin. 1650. Dawkes v. Payton.

4. A Writ of Error recited a *Judgment* given *in Curia Regis* when it ſhould be *Regis & Reginæ*. It was mov'd to amend it, for that the Note to the Curſitor was right, and this was a Miſpriſion only in Matter of Form, and not in Skill; ſed non allocatur, for there is no Fault in the Writ itſelf, only it does not agree with the Record, and the Amendment will make a new Writ. The 8 H. 6. gives the Court Power to amend in Matters precedent to the Judgment, and to ſupport Judgments, and to avoid Writs of Error, whereas this may make good the Writ of Error, and ſo to reverſe a Judgment; beſides, this Writ is a Commiſſion to the Court, and they cannot amend their own Commiſſion. 1 Salk. 49. pl. 9. Paſch. 12 W. 3. B. R. Thompſon v. Crocker.

12 Mod. 369. Thonkin v. Crocker, S. C. accordingly, and Holt Ch. J. ſaid, that there is no Inſtance of amending Writs of Error.—— Carth. 520. Tonkyn v. Crocker, S. C. and it was inſiſted that it was an Alteration, and not an Amendment, which was mov'd for, the Record now return'd being a wrong one, and if the Writ be alter'd to the Record, then it would be a right Record, and conſequently here will be a Record or no Record according to the Alteration, or no Alteration of the Writ, and thereupon the Court denied to alter it.—— Ld. Raym. Rep. 564. Tomkin v. Crocker, S.C. and Holt Ch. J. ſaid, that no Precedent can be ſhewn where a Writ of Error has been amended; and the Amendment was denied.

5. An *Action was* by the Name of *Giggeer*, and a Writ of *Error was brought as* in an Action *between Giggure and the Defendant*. The Court held this to be a fatal Variance, and that the Record was not remov'd by this Writ of Error, but at laſt the Record was amended. 1 Salk. 264 Paſch. 1 Ann. B. R. Giggeer's Caſe.

6. In Error upon a Judgment in C. B. the Court was moved to quaſh the Writ for a Variance between it and the Record returned; the *Writ deſcribed a Loquela inter Lowther and 4 Defendants wherein Judgment had been given againſt* 3, whereas the Judgment in the *Record return'd was only againſt* 2; the Writ was quaſh'd, and Parker Ch. J. ſaid, that the Ch. J. of C. B. ſhould, upon the Writ, have returned Nul tiel Record. MS. Rep. 3 Geo. 1. B. R. Dawſon v. Lowther.

7. Error was brought to reverſe a Judgment in C. B. in Ejectment. The Writ of Error was *teſted 23 Oct. 12 Geo. 1. returnable Octabis Martini Mich. Term*, 12 *Geo.* 1. and by the *Record certified the Judgment* appeared not to be *given* till *Hill. Term following* 12 *Geo.* 1. and thereupon it was held clearly, that the Record was not well remov'd by this Writ

Writ. The Court were clear of Opinion that this Writ is not amendable by the Stat. 5 Geo, 1. cap. 13. for it would be to amend the Writ contrary to the Truth of the Caſe, the Judgment in Fact not being given till Hill. 12 Geo. 1. and ſo the Variance not ſuch as was intended to be amended by that Act; and the Motion for Amendment denied. 2 Ld. Raym. Rep. 1531. Trin. 2 Geo. 2. Canning v. Wright.

8. A Writ of Error was brought by G. to reverſe a Judgment in C. B. in an Action brought againſt him by M. and the Writ *deſcrib'd the Record to be of a Loquela* in C. B. *by Writ by M. and G.* and the *Record remov'd was between M. and G.* and ſo a Variance &c. But the Court of B. R. ruled it to be amended and made agreeable to the Record, and this by the Stat. 5 Geo. 1. cap. 13. And they held they could do it by this Act without Prayer of either Party, the Variance appearing to them upon the Record; and gave *no Coſts* as not being directed by the Statute. 2 Ld. Raym. Rep. 1587. Paſch. 4 Geo. 2. B. R. Gardiner v. Merrot.

See Tit. Fines (B. b. 2)

(L. a) Defects in Fines and Common Recoveries, and Writs thereupon, amended.

1. A *Fine was to the Heirs Males*, and the *Scire Facias is made to the Heirs general*, this ſhall be amended. Br. Amendment, pl. 113. cites 10 H. 7. 25.

2. A *Common Recovery* was ſuffer'd to the Intent to bar an Entail, and the Warrant of Attorney was, that *Alicia Pinde ponit Loco ſuo A. B.* &c. whereas her Name was *Elizabeth*, and ſo it was aſſigned for Error that no Warrant of Attorney was enter'd for Eliz. The Quære was, if this were amendable, and the Book ſays that it was amended afterwards. Mich. 1 & 2 P. & M. D. 105. Pind v. Norton.

Noy 73. S. C. ruled accordingly, tho' it was an original Writ.

3. In Formedon the Writ was Præcipe quod reddat 20 *Acres Heddington*, not ſaying *(in* Heddington.) The Curſitor upon Oath confeſs'd that the *Paper deliver'd to make out the Writ by, had the Word (in,)* and therefore it was amended by Order of the Court, it being only the Default of the Clerk. Cro. E. 644. pl. 49. Mich. 40 & 41 Eliz. B. R. Powell v. Brazen-Noſe College.

Noy 1. Thompſon v. Warner, S. P. and ſeems to be S.C. adjudg'd againſt the Demandant.

4. In a *Formedon* of the Manor of *Iſfield*, the Tenant pleaded in Bar a Common Recovery againſt the Donee in Tail. The Plaintiff replied Nul tiel Record. A Record was produced where the Name was *Iffield*, inſtead of Iſfield. It was reſolved, that if it appeared to be the Miſtake of the Clerk, or corrupted after, it ſhould be amended. 5 Rep. 46. a. Trin. 41 El. C. B. Cook's Caſe, alias, Challoner v. Cook.

— S. C. cited by Williams J. Bulſt 7.——It was mov'd to amend a Fine, in which Sir John Forth was Conuſee, and Sir Manwaring Conuſor, which was levied of the *Manor of Ighfield*, where the Deed which declared the Uſes was of the Manor of *Ightfield*, which was the true Name, and it was amended. 1 Ld. Raym. Rep. 209. Paſch. 9 W. 3. C. B. Anon.

5. In the *3d Proclamation upon the Foot of a Fine levied in Trin. Term 5 Jac.* the ſaid Proclamation is *ſaid to be made 6 Jac.* and upon the Foot of the Fine the *4th Proclamation is wholly left out*; but becauſe upon View of the *Proclamations indorſed upon Record remaining with the Chirographer*, and the Book in which the Proclamations were firſt enter'd, it appear'd that the ſaid Proclamations were *rightly and duly made*, it was adjudg'd that they be amended. 13 Rep. 54. Trin. 7 Jac. C. B. Pettus v. Godſalve.

6. In

6. In a Recovery agreed to be ſuffer'd by A. B. and *R. C.* the *Writ of Entry was* ſued out in the Name of *J. C.* inſtead of R. C. but ordered to be amended. Rep. of Pract. in C. B. 127. cites Trin. 2 Car. 1. Clapham v. Bacon.

7. A Warrant to ſuffer a Recovery by W. R. and *Heſter his Wife.* The Serjeant had certified that the Warrant was given by W. R. and *Margaret* his Wife, and the Mittitur and Tranſcript made, and the Recovery enter'd accordingly, but ordered to be amended. Rep. of Pract. in C. B. 127. cites Mich. 4 Car. 1. Anon.

8. A Recovery enter'd by A. B. and C. his Wife, but the *Name of the Wife totally omitted*, ordered by the Court to be amended. Rep. of Pract. in C. B. 127. cites Mich. 8 Car. 1. Thurban v. Pantry.

9. A Fine was levied Mich. 11 Eliz. and the *Proclamations* indorſed by the Chirographer *were right*; but *in the Note* of the Fine delivered to the Cuſtos Brevium, the *2d Proclamation was enter'd* to be made the 20 *May* by the Miſpriſion of the Clerk, where it ſhould have been the 23 *May*. The Court held that it ſhould be amended; for the *Engroſſment* upon the Fine *by the Chirographer is the Foundation*, which being right, is a ſufficient Warrant to amend the other, tho' the Court held it a good Fine without any Amendment. Hutt. 122. Paſch. 9 Car. Strilley's Caſe.

10 A Fine and Proclamations, as found in the Office of the Cuſtos Brevium, were *exemplified* under the Great Seal. It was objected, that by a Clauſe in 23 *Eliz. cap.* 3. they could not be amended after ſuch Exemplification; but it was anſwer'd that that Statute *extends only to Fines before levied, which ſhould be exemplified before the 1ſt of June* 1582. and that the latter Clauſe in the ſaid Statute extends only to Fines exemplified according to the ſaid Statute. Hutt. 122. Paſch. 9 Car. in Strilly's Caſe.

11. A Recovery was ſuffer'd, but the *Writ of Seiſin* was made *returnable the ſame Return as the Writ of Entry.* The Return was order'd to be amended. Rep of Pract. in C. B. 127. Paſch. 26 Car. 1. Doncaſter v. Campion.

12. The *Writ of Entry* was made *returnable Tres Mich.* 33 Car. 2. which was *before the Date of the Deed*, to make a Tenant to the Præcipe; and ordered to be *amended* by making the Writ *returnable Craſtin' Animarum.* Rep. of Pract. in C. B. 127. Mich. 4 W. & M. Bunce & al' v. Greenway & al'. Ibid. ſays the like Amendments were order'd to be made. Mich. 5 W. & M. Watry v. Jodrell, and Mich. 5 W. & M. Warkhouſe v. Watts.

13. It was moved to amend a *Recovery ſuffer'd* by Jane Knight, the *Lands* being *ſaid* in the Recovery *to lie in Parochia Sanctæ Mariæ Salvatoris in Southwark*, whereas there is *no ſuch Pariſh*; for the proper Name is Sancti Salvatoris. And the Court gave him Leave to raſe the Word (Mariæ.) And per Treby Ch. J. the vulgar Name is St. *Mary Over-rce*, that is, Over the River; but Sancti Salvatoris is the Name uſed in Pleadings. 1 Ld. Raym. 134. Mich. 8 W. 3. Anon.

14 Upon the Certificates of the Cuſtos Brevium, Mr. Prothonotary Tempeſt, and the Clerk of the Warrants of this Court, ſaid, that the Writ of Entry and Writ of Seiſin between the Parties had been duly iſſued; and alſo that the *Recovery* in this Cauſe was *taken at the Bar* of this Court of the Term of St. Michael, *in the 8th Year of K. Charles the* 1ſt, *all the Parties in the ſaid Recovery named, then and there appearing in their own Perſons.* It was ordered that the ſaid Recovery ſhould be enter'd of Record of that ſame Term of St. Michael, upon the 134th Roll, among the Rolls of the Pleas of Land inroll'd in that Term. Rep. of Pract. in C. B. 127. Trin. 12 W. 3. Ives & al' v. Young.

See (B. a) pl. 26. Ld. Jeffries's Caſe.

15. A *Writ of Covenant was teſted 6 Months after the Dedimus*; but the Court of Grand Seſſions in Wales had amended it, and this Matter being referr'd to the Judges, Holt Ch. J. & al' certified, that the Writ of Covenant being an Original, was not amendable either by the Common Law or by any Statute, and that there is no Difference as to this Purpoſe between Amicable and Adverſary Actions. 1 Salk. 52. The Earl of Pembroke v. Lord Jefferies.

16. On Motion to amend a Writ of Entry *by putting out Cowickbury, and inſerting (in Paroch' de Sheering,)* it appeared that the Deed to lead the Uſes thereof was right; and upon producing ſeveral Precedents for Amendment, (among which were thoſe cited above in pl. 6, 7, 8.) a Rule was granted (upon great Deliberation) to amend. Rep. of Pract. in C. B. 9. Hill. 2 Geo. 1. 1715. Bedford v. Cullen.

17. A Motion to amend a Recovery in Hill. 1703. wherein *Weſt-Engleſton and Weſt-Tyneham* was put in the Writ of Entry, *inſtead of Ingleſton Tyneham*. The Deed to lead the Uſes was right; E. J. who was one of the Vouchees was dead, the other Parties alive and conſenting; and it appearing that it was the Intent of all the Parties that it ſhould be right, and Common Recoveries being Common Aſſurances, Amendments ought more eaſily to be made than in other Caſes; therefore the Court ordered it to be amended accordingly. Rep. of Pract. in C. B. 17. Trin. 5 Geo. 1. Laming v. Beſtland.

Ibid. 30. S. C in Mich. following, there being three new Judges the Court declared unanimouſly now, that

18. A Motion to amend a Recovery *by putting in* theſe Word, *In Paroch' Sanctæ Mariæ in Wallingford, and in Paroch' de Wargrove*, and a Rule to ſhew Cauſe granted; this was afterwards oppoſed ſtrongly, 3 Juſtices againſt the Amendment; but Tracey ſeem'd for it, tho' the *Parties were all dead*, and Purchaſors in the Caſe. It was denied chiefly becauſe, if the Amendment was made, *the King would loſe his Fine for the Parcels to be inſerted.* Rep. of Pract. in C. B. 25, 26. Trin. 10 Geo. 1. 1724. Dean & al' v. Coward.

tho' the Parties were dead, yet as it *appear'd by the Deed that it was with their Conſent*, the Vills omitted by the Clerk ſhou'd not prejudice a Family; and therefore it being the Intent of the Parties at that Time, the Court order'd the Amendment to be made, and ſo made the firſt Rule abſolute.—Comyns's Rep. 386 Trin. 12 Geo. 1. S C accordingly.

Motion to amend a Recovery by *putting in, Rectoria de Lea & Decima eidem Spectan'*, it appear'd to be right in the Deed to lead the Uſes, and moved at the Vouchee's Requeſt. The Ch. J. ſaid the King will loſe his Fine; ſo the Amendment was denied. Rep. of Pract. in C. B 26. Trin. 10 Geo. 1. Cranmer v. Cranmer.

19. A Motion was made laſt Term to amend a Fine *by inſerting the Word (Woorth,)* and this preſent Term on ſhewing Cauſe, the Rule was made abſolute for the Amendment, tho' it was objected that the Heirs at Law would be prejudiced if the Fine was amended; the Court ſaid they could not take Notice, whether it would be a Prejudice to the Heirs at Law or Not; but it was the Duty of the Court *to make the Fine agreeable to the Deed and Intention of the Parties.* Rep. of Pract. in C. B. 52. Paſch. 2 Geo. 2. 1729. Walter v. Okeden.

20. A Motion to amend a Recovery by *inſerting ſeveral Pariſhes* which were *left out in the Inſtructions to the Curſitor*, it appear'd that the Deed to lead the Uſes of the Recovery was dated the 7th of October, the Writ of Entry teſted the 11th of Decemb. and returnable in Menſem Mich. The Court order'd the Recovery to be amended. Rep. of Pract. in C. B. 85. Jenkinſon v. Staples.

Barnes's Notes in C. B. 143. S.C. and per Cur. the Repugnancy inſerted merely thro'

21. It was moved to amend a Fine *by ſtriking out the Words, In America in partibus Tranſmarinis*, this *Fine was of Lands* and Tenements *in the Iſland of Antigoa, or otherwiſe Antigua, in Paroch' Sanctæ Mariæ Iſlington, in the County of Middleſex*, and was paſt in the Year 1714. Application had been made to the Maſter of the Rolls, and an Order made by his Honour for the Amendment, which Order was ſet aſide by my Ld. Chan-

Chancellor. After great Debate in this Cauſe (a Writ of Error being depending) the Judges were unanimouſly of Opinion that this Court had the only Cognizance of Fines, and order'd the ſame to be amended. Rep. of Pract. in C. B. 121. Trin. 8 & 9 Geo. 2. Foſter v. Pollington & al'. Want of Skill, and which would vitiate the Fine muſt be rejected, and the Fine made effectual, viz. in common Form; but if it be then inſufficient, Advantage may be taken thereof.

22. A Rule *to compleat a Recovery* of Eaſter Term the 9th of Queen Ann. the *Præcipe at Bar was ſign'd* by Serjeat Richardſon, the *Plea Roll enter'd*, and the *Exemplification ingroſſed but not ſealed*, and *neither the Roll carried in, nor the Writs filed*; upon reading the Deeds and Affidavit of Notice to the reſpective Parties, the Recovery was order'd to be compleated, and the Rolls and Writs to be filed. Rep. of Pract. in C. B. 126. Hill. 9 Geo. 2. Sheppard v. Harris, Dewey, & al'.

(M. a) Omiſſions and Defects in Entry of Warrants of Attorney, amended.

1. A Man had *put Warrant of Attorney in the Remembrance* and *neglected to enter it*, and it was amended. Br. Amendment, pl. 69. cites 41 E. 3. 1.

2. *Warrant of Attorney in Formedon* was put, quod *tenens po. lo. ſuo* againſt the Demandant *in Plea of Scire Facias*, where it was *Formedon*, and it was amended; quod nota. Br. Amendment, pl. 36. cites 19 H. 6. 15.

3. *Forcible Entry* found for the Plaintiff. Markham ſaid the Judgment ought not to go, for the Defendant appear'd by *Attorney* who *had no Warrant in Court.* But per Newton, it may be that ſome Juſtice of this Court has the Warrant in his Hands, or that he was made Attorney by Writ, and therefore no Cauſe by which the Plaintiff recovered; quod nota. Br. Repleader, pl. 17. cites 19 H. 6. 6.

4. If Clerk of the Eſſoigns *enters* Warrant of Attorney *in the Remembrance and* does *not* enter it *upon the Record*, this ſhall be amended, and this in another Term. Br. Amendment, pl. 14. cites 35 H. 6. 24.

5. *Warrant of Attorney varied from the Name of the Corporation* Party, and Writ of Error was brought to thoſe of C. B. and they amended it immediately. And it was ſaid that the Court of B. R. would have done the like there; quod nota. Br Amendment, pl. 47. cites 24 H. 8. Br. N. C. 23 H. S. pl. 26. cites S. C.

6. A Bill was exhibited in the Name of Rigs, *per Johannem Keeling attornatum ſuum*, and the Warrant of Attorney was, that Rigs poſuit loco ſuo *Gulielmum Keeling*. This was aſſign'd for Error; but the Juſtices cauſed it to be amended, and affirm'd the Judgment. Mo. 711. pl. 996. Hill 38 Eliz. Heley v. Rigs.

7. In *Debt by C. H. Executor of C. H.* againſt R. as Son and Heir of R. After Judgment by Default a Writ of Error was brought, and the Error aſſigned was for the Want of a ſufficient Warrant of Attorney for the Plaintiff, which was thus, viz. *C. H. Miles ponit loco ſuo J. S. Atturnatum ſuum verſus J. K.* the Plaintiff not *naming him Executor as he ſhould* have done; but it was held to be amendable, there being *no other Action depending* between the Parties. Cro. J. 135. pl. 9. Mich. 4 Jac. Hilliard (Sir Chriſtopher) v. Redner.

7. Error

8. Error &c. on a Judgment in a Formedon in Deſcender. The Error aſſign'd was for Default of a Warrant of Attorney, becauſe it was in this manner, H. B. *ponit loco ſuo .... Darſly Atturnatum ſuum, omitting his Name of Baptiſm*; and held to be Error not aided by any Statute, nor amendable. Cro. J. 332. Mich. 11 Jac. Bartholomew v. Belfield.

Ld. Raym. Rep 68. S. C mentions it as a Judgment recovered for 3000 l. and that the Motion was to inſert a Sum certain for the Coſts and Damages, however ſmall, to perfect the Judgment. But after ſeveral Arguments at the Bar, Holt Ch. J. held it could not be granted, becauſe it would be to give a new Judgment. But Rookby J. thought it might be amended, becauſe it was for a juſt Debt. Adjornatur.

9. A Warrant of Attorney was given to S. to *confeſs a Judgment* at the Suit of the Plaintiff. S. ſent it to W. his Entring *Clerk*, who *enter'd it* accordingly *Quod recuperet Debitum & Damna ſua, but left a Blank to inſert* what Sum ſhould be *for the Damages. W. died*, and this *Warrant of* Attorney *was loſt*, but *S. made Affidavit of the Fact*; and upon a Motion for Leave to inſert a Sum certain for the Damages and Coſts, the Court held it to be amendable, if there had been any Thing to amend it by. It might have been amended in the ſame Term, but in this Caſe the *Entry was 19 Years ago.* 5 Mod. 147. Hill. 7 W. 3. B. R. Wentworth v. the Earl of Strafford.

Ld. Raym. Rep. 695. S. C but S. P. does not appear. ——2 Ld. Raym. Rep. 895 S. C. & S. P. and Powis and Gould J. agreed with Holt; but Powell J. diſagreed as to the taking the Entry of the Warrant of Attorney on the Plea Roll for the Foundation only, and putting the Judgment Paper ſign'd by the Maſter, and which was right, and which the Roll was to be made up by, out of the Caſe, becauſe tho' that proved the Parties had Attornies in Court, yet, notwithſtanding that, the Plaintiff had Election to ſue either in Perſon or by Attorney, and that Entry did not prove he ſued by Attorney, and ſo there was no Authority to amend by. ——Comyns's Rep. 117. pl. 82. S. C. but S. P. does not appear.

9. The Entry on the Top of the *Plea-Roll* was, that the Plaintiff *ponit loco ſuo, J. S. Attorn' ſuum*; and the *Memorandum was*, that the Plaintiff *venit & protulit* &c. but did *not ſay per Attornatum ſuum, or in propria Perſona ſua.* Error being brought in the Exchequer-Chamber, it was moved to amend the Declaration by the Top of the Plea-Roll; and Holt Ch. J. held it might be done; for a Warrant of Attorney upon the Plea-Roll is as much a Record as if enter'd on any other Roll, and it cannot be intended but that the Plaintiff declared by Attorney, his Name being to the Judgment Paper, viz. J. S. pro Quer. 1 Salk. 88. B. R. Trin. 2 Ann. Parſons v. Gill.

11. A Warrant of Attorney fil'd was mov'd to be amended, and to make it *Debt inſtead of Caſe*; and upon hearing Counſel on both Sides, and citing many Caſes, the Court order'd it to be amended, and if the adverſe Party does not proceed in Error, Coſts to be paid him. Rep. of Pract. in C. B. Paſch. 1 Geo. 2. the Dutch Eaſt India Company v. Henriques & al'.

(N. a) Omiſſions and Defects in entring Pledges, amended.

Br. Brief, pl. 21. cites S. C.

1. IN Aſſiſe the Writ was Et interim *Fac.* 12. &c. *videre Tenementa ill' & Sum' eos quod ſint coram præfat' Juſticiar'* &c. *Et pone per Vadios* et ſalvo Pleg' prædictum W. vel Ballivum ſuum &c. ſi &c. *quod ſit ibi audiend'* ill' Recogn' and becauſe it *ought to be Quod tunc ſit ibi*, and this Word *(tunc)* was wanting, the Aſſiſe was adjourned, and they were clear in Opinion to abate the Writ; and the Plaintiff was nonſuited. Brooke ſays, Quære if it ſhall not be amended; for it is ſaid there, that it has been uſed to amend ſuch Writs, and ſo it was done before Sir R. Newton. Br. Aſſiſe, pl. 4. cites 27 H. 6. 2.

2. *Decem.*

2. *Decem Tales return'd, & nullos Manucaptores Juratorum* return'd, and the *Jury paſſed*, and the *Plaintiff recover'd*, and the *Defendant brought* Writ of *Error*, and it was debated if it ſhould be amended; for it was ſaid they may amend Miſpriſion as well after Judgment as before, upon Examination of the Sheriff &c. Choke Juſtice ſaid, this is not Miſpriſion, but Nonfeaſance, therefore it ſhall not be amended; and the Sheriff cannot put Manucaptors without being found by the Parties, for they find the Manucaptors, therefore this is the Default of the Parties; but per Genney, at the firſt Day *before that they were ſworn*, it might have been amended, but not after Judgment. Br. Amendment, pl. 47. cites 9 E. 4. 14.

3. *Pledges* were *found for W. T.* where *his Name was T. T.* this cannot be amended. Br. Amendment, pl. 47. cites 9 E. 4. 14. per Catesby.

4. Note, that where the *Sheriff returns Manucaptors upon Diſtringas Juratores*, and *no Pledges of the Manucaptors*, and yet the Jury appeared, and were ſworn, and found for the Plaintiff; and Exception was taken in Arreſt of Judgment, and the Sheriff was thereof examin'd, who ſaid, that his Intent was that it ſhould be well return'd, and therefore by Advice of all the Juſtices of both Benches, except Brian, it was amended, and the Plaintiff recover'd. Br. Amendment, pl. 61. cites 3 H. 7. 14.

5. It was moved in Arreſt of Judgment, that upon *the Return of the Venire* Facias there *wanted* theſe Words, Quilibet Jurator *per Plegios*, ſo that the Writ was as if it had never been return'd; but held per Cur. that *this was* not as a Blank Return, or where the Name of the Sheriff is omitted, but it is *an inſufficient Return*, which is aided by the Statute of Jeofails, for the Omiſſion of the Pledges is but Matter of Form. Cro. J. 534. Paſch. 17 Jac. More v. Blackwell.

6. After Verdict and Judgment for the Plaintiff in Aſſumpſit Error being brought and aſſigned that there were *no Pledges enter'd upon the Imparlance Roll*, it was mov'd that it might be amended, becauſe *in the Niſi Prius Roll the Pledges were mentioned*, and it being only *Matter of Form*, was aided after Verdict, by 18 Eliz. cap. 13. [14] but the Court denied the Amendment, for although the *Iſſue Roll ſhall be amended by the Imparlance Roll*, becauſe it is precedent, yet the *Imparlance Roll ſhall not be* amended *by the Iſſue Roll*, it being ſubſequent, and this is *Matter of Subſtance*. Cro. C. 91. pl. 15. Mich. 3 Car. Wolfe v. Hole.

Hutt. 92. S. C. accordingly; beſides, it concerns the King; for if there be Cauſe to amerce the Plaintiff, the Judgment is, that the Plaintiff and his Pledges be amerc'd, and that is not aided by the 18 Eliz. quod quære.——Litt. Rep. 72. Woolf's Caſe, S. C. and by Crooke the Stat. of Eliz. will not help ſubſtantial Errors.

7. In Error of a Judgment in C. B. for that there were no Pledges, it was inſiſted in B. R. that it was amendable, or at leaſt aided by the 18 Eliz. cap. 13 [14] becauſe in C. B. the Pledges are always indorſed upon the Original, and when there is no Original there are no Pledges. The Court adviſ'd to pray a Certiorari upon alleging Diminution; and upon Return that there was no Original, the Court debated it largely; and Windham. J. thought it was aided by the Statute of 18 Eliz. but Foſter and Twiſden e contra; but upon Examination, and no Diminution alleged that there was an Original, an Amendment was awarded. Raym. 51. Mich. 13 Car. 2 B. R. Hodges v. Hodges.

Sid. 84. pl. 12. Trin. 14 Car. 2 B. R. Wheeler v. Wilkinſon, S. P. and it was agreed, that if no Pledges had been found it ſhould be Error; but per Cur. in this Caſe it ſhall be intended that Pledges were found upon the Original, (tho' it cannot now be known) becauſe in C. B. they are not wont to enter the Pledges upon the Roll, but only upon the Original, and ſo no Original is aided by the Statute, tho' an ill Original is not.——Error was aſſigned, for that no *Pledges* de proſequendo were return'd on the Back of the Writ, but the Sheriff was permitted to amend it. 3 Lev. 361 Paſch. 5 W. & M. in C. B. Nicholas v. Chapman.

See (B) pl. 16 and (E) pl. 5 8. 9. 10.

(O. a) Omiſſions in Writs and other after Proceedings, amended.

S. P. for it was taken to be the Miſprifion of the Clerk. Br. Diſcontinuance de Proceſs, pl. 46. cites 40 E. 3. 36.

1. IN *Præcipe quod reddat R. Son of W of Clyen, Knight was vouch'd by the Tenant himſelf*, and the *Tenant and the Vouchee were one and the ſame Perſon*, and in the *Proceſs Clyven and Knight were left out*, and it was awarded to be amended, per Cur. Br. Amendment, pl. 19. cites 40 E. 3. 36.

2. In Writ of *Appeal* this Word (*Habeas*) was omitted, and for this Cauſe it was aboted, for the Court would not amend it. Thel. Dig. 223. lib. 16. cap. 6. S. 2. cites Mich. 13 E. 3. Amendment 63. fine Aſſenſu Partium.

3. *Summons ad Warrantizandum* was awarded *againſt* 2 *in the Premiſſes of the Writ*, and *in the Percloſe was but one*, and it was amended. Br. Amendment, pl. 100. cites 3 H. 4. 11.

4 In Detinue the *Parol was without Delay by Protection*, and after *Reſummons* was ſued, which *made Mention that the Parol was put without Day by Protection, bearing Date the 1ſt. Day of January*, where the Protection bore Date the 11t. Day of *June*, and the Roll was well by which the Plaintiff would have amended it; and the Opinion of the whole Court was, that it ſhall not be amended, becauſe it is as ſtrong as the Original. Brooke ſays, Quod Mirum! for the *Original*, which is *founded upon Record or Specialty*, ſhall be amended. Br. Amendment, pl. 2. cites 3 H. 6. 45.

5. Præcipe quod reddat, that is to ſay, *Writ of Entry againſt* 4, and *in the Clauſe* (*& niſi fecerit*) were 3, and *the 4th. was omitted*, and it was challeng'd, [but] becauſe it was a petit Default, and the Demandant [had] pray'd Leave to amend it *before that it was challeng'd*, therefore it was amended; Quod Nota; for the Court ſaid, that of Cuſtom ſuch Defaults have been amended before Challenge of the Party. Br. Amendment, pl. 35. cites 8 H. 6. 37.

6. *Formedon upon a Gift* made *to R. and J. as Feme, and that after the Death of R. to the Demandant as Heir* &c. *deſcendere debet*, and did not ſay after the Death of J. and therefore the Writ was abated without Amendment, becauſe it does not appear to the Court if J. was dead or alive. Br. Amendment, pl. 84. cites 11 H. 6 28.

7. It is reported by Martin, that an Original was amended, where it was 20 *Die Junii*, and *(Die)* was *left out*. Thel. Dig. 224. lib. 16. cap. 6. S 11. cites 11 H. 6. 2. 17.

In *Maintenance*, if *the Place where the Plea was held be omitted in the Writ*, it is not amendable; per Priſot. Thel. Dig. 224. lib. 16. cap. 6. S 20. cites Hill. 34 H 6. 27.

8. In Writ of *Champerty* directed to the Sheriff, it did *not appear of which Part the Maintenance was made*, by which the Plaintiff purchaſed a new Writ; for the other could not be amended. Thel. Dig. 224. lib. 16. cap. 6. S. 13. cites Mich. 22 H. 6. 8.

The Omiſſion of *Dei Gratia* in the Stile of the King, is amendable; but the Omiſſion of *any Thing that alters the Form of the Writ*, is not amendable. 8 Rep. 160. Mich. 8 Jac. in Blackamore's Caſe.

9. But it was ſaid that ſuch Writ Henricus *Rex Angliæ* & Franc' *without* ſaying *Dei gra'* may be amended. Thel. Dig. 224. lib. 16. cap. 6. S. 13. cites Mich 22 H. 6. 8.

10. Præ-

10. Præcipe quod reddat was *Præcipe R. B. & J. C. quod reddat* &c. And by another Præcipe in the ſame Writ [it was] *Et Præcipe J. T. quod reddat* &c. and in the Summons in the ſame Writ was *Et Summoneas prædict' R. & J.* and the Demandant pray'd that it be amended. But per Cur. it cannot be amended; for *it does not appear to the Court which J. is left out*, and ſo was the Opinion of the Court; for there were two J.'s. Br. Amendment, pl. 6. cites 27 H. 6. 6. Thel. Dig. 224. lib. 16. cap. 6. S. 15. cites S. C.

11. The Writ of *Error* was Rex Johanni Priſot capitali Juſtic' &c. ſalutem. Quia in Recordo & Proceſſu &c. which was *Coram vobis* inter A. &c. where it ſhould be *Coram vobis & ſociis veſtris*, and was not amended. Thel. Dig. 224. lib. 16. cap. 6. S. 17. cites Trin. 28 H. 6. 14. Br. Amendment, pl. 94. cites 28 H. 6. 11. S. P. [and it is at 11. b. 12. a. pl. 24.]——

Br. Error, pl. 13. cites S. C.———Br. Faux Latin &c. pl. 89. cites S. C.———Fitzh. Error, pl. 30. cites S. C.

12. In Debt the Writ was by *Jo. Gargrave, Eſquire*, and the Obligation was *Jo. Gargrave only*, and it was not amended but abated, inaſmuch as this Miſpriſion was of the Part of the Plaintiff. Thel. Dig. 224. lib. 16. cap. 6. S. 18. cites Mich. 30 H. 6. 6 Amendment 37. Quære.

13. It was agreed, that where *divers Things in the Writ of Conſpiracy* are omitted in the Count, it ſhall be amended; quod nota; for it is Miſpriſion of the Clerk. Br. Amendment, pl. 8. cites 33 H. 6. 2.

14. *Where Things in the Writ are omitted in the Count*, this Omiſſion ſhall be amended, per Cur. but not the other Matter. Br. Conſpiracy, pl. 2. cites 33 H. 6.

15. If *Clerk of the Eſſoign enters Challenge of the Conuſance of Plea in his Remembrance*, and after does *not enter it in the Roll*, this ſhall be amended; per Billing; by which he took Iſſue that the Land is out of the Franchiſe &c. and therefore it ſeems that it may be amended. Br. Amendment, pl. 14. cites 35 H. 6. 24.

16. Formedon was, viz. *And which after the Death of J. the Son of the Donee, deſcendere debet to the Demandant.* Billinge demanded Judgment of the Writ; for he makes J. Heir to the Donee. Littleton ſaid my Titling is *Son and Heir*, which the Clerk ſaw; and therefore it is the Default of the Clerk, and pray'd that it might be amended. Priſot ſaid it is no Matter for your Titling, which you keep; but the *Clerk of the Chancery uſed to make Titling*, and therefore he ſhall be brought and examined, and if his Titling be as you ſay, it ſhall be amended, and otherwiſe not. Quod nota, for Non negatur; but Littleton aſſented. Br. Amendment, pl. 56. cites 38 H. 6. 4. *A Title* was *rehearſed* to be, *that one W. was ſeiſed in Fee, and died ſeiſed, and the Land deſcended to R. as Son and Heir, and from R. to H. as Son*, and *did not ſay Heir, and from H. to E. as Son and Heir.* And per Cur it ſhall not be amended where this Word (*Heir*) *is* omitted at H. For *Matter in Fact* cannot be amended; for then peradventure the Court ſhall make a Falſity; for peradventure H is not Heir. Br. Amendment, pl. 113. cites 10 H. 7. 25.

17. In Debt the Plaintiff *counted upon an Obligation.* The *Defendant imparl'd till another Term*, and then he *demanded Judgment of the Count*; for he ſaid that there is no Place laid *where the Obligation is made*, but a *Space was left in the Roll for it*, and it was not ſuffer'd to be amended. Br. Amendment, pl. 68. cites 4 E. 4. 14. Fitzh. Amendment, pl. 49. cites S. C.—— Br. Brief, 482. (478) cites S. C.——

Br. Count, pl 61. 64 cites S. C.———8 Rep. 161. a. cites S. C.

18. *Scire Facias upon a Fine*, which *was to him and his Heirs Male*, and the *Mittimus was Ad Proſecutionem J. T. Conſanguinei & Hered.* without Maſcul' and it was doubted if it may be amended. Per Fairfax, if Writ Judicial varies from the Original, it ſhall be amended; ſo if Writ of Debt varies from the Obligation; for this is the Default of the Clerk who ſees the Record and the Specialty, if this Matter be found upon

upon the Examination of the Clerk. But per Pygot, a Thing which * See pl. 21. ought to come by * Information of the Party, as the Will, Myſtery, or the like, ſhall not be amended; & adjornatur. Br. Amendment, pl 48. cites 9 E. 4. 15.

S. P. Br. Abbe, pl. 31. cites 4 E. 4 24.

19. *Writ was J. S. Clerk*, in Debt upon an Obligation, and in the *Count it was Abbot of D. and J. S. Clerk was omitted*, and it was amended becauſe it was in one and the ſame Term. Br. Amendment, pl. 112. cites 4 E. 4. 25.

20. In *Præcipe* quod reddat, if the *Sheriff delivers the Writ in Court without Indorſement*, it may be *amended before Proceſs awarded* upon it; Per Genney. But per Moyle, This is *Ex Gratia Curiæ*. But Genney ſaid *not after Grand Cape awarded*, and Judgment given, for this iſſued upon Writ ill returned; but per Choke, that which is once miſtaken is always miſtaken; quod Danby conceſſit; and yet per Littleton, we may amend ſeveral Things before Judgment, which cannot be amended after; for then the Party ſhall loſe the Advantage. Br. Amendment, pl. 47. cites 9 E. 4. 14.

21. *Bill* was ſent into Chancery *upon an Obligation* againſt J. N. and the Intent of the Plaintiff was to have it in London, and this Word (London) nor *no* other *County was put in the Teſte nor Margin of the Bill*, as it ought to be in every Bill of Indictment. And they were at Iſſue in Chancery, and Venire Facias awarded in B. R. who tried it, and paſſed for the Plaintiff. And Exception was taken in Arreſt of Judgment, and it *was amended* per Cur. *after Verdict*, quod nota, *and in another Court*, and yet this ought to have been of the *Information of the Party*, and then it is not properly Miſpriſion of the Clerk. Br. Amendment, pl. 88. cites 2 R. 3. 12.

22. Where a *Thing uſual* is *omitted*, as the *Defence* or *Averment Et hoc paratus eſt* &c. and the like, this cannot be amended. Br. Amendment, pl. 113. cites 1 H. 7. 23.

Br. Retorn de Brief, pl. 9. cites S. C.

23. It was held that, if the Sheriff *returns upon a Capias againſt J. and N. quod virtute brevis mihi directi Cepi Corpus J. and N.* and does *not ſay*, *Infranominat'*, this is Miſpriſion, and ſhall be amended, but by the Reporter it is good without Amendment. Br. Amendment, pl. 64. cites 12 H. 7. 19.

24. *Debt upon a Recovery* of Damages *in Aſſiſe*, the *Teſte of the Writ upon Aſſiſe was not expreſs'd*. And per Cur. this may be amended. Br. Amendment, pl. 114. cites 13 H. 7. 21.

25. In a *Quare Impedit* againſt the Biſhop of Lincoln, the Writ *was ſuam ſpectat Donationem*, the Word (*ad*) being omitted; it was held by the whole Court to be amendable. Golds. 78. pl. 12. Hill. 30 Eliz. Brookesby v. Biſhop of Lincoln.

Noy. 57. S.C. the Objection was not allow'd. ——Ow. 59. S. C. but S. P. does not appear.

26. *Venire Facias* was, Et *habeas ibi Nomina*, but *left out (Juratorum.)* This is only the Miſpriſion of the Clerk, and was awarded to be amended, and Judgment affirm'd. Cro. E. 467. (bis) Paſch. 38 Eliz. B. R. Willoughby v. Gray.

——Mo. 465. pl. 657. S. C. but S. P does not appear as a Point in that Caſe but cites it there as a Point in the Caſe of Biſſey v. Hungerford, and that it was good after Verdict and amendable, becauſe it cannot be intended of other Names than the Names of the Jurors.——So where the Venire Facias wanted the Words (Et habeas ibi nomina Juratorum) but the Words Venire Facias duodecim &c. were inſerted, all the Juſtices ſeem'd that it was good, and that the firſt Words are ſupplied in the laſt, and are aided by the Statute of Jeofails after Verdict. 2 Brownl. 167. Paſch. 10 Jac. C. B. Barde v. Stubbing.

27. An *Original Writ* was *return'd* by the *Sheriff* and *his Chriſtian Name omitted*; the Court would not allow it to be amended. Golds. 113. pl. 3. 39 & 40 Eliz. Broughton v. Flood

28. If

28. A Record of Nifi Prius in an Action of *Debt upon an Obligation*, with Condition to pay ſuch a Sum at ſuch a Feaſt next after the Date of the Obligation, the Day of the *Date was omitted in the Record of the Niſi Prius*, ſo that it doth not appear which ſhall be the next Feaſt, at which the Money ought to be paid after the Date; and by all the Juſtices, it was *no perfect Iſſue*, and for that the Juſtices of Niſi Prius have no Power to proceed upon it, and it ſhall not be amended, otherwiſe if it had been a good Iſſue, tho' another Thing had been miſtaken. 2 Brownl. 47. Hill. 8 Jac. Anon.

29. The Clerk that enter'd the Cauſe had *omitted the Charge, which was* 400 *l.* and it was omitted *in the Roll and Niſi Prius.* After Verdict Exception was taken and amended by the Court. Brownl. 26. the Earl of Cumberland v. Hilton.

30. It was aſſign'd for Error that there was Variance between the Bill filed and the Declaration; the *Declaration* was, *that J. S. after the Death of Tenant pour auter vie primo intravit, and ſo was occupant*, and *in the Bill filed*, the Words *(primo intravit) were omitted*; but becauſe the *Paper-Book*, by which the Bill was ingroſs'd, *had thoſe Words* in it, therefore ruled it ſhould be amended. Cro. J. 393. pl. 4. Hill. 12 Jac. B. R. Chamberlaine v. Ewer. 2 Bulſt. 339. Ewer v. Chamberlaine S. C. ruled accordingly, and Coke Ch. J. cited 10 H. 7. S. P.

31. In *Debt in* a Court of *Piepowders*, the Words (Secundum Conſuetudinem Civitatis illius) were in the Imparlance Roll but omitted in the Iſſue Roll; the Court held this to be only Vitium Clerici, and therefore amendable. Cro. C. 45. 46. pl. 5. Mich. 2 Car. C. B. Hodges v. Moyles.

32. In a Formedon in the Deſcender, the Plaintiff was admitted before one of the Juſtices of C. B. to proſecute in Omnibus Actionibus, which was enter'd in the *Plea Roll* thus, *Conceſſum eſt per Curiam, that the Plaintiff by J. S. his Guardian ſhould proſecute* &c. and the *Philizer's Roll was, that J. N. by J. S. his Guardian ad hoc admiſſus per Cur. obtulit ſe quarto die* &c. But there was *no Entry in the Philizer's Roll as uſual, Quod conceſſum eſt per Cur. quod petens ſequatur per J. S. his Guardian*; Whereupon Error was brought. It was the Opinion of the Court, that notwithſtanding Error was brought, yet it might be amended, becauſe it appears the Juſtices admitted the Guardian Ad proſequendum, and the Philizer's Roll is Obtulit ſe, ſo the Admiſſion appearing to be before the Obtulit ſe, it was the Omiſſion of the Clerk rather than the Act of the Court, wherefore it was amended. Cro. C. 86. pl. 1. Mich. 3 Car. C. B. Young v. Young. Het. 52. Young's Caſe S. C. and the Court agreed that it ſhould be amended. —Jo. 177. pl. 1. S. C. but S. P. does not appear.——Hutt 92. S. C. reſolv'd that it ſhould be enter'd on the Philizer's Roll,

becauſe this Admittance by his Guardian is the Act of the Court and not like the Entry of the Warrant of Attorney &c.——Palm. 518. S. C. but S. P. does not appear.——Litt. Rep. 60. S. C. & S. P. agreed that it be amended.

33. An *Elegit* iſſued after Judgment, and *recited the Judgment Quod Elegit Executionem of the Goods, and of the Moiety of the Land*; and the Writ was, *Tibi præcipimus quod Bona & Catalla, of the Defendant quæ habuit die Judicii prædicti reddita deliberari facias*, omitting theſe Words, (*Et Medietatem terrarum* & tenementorum) *tenendum the ſaid Goods and the Moiety of the ſaid Lands*, quouſque debitum levetur; the Sheriff extended the Moiety of the Lands and the Goods, and deliver'd the Moiety of the Lands, and return'd the Inquiſition. It was moved that this was only the Miſpriſion of the Clerk; but reſolved it could not be amended, but the Plaintiff might have a new Elegit, becauſe the Inquiſition was taken without Warrant. Cro. C. 162. pl. 4. Mich. 5 Car. B. K. Walker v. Riches.

34. A *Scire Facias againſt the Bail* was *Quare Executionem*, but *(habere non debet) was left out*; it was pray'd that this being a Judicial Writ 3 Keb. 190. pl. 36. Manuel v. Cole.

Ioe, Trin. 25 Car. 2. B. R. the S. C. and continue.

might be amended if it were right upon the File; whereupon a Search was order'd. Freem. Rep. 138. Trin. 1673. Menate v. Coltlo.

the Court held that if the Writ be ſo it is not amendable, but the Plaintiff muſt diſ-

35. *Writ of Enquiry* was awarded, and in entring it on the Roll, the Words *per Sacramentum duodecim proborum & legalium hominum, were left out*; per Cur. this is amendable, for it is only a Miſentry of the Clerk. 3 Mod. 112. Trin. 2 Jac. 2. B. R. Anon.

36. Covenant that he had not made done or ſuffer'd any Act or Thing to incumber &c. the Breach aſſign'd was, that the Defendant Ad Seſſionem Ceſtriæ tent' &c. Anno 4to Jac. 2. utlagat' fuit; upon Demurrer, the Declaration being held naught for Uncertainty in what Term the Outlary was, it was moved to amend it; but per Holt Ch. J. diſallow'd. For to amend upon Demurrer when this may be the Cauſe of the Demurrer, would be to enſnare the Defendant without Cauſe. 1 Salk. 50. pl. 11. Paſch. 13 W. 3. B. R. Cox v. Wilbraham.

(P. a) Diſcontinuance or Miſcontinuance of Proceſs, amended.

For *where Judgment is given which makes an End of the Plea or Proceſs*, there if it be erroneous *it cannot be amended.* Ibid.——*Contra where the Proceſs ſtill depends*, as here, there *they ſhall commence where the Proceſs iſſued firſt out of Courſe*, and ſhall commence there again; Quod nota. Ibid.

1. IN *Ejectione Cuſtodiæ, Proceſs continued till Exigent was awarded*, by which the *Defendant alleged Diſcontinuance of Proceſs*, becauſe the *Proceſs in this Action is Summons, Attachment, and Diſtreſs*, and not Proceſs of Outlawry; and per Finch and Wichem, it ſhall be amended where the Proceſs iſſues firſt out of Courſe. Br. Amendment, pl. 16. cites 40 E. 3. 15.

2. In *Præcipe* quod reddat *againſt* 4, *one made Default*, and *the other* 3 *appeared and demanded the View*, which was granted, and Day given over; at which Day *he who made Default appear'd*, and the *Demandant releaſed the Default*, and he demanded the View, and it was granted, and the others were eſſoign'd, and Day given over till now, and now the Tenant pray'd that the Proceſs be diſcontinued; and hence it ſeems that *againſt him, who firſt made Default, no Proceſs was made, nor Day given*; and the Opinion of the whole Court was that it ſhall be amended, becauſe *the Proceſs depends yet*, and is not determined; quod mirum, that Diſcontinuance ſhall be amended, but Miſcontinuance is often amended. Br. Amendment, pl. 17. cites 40 E. 3. 20.

Br. Diſcontinuance, pl. 47. cites S. C.

3. In Venire Facias in Debt a *Juror was named W. B.* and the *Habeas Corpora was J. B.* and the Sheriff diſtrain'd W. B. and the Opinion was, that the Proceſs againſt the Jury was diſcontinued, and could not be amended; contrary of *Miſcontinuance*. Note the Difference. Br. Amendment, pl 92. cites 27 H. 6. 5.

Yelv. 156. The Court upon citing this Caſe ſaid it ſhould be intended that there was ſome Remembrance in ſome By-Roll, by which the Court was inſtructed that the Feme alſo appeared, tho' it was not enter'd in the principal Roll.

4. A *Writ* was brought *by Baron and Feme*, and the Parties appeared, and had Day till another Term; but *no Appearance was had of the Feme, nor any Day given her by the Roll*; and yet inaſmuch as it appeared to be the Default of the Clerk, it was amended. Yelv. 156. in Caſe of Paſton v. Luther, cites 26 H. 6. Amendment 33.

5. *Treſ-*

5. *Treſpaſs* by A. *againſt* 2, they were at Iſſue and found for the Plaintiff, and it was alleged in Arreſt of Judgment that the *Proceſs was continued in the Roll by Day given to one only.* And by all the Juſtices it ſhall be amended, for it was the Miſpriſion of the Clerk; for it cannot be intended that the Court will give Day to the one and not to the other. Br. Amendment, pl. 76. cites 22 E. 4. 3.

S. P. So in Treſpaſs againſt 6, and the meſne Proceſs is continued againſt 5 only, it may be amended; for it is *Miſpriſio Clerici.* Br. Diſcontinuance of Proceſs, pl. 38. cites S. C.

6. *Contrary where no Day is given to either of them.* Br. Amendment, pl. 76. cites 22 E. 4. 3.

Br. Diſcontinuance de Proceſs, pl. 38. cites S. C. accordingly.

7. *Treſpaſs* was brought *by* 6, and *all the Proceſs after the Original was to the Damage of* 5, and not of 6, and they were at Iſſue and found for the Plaintiff, and this alleged in Arreſt of Judgment, and it was amended. Br. Amendment, pl. 76. cites 22 E. 4. 3.

Br. Diſcontinuance de Proceſs, pl. 38. cites S. C.

8. *Day was given* by the Court to the Parties *to another Time, which ought not to be*; and it was adjudged that it ſhall be amended. But per Fairfax, if *Plea* be *miſcontinued, and Judgment given upon Default upon this Proceſs*, this is Error, and ſhall not be amended; *but* if Judgment be given *upon other Matter*, it ſhall be amended, *viz. the Miſcontinuance*, and ſhall not be Error. Br. Amendment, pl. 60. cites 2 H. 7. 11.

9. Note per Vaviſor J. if *Proceſs* be *diſcontinued in Aſſiſe*, it may *be continued well enough by Conſent of the Parties*, and may be amended. Br. Diſcontinuance de Proceſs, pl. 24. cites 21 H. 7. 40.

10. If a *Continuance is to be given to* 2, and it *is given to one only*, that is a Miſpriſion of the Clerk, and ſhall be amended, and cites 22 E. 4. 3. Cro. E. 619. pl. 6. Mich. 40 & 41 Eliz. B. R.

11. *But* where *no Continuance* is given *to the Party* at all, *but to a Stranger*, it is the Act of the Court, and not amendable; As where W. brought Action on the Statute of Hue and Cry, which ſuppoſed that A. his Servant was robb'd, and the Defendant imparl'd, Et idem Dies datus eſt prædicto A. inſtead of eidem W. and held not amendable; per tot. Cur. præter Gawdy, and ſo Judgment reverſed. Cro. E. 618. 619. pl. 6. Mich. 41 & 42 Eliz. B. R. Walford v. the Hundred of Beners.

12. If a Man *voluntarily diſcontinues* Proceſs, and afterwards purchaſes a Ven. Fa. and tries the Action, this voluntary Diſcontinuance is not aided by the Statute; per Popham. Mo. 403. Paſch. 37 Eliz. in pl. 535.

13. *Three Executors recover'd* in C. B. in Debt by Default. The Defendant brought Error, and aſſign'd a *Diſcontinuance*, viz. That the Suit being by 3 Executors, and *at the Day*, which they had *by the Roll* upon a Continuance, 2 *only appear'd*; and by the ſame Roll Day was given to all 3 upon another Roll. Per tot. Cur. This is a Diſcontinuance, and cannot be amended; for Credit ought to be given to the Roll, and therefore Non conſtat that more than 2 appear'd, and that the 3d made Default, which is a Non Proſecution of the Defendant at that Day, and ſhall go to all 3 afterwards, and Judgment was reverſed. Yelv. 155. Trin. 7 Jac. B. R. Paſton v. Luther.

14. In *Debt for Rent for* 7 *Years*, reſerved *by Leaſe* made *in London of Lands in Norfolk*, the Defendant *as to two Years pleaded Non detinet*, and Iſſue thereupon; and *as to the Reſidue, pleaded that the Plaintiff's Teſtator enter'd into Parcel* of the Land demiſed, and Iſſue thereupon. The *firſt Iſſue was tried in* Trin. Term in *London*, and the *2d Iſſue at Norfolk Aſſiſes afterwards*; but *no Continuance made by Curia adviſare vult, from the Day of the Return of the Diſtringas in London to the Day of the Return of the Diſtringas in Norfolk, nor any Entry of the Judgment reſpited Quouſque.*

The

The 2d Iſſue was tried as it ought to be in this Caſe. The Want of this Continuance was aſſign'd for Error; but all the Juſtices and Barons held that it is aided by the Statute of Jeofails as well after Verdict as before, and as well where there are 2 Verdicts as where there is but one. Cro. J. 528. pl. 8. Paſch. 16 Jac. Smith v. Bower.

14. Motion to amend a *Record* after it was *removed by* Writ of *Error into the Exchequer-Chamber*, becauſe therein was a *Day given* over to the Parties *from Eaſter* Term *to Michaelmas Term, Trinity being omitted.* By Roll Ch. J. This is not a Miſcontinuance, but a Diſcontinuance, and cannot be amended. Sty. 339. Trin. 1652. Friend v. Baker.

Skin. 46. pl. 18. S. C. ſays that Pemberton Ch. Juſt. thought it amendable, and only the Default of the Clerk; but that Jones and Dolben took it to be the Award of the Court, and ſays it was held by the greater Opinion, that this was not amendable by the Clerk without Order of the Court; but if done by him, (if according to Law) they could not alter it, but they could puniſh him.

15. *Judgment* was had *on a Bond 25 Years ſince*, and *in one of the Continuances* from one Term to another there *was a Blank.* The Executors of the Defendant now brought a Writ of Error, and the Plaintiff in the Action got a Rule to amend and inſert the Continuance upon Suggeſtion that it was a Judgment of a few Terms and ſo aided by the Statute of 16 and 17 Car. 2. cap. 8. Thereupon the Plaintiff fills up the Blank, and the Record ſo fill'd up was certified into the Exchequer-Chamber. The Ch. Juſt. held this not a Diſcontinuance but *an inſufficient Continuance*, and only an Omiſſion of the Clerk, and if he had himſelf fill'd up this Blank without Rule, it could not afterwards be ſet aſide; But Jones J. held it a Miſpriſion of the Clerk and not amendable by the Stat. H. 6. ſince it was not in the ſame Term, and all the Proceedings being in the Breaſt of the Court, during the Term only, it ought to be left blank as it was; And tho' the Writ of Error be return'd into the Exchequer, that makes no Alteration, the Record itſelf ſtill remaining here, and it is only a Tranſcript that is removed thither. Adjornatur. 2 Mod. 316. Trin. 34 Car. 2. B. R. Birch v. Lingen.

17. *Scire Facias on a Judgment bore Teſte 25 Aprilis 6 W. & M. returnable in Trin. Term 6 W.* 3. but the *Entry on the Record was Trin 7 W.* 3. and *no Continuance from Trin. 6. to Trin. 7 W.* 3. The Defendant pleaded a frivolous Plea, to which the Plaintiff demurr'd; it was objected, that the Cauſe was out of Court for want of theſe Continuances, ſo that he could never have Judgment; but adjudg'd, that the Plea Roll is amendable without Aid of the Imparlance Roll, becauſe Continuances, Eſſoigns &c. are the Acts of the Court, and at Common Law they might amend their own Acts at any Time before Judgment, tho' in another Term, but their Judgments were only amendable in the ſame Term at Common Law, whereupon the Plea Roll was amended thus, Memorand' quod alias ſcil' Term. Sanctæ Trin. Anno Sexto &c. and ſo the Continuances enter'd down to Trin. 7. and Judgment for the Plaintiff. 3 Lev. 431. Mich. 7 W. 3. C. B. Chambers v. Moor.

Comyns's Rep. 279. 285. Paſch. 4 Geo. 1. S. C. ſays, that after Conſideration the Court was of Opinion that it might be amended,

18. After Judgment in B. R. and a Writ of *Error brought*, returnable *in the Exchequer Chamber, and Error aſſigned* there, this Court was moved for Leave to continue the Bill, and after Deliberation Pratt Ch. J. deliver'd the Opinion of the Court that the Continuances might be entered, becauſe the Stat. 9 H. 5. cap. 4. allows Amendments for Judgment, and upon Enquiry it was found to be the conſtant Practice of the Court of C. B. and alſo of this Court, and that if *Continuances* were not *allow'd to be enter'd after Judgment*, moſt of the Judgments of this Court might be revers'd. MS. Rep. Mich. 5 Geo. B. R. Phillips v. Smith.

for it appears that Continuances may be enter'd at any time before Judgment, and if they are omitted it is the Fault of the Clerk, which ſhall be amended before Judgment by the Common Law, and cites 3 Lev. 431. and every thing which was amendable before the Judgment by the Common Law, may be amended after Judgment by the Statute of Jeofails, and Pratt Ch. J. ſaid, that they had inquired into the Courſe of C. B. and were inform'd that after Judgment they were enter'd of Courſe by the Clerk, unleſs

unleſs reſtrained by Rule of Court, ſo they are always amendable of Courſe in B. R. and there ſeems to be a Difference where there is a Miſ-entry of a Continuance, and where the Entry is omitted.

19. Motion was made to *amend the Continuance* on the Roll, *by ſtriking out a general Return, and making it a Day certain*; the Action being at the Suit of an Attorney, the Court at firſt made ſome Difficulty in granting the Rule for an Amendment, it being *after Judgment upon a Demurrer*; but upon Conſideration, Continuances being merely the Acts of the Court, the Amendment was order'd. Barnes's Notes of C. B. 4. Hill. 6 Geo. 2. Cooper an Attorney v. Younges.

20. Continuances could be amended at Common Law, as A. brought a Bill againſt B. who vouches C. who enters into Warranty, and pleads to Iſſue; there was a Ven. Fac. and a Jurat' inter A. and B. which Jurat' ought to have been inter A. and C. becauſe it appears by the Record of the Iſſue, and the Award of the Ven. Fac. and the Venire itſelf, that the Jurat' ought to be between A. and C. this is amendable, becauſe it was an Inrollment againſt a former Record. G. Hiſt. of C. B. 87, 88.

(Q. a) Surpluſage in Writs &c. amended.

1. *Recognizance of* 100 *Marks*, and the *Writ of Execution upon it was* 100 *l.* and it was amended, but Quære what Remedy, if Execution had been made by the Sheriff. Br. Amendment; pl. 97. cites 44 E. 3. 11.

Br. Execution, pl. 20. cites S. C. —— Br. Elegit, pl. 2. cites S. C.

—— Fitzh. Execution pl. 35. cites S. C. accordingly, by Thorp, and the ſame Quære by him.

2. *Original was M. of T.* and the *meſne Proceſs was M. T.* and (of) was omitted, and ſhall be amended, by the Opinion of the Court; for the Statute is where * Word, Syllable, or Letter is too much or too little in Default of the Clerk that it ſhall be amended. Br. Amendment, pl. 102. cites 11 H. 4. 70.

Ana the *Protection had the ſame Fault* in it, and was not amended, becauſe *it was not made in this Court.* Br. Amendment, pl. 102. cites 11 H. 4. 7. —— Br. Variance, pl. 33. cites S. C. —— Br. Miſnoſmer, pl. 72. cites S. C.

* (Word) is not in the printed Statute.

3. *Treſpaſs upon the Statute* 5 *R.* 2. ubi Ingreſſus non datur per Legem, and *was Vi & Armis*, and becauſe it is not the Courſe of the Writ to ſay Vi & Armis, therefore per tot. Cur. the Writ ſhall abate, and cannot be amended. Br. Amendment, pl. 11. cites 34 H. 6. 26.

4. *Debt againſt N. Wickes late of Briſtol* &c. The *Defendant ſaid, that the Day of the Writ purchaſed he was abiding at D. abſque hoc that he was ever abiding at the aforeſaid Vill of Briſtol*, and it was found for the Defendant, and they were compell'd to replead, becauſe the Writ was *Briſtol*, and not *Vill of Briſtol*, and by reaſon of this Word of Surpluſage (Vill) they repeaded; Quod Nota. Br. Repleader, pl. 6. cites 34 H. 6. 19.

5. Priſot cauſed him who ſued *Writ of Error returnable* 15 *Hill'* to make it *moreſhort*, viz. Quindena Martini, *becauſe the Plaintiff who recovered ſhould not be long delay'd*; Quod Nota in C. B. viz. another Court. Br. Amendment, pl. 13. cites 35 H. 6. 13.

Br. Error, pl. 21. cites 35 H. 6. 12. 13.

So where one recovers against J. S. and after J. S. and T. N. brings Writ of Error

6. *J. S. recover'd*, and after *J. S. and T. N. brought Scire Facias to execute the ſame Recovery*, and it was amended per Judicium. Br. Amendment, pl. 77. cites 22 E. 4. 6.

; Quod Nota. Br. Amendment, pl 77. cites 22 E. 4. 6.

7. *Debt* was brought *in the Debet & Detinet*, and after the Plaintiff counted *of a Debt due to him as Executor to J. S.* and therefore it ought to be Detinet only without Debet, and the Writ was abated, and not amended per Judicium. Br. Amendment, pl. 78. cites 22 E. 4. 20.

For it was agreed, that *where one in the Commencement of a Plea* or Title *intitles himſelf by N T.*

8. Error, becauſe in *Aſſiſe* the *Tenant intitled himſelf to the Moiety by the dying ſeiſed of Robert his Father, and to the other Moiety by Gift in Tail to Rauſe his Father, whoſe Heir* &c. and it was aſſigned for Error, that he had 2 Names, [*Robert and Rauſe*] and by the beſt Opinion it ſhall be amended, quod Fineux conceſſit. Br. Amendment, pl. 43. cites 14 H. 7. 11.

his Father, *and after in the ſame Plea ſays Prædictus J. T.* &c. this ſhall be amended, becauſe it appears in the Commencement what his Name was. Br. Amendment, pl. 43. cites 14 H. 7. 11.

So where it is *in ſeveral Pleas*, quære. Ibid.

9. *Scire Facias upon a Recognizance* to ſhew Cauſe *quare the Plaintiff ſhould not have Execution de prædict' mille Libris Recognitis juxta Formam Recuperationis, inſtead of Recognitionis præd'*; and it was held on Demurrer, that the Words (juxta Formam Recuperationis) was Surpluſage, and the Record was amended. 3 Mod. 251. Mich. 4 Jac. B. R. Ayres v. Huntington.

See (B) pl. 13. 15. 16. 19. 28. 30. 35. 36. (E) 11. (O. a) 5.

(R. a) What ſhall be ſaid to be the Default of the Clerk, Sheriff &c.

1. IF *Treſpaſs* be brought *of breaking his Cloſe, trampling his Graſs, and carrying away his Goods*, and *in the Count the carrying away of the Goods is left out*, the Count ſhall not be amended; for *this is not properly the Miſpriſion of the Clerk*, and therefore ſhall not be amended in another Term; for the Plaintiff may count as he will at his Peril, and if it be ill it ſhall not be amended; contrary it may be ex gratia Curiæ *in the ſame Term*; Note the Diverſity, and this before that the Court records it. Br. Amendment, pl. 41. cites 22 H. 6. 58.

* Br Amendment, pl. 103. cites S. C. for *it is a Matter of Subſtance.*

2. In *Debt* the *Defendant pleaded Releaſe and ſo to Iſſue*, and *did not ſay, Et hoc paratus eſt verificare*, as he ought to have ſaid upon Plea in the Affirmative, as here, and the Defendant pray'd that it be amended, and it was * not; for this is the Default of the Party or his Counſel, and not of the Clerk, and therefore it is not warranted by the Statute. Br. Amendment, pl. 7. cites 27 H. 6. 10.

Otherwiſe it ſeems *where it is caſt after Iſſue join'd*, or the

3. *Eſſoign* was *Michel* where the Writ was *Michyel*, and it was not amended, for this is not Miſpriſion of the Clerk; for this ſhall be caſt *before the Writ comes in.* Br. Amendment, pl. 86. cites 30 H. 6. 1.

Court is ſeiſed of a Record. Ibid.— Br. Eſſoign, pl. 143. cites S. C.

4. *Petition* was ſued *in the Name of Abbot and Covent*, which is in Lieu of Action, And no Action can be ſued in the Name of the Covent. And it

it was held not Miſpriſion of the Clerk, and that it ſhall not be amended. Br. Amendment, pl. 65. cites L. 5 E. 4. 38.

5. *At Iſſue, Venire* Facias *iſſued, and* after Sicut *alias & Pluries*, and *where it ſhould be Quod præceptum eſt Vic' quod Venire Facias ſicut alias duodecim* &c. *at ſuch a Day ad Recogn.* &c. quia ram &c. it was *præceptum eſt Vic' ſicut alias quod Capiantur* &c. *ad Recogn.* &c. And it was amended, for it is only Miſpriſion of the Clerk. Br. Amendment, pl. 66. cites 5 E. 4. 140.

6. In *Annuity*, the *Writ* was Præcipe quod reddat 10 *l.* 6 *s.* 8 *d.* and the *Count was* 10 *l.* only, and the 6 *s.* 8 *d. omitted*, and the Plaintiff recover'd, and it was reverſed, becauſe it is not warranted by the Writ, and was not a Miſtake; for the Count is by the Party and not by the Clerk, and therefore the Judgment was reverſed; quod nota. Br. Amendment, pl. 49. cites 9 E. 4. 51. Br. Annuity, pl. 24. cites S. C.

7. *Aſſiſe by J. S. and W. N.* the *Defendant pleaded that T. N. died after the laſt Continuance* where it *ſhould be W. N.* And the beſt Opinion was that it ſhall not be amended; for the Statute was made in Favour of Clerks and Officers, ſo that Miſpriſion of the Clerk ſhall be amended; but e contra of *Plea of the Party*, for this is done by himſelf or his Counſellor, and is no Default of the Clerk. Br. Amendment, pl. 74. cites 18 E. 4. 13 & 20 E. 4. 6.

8. A Man in Aſſiſe made Bar and gave Colour that J. S. enter'd, upon whom the *Plaintiff enter'd* &c. where it *ſhould be that the Defendant enter'd*, and adjudg'd Miſpriſion, and was amended per Judicium. Br. Amendment, pl 113. cites 11 H. 7. 26.

9. In *Debt upon a Recovery* had *in Aſſiſe*, the *Date of the Writ of Aſſiſe was not put in the Writ*, and it was held that it ſhould be amended; for the Clerk had the Record for his Inſtruction. Thel. Dig. 225. lib. 16. cap. 6. S. 26. cites Paſch. 13 H. 7. 21. but adds, quære what Manner of Writ of Debt this was.

10. *Annuity granted by the Maſter and Confreres*, the *Writ was againſt Maſter only*, and becauſe the Clerk of the Chancery had the Deed of Annuity in his Hands, therefore by the beſt Opinion it ſhall be amended; quod nota. Br. Amendment, pl. 44. cites 14 A. 7. 13. Thel. Dig. 225. lib. 16. cap. 6. S. 27. cites S. C. ſays it was held by the greater Opinion of the Court, and by Brian that the Writ ſhould be amended; but adds Quære.

11. *Exigent* was return'd *that one County was held at Oxon*, and *did not ſhew in what County Oxon was*, nor where the other Counties were held &c. And per Tremail, the Outlawry is good. And per Cur. ſuch Default at the Exigent, nor after, ſhall not be ſaid Miſpriſion, and therefore ſhall not be amended. Br. Amendment, pl. 54. cites 21 H. 7. 34.

12. *Debt* againſt an Heir *upon a Bond* of his Father, the Plaintiff in ſetting forth the Bond in his *Declaration* had *omitted* theſe Words, *Et ad eandem Solutionem obligo me et Hæredes meos*; this being moved in Arreſt of Judgment, it was held by Croke and Whitlock J. againſt Jones, that it was amendable, it being merely the Default of the Clerk who had the Obligation before him, and Inſtructions, as he confeſſed, to draw it againſt the Defendant as Heir. Hide Ch. J. inclined likewiſe to this Opinion, but it was appointed to be amended by Conſent. Cro. C. 147. pl. 2. Hill. 4 Car. B. R. Forger v. Sales. Jo. 199. pl. 14. S. C. ſays that Hide Ch. J. at the firſt was of Opinion with Whitlock and Crooke, that it ſhould be amended, but that afterwards he doubted; but it was amended by Conſent. ——— Win. 20. Trin. 19 Jac. C. B. Anon. S. P. exactly, and ſeems to be S. C. and Hobart and Winch ſaid, it ſhould not be amended, for it is Matter of Subſtance, but becauſe the Clerk that made this Miſpriſion was a good Clerk, Day was given over &c.

(S. a) Raſed

See (F) pl. 22. and the Notes there.

(S. a) Raſed, Obliterated &c. Records, amended.

The Reporter adds a Nota, that all the Parchment remain'd intire and not diminiſh'd; for if ſo, then it had been otherwiſe, as was before held in Sir John Throgmorton's Caſe.

1. *Original Writ* whereupon a common Recovery of ſeveral Manors, *by Caſualty of Water and other ill keeping was ſo defaced that ſome Words could not be read* at all, and only Part of others, and which was in *the Names of the Manors*, but in the Roll and *in the Habere Facias Seiſinam the Manors and all Particulars appear'd certainly*; It was held that the Original Writ is amendable by the Stat. 8 H. 6. And. 79. 80. pl. 67. Trin. 24 Eliz. the * Earl of Arundel v. Ld. Lumly.

* S. C. cited 8 Rep. 160. a. to have been adjudged by all the Judges of England, Una Voce, and the rather becauſe it was a common Recovery.

2. If the Original or other Part of the Record be ſtole, taken away, withdrawn or avoided by any Clerk, tho' this be Felony per 8 H. 6. cap. 12. yet this may be ſupplied, and amended by the other Parts of the Record; but if ſuch Part ſtole &c. or obliterated cannot be ſupplied by the Record, nor by any Exemplification made of the Record, then it cannot be amended. 8 Rep. 160. a. b. cites it as reſolved by all the Judges of England Trin. 24 Eliz. in the Caſe of the Earl of Arundel v. Lord Lumly.

3. By Accident ſome *Ink had fallen on a Roll* remaining *in the Treaſury*, and on Motion to amend the ſame, the Clerk, Under-Clerks, and Treaſury Keeper were examined, and it appearing to be a mere Accident the Court order'd the Roll in the Treaſury to be *amended by the Niſi Prius Roll and Poſtea.* Rep. of Pract. in C. B. 3. Hill. 10 Ann. Thornhill v. Lomax.

(T. a) Defects in *Indictments and* Criminal Caſes, *or other Caſes where the King is Party*, amended.

Note it was agreed by the learned Counſel of the King, that the *King may amend his Declaration in another Term in Omiſſion* &c. *but he cannot alter the Matter and change it wholly. As* where *Information miſ recites the Statute* it may be amended, becauſe Miſ-recital is the Cauſe of Demurrer; for if it be miſ-recited then there is no ſuch Statute. Br. Amendment, pl. 80. cites 30 H. 8.

1. MIſrecital of a Statute *in Matter, or* in *Year, Day, or Place*, may be amended in the Caſe of the King, and this in another Term; contra of a common Perſon, for every one that meddles with it ought to ſhew the Law truly. Br. Parliament, pl. 87. cites 33 H. 8.

H. was indicted and found guilty of a *Miſdemeanor in altering an Aſſeſſment*, which he with the other Commiſſioners ſign'd in Purſuance of the *Land-Tax Act*, which was enacted at a Seſſions of Parliament held in Nov. 4 Ann. Exception was taken that in the Indictment the Act was not well ſet forth; for tho' the *Writs* of Parliament were *returnable the 14th of June*, the Time mention'd in the Indictment, and right according to the printed Book, yet being *prorogued till October*, the Seſſions did not commence till then, whereupon the Indictment was quaſhed. 11 Mod. 113. Paſch. 6 Annæ B. R. the Queen v. Hickeringill.

2. T. was indicted upon the Statute of 8 H. 6. in this Manner, *Inquiſitio capt. apud Surflet coram A. & B. Juſtic. Pacis &c. in partibus prædict.* per Sacramentum &c. Exception was taken becauſe it did *not appear that Surflet, where the Inquiſition was taken, was in partibus Hollandiæ*, and if it

it was not, the Inquiſition was taken without Authority. For the County of Lincoln hath three Diviſions, and three ſeveral Commiſſions of Peace, ſo as the one hath not to do with the other, at length the Court agreed that the Indictment be diſcharged if the Record with the Clerk of the Peace was ſo; but if upon View of the Record they ſhould find it to be a Miſpriſion in the Certificate, then they ſhould cauſe it to be amended. Cro. J. 276. pl. 6. Paſch. 9 Jac. B. R. Thorney's Caſe.

3. *Two were indicted for Felony* in Caſe of Life, and found Guilty, and this was *in the ſingular Number*. By the Opinion of 8 or 9 Judges, the Indictment was held clearly good and well amendable, which was done, and the Criminals were afterwards hang'd for the Felony. Cited by Yelverton J. 2 Bulſt. 35. Mich. 10 Jac. as a Caſe that happened at the Aſſiſes before him about 2 Years before.

S. C. cited by Gould J. 2 Ld. Raym. Rep. 1061.

4. Dr. Alphonſo was committed by the College of Phyſicians for practiſing Phyſick &c. and upon *Habeas Corpus* the *Return was held inſufficient*, becauſe it did *not ſet forth the Cauſe of his Commitment in particular*, and the Court would not ſuffer them to amend the Return, but bail'd the Priſoner; the rather, becauſe if they diſcharged him he would be immediately committed again, and then they would amend the Return. 2 Bulſt. 259. Mich. 12 Jac. Dr. Alphonſo v. the College of Phyſicians.

Upon a *Habeas Corpus* to the Lieutenant of the Tower of London, he made an *Inſufficient Return*. The Court ordered that he ſhould amend his Return, or elſe they would grant an Alias with a Pain. Sty. 96. Paſch. 24 Car. B. R. Lilborn's Caſe.

5. D. was *indicted* at the Aſſiſes *for a Nuſance*, and traverſed the Indictment; but *in the joining of the Iſſue*, the Word *(Similiter)* after the Words *(Et do hoc ponit ſe ſuper Patriam & prædictus)* was *omitted*. All the Juſtices held that the Verdict having paſs'd for the King, the Clerk of Aſſiſe ſhould come into Court and amend it; for otherwiſe infinite Indictments ſhould be avoided by Negligence of the Clerk. 2 Roll Rep. 59. Hill. 16 Jac. B. R. Delbridge's Caſe.

6. In *Indictment for* erecting a *Nuſance*, the Defendant pleaded Not guilty, and found againſt him. The *Entry of the Iſſue of Not guilty*, which ſhould have been *by the Clerk of the Aſſiſes, who ought to have join'd the Iſſue*, *was omitted*, and ſo the Verdict was without an Iſſue. The Court held it was the Default of the Clerk, and ordered it ſhould be amended by the Clerk of the Aſſiſe that then was, tho' the Omiſſion of it was by another Clerk, who was removed. Cro. J. 502. pl. 12. Mich. 16 Jac. B. R. Harris's Caſe.

S. C. cited 2 Ld. Raym. Rep 1068. by Powel J. who ſaid the Reaſon of it was, becauſe it was look'd upon to be a Thing of Courſe; but he ſaid he cannot come up to it.

7. In a Quo Warranto a *Judgment of Diſclaimer virtute Literarum Patentium gerent. dat.* 17 *Jacobi*, *was enter'd by Conſent*; but becauſe the Words *(gerent. dat.* 17 *Jacobi) were written in the Margin of the Paper-Book*, and had a *Stroke drawn a-croſs* them, the *Clerk omitted them in engroſſing the Judgment*. It was moved to amend it by interlining theſe Words; but it was objected that it could not be amended, being in another Term, eſpecially in the King's Caſe, and that none of the Statutes of Amendment extend to Quo Warranto. But per tot. Cur. it is amendable at Common Law as well *in another Term* as the Term wherein enter'd, and as well *in the King's Caſe* as of a common Perſon, it being only the *Miſtake of the Clerk*. Cro. C. 144. pl. 22. Mich. 4 Car. Sir Humphry Tuſton and Sir John Aſhley's Caſe.

S. C. cited 2 Ld. Raym. Rep. 1069. —The Statutes of Jeofails do not extend to *Quo Warranto*, nor to *Informations of Intruſion*; for the King is not bound unleſs he is named; per 3 Juſtices.

But Noy ſaid that peradventure it ſhould be otherwiſe in Caſe of a *Quare Impedit*, where the Suit is betwixt the Party and the King. Cro. C. 311. 312. pl. 2. Trin. 9 Car. B. R. in Caſe of the King v. Sherington Talbot ——— Jo 320. pl 2. S. C. accordingly as to Quo Warranto ——— S. C cited, and ſaid

ſaid it ſeemed unreaſonable to hold, that the King was not bound by the Law by his not being named, becauſe it appears by the Exception that the Parliament intended that he had been bound, though not named; for otherwiſe there would have been no Occaſion for the Exception. 2 Lev. 139. Trin 27 Car. 2. B. R The King v Ld. Fitzwalter ——— 3 Keb 242. pl. 60. Mich 25 Car. 2. S C. but S. P. does not appear.—— S. C. cited G. Hiſt of C B. 93. and in the New Abr. 96. in the ſame Words.

See Stat. 9 Annæ, cap. 20. at (Q)

8. In an *Information againſt the Inhabitants of B. for not repairing a Bridge, two of the Defendants pleaded to Iſſue, and Verdict found for them.* It was moved that Mr. Attorney-General having *miſtaken the Name of one* of them in his Replication, the Record might be amended, and ſo the Judgment after not be erroneous; but the Court ſaid they did not ſee how it could be amended; for they conceived there was *no Iſſue joined.* Sty. 167. Mich. 1649. B. R.

9. A Motion was made that the Word *(Publicæ)* might be put into an Indictment, which was removed into B. R. by Certiorari; but per Cur. it could not be. Sty. 321. Hill. 1651. Anon.

10. A Solicitor was committed for *interlining the Poſtea of an Indictment*, by inſerting the Word *(Falſely.)* The Poſtea was ordered to be amended by the Paper-Book. Sty. 374. Trin. 1653. Kitchingman's Caſe.

It was ſaid that *Indictments remov'd out of London* have been amended by the Original; for they do not certify that, but only a Tranſcript; and a Jury have been reſummoned to amend an

11. The Defendant was *indicted for Barretry in Middleſex*, and *in the Return of the Certiorari 2 or 3 Lines of the Indictment were left out.* It was moved that the Clerk of the Peace of Middleſex might amend it by the Record, which he had brought into Court; but it was agreed that there is a *Diverſity* as to this Matter *between London and other Counties*; for an Indictment &c. certified out of London, may be amended upon Motion by the Original, becauſe *by their Charter they certify only Tenorem Recordi, ſo that the Record ſtill remains with them*; but it cannot be amended in any other County, becauſe the Law ſuppoſes the Record itſelf to be removed, and ſo there is nothing remaining for them to amend it by; but the Reporter makes a Quære. Sid. 155. pl. 5. Mich. 15 Car. 2. B. R. The King v. Alcock.

Indictment found in this Court, and in the principal Caſe where the Indictment was againſt (Edward) all along till the Concluſion, and then it was præd (Johannes,) if by Examination of the Clerk of the Peace it appear'd that the Indictment certified varied from the Original, it might be amended. Sed Curia adviſare vult. Vent. 13. Paſch. 21 Car. 2. B. R. in Caſe of the King v. Bromley.

12. It was agreed by all, that if an *Information* be put in againſt one *in the Crown-Office*, that Information *may be amended before the Party has pleaded*; for that Information is only a Declaration for the King; but otherwiſe it is of an Indictment, for that is found by a Jury, therefore cannot be amended; and accordingly this Term an Information againſt the Brewers of London was amended, they having not pleaded. And ſo it was agreed the Information againſt Sir Charles Sydley ſhould be amended, if the Attorney-General then thought fit. Copy of a MS. Rep. of Ld. Ch. J. Keyling. Mich. 15 Car. 2. Anon.

If an *Inquiſition of Murder* be *without* the Word (*Murdravit*) it may be amended; Per Twiſden J. but Keeling e contra.

13. An *Inquiſition found that G. feloniouſly drowned himſelf*, but did *not ſay that he caſt himſelf into the Water, nor that he died ſo.* It was moved that the Coroner ſhould attend to amend the Inquiſition. Per Cur. All *Matters of Form* may be amended in the Office by the Coroners, but not Matter of Subſtance; and at length it was agreed that this ſhall be amended; for the feloniouſly drowning himſelf is the Subſtance. Sid. 259. pl. 6. Trin. 17 Car. 2. B. R. The King v. Glover.

Sid. 259. Trin. 17 Car. 2. in pl. 6.

14. An *Information of Perjury* may be amended; per Cur. Lev. 189. Trin. 18 Car. 2. B. R. The King v. Goſſe.

15. Debt

15. Debt *Qui tam* &c. for 100 l. againſt a Juſtice of Peace, for refuſing to grant his Warrant to ſuppreſs a ſeditious Conventicle. *After Iſſue joined, and the Cauſe ſet down to be tried* at the Niſi Prius, the Plaintiff moved to amend a Word in his Declaration, which laid the Conventicle to be at the Defendant's Manſion-Houſe, when in Truth it was not, but was at a little Diſtance from it. But per Ch. J. *after Iſſue join'd* &c. *and* this being on a *penal Statute*, no Precedent can be ſhewn for an Amendment in ſuch Caſe. 2 Mod. 144. Hill. 28 & 29 Car. 2. C. B. Sir William Turner's Caſe. Freem. Rep. 221. pl. 228. S. C. accordingly per Cur. but that in Informations at Common Law, the Court may grant Amendment.

16. The *Caption of an Indictment* may be amended the *ſame Term* it comes into Court. Vent. 344. Mich. 31 Car. 2. B. R. in a Nota. Sid. 175. pl. 7. Hill. 15 & 16 Car. 2. B. R. The King v. Love, S. P. but not in another Term ——Saund. 249. Paſch. 21 Car. 2. B. R. Faulkner's Caſe, S. P. accordingly. ——North Ch. J. ſaid there could be no Amendment of an Indictment, becauſe it was found by the Oaths of 12 Men. Freem. Rep. 221. pl. 228. Hill. 1676. S. P. held accordingly, 2 Ld. Raym. Rep. 968. Trin. 2 Ann. Anon.

17. An *Information* was exhibited againſt the Defendant at Michaelmas Seſſions *for a Riot*, and the Fact laid to be in January following. It is not only amendable at Common Law, but by ſeveral Statutes, which extend to Miſpriſions of Clerks, except Treaſon, Felony, and Outlawry, and ſo the Miſtake, which was Quindenam Martini, was amended, and made Quindenam Hillarii. 3 Mod. 167. Hill. 3 Jac. 2. B. R. The King v. Hockenhul. Comb 73. The King v. Hocknall, S. C.

18. Tho' true it is that the Statute of 8 *H.* 6. *cap.* 12. *excepts Appeals, Indictments of Treaſon or Felony and Outlawries for the ſame*, and that the Stat. 32 *H.* 8. *aids only in Actions or Suits at Common Law*, and 18 *Eliz.* 14. *extends not to Actions or Informations on any popular or penal Statute*, and therefore every criminal Proſecution is out of the Statute of Jeofails; yet *Actions Remedial, tho' founded upon penal Statutes*, have been allow'd the Benefit of thoſe Statutes; and therefore in an Action Qui tam &c. upon 31 Eliz. *for ſelling Horſes in Smithfield not toll'd*, it was ſaid, that a Diſcontinuance ſhall be aided by 32 H. 8. 30. Arg. Comyns's Rep. 284. cites 3 Lev. 375. 3 Lev. 375. Mich. 5 W. & M. in C. B. S. P. accordingly, and therefore it is cur'd by the Verdict, Sedgwick Qui tam &c. v. Richardſon. ——*So* in an Action *Qui tam &c. upon the Statute of Uſury* it was allow'd by Holt Ch J. that the Information by the *Party grieved* ſhall be within thoſe Statutes, though *not Common Informations*, Arg Comyns's Rep. 284. cites 1 Salk. 324. [325. pl 2 Trin. 2 Ann. Wyat v. Aland.]——In an Action on a penal Statute the *Sum was miſtaken in the Declaration*, but Leave was given to amend it, the *Writ being general*. 12 Mod. 248 Mich. 10 W. 3 Broom v. Holford.——Holt Ch. J. ſeemed to hold, that an Information upon a Penal Statute *by a Common Informer* was not within the Statute of Jeofails, otherwiſe of an Information by the Party grieved. 1 Salk. 325 pl. 2. Trin. 2 Ann. in Caſe of Wyatt v. Aland.—— 2 Ld. Raym. Rep 977. Wyatt v. Eyland, S. C. in an Action on the Statute of Uſury the Memorandum was general of the firſt Day of the Term, but Bail was not put in till the Middle of the Term, and the Court gave Leave to the Plaintiff to enter up a ſpecial Memorandum, for the Defendant is not in Court till Bail fil'd, and this is only to make the Entry according to the Truth, which appears on Record, and the Court ſaid, it was an Amendment at the Common Law, and not on the Statutes.

19. The Defendant being *indicted for Murder, pleaded that he is Earl of Banbury* &c. the *Attorney General replied*, and then the *Defendant moved to amend his Plea*, and had Leave, (Holt doubting) becauſe *not enter'd on the Roll.* 1 Salk. 47. Trin. 6 W. 3. B. R. the King v. Knolles.

20. The Defendant was found Guilty upon an *Information, for a Libel*, and it was mov'd in Arreſt of Judgment, that the *Ven. Fac.* was *returnable Die Lunæ prox' poſt tres Sept' Sanct' Mich'*, which was 23 Octob. but the *Diſtringas was Teſte* 24 *Octob.* whereas the Venire was return'd the 23d. The Court held this not amendable by any Statute of Amendment, nor at Common Law, becauſe it would be to warrant a Trial that was tried without any Authority, and to make it contrary to the 2 Ld. Raym. Rep 1061. S. C. and Gould J. held that it was amendable at Common Law. Powis J.

thought it rather amendable than not

the Truth of the Fact, and it is a Miſtake of the Clerk in Skill. 1 Salk. 51. pl. 14. Mich. 3 Ann. B. R. the Queen v. Tutchin.

Holt Ch. J and Powell J. held it not amendable, and thereupon (as the Reporter ſays) Powys, who had delivered his Opinion with great dubiouſneſs, and concluded it as mentioned above, came over to Holt and Powell, and held it not amendable, becauſe, as he ſaid, it ſhould not go upon a Court divided. And ſee there the Arguments of the Judges much at large.——S. C. cited G. Hiſt. of C. B. 94. and New Abr. 96. in the ſame Words.

22. An Indictment wanted the Words *in Com'* and upon Motion the Court would not amend it, but ſecus upon an Information. Note, it is Matter of Subſtance. 12 Mod. 229. King v. Lewis

And if a Jury find for the Queen, and the Verdict is entered for the Defendant, yet at Common Law it is amendable; per Cur. and ſays it was agreed in Dr Drake's Caſe.

23. The Court were of Opinion, that the Entry of a *ſpecial Verdict*, tho' *in a criminal Proſecution*, may be amended, if it was *not enter'd according to the Notes* taken, and the Roll may be amended. Gould cited Raym. 460. and ſaid, the Court frequently amended Informations; Quære if the Court would amend in a Caſe where they had not the Minutes there. Per Cur if the *Notes and the Verdict vary*, the Court will amend according the Notes, elſe not. 11 Mod. 84. pl. 2. Trin. 5 Ann. B. R. Anon.

11 Mod. 84. pl. 2. Trin. 5 Ann. B R. Anon.——If in a ſpecial Verdict the *Clerk takes the Minutes right*, and the *Verdict is enter'd up wrong*, the Court will amend the Roll according to the Minutes, tho' in a *Criminal Proſecution*. 11 Mod. 84. pl. 2. Trin. 5 Ann. B. R. Anon.

24. An *Information for a Challenge* by the Defendant was by a *wrong Addition*, but it was rul'd to be amended on Payment of Coſts, this being a Suit not carried on by the Crown. 2 Ld. Raym. Rep. 1472. Hill 13 Geo. 1. the King v. Seagood.

Barnard. Rep. in B. R. 31. S. C.

25. A Bond was forg'd in which the pretended Obligor was mentioned to be of L. in Peroch. (inſtead of Paroch.) de S. in Com. M. and the Offender being indicted, the Niſi Prius Roll of the Indictment was (Paroch.) but after Verdict upon Motion and Argument it was amended by the Record, and made (Peroch.) agreeable to the forg'd Bond which was produced in Evidence. 2 Ld. Raym. Rep. 1518. Paſch. 1 Geo. 2. B. R. the King v. Hayes.

26. Anciently where an Indictment appeared to be *inſufficient*, the Practice was not to put the Defendant to anſwer it, but if it were *found in the County in which the Court ſat*, to *award Proceſs againſt the Grand Jury, to come into Court and amend it*, and it is common Practice at this Day, while the Grand Jury which found a Bill is before the Court, to amend it by their Conſent *in Matter of Form*, as the Name or Addition of the Party &c. 2 Hawk. Pl. C. 245. cap. 25. S. 100.

L. P. R. 45. cites Paſch. 24 Car. B. R. for tho' the Law will give way as much as is requiſite for the maintaining of Indictments, becauſe it is intended they are preferr'd Pro bono publico, yet it will not permit that the Party in-

27. Clearly none of the *Statutes of Amendments* extend to criminal Proſecutions, and therefore no Indictment can be amended *in any Caſe wherein an Amendment is not allowable by the common Law*; but it is ſaid that the Body of an *Indictment from London* may be amended, becauſe by the City Charter *the Tenour* of the Record *only ſhall be removed* from thence. Alſo a *Coroner* may by Rule amend his Inqueſt *by the Notes* in Matter of Form before it is filed; and the Caption of an Indictment may on Motion be amended *by the Clerk of the Aſſiſes, or* of the *Peace*, ſo as *to make it agree with the original Record*, at any Time *during the Term in which it came in*, but not in a ſubſequent Term. But it is ſaid, that the Caption of an Inquiſition ſhall never be amended after it is filed; for being part of, and drawn at the ſame Time with the Inquiſition, greater Exactneſs is required in it than in the Caption of an Indictment, which is left as of Courſe to be drawn up as Occaſion ſhall require. Alſo it ſeems to be ſettled, that a *Diſcontinuance in a criminal Proſecution* is not amendable without Conſent, *but* it ſeems, *that the mere Miſpriſion*

in

of the joining of an Iſſue, as where the *ſimiliter* &c. is *omitted*, is amendable at any Time. Alſo the Direction of a *Venire Vicecomitibus of B.* which is *returned by J. S.* Vicecomite, may be amended by the Oath of J. S. that there is but one Sheriff of B. which is himſelf; alſo it is common Practice to amend criminal Informations, and the Pleadings thereon, while all is on Paper. 2 Hawk. Pl. C. Abr. 224. cap. 25. S. 62. but in the Fol. Edit. 244. S. 99.

dicted ſhall be unneceſſarily delay'd by the Proſecutor from coming to a juſt Vindication of himſelf for the Crime for which he ſtands indicted. ——In all the Statutes of Amendments from 8 H. 6. there is an Exception for Appeals, Indictment of High Treaſon, and of Felonies.. It has been a great Queſtion, whether any of theſe Statutes extend to the Caſe of the King, or either *to remedy the Parties where the Party has prevailed againſt the King, or the King againſt the Parties*; and in both Caſes it has been rul'd, that theſe Statutes do not extend to the King; for there only Indictments, Appeals, and Informations on Penal Statutes are mention'd, yet becauſe the firſt ſays it ſhall be amended on the Challenge of the Party, in which the King with Decency cannot be included, the ſubſequent Statutes are ſuppoſed to be made on the ſame Platform, and this *Exception is only ex abundanti Cautela.* G. Hiſt. of C. B. 93.

(U. a) Jeofails. Aided by Verdict. In what Caſes in General; and why.

1. *Miſtrials* are not help'd by the Statute of Jeofails. Agreed by Court and Counſell. Goldsb. 38. pl. 12. Mich. 29 Eliz. Knight's Caſe.

2. A Verdict *helps every thing which is neceſſary to be prov'd upon the Trial, and without Proof of which no Verdict could be given for the Plaintiff.* Carth. 389. Mich. 8 W. 3. B. R. Arg. in Caſe of Blackall v. Eale. S. P. Arg. 10 Mod 229. cites Hutt. 24. and 2 Jo. 132. and Raym. 487. and Lev. 308. ——S. P. Arg. 12 Mod. 510. in Caſe of Palmer v. Stavely.

3. A Verdict does not make the Declaration better in any Caſe, but *where the Plaintiff is to give the Matter in Evidence* and want of ſuch Matter in the Declaration is aided; per Holt Ch. J. Holt's Rep. 567. pl. 46. Mich. 5 Ann. in Caſe of Willet v. Waxcomb.

4. The general *Reaſon why* Defects in Pleadings are cur'd by Verdict is, becauſe it is to be ſuppoſed that the Verdict could not have been found unleſs there had been Evidence given at the Trial of that Matter wherein the Pleading is defective. Arg. 10 Mod. 300. in Caſe of Muſton and Yateman.

(W. a) Omiſſions in Declarations aided by Verdict. In what Caſes.

1. *DEBT againſt J. S. of the City of York*, he appeared and pleaded to Iſſue, which *paſſed againſt him*, and he *pleaded in Arreſt* of Judgment, *that he had not ſufficient Addition according to the Statute*; for he may be of the City of York and abiding in L. where the Statute 1 H. 5. cap. 5. is, that he ſhall be named of the Vill where he abides, in Action where Proceſs of Outlawry lies; for the Statute is that the Writ ſhall abate by Exception of the Party, which is intended by Plea, and now he did not plead this in Abatement of the Writ at firſt, and ſo has loſt the Advantage. Br. Repleader, pl. 60. cites 35 H. 6. 12.

2. In *Aſſumpſit* no Place was ſet forth where the Promiſe was made. After Verdict upon Non Aſſumpſit it was moved in Arreſt of Judgment, that this was a Miſtrial, becauſe there was *no Place laid* &c. The Court held that this is help'd by the Verdict. Goldsb. 47. pl. 5. Paſch. 29 Eliz. Anon.

3. After Verdict Defendant ſhall not take *Advantage of Uncertainty in the Declaration* if there be any *convenient Certainty*, but where there is no Certainty it is otherwiſe. Cro. E. 817. pl. 11. Paſch 43 Eliz. B. R. in Caſe of Wood v. Smith.

Cro. J. 173. pl. 15. S. C. adjudged accordingly — Brownl. 137. Ward v. Willingsby S. C accordingly, but ſeems to be only a Tranſlation of Yelv.

4. The Declaration was of a Grant of Land in *Sutton Coe-field*, but the Deed was of Land in *Sutton Parva infra Dominium de Sutton in Coe-field*. Yet this is aided by the finding of the Jury, who found expreſsly that the Grantor *Dedit Tenementa Infra ſcripta*, ſo that being ſo *expreſsly found*, the Deed is not material. Quod nota. Yelv. 101. Paſch. 5 Jac. B. R. Ward v. Walthew.

——Mo. 683. pl. 943. Ward v. Sudman S. C. but S. P. does not appear.

S. C. cited per Cur. Vent. 109. in Caſe of Monnington v. Williams.

5. If Iſſue be join'd upon a *Grant of a Reverſion* where it is *not alleged that it was by Deed, or that the Tenant attorn'd*, yet if it be found it ſhall be good. Hutt. 54. Mich. 20 Jac. in Caſe of Lightfoot v. Brightman.

——S. C. cited per Cur. Lev. 308. 309

6. In Avowry for a *Rent-Charge*, where the *Grant thereof is not pleaded by Deed*, and Iſſue is join'd upon Non conceſſit, if it be *found quod conceſſit*, it is good by the Verdict. Winch. 54. in Caſe of Lightfoot v. Brightman.

Hill. 22 & 23 Car. 2. in B. R. in Caſe of Mannington v. Guillims S. C. which was in Replevin, and the Defendant avow'd for a Rent-Charge, and ſet forth that J. S. was ſeiſed of the Rent, and bargain'd and ſold it to the Avowant, and upon Iſſue Non conceſſit, it was found for the Avowant. And tho' it was moved that no Conſideration was alleged of the Grant, yet this ſhall be intended to be proved on the Trial, otherwiſe it could not be found for him; And the Avowant had Judgment.

7. In Replevin, the Defendant *avow'd for Rent granted to his Father in Fee*, but did *not allege that it became Arrear after his Father's Death*. The Court agreed, and reſolved that it was good after Verdict, it being *pleaded that it was Arrear and not paid to him*, Ergo it was due to him; and tho' it might have been more fully pleaded, yet after Verdict it is ſufficient. Hutt. 55. Mich. 20 Jac. Chittle v. Samnon.

8. The Plaintiff declared that he *proſecuted a Capias againſt C.* &c. *which he deliver'd to the Sheriff at N. who adtunc & ibidem potuiſſet arreſtare* the Defendant, but contriving to delay the Plaintiff adtunc & ibidem *recuſavit* arreſtare &c. It was moved after Verdict that (potuiſſet) ſignified only a Poſſibility to arreſt, and that might be if C. was within the County; and that he ought to have *ſhew'd* How, viz. *that C. was in the View or Preſence of the Sheriff*. But per tot. Cur. after Verdict the Declaration is good enough, and it ſhall be *intended that* Evidence was given at the Trial that the Sheriff might have arreſted C if he had not *voluntarily neglected doing his Office*, and the Word (Recuſavit) implies that he had an Opportunity, and Judgment for the Plaintiff; but they agreed that this was good Cauſe of Demurrer. 2 Jo. 40. Hill. 25 & 26 Car. 2. C. B. Fiſh v. Aſton.

9. An *Aſſumpſit* was brought upon a Promiſe *to pay Money to two, or either of them*, and *declared that* it was *not paid to the two, and not ſaid, or either of them*, yet it was adjudg'd good after Verdict. Cited by the Ch. Juſt. Vent. 119. Paſch. 23 Car. 2. B. R.

S. C. cited Carth. 389. as adjudg'd accordingly, and held

10. In Indebitatus Aſſumpſit the Plaintiff *declared of a Day not yet come*. Iſſue was join'd, and Verdict for the Plaintiff; Upon Exception taken, the Court ſaid there ſhould have been a Special Demurrer, but that it is well enough now, being aided by the Verdict, which muſt be upon

upon Evidence of a Promiſe before the Action brought, and a Duty before the Promiſe; and Judgment for the Plaintiff. 3 Keb. 354. pl. 18. Mich. 26 Car. 2. B. R. Sorrel v Lewin.

that where an *impoſſible Day*, as a Day not yet come, was laid in the Declaration in an Action of Battery, it was cured by the Verdict. Carth. 389. Blackall v. Eale ——12 Mod. 102. Blackhall v Eccles S. C. and per Cur. the Day alleged not being yet come, is no Day at all; and Judgment for the Plaintiff ——5 Mod. 286 S. C. adjudg'd for the Plaintiff. ——3 Salk. 8. Blachall v. Evans S. C. ——Comyns's Rep. 12. S. C. adjudg'd for the Plaintiff.

11. Whereſoever it may be *preſumed that any thing muſt of Neceſſity be given in Evidence*, the Want of mentioning it in the Record will not viciate it after a Verdict. Per Cur. Raym. 487. Hill. 34 & 35 Car. 2. B. R. in Caſe of Hitchin's v. Stevens.

In any Caſe where any thing is omitted in a Declaration, *tho'* it be *Matter of Subſtance* if it be ſuch as without proving it at the Trial the Plaintiff could not have had a Verdict, and there be a Verdict for the Plaintiff, ſuch Omiſſion ſhall not arreſt the Judgment. 2 Show. 234. pl. 230. ſays this Rule was taken and agreed by all the Court Mich. 34 Car. 2. in Caſe of Hitchins v. Stevens.——*As* where *Bargainee of a Reverſion brought Debt for Rent*, and *alleged no Attornment*, and upon *Nil debet pleaded*, a Verdict was for the Plaintiff. It was moved that the Plaintiff had ſet forth no Title to the Rent, becauſe without Attornment he had none; and cited Lat. 14. the King v. Somerland, and Hob. [72. pl. 87.] Hope [Pope] v. Skinner, yet the Court upon the Rule above, after ſolemn Debate, gave Judgment for the Plaintiff. 2 Show. 233. pl. 230. Mich. 34 Car. 2. B. R. Hitchins v. Stevens.——Raym 487. S. C. adjudg'd accordingly.—— 2 Jo. 217. 232. S. C. adjudg'd accordingly.

The Plaintiff as *Aſſignee of a Reverſion for Years expectant* on a Leaſe for Years whereon a Rent was reſerved, brought an Action of *Covenant againſt the Defendant Tenant for Years, for not repairing* the Houſes demiſed, and *had an interlocutory Judgment by Default*. It was moved in Arreſt of Judgment, becauſe the Plaintiff had *not alleged an Attornment* of the Tenant upon the Aſſignment of the Reverſion. But it was anſwered, that there was no need of an Attornment ſince the 32 *H.* 8. *cap.* 34. for that Statute has given Aſſignees of Reverſions the like Advantage for Breach of Covenants as their Grantors had, and that the Plaintiff in this Caſe was Aſſignee before Attornment, and that an Action of Covenant had been held maintainable by the Grantee of a Reverſion of Copyhold, tho' in ſuch Caſe there be no Attornment Beſides, though Attornment ought to have been alleged, that Defect was cur'd by the 4 *Ann. cap.* 16. which *has put Judgments upon Default upon the ſame Footing with Caſes after Verdict*, in which Caſe this Defect would have been cured. But the Court held that nothing paſſed by the Aſſignment before the Attornment of the Tenant, and that the 32 H. 8. has given Grantees and Aſſignees of Reverſions a Power to take Advantage of Covenants, but hath not made any Perſon a Grantee or Aſſignee which was not ſo before the Statute, and therefore to take Advantage of that Statute, a Man muſt be a compleat Aſſignee according to 1 Inſt. 215. a And Eyre Juſt. cited the Caſe of Player and Roberts in Sir W. Jones's Rep. 243. and a Caſe in Sir T. Jones, where this Caſe had been adjudg'd. As to the Caſes of Copyholds, they held that the Grantee had the Reverſion veſted in him without Attornment, and that it has put Caſes wherein Judgments are given for Default upon the ſame Foot with Caſes after Verdict, as to the Jeofails only, but that the Omiſſions in this Caſe is not a Jeofail, for which Reaſons, per tot. Cur. Judgment was arreſted. MS. Rep. Hill. 4 Geo. 1. in B. R. Vandiput v. Thorpe.

N. B. The Ch. J. ſaid, that if the Aſſignee had brought an Action for Rent without alleging Attornment, and upon Nil debet pleaded a Verdict was given for him, the Attornment ſhall be ſuppoſed, becauſe he could not prove the Rent due without giving the Attornment in Evidence. Ibid.

12. In *Treſpaſs* the Writ was, *Quare Clauſum fregit & Herbam* &c. *conculcavit* &c. and the Declaration was, Quare Clauſum *(omitting, fregit)* & Herbam &c. The Plaintiff had a Verdict, but Judgment was arreſted, becauſe (Clauſum fregit) was not in the Declaration; and if the Writ contains more than is declared for, this is a Variance not aided by a Verdict; but Ventris J. held, that treading and conſuming the Graſs neceſſarily implied a Breach of the Cloſe, for that there could not be an Entry without a Breach. 2 Vent. 153. Paſch. 2 W. & M. in C. B. Ellis v. Yates.

13. Tho' a Demurrer may be to a *Declaration on a Promiſe on a ſpecial Agreement, which ſets forth a Breach generally, and not any particular Inſtance of the Breach* of it, yet after a Verdict it ſhall be intended that ſome particular Breach was given in Evidence to the Jury, otherwiſe the Plaintiff could not have recovered a Verdict. Carth. 271. Paſch. 5 W. 3. in B. R.

See tit. Actions (Z 12) pl. 31.

14. *Treſpaſs*

S. C cited as held accordingly Comyns's Rep. 13.

14. *Treſpaſs* was only laid to be *Diverſis diebus & vicibus*, without laying any particular Time. Per Cur. it is well enough after Verdict. 12 Mod. 105. Mich. 8 W. 3. Wall and Dukes.

1 Salk. 13. pl. 4. S. C. Judgment for the Plaintiff, but no Mention is made of the Servant ——— Comb. 459. S. C. ſays nothing of Servant, adjornatur. ——— Carth. 425. S. C. ſays nothing of Servant, but Judgment for the Plaintiff.

15. In an Action upon the *Caſe*, upon the general Cuſtom of the Realm, and alſo a ſpecial Action *for negligently keeping his Fire* in which the Plaintiff counts, that he was poſſeſs'd of a *Cloſe of Heath*, and the Defendant of another Contigue adjacent' and that he had kindled a Fire in this Cloſe, the which tam improvide & negligenter ſervavit, that it burnt the Cloſe, and after a Verdict it was moved in Arreſt of Judgment, that it does *not appear* in this Caſe *to be done by the Command of the Maſter*, and then it being out of his Houſe he is not reſponſible, and cited 2 H. 4. 24. for if the Servant does it without the Command of his Maſter, it is not the Negligence of the Maſter; but it was anſwered, that it being after a Verdict, be it by Negligence or Misfortune, it is all one; for now they are upon the Record, and it may be *his Fire in a Field* as well as in a Houſe, and it was Matter of Evidence if it be his Fire or not It was adjudg'd pro Quer'. Skin. 681. pl. 1. Mich. 9 W. 3. B. R. Turbervill v. Stamp.

——12 Mod. 151. S C. adjudg'd for the Plaintiff, but no Mention of the Servant ——— Ld. Raym Rep. 264. S.C. ſays the Fire in Fact was kindled by the Servant, [but no Notice of this being moved in Arreſt of Judgment] and Judgment for the Plaintiff. And Holt Ch J. ſaid, that if the Servant kindled the Fire by way of Husbandry, and proper for his Employment, tho' he had no expreſs Command from his Maſter, yet the Maſter ſhall be liable for Damage done by the Fire; for it ſhall be intended that the Servant had Authority from his Maſter, it being for his Maſter's Benefit. ——Comyns's Rep. 32. pl. 22. S.C. adjudged for the Paintiff.

16. A. *promiſes to pay B.* Money, *and if B. died within Age of* 18, *to pay it to his Executor*, Executor brings the Action, and *avers* that there was *no Payment to him, without ſaying any thing of his Teſtator*, and yet cured by Verdict; Per Cur. 12 Mod. 422. Mich. 12 W. 3.

See Actions (P. c) pl. 26.

17. In Action for *falſly and maliciouſly indicting* it is no good Declaration *without ſaying* that it was *without probable Cauſe, and that the* Plaintiff *was acquitted, or* an *Ignoramus returned*; and yet this Fault was helped by Verdict; per Cur. 12 Mod. 422. Mich. 12 W. 3.

12 Mod. 537. Trin. 13 W. 3. S. C. but S. P. does not appear. ——— Ld. Raym. Rep 680. S.C. but S.P. does not appear.

18. In *Aſſumpſit* the Plaintiff declared, that *in Conſideration* that *he had deliver'd to the Defendant a Chariot, and* had *agreed to permit him to have the Uſe of it for one Year*, the *Defendant promiſed to pay* 200 l. but it was *not alleged that the Defendant had the Uſe of* the Chariot for a Year; and this after a Verdict for the Plaintiff was moved in Arreſt of Judgment. Sed non allocatur; for after a Verdict it *ſhall be intended* that he had the Uſe of it for a Year, as it appears that the Chariot was deliver'd to him. Comyns's Rep. 116. pl. 80. Paſch. 13 W. 3. B. R. May v. King.

18. Want of *Attornment* in *Debt for Rent by the Aſſignee* of the Reverſion, is aided by Verdict; per Cur. obiter. 2 Ld. Raym. Rep. 811. Mich. 1 Ann.

Arg. 10 Mod. 302 cites Hob. 116, 117. and Palm 420. and Lat. 110.

19. Tho' a *Title which cannot be good* can never be aided by a Verdict, yet a Title in a Declaration, which is *only imperfectly ſet forth, and where the Want* of ſomething omitted *may be ſupply'd by Intendment*, is cured by Verdict. 1 Salk. 365. pl. 5. Hill. 4 Ann. Crowther v. Oldfield.

As where a Count was of a *Copyhold Eſtate, without ſaying Ad Voluntatem Domini*, and this was held well after a Verdict, becauſe the Lands were *alleged and found to be Parcel of the Manor, and that by Cuſtom the Plaintiff ut Tenens Cuſtomarius had Common*, which would not be unleſs it was Copyhold. 1 Salk. 364 pl. 5. Hill. 4 Ann. B. R. Crowther v. Oldfield.

So where *Termor for Years preſcribed* for a Way *by a Que Eſtate* Time out of Mind, and that the Defendant obſtructed it, and had a Verdict. The Count ſet forth alſo a *Terminus ad quem, but no Terminus a quo* the Way did lead. It was held upon a Motion in Arreſt of Judgment, that this laſt Defect was cured by the Verdict; but that the firſt was incurable, and ſo Judgment arreſted. Carth. 432. Mich. 9 W. 3. B. R. Dawney v. Caſhford.— ——1 Salk. 363. pl. 2. Dorne v. Caſhford, S. C. accordingly.—— S. C. admitted by the Court, and ſaid that tho' the Plaintiff in Poſſeſſory Actions may declare upon his Poſſeſſion

Poſſeſſion without ſetting out a Title, yet if he *undertakes to ſet out a Title, and ſhews a bad one, tho' he need not have ſhewn any*, the Verdict cannot cure it. 1 Salk. 365. in Caſe of Crowther v. Oldfield.

21. If the Jury *finds a Title* where *none appears in the Declaration*, it will be hard to help this Caſe by the Verdict; per Holt Ch. J. & adjornatur. See 11 Mod. 179. 180. Trin. 7 Ann. B. R. Willet v. Boſcomb.

22. In *Caſe* the Plaintiff declares that he was poſſeſs'd of a Farm and a River, *apud* D. *in Com'* Devon, and the Defendant, to damage the Plaintiff's Farm and River, did at a Place *vocat' Davys's* Cloſe *in Com' Dorſet, dig two Ditches, and diverted the Plaintiff's Water* out of the Rivers, and damaged the Meadows, but does not ſay *per quod*. It was objected in Arreſt of Judgment, that this Declaration was ill, *not ſhewing that the diverting of the Water was conſequential of the digging* the Ditches, which is the Jet or Gift of the Action; ſo that this is no more than Treſpaſs. But the Court were of Opinion, that after Verdict it ſhall be intended that it was proved to be conſequential. 11 Mod. 257. pl. 12. Mich. 8 Ann. B. R. Leveridge v. Hoskins.

23. Where a *Special Requeſt in an Aſſumpſit* ſhould be alleged, and is not, it is fatal on Demurrer, but help'd after Verdict. 12 Mod. 44. Maſters and Marriot.

(X. a) Want of Averment aided by Verdict.

1. IN Treſpaſs *Iſſue* was *on a Preſcription for Common of Paſture in* &c. *for all his Sheep Levant and Couchant, in and upon the Demeſne Lands of W. which lie and are in A.* aforeſaid, every Year. Exception was taken for the Uncertainty, becauſe it did *not appear that thoſe were Demeſne Lands which lie in A.* For it was ill pleaded, and ought to be averr'd; but it being after a Verdict was held good, and Judgment for the Plaintiff. Brownl. 232. Hill. 9 Jac. Duncomb v. Randall.

2. In Ejectment the *Declaration was upon a Leaſe for* 3 *Years, if the Feme of the Plaintiff ſhould ſo long live*, and *hath not ſhewn that the Feme is yet alive*. After Verdict this was moved in Arreſt, and the common Difference taken 10 E. 4. &c. where the Declaration is in Action, in which *Damages only* ſhall be recovered, there it is not requiſite to ſhew the Life of Ceſty que Vie; but where the *Term* is *alſo to be recovered*, there a Continuance of the Eſtate ought to be ſhewn. Sed tota Curia contra, becauſe this being after Verdict, is made good by the Statute 21 Jac. cap. ... of Amendments, if Ceſty que Vie be yet alive, the which we may *examine by the Sheriff* &c. Sid. 61. pl. 30. Mich. 13 Car. 2. B. R. Anon. Keb. 176. pl. 137. Tubb v. Wallwin, S. P. held accordingly, and ſeems to be S. C.

3. Debt upon an *Obligation* condition'd *to pay the Plaintiff on his Marriage*, or &c. Although his Marriage was *not alleged to be Tempore Brevis*, and ſo might be after the Action commenced, yet after Verdict it ſhall be intended to refer to the Time of the Writ. Lev. 41. Trin. 13 Car. 2. B. R. Baſſet v. Morgan.

4. In *Treſpaſs* the Defendant *juſtifies by reaſon of Common*, in the Place where, for Cattle Levant and Couchant, and does *not aver the Beaſts were Levant and Couchant*, this is aided after a Verdict. Vent. 34. Trin. 21 Car. 2. B. R. Anon.

5. In *Debt againſt an Executor* it was *averr'd, that the Executor did not pay it*, ſed adhuc injuſte detinet; but did *not aver that the Teſtator had not paid in his Life-time*, this was ſaid per Cur. to have been held aided after a Verdict. Vent. 137.

6. The Plaintiff declared in Action ſur le *Caſe*, for that whereas the *Cattle of the Defendant were impounded by* A. B. that the Defendant *promiſed* the Plaintiff that *if he would deliver them out of the Pound, he would ſave him harmleſs from A. B.* and then ſets forth that A. B. brought a *Parco Fracto pro Deliberatione* of the Cattle, and *recover'd* ſo much, and that the Defendant *licet ſæpius requiſitus had not* ſaved him harmleſs, *per quod* &c. and Verdict for the Plaintiff; and it was argued that he hath *not here averr'd that he did deliver them.* Judgment was arreſted; for they held the Delivery of the Cattle to be a material traverſable Point, and not holpen by Verdict, and tho' he ſays he was ſued in a Parco Fracto pro Deliberatione, ſo he might, and not deliver the Cattle. Skin. 141. Mich. 35 Car. 2. B. R. Anon.

3 Mod. 161. S. C. adjudged accordingly.

7. Action *for a Duty for weighing Goods at the Common Beam in L. ſetting forth that the Lord Mayor* &c. Time out of Mind, *kept a Common Beam and Weights, and Servants to attend, and that the Defendant bought Goods, but did not bring them to the Beam to be weigh'd.* After a Verdict for the Plaintiff it was moved, that the Plaintiff had not well applied the Cuſtom to the preſent Caſe, in not averring that the Goods were ſuch as were uſually ſold by Weight, and if not, then it is no Breach of the Cuſtom in the Declaration; beſides it was not alleged that the Plaintiff had not paid the cuſtomary Toll for Weighing. But per 3 Judges, contra Allibone J. theſe Faults are cured by the Verdict. Carth. 67. Trin. 3 Jac. 2. B. R. Jefferies (Ld Mayor) v. Watkins.

8. In *Debt upon the Statute of Tithes* of 2 E. 6. and demanded the treble Value, the Plaintiff counted only that *Defendant had carried away the* Corn without ſetting out the Tithe, *but did not aver that Defendant had not made any Agreement* with him for the Tithes, as the Statute mentions. The Court was of Opinion that the Declaration was ill had it been demurr'd to, but was help'd by the Verdict, for had any Agreement been prov'd at the Trial, the Plaintiff could not have obtained a Verdict. Carth. 304. Paſch. 6 W. & M. in B. R. Alſton & al' v. Buſcough.

9. A. brought *Debt in Right of his Wife* due to her before Coverture, and *counted that the Debt was not paid to the Wife*, but did *not not ſay that it was not paid to him Poſt Deſponſalia*; it was adjudg'd ill upon a Demurrer, tho' it had been good after Verdict, cited by Treby Ch. J. as a late Caſe. Ld. Raym. Rep. 284. Mich. 9 W. 3. Anon.

3 Salk. 29. S. C. accordingly.—— 12 Mod. 133. S. C. accordingly.

10. *Aſſumpſit in Conſideration that the Plaintiff would accept C. to be his Debtor for 20 l. due to him from A. in Loco A.* and averr'd that he did accept C. fore Debitorem &c. This was adjudg'd good after a Verdict, *without expreſs Averment that A. was diſcharged*, and Judgment affirm'd in the Exchequer Chamber by 4 Judges againſt 3. 1 Salk. 29. pl. 30. Paſch. 9 W. 3. Roe v. Haugh.

11. A Verdict will aid a defective Averment *of the Indorſement of a Bill of Exchange.* See Bills of Exchange. Eaſt v. Eſſington.

See Tit. Actions (Z. 8) pl. 49.

12. In Caſe upon an *Agreement* that the Plaintiff was *to buy for the Defendant all the Plumbs he could* &c. the Plaintiff ſhews that he bought ſo many, the want of averring that they were all he could buy is cur'd by Verdict; for unleſs the Plaintiff had prov'd that they were all that he had bought, or could buy, it would have been againſt him for want of proving the Performance of the Conſideration. 2 Ld. Raym. Rep. 1060. Mich. 3 Ann. Anon.

14. Where

14. Where a Verdict has *found Words ſpoken of the Plaintiff as Brother of the Defendant*, it is ſufficient, tho' no Averment in was the Declaration that he was his Brother. Comyns's Rep. 528. Paſch. 9 Geo. 2. C. B. Caſtell v. Baily.

(Y. a) Nudum Pactum, or where no good Aſſumpſit or Conſideration of Suit is ſhewn, aided by Verdict.

1. IN a *Replevin*, the Defendant avow'd for a *Rent-Charge* for that J. S. ſeiſed of a Rent, *bargain'd and ſold* it to him, and ſhew'd the Indenture to be *inroll'd* within ſix Months *virtute cujus, and the Statute of Uſes*, he was ſeiſed, and for a Year's Rent ſince the Aſſignment avow'd. The Plaintiff *traverſed* the of J. S. *prout*, and found for the Avowant, and moved in Arreſt of Judgment, that he entitles himſelf by Bargain and Sale, and the Statute of Uſes, and doth *not ſhew that it was in Conſideration of Money*; But the Court held the Pleading good after a Verdict; and it *ſhall be intended that Evidence was given of Money paid.* Vent. 108. Hill. 22 & 23 Car. B. R. Monnington v. Williams.

Lev. 308. Mannington v. Guillims S. C. accordingly, and Judgment for the Avowant.—— Raym. 200. Guilliams v. Munnington S. C. and Twiſden thought the Exception material, and Judgment ſtay'd until &c.——S. P. where Replevin was brought againſt the Heir of a ſecond Grantee of the Rent-Charge, in which the Plaintiff pleaded Non eſt Factum of J S and Iſſue thereupon, and Verdict for the Defendant, and the ſame Exceptions taken, and alſo that this cannot be aided by the Verdict, becauſe the Iſſue was taken upon the other Deed of J. S Sed non allocatur; for per Cur. if the Plaintiff had taken Iſſue upon the Bargain and Sale, and it had been found for the Defendant, it had been good after a Verdict tho' no Expreſs Conſideration had been mention'd, As in the Caſe of * Barber v. Fox, in the Time of Car. 2. in B. R. where a Bargain and Sale was pleaded Pro quadam Pecuniæ Summa, without ſaying what Sum, yet it was adjudged to be aided by the Verdict. Then in this Caſe the Plaintiff has waved the Benefit of this Exception by taking Iſſue upon the other Deed; but if he had demurr'd this Fault had been fatal to the Defendant; but now after Verdict it is good enough, and therefore Judgment was given for the Defendant. Niſi &c. 2 Ld. Raym. R p. 111. Mich. 8 W. 3. Stream v. Seyer.

* The mentioning that Caſe as adjudg'd upon the Point mention'd ſeems to be by Miſtake, that Caſe being another Point, as may be ſeen at Tit. Actions (Z 3) pl. 21. and at Tit. Heir (K. 2) pl. 13. but it ſeems that the Caſe intended is the principal Caſe above of Monnington v. Williams.

2. After Verdict in *Aſſumpſit* the Judgment was arreſted, becauſe it was a *Nudum Pactum*, and the Court would not intend a Conſideration. See. Tit. Actions (O) pl. 21. Mich. 4 Ann. Courtney v. Strong.

(Z. a) Other Faults in Declarations, aided by Verdict.

1. THE Plaintiff ſet forth that he was *ſeiſed of a Houſe and Meadow*, and *preſcrib'd for a Way thereto* &c. and after a Verdict for him, many Exceptions were taken to the Declaration, as that it was not ſaid to be Antiquum Meſuagium, nor ſhew'd it certain whither the Way did lead, nor in what Town it was, nor what Manner of Way it was; it was held that the Verdict had aided and made good all the Imperfections in the Declaration. 3 Bulſt. 334. Hill. 1 Car. B. R. Harriſon v. Rock.

Palm. 420. Harriſon v. Rooke S. C. ——Lat. 110. Harriſon v. Peck, S. C. accordingly, and Judgment for the Plaintiff.

2. In *Debt upon Bond for Performance of Covenants* in an Indenture, the Plaintiff *declared, that E. covenanted that J. S. was ſeiſed in Fee*, where-

as the *Indenture was, that J. S. covenanted that E. was ſeiſed in Fee*; this Variance ſhall not ſtay Judgment after Verdict, for it was the Defendant's Fault not to take Advantage of it upon a Demurrer, but ſince Iſſue is well join'd upon Affirmative and Negative and found for the Plaintiff, he ſhall have his Judgment. Sid. 48. pl. 10. Mich. 13 Car. 2. B. R. Pigg v. Waters.

3. In *Debt for a Moiety* of Tithes of D. it was found for the Plaintiff, and now moved in Arreſt of Judgment; that it appears by this Declaration, that the Plaintiff is Tenant in Common with another, for he has declared of the Moiety; and being Tenant in Common, Tenants in Common muſt join in perſonal Actions, As Debt or Avowry for Damage feaſant; but it was reſolv'd that the Plaintiff ſhall have Judgment, for this being *after Verdict ſhall not be intended a Moiety in Common, but a Moiety in Law.* Sid. 49. pl. 11. Mich. 13 Car. 2. B. R. Cole v. Banbury.

Indebitatus for *Money received by the Defendant for the Plaintiff*, and laid *ad uſum* of *Defendant.* It was moved after Verdict that

4. The Declaration was, that the Defendant was *indebted to the Plaintiff in ſo much Money recovered to the Uſe of the Defendant*; after Verdict for the Plaintiff it was moved in Arreſt of Judgment, that an Action would not lie for Money received by the Defendant to the Defendant's Uſe, but becauſe it might be Money lent which the Defendant received to his own Uſe, the Court after Verdict will preſume that it appeared ſo to the Jury. Mod. 42. Hill. 21 & 22 Car. 2. B. R. Noſworthy v. Wyldeman.

Aſſumpſit lies not for Money received by one to his own Uſe. It was anſwer'd, that to conſtrue this according to the Words of the Declaration, would directly contradict the Verdict; and ſaying that it was for Money received for the Plaintiff, was ſufficient without ſaying Ad Uſum &c. and therefore the Ad Uſum ſuperfluous being contradictory, ought to be rejected. And Judgment Niſi pro quer'. 12 Mod 511. Paſch. 13 W. 3. Palmer v. Stavely.——1 Salk. 21. pl. 7. S. C.——Ld. Raym. Rep. 669. S. C accordingly.——Comyns's Rep. 115. pl. 79. S. C. accordingly.

2 Keb 734. pl. 26. Calthorp v. Jacobſon, S. C. ſays, that Keeling Ch. J. held it ill, but Curia contra, and that the Finito is immaterial; ſed adjornatur.

4. In *Debt for Rent*, the Plaintiff declared, that he *let* the Defendant ſuch Land, *Anno* 16, of the King *Quamdiu Ambabus partibus placeret*; and that *Anno* 16. the Defendant enter'd and occupied it *pro uno Anno tunc proxime ſequent'* and becauſe the Rent was behind *pro præd' Anno finit'* 18. he brought the Action, upon which it was demurr'd, becauſe the Rent is demanded for the Year ending 18, and it is not ſhewn that the Defendant enjoyed the Land longer than *Anno* 17. and in Debt for Rent upon a Leaſe at Will, Occupation of the Tenant muſt be averr'd; but it was anſwered, that *pro prædicto Anno* refers to the Year mentioned before, which was next following the Leaſe, and it might be ſaid *finito Anno* 18. for ſo it was ended then, or at any time after; and the Court ſaid, it would be clearly good after a Verdict, but being upon a Demurrer they would adviſe. Vent. 108. Hill. 22 & 23 Car. 2. B. R. Calthorpe v.

5. In *Caſe* the Plaintiff declared, that the Defendants (the Tenants and Occupiers of ſuch a Parcel of *Land adjoining* to the Plaintiffs) have Time out of Mind *maintained ſuch a Fence*, and that from the 23d. of *April to the 25th. of May, & poſtea* the Fence *lay open*, and that *una Equa* of the Plaintiff's *went thro' the Gap, and fell into a Ditch the 28th. of May, & ſubmerſa fuit.* Upon Not Guilty pleaded, and found for the Plaintiff, it was mov'd in Arreſt of Judgment, that the *Cauſe of Action is laid after the 25th. of May*, and (for aught appears) the Fence might be good at that Time, tho' it is ſaid to be open till the *25th. of May & poſtea*; ſed non allocatur; for 1ſt. it is after Verdict. 2dly, It is ſaid expreſsly, that the Beaſt was loſt *in defectu Fenſurarum*, and ſo *cannot be intended but that it was down at the Time.* Vent. 264, 265. Mich. 26 Car. 2. B. R. Anon.

7. *In-*

7. *Inſenſible* Words in the Declaration were help'd by the Verdict. See Carth. 131. Paſch. 2 W. & M. B. R. Nightingale and Fowles v. Bridges.

8. If on *Oyer* of the Deed you have *avow'd otherwiſe than you ought*, it may be taken Advantage of, tho' after Verdict, as they may of any *Thing which makes the Avowry abateable*; for we muſt judge upon the whole Record; per Holt Ch. J. 5 Mod. 29. Trin. 7 W. 3. B. R. in Caſe of Ward v. Evans, alias, Everard.

9. In *Treſpaſs* &c. the Plaintiff declared that the Defendant on 1 Feb. 8 W. 3. with Force and Arms &c. Upon Not guilty pleaded the Plaintiff had a Verdict. It was inſiſted that he could not have Judgment, becauſe the *Declaration was of* Eaſter-Term laſt of a Treſpaſs done 1 Feb. 8 W. 3. which *Time is not yet come*. On the other Side, it was argued that this was help'd by the Verdict; for the Plaintiff could never have had a Verdict unleſs the Treſpaſs had been proved to be done before the Bill filed; for he could give nothing in Evidence after that Time. And per Cur. There muſt be Evidence given of a Fact done before the Action brought; that the Time is but a Circumſtance of a Thing done; for when by a Traverſe it is made Part of the Iſſue, ſuch Traverſe is never good; and ſo the Plaintiff had Judgment. 5 Mod. 286. Mich. 8 W. 3. Blackwell v. Eales.

Carth. 389. S. C. accordingly. —— 12 Mod. 102. Blackhall v. Eccles, S. C. and this being moved in Arreſt of Judgment, Northey for the Plaintiff acknowledged, that if the Time in the Declaration had been after the Bill filed, and before the Trial, the Judgment muſt be arreſted; becauſe then it would have appeared the Jury gave Damages for an Action ariſing ſince the Suit commenced; but in this Caſe the Time being after the Trial, it is as if there were no Time at all, it being impoſſible, and therefore holpen after Verdict. ——— S. C. cited 12 Mod. 109.

10. *Bis petitum* is aided by Verdict, but ill upon Demurrer; per Treby Ch. J. Ld. Raym. Rep. 241. Trin. 9 W. 3.

11. *Treſpaſs laid in a former King's Time, contra Pacem of the preſent*, is ill on Demurrer, but cured by Verdict. 2 Salk. 640. pl. 11. Mich. 2 Ann. B. R. Day v. Muskett.

6 Mod. 80. S. C.

12. Where a *Preſcription* was *laid in all the Occupiers of ſuch a Cloſe, for that they Time out of Mind have repaired a Fence*; this is too general, and therefore ill; for Tenants at Will or at Sufferance, Diſſeiſors &c. are Occupiers, and they cannot charge the Land; yet becauſe Iſſue was taken upon the Preſcription, and a Verdict had found it, adjudged that it was help'd by the Statute. Cro. E. 445. pl. 9. Mich. 37 & 38 Eliz. C. B. Auſtye v. Fawkener.

This is the only Caſe where a bad Preſcription is held cured by Verdict, and is eaſily anſwer'd; for firſt, How was it poſſible that any Finding of the Jury could maintain that Preſcription, which the Law ſays is naught? And yet that is the Caſe here; for here the Preſcription was, that the Defendant and all the Occupiers of the ſaid Cloſe, Time out of Mind &c. This Preſcription was by the Court held too general; for a Tenant at Will or Diſſeiſor may be Occupiers. 2dly, This Caſe is denied to be Law, Mich. 9 Ann. Thorn v. Rookby; Arg. 10 Mod. 300 301. in Caſe of Muſton v. Yateman.

13. A Verdict will *not* cure *where upon the Declaration it manifeſtly appears, that no Evidence whatſoever can maintain the Iſſue*; per Cur. 10 Mod. 313. Paſch. 1 Geo. B. R. in Caſe of Stafford and Forcer.

14. In an Action on a Policy of Inſurance the Plaintiff *counted that the Ship was laden with Goods, and bound from S. to T. and that the Ship aforeſaid and Goods aforeſaid were drown'd.* After Judgment for the Plaintiff it was aſſigned for Error, becauſe the Goods only, and not the Ship, were inſured. But per Cur. This being only an Inſurance on the Goods, nothing could be given in Evidence at the Trial but the Loſs thereof, without which the Plaintiff could not have a Verdict, and Judgment was affirm'd. 8 Mod. 380. Trin. 11 Geo. 1. Cambridge v. Lea.

15. Whatever is *eſſential to the Giſt of the Action*, and cannot be cured by a Verdict, are *ſuch ſubſtantial Facts as muſt be laid in proper Time and Place, ſo that the Defendant may traverſe them diſtinctly*, if he pleaſes; for as he may traverſe the Whole, ſo he may traverſe each ſubſtantial Part, *in order to put the Weight of the Cauſe upon any thing that will put an End* to the Cauſe; and this is allowed that the Jury may be more eaſily attainted of falſe Verdict; but ſuch Part of a Declaration as cannot make a ſubſtantive Iſſue ſhall be intended after Verdict, becauſe they are Matters of Form only, which the Statute deſigned to cure, and therefore if the Plaintiff declares that the Defendant promiſed, if the Plaintiff married his Daughter at his Requeſt, that he would give him 10 l. and alleges in Fact that he did marry her, but does not allege any Requeſt. This is good after Verdict, becauſe the Requeſt is only a Form, in which the Promiſe was conceived, and not an eſſential Part of the Promiſe to be proved to be precedent to the Marriage; for the Father, unleſs he had deſired the Match, had never made the Promiſe; and therefore, ſecundum ſubjectam Materiam, it cannot be ſuppoſed by the Intention of the Parties that a previous Requeſt ſhould be neceſſary, and therefore ſhall be intended after Verdict. G. Hiſt. of C. B. 111. 112.

(A. b) Miſtakes or Omiſſions in Pleadings, aided by Verdict.

Br. Counterple de Reſceipt, pl. 9. S. C.

1. IN *Præcipe quod* reddat the *Tenant for Life made Default after Default* and he in *Reverſion pray'd to be received.* The *Demandant ſaid that he had nothing in the Reverſion the Day of the Writ purchaſed*, and *did not ſay Nor ever after*, whereas he who purchaſes the Reverſion pending the Writ ſhall be received, yet there *if it be found for the Prayor he ſhall be received*; for the Verdict has made the Plea good. *Contra if they had found that he had nothing in Reverſion the Day of the Writ purchaſed*; for it may be that he purchaſed pending the Writ. Br. Verdict, pl. 91. cites 21 H. 6. 13.

2. In *Formedon* the *Tenant confeſs'd the Action*, and *G.* came and *pray'd to be received by Reverſion*, and pleaded that the Tenant had only for Term of Life, the Reverſion to him. The *Demandant counterpleaded that he had nothing in Reverſion the Day of the Writ purchaſed*, and found for the Prayor, by which he was received; for *it is not Jeofail where it is found for the Prayor in the Affirmative*; for tho' he ought to have ſaid that Nothing in Reverſion the Day of the Writ purchaſed, nor ever after, yet now it is good. *Contra if it had been found for the Demandant in the Negative*; for there it may be that he had by Purchaſe or by Deſcent pending the Writ, tho' he had not the Day of the Writ purchaſed, and then Jeofail. Contra here; for now the Verdict has made the Plea good. Br. Repleader, pl. 18. cites 22 H. 6. 14.

Br. Verdict, pl. 54. cites 5 H. 7. S. P. per Huſſey. ——But if it be found that the Tenant was not Tenant the Day of the Writ purchaſed, there this remains a Jeofail, but is now cured by the Statute of 32 H. 8. cap. 30. where it paſſes by Verdict. Ibid. ——Br. Verdict, pl. 55. cites 6 H. 7. 6. S. P. accordingly. ——Br. Verdict, pl. 91. cites 21 H. 6 13. S. P. accordingly.

3. In *Præcipe quod* reddat the *Tenant pleaded Non-tenure the Day of the Writ purchaſed.* This is no Plea; for *he ought to ſay Nor ever after*; for Purchaſe pending the Writ makes the Writ good, and yet in the firſt Caſe, *if the Verdict finds that the Defendant was Tenant the Day of the Writ purchaſed*, this ſuffices; for the Verdict makes the Plea good. Br. Verdict, pl. 53. cites 3 H. 7. 8.

4. So

4. *So* of *Jointenancy*. Br. Verdict, pl 53. cites 3 H. 7. 8.

5. *The like* of *Arbitrators and Umpire*, if the *Defendant ſays that the Arbitrators made no Award*, this is no Plea; for he *ought to ſay Nor the Umpire*; and yet if the Jury ſays that the Arbitrators made an Award, this makes the Plea good; quod nota, per Huſſey Ch. J. For none denied it. Ibid.

6. If a Man *pleads*, *in Debt againſt Executors*, *Riens enter mains the Day of the Writ purchaſed*, and *does not ſay Nor ever after*, yet if *the other avers the contrary*, *and it is found for him*, then it is well; for the Verdict has made the Plea good. Br. Verdict, pl. 54. cites 5 H. 7. 14. Per Huſſey. Br. Verdict, pl. 55. cites 6 H. 7. 6. S. P. accordingly, that it is made good by the Statute of 32 H. 8. ——*But if* it be *found that he had Riens enter mains the Day of the Writ purchaſed*, there this *remains a Jeofail*; but now it is *remedied by the Statute* of Jeofails 32 *H.* 8. 30. where it paſſes by Verdict. Ibid.

7. In *Treſpaſs* the *Defendant pleaded Accord*, that he ſhould make two Windows, and pay 10 l. to the Plaintiff, which he has paid. The Plaintiff replied that *No ſuch Accord*, and *found for the Plaintiff*. The Verdict has not made the Plea good; for the Matter of the Plea is not good; for Accord ought to be executed, and he *has not ſhewn Execution* of the Windows. Br. Verdict, pl. 82. cites 6 H. 7. 16. *But where the Matter of the Plea is good, and it is found, but is not formal in Omnibus*, there the Verdict may make the Plea good. Ibid.

(B. b) Other Faults in Pleadings aided by Verdict.

1. IN *Treſpaſs*, per Keble, where *Feoffment is pleaded*, *and not good*, and *it is found that Ne infeoffa pas*, there the Verdict has made the ill Plea good *by the Statute of Jeofail* 32 *H.* 8. Br. Verdict, pl. 55. cites 6 H. 7. 6.

2. In *Ejectment* the Defendant *pleaded a Special Bar*. The Plaintiff by *Replication confeſs'd and avoided it*, *and alſo traverſed*. The Iſſue was found for the Plaintiff. It was aſſign'd for Error, that the Iſſue was taken where no Iſſue ought to have been, becauſe the Bar was confeſs'd and avoided. Sed non allocatur, becauſe it is remedied by the Statute of Jeofails. Mo. 693. pl. 959. in Cam. Scacc. Smithwick v. Bingham.

3. *Debt on a Penal Bill for* 300 *l.* The Defendant pleaded *Nil debet*, and the Plaintiff took Iſſue thereupon. And the Jury *found Nil debet for* 200 *l. and Debet as to* 100 *l.* Per Cur. The Plea is ill, but the Verdict has made it good. We will intend 200 l. paid, and an Acquittance under Seal produced in Proof thereof; and the Jury may as well apportion here as in Debt on a ſimple Contract, where they may find Nil Debet for Part. 2 Salk. 664. pl. 8. Mich. 9 Ann. B. R. Hadley v. Stiles. 10 Mod. 7. S. C.

4. As the Plaintiff's Action muſt have all Eſſentials neceſſary to maintain it, ſo the Defendant's Bar muſt be eſſentially good; and if the *Giſt of the Bar* be *naught*, it cannot be cured by a Verdict found for the Defendant; but if it had been found for the Plaintiff, he ſhall have Judgment either for the Badneſs or Falſhood of the Bar; but if it be *bad only in Form*, a Verdict will cure it; and *if the Giſt be traverſed*, all *Collateral Circumſtances will be intended* after Verdict. G. Hiſt. of C. B. 112.

See (M) supra, pag. 326. 327.

(C. b) Diſcontinuance in Pleadings aided by Verdict.

If a Defendant *pleads to Part*, and *ſays nothing to the other Part*, and the *Plaintiff replies* to ſuch Plea, *without taking Judgment for Part of the Plea not anſwer'd to*,

1. *Treſpaſs* is brought *of Graſs cut, and of Goods carried away, and of Battery*, and the *Defendant juſtifies for the Graſs and the Goods*, and *ſays nothing to the Battery*. If the *Plaintiff* does not demand Judgment immediately for the Battery, nor has Entry thereof, but *joins Iſſue to the other two Points*, and it is found for him, this is Jeofail. Per Alcue, The Reaſon ſeems to be inaſmuch as the Damages are intire. Quia nemo dedixit. Br. Repleader, pl. 48. cites 21 H. 6. 33. and 22 H. 6. 8.

this is a Diſcontinuance, becauſe he does not follow his intire Demand in the Count; but ſuch Diſcontinuance is cured by the Verdict, becauſe it was the Intent of the Statute, that when they deſcended to Iſſue they ſhould wave all Objections of this Nature; for both Parties by extending to Iſſue ſuppoſed a Cauſe in Court; and therefore they ſhould not afterwards make any Objections that the Cauſe was out of Court before Trial. G. Hiſt. of C. B. 125.

Ibid Bridgman Ch. J. put the Caſe following, viz. *In Treſpaſs and Ejectment for entring into three Acres*, the Defendant *pleads one Plea as to one, another as to another, and nothing to the 3d Acre*, Iſſue is join'd and Verdict for the Plaintiff;

2. *Treſpaſs* Quare *Clauſum fregit pedibus Ambulando* &c. *& cum averiis depaſturat' conculcat' with Oxen, Horſes, Cows, Sheep, & Hogs*. The Defendant pleads Quoad Venire Vi & Armis, nec non totam Tranſgreſſionem præd' præter pedibus Ambulando & præter the Horſes, Oxen, Sheep, and Cows Not guilty, and *ſays nothing as to the Hogs*, but leaves the Hogs out, and Verdict pro querente. Windham held this a Diſcontinuance in Pleading, and that it is help'd by a Verdict. But Bridgman Ch. J. ſaid that as to the Queſtion of Diſcontinuance, he was never ſatisfied in it, Diſcontinuance in Pleading, as he thought, not being aidable, but Diſcontinuance in Proceſs is; and it was doubtful to him whether it was the Intent of the Statute. In Sir John Barrington's Caſe a Diſcontinuance in Pleading was not help'd. A Venire Facias de Novo was awarded. Cart. 51. Hill. 17 & 18 Car. 2. C. B. Ayre v. Gloſſam.

He ask'd, what will you have become of the 3d Acre? will you have it a Diſcontinuance for the 3d Acre, or a Bar or a new Action? He ſaid he had been always of Opinion, and ſome of the Judges ſeem to be of that Opinion, that a Diſcontinuance in pleading ſhall not be help'd by the Statute of Jeofails.

3. If the Verdict itſelf made a Diſcontinuance, and *found Part of the Declaration, and nothing to the other Part*, this is a Diſcontinuance not cured by the Statute, becauſe the Intent of the Iſſue is, that the whole Event of the Matter in Iſſue ſhall be determined, and the Anſwering to part, does not anſwer to the Precept of the Court, nor to the Deſign of the Iſſue which is to determine the whole Cauſe, that ſo it may be a Bar to any other Action. So that ſuch imperfect Verdict ought not to be received by the Judge of Niſi Prius, it not anſwering to the Iſſue, and if it be received it ought not to be entered of Record, and if it be, it is erroneous, becauſe the whole Matter in Iſſue is not anſwered, and a Venire Facias de Novo ought to be awarded, ſo that the whole Matter in Iſſue may be determined in that Action, and this is not aided by the Statute, which did not intend to help Imperfections of the Verdict, which is ſtill deſigned to make an intire End of the Iſſue, but it helps the Diſcontinuance before the Verdict, becauſe the Verdict is a Foundation by the Statute for the Judgment, which the Parties cannot by Miſtake change or alter. G. Hiſt. of C. B. 125, 126.

(D. b) * Immaterial, Informal, or Impoſſible, and Improper Iſſues, aided by Verdict.

* An *Informal* Iſſue *is* where it is not travers'd in a right manner. G. Hiſt. of C. B. 118.

1. DEBT *againſt Executors*, who *pleaded that they had not adminiſter'd as Executors any of the Goods which belong'd to the Teſtator at the Time of his Death.* And per Cur. the Iſſue is not good; for it may be that they have recover'd Debt as Executors after the Death of the Teſtator, and it may be that they have retaken Goods which were taken by a Treſpaſſor, or recover'd Damages for them; but the Verdict found that they adminiſter'd Goods which were the Teſtators at the Time of his Death, and therefore the Verdict has made the Plea good. Quod nota. Br. Verdict, pl. 11. cites 7 H. 4. 39.

2. The Plaintiff counted of a *Covenant to have three Years Board* in Marriage with the Defendant's Daughter. The Defendant *pleaded* that *he did not promiſe two Years Board*, and ſo Iſſue was join'd and tried. This is not aided by the Statute, becauſe it is *no Iſſue*, and did not meet with the Plaintiff. Godb. 56. Arg. cites 19 Eliz.

3 Le. 66. pl. 99. Mich. 19 & 20 Eliz. C. B. Kirlee v. Lee, S. C. is, that the Promiſe was to board them and two Servants, and to find Paſture for 2 Geldings &c. The Defendant confeſs'd the Promiſe as to boarding the Plaintiff and his Wife, but traverſed as to the Servants and Geldings. The Plaintiff replied, that the Defendant promiſed to find &c. for 3 Years next following, and ſo to Iſſue, and found for the Plaintiff. It was moved that the *Replication affirm'd another Aſſumpſit than that whereof he declared*, and this is not a Miſ-joining, but a Not-joining of Iſſue, and not helped by the Statute of Jeofails, and the Court held this a material Exception, and Ld. Dyer conceived it a Departure. ——2 Le. 195 in pl. 244. S. C. cited in the very Words of Godb. 56.

3. In *Debt on Bond* the Defendant *pleaded the Statute of Uſury*, becauſe it was *made for the Sale of certain Copperas, and he took more than was limited by the Statute*, and that it was made by Shift and Chevifance, and alleged other Matter to prove it within the Statute. The Plaintiff *replied that it was made upon good Conſideration*, and *traverſed the Delivery of the Copperas*, which was an ill Iſſue clearly, and it was found for the Plaintiff, and this was alleged in Arreſt of Judgment; and yet there being an Iſſue tried, altho' it was *miſ-joined*, the Exception was diſallow'd, and Judgment for the Plaintiff. Goldsb. 39. pl. 15. Mich. 29 Eliz. Mounſay v. Hildyard.

4. *Debt* upon *Bond for Performance of Covenants* on a Charter-Party, one whereof was *to deliver a Ship then in London at ſuch a Port*, and *no Time limited for it.* The *Breach aſſign'd* was, *that he did not deliver the Ship on ſuch a Day*, and *Iſſue was* taken *upon the Delivery*, and found for the Plaintiff. After Judgment it was aſſigned for Error, that the Iſſue was not well joined, becauſe he had Time during his Life to deliver it; but adjudged that this miſ-joining of Iſſue was remedied by the Statute of Jeofails, being after a Verdict. Mo. 695. pl. 966. Trin. 32 Eliz. Biſhop v. Gyn.

5. In *Treſpaſs for taking 5 Horſes*, the Defendant *juſtified that G. was amerced for Bloodſhed within the Leet*, and that the Lord of the Manor, Time out of &c. had uſed to diſtrain the Beaſt of any which came within the Manor, and was in the Poſſeſſion of any Man who was amerced for the Amercement, and that the Horſes were in the Poſſeſſion of G. *Iſſue was taken that they were not in the Poſſeſſion of G.* and found for the Plaintiff. Error aſſign'd was, that the Iſſue was joined upon a Thing meerly void, and ſo no Iſſue, and not aided by the Statute of Jeofails. The Court agreed *if there be no Matter of Bar in the Plea, and* the *Iſſue is joined upon it*, it is void, and not help'd by the Statute; *but if the Plea contains*

contains Matter of Bar, and Iſſue is joined upon a Thing not material, it is help'd by the Statute; for here is no Matter of Bar, for the Preſcription is agreed to be void, and then if no Bar, no Iſſue; and Judgment being given upon the Verdict, where no Iſſue was join'd, is erroneous, and agreed that Judgment be reverſed, but would adviſe till next Term. Cro. E. 227. pl. 14. Paſch. 33 Eliz. B. R. Lovelace v. Grimſden.

Cro E. 457. (bis) pl. 1. Paſch. 38 Eliz. S. C. and the Court held it aided by the Statute. —5 Rep. 24. a. b. Mich. 43 & 44 Eliz. B. R. S. C. but S. P. does not appear.

6. The Leſſee *covenanted to repair*, and the *Breach aſſigned was, that he ſuffer'd the Houſe* and Premiſſes *to be ruinous, & ſic non reparavit.* The Defendant *pleaded that he did not ſuffer the Premiſſes to be ruinous*, and ſo to Iſſue, and the Plaintiff had a Verdict, and Judgment in C. B. Error was aſſigned that the Iſſue was miſ-joined; for the Covenant was to repair, and the Breach aſſigned was Non reparavit; but the Iſſue was Non permiſit eſſe in decaſu. But per tot. Cur. the Iſſue is good; for *Non reparare is* all one as *permittere eſſe in decaſu*, and ſo the Judgment was affirm'd. Mo. 399. pl. 523. Paſch. 37 Eliz. Hide v. Dean and Canons of Windſor.

It was held no good Iſſue in Aſſumpſit; but in Action on the Caſe for Diſceit, or Tort, it is a proper Iſſue. Palm. 393. Mich. 21 Jac. B. R. Turner v. Turbervlle. —2 Roll Rep. 368. S. C. accordingly.

7. *Aſſumpſit*, the Defendant pleaded *Not Guilty*, and found for the Plaintiff. It was moved that this was not any Iſſue in this Action. But all the Court held, that altho' it be not a proper Iſſue in this Action, and therefore the Plaintiff might have demurred thereupon, yet becauſe in this Action there is a *Diſceit alleged to charge the Defendant*, Not Guilty is an Anſwer thereto, and that it is but an Iſſue misjoin'd, which is aided by the Statute, being after Verdict; and this *is an Iſſue, but an imperfect one.* Wherefore, abſente Owen, it was adjudg'd for the Plaintiff. And Walmſley ſaid, that he had many Precedents in B. R. of that Iſſue join'd, and tried in this Action, and Judgment thereupon. Cro. E. 470. pl. 29. Paſch. 38 Eliz. B. R. Corbyn v. Brown.

———In an Action for *Debt*, if Not Guilty be pleaded, and there be a Verdict for the Plaintiff, it ſhall be aided by the Statute, becauſe being an ill Plea and a falſe one, the Plaintiff ought to have his Judgment, both for the Badneſs and for the Falſhood; but if the Verdict was for the Defendant, yet the Plaintiff ſhould have Judgment, becauſe the Deed is not anſwer'd by the Bar. G. Hiſt. of C. B. 124.

S. C. cited Arg. Hard. 40.

8. *Debt* upon Bond, the Defendant *pleaded the Statute of Uſury, and that Corrupte agreatum fuit* between them, *and that the Plaintiff Corrupte recepit ſo much. Iſſue was taken upon Both*, and found for the *Defendant.* It was moved that the *double Iſſue* was a Miſtrial and not remedied by any Statute; but per Cur. e contra; for when Iſſue is *taken upon one Thing Material and another Immaterial*, and both found for the Defendant, it is a ſufficient Warrant for the Court to give Judgment for the Defendant. Moor 574. pl. 790. Hill. 41 Eliz. Johnſon v. Clerke.

9. Error of a Judgment in *Treſpaſs*, Aſſault and Battery, for that the Defendant *pleaded in Bar a Concord, but* it was *not with Satisfaction*; alſo as it was pleaded it was not for the ſame Treſpaſs, and ſo void, and yet the Iſſue was taken thereupon, and *found for the Plaintiff*, and *Judgment given upon the Verdict, where it ſhould be given for the Inſufficiency of the Plea*; but the Court held, that altho' this Plea was ill, ſo as the Plaintiff might have demurr'd to it, yet it is not merely void, for that Concord is a good Plea in this Action, and altho' it be not ſufficiently pleaded, no Advantage ſhall be taken thereof after Verdict, but it is help'd by the Statute 32 H. 8. of Iſſues misjoined. Cro. E. 778. pl. 11. Mich. 42 & 43 Eliz. B. R. Dighton v. Bartholomew.

S. C. cited 8 Mod. 376. and per Cur.

10. In Battery by J. C. againſt T. C. the Defendant pleaded De ſon Aſſault demeſne abſque tali Cauſa per ipſum J. C. ſuperius allegat' and ſo to Iſſue, and found for the Plaintiff. The *traverſing the Matter alleged*

leged J. C. whereas it was alleged by T. C. was held to be only a Miſpriſion, and it was ordered per tot. Cur. to be amended. Cro. E. 752. pl. 12. Paſch. 42 Eliz. B. R. John Coſton v. Thomas Coſton.

this was a Caſe where the Iſſue was informally join'd.

11. In *Treſpaſs*, the Defendant *juſtifies that he had Common for all his Beaſts levant & couchant* in the Place where &c. by Preſcription, and put in his Cattle Utendo Communia &c. but did *not aver that his Cattle were levant* &c. Judgment for the Plaintiff; for the want of Averment is help'd by the Statute of Jeofails. Cro. J. 44. pl. 12. Mich. 2 Jac. B. R. * France v. Tringer.

S. P. aided by the Verdict. Vent. 34 Trin. 21 Car. B. R. Anon.

* S. C. cited by the Name of Prance v. Tringer. Saund. 228. per Cur.——S. C. cited Arg. Ld. Raym. Rep 168.

12. Replevin the Defendant *avowed, for that E. B. was ſeiſed, and took T. P. to Husband, and had Iſſue J. P. and died*, that T. P. being Tenant by the Curteſy, *J. P. granted a Rent-charge*, and ſo avows. The Plaintiff *replied, that E. B. was ſeiſed in Tail, and that J. P. granted the Rent, and died, and the Land deſcended to the Defendant's Wife as Heir in Tail, abſque hoc that E. B. was ſeiſed in Fee*; after Verdict it was moved, that the Iſſue was not well joined, for the Seiſin of the Grantor ought to be traverſed, and not the Seiſin of any Anceſtor paramount; but by all the Juſtices præter Gawdy, in regard the Seiſin in Fee is eſpecially alleged in E. B. and the Conveyance of the Reverſion to J. P. therefore the Seiſin in E. B. might well be traverſed, and if it be not an apt Iſſue, yet it is an Iſſue, and help'd by the Statute of 32 H. 8. of Jeofails. Cro. J. 44. pl 11. Mich. 2 Jac. B. R. Piggot v. Piggot.

Yelv. 54. S. C. held accordingly by three, the Eſtate of E. B. being in a Manner and by Circumſtance material; for if ſhe was ſeiſed in Tail, and that Tail deſcended to T. from E. then by her Death the Rent determined after the Fee deſcended to J. from E. C. there the Eſtate was of that Nature, that he might grant a ſufficient Rent-charge, and altho' it might well be preſumed that J. after the Fee deſcended to him from E. had altered ſuch Eſtate Tail, yet by Popham the Courts ſhall not now intend that, becauſe the Parties doubted nothing but whether E. was ſeiſed in Fee or not when ſhe died, and that Doubt is reſolved by the Verdict, As if a Defendant ſhould plead a Deed of J. S. to A. and B. and that A. died, and B. ſurvived and infeoffed the Defendant, if the Plaintiff ſhould ſay that J. S. did not infeoff A. and that they ſhould be at Iſſue upon that, and ſhould be found againſt him, altho' this be no apt Iſſue, yet it is help'd by the Statute, becauſe the Parties doubted of nothing but of the Manner of the Feoffment of J. S. whether it was made to A. or not.——Brownl. 183. 184. S. C. in totidem Verbis, and ſeems only a Tranſlation of Yelv.——G. Hiſt. of C. B. 120. cites S. C. and ſays, tho' this was an informal Action, for that the Plaintiff ought to have traverſed that J. the Grantor was ſeiſed in Fee, yet it is a deciſive Iſſue, for it is allowed on both Sides that John was in by Deſcent from E. and if E. was ſeiſed in Fee, J. was ſo too, and conſequently had good right to make the Grant.

13. *Treſpaſs for entring his Houſe and taking his Goods*, the Defendant *plended Not Guilty as to the Goods, and to the Entry pleaded the Licence of the Plaintiff's Daughter*; the Plaintiff *replied, that he did not enter by her Licence.* The firſt Iſſue found for the Defendant, and the 2d. for the Plaintiff, and Damages aſſeſſed to 80 l. Williams and Yelverton held the Iſſue ill, for he *ought to have traverſed the Entry by itſelf, or the Licence by itſelf, and not both together*; and Popham agreed that the Iſſue was ill, had it been at Common Law, but it being tried it is made good by the Statute 32 H. 8. which aids *miſjoining of Iſſue*; for tho' the Entry by the Licence is pregnant, yet a *Negative pregnant* is an Iſſue; Et adjornatur. Cro. J. 87. pl. 13. Mich. 3 Jac. B. R. Myn v. Coles.

G. Hiſt. of C. B. 123. cites S. P. and ſeems to intend S. C. and ſays, that if the Iſſue be join'd on a Negative pregnant that is an Iſſue that rather ſuppoſes an Affirmative than the contrary, tho' it is bad on a Demurrer, becauſe the Plea &c. is not a certain Affirmation or Negative of any ſingle Point in Queſtion, yet after Verdict, this being only an Error in Phraſe ſhall be good, As if an Action of Treſpaſs be brought for entring into his Houſe, the Defendant pleads the Daughter licens'd him to enter, by which he entered, the Plaintiff replies, Quod non intravit per Licentiam ſuam, tho' this Replication be a Negative pregnant it is good after Verdict.

14. In *Replevin* the Defendant *pleads* that it is *his Franktenement*; the Plaintiff *replies, that the Beaſts eſpaped thence by Default of the Encloſure* &c. The Defendant replies, that tempore captionis the Hedge was well repaired,

repaired, and Iſſue upon that is found againſt the Plaintiff, who now moved in Arreſt of Judgment, that is not a good Iſſue; for it ought to have been tempore Eſcapii, or Intrationis, but by the Court that was now diſallowed, being mov'd after a Verdict. Noy. 115. Bafford v. Ventres.

Hob. 176. pl. 197. Hill. 14 Jac. Plant v. Thorley S C but not exactly S. P.

15. In *Treſpaſs for taking and impounding his Goods*, the Defendant *pleaded the Common Bar*; the Plaintiff *replied and aſſigned the Place*, and thereupon they were at Iſſue, and a Verdict for the Plaintiff; it was moved in Arreſt that this was no Iſſue, becauſe the *Lands are not in Queſtion*, and therefore no Aſſignment neceſſary, and Judgment was ſtay'd; but adjudged afterwards for the Plaintiff, for the Iſſue was holpen by the Statute of Jeofails. Brownl. 200. Hill. 6 Jac. Plaint v. Thirley.

16. In *Treſpaſs* of falſe Impriſonment, the Defendant *juſtified as Conſtable*, but the Juſtification was ill; the Plaintiff takes Iſſue de ſon tort Demeſne, and found for the Defendant. It was held by the Court, altho' the *Juſtification was not good*, yet being an Iſſue and tried, Judgment ſhall be againſt the Plaintiff, and Judgment accordingly. Cro. J. 251. pl. 3. Mich. 8 Jac. B. R. Booker v. Evans.

17. An *Iſſue upon that which the Defendant does not claim* is void, and tho' Iſſue be joined, yet it is not helped by the Statute of Jeofails of 18 Eliz. or 32 H. 8. for it is *no Iſſue* when it is of a thing not in Queſtion; but if the Iſſue had been of a Matter in Queſtion, tho' ill join'd, yet it is aided. Arg And Dodderidge and Crooke J. ſeemed to incline thereto. Brownl. 229. Trin. 11 Jac. in Caſe of Waldron v. Moore.

18. In *Treſpaſs* &c. for taking his Goods, the Defendant *pleaded that the Plaintiff 5 Jac. acknowledged a Recognizance* of 100 l. *to be paid at Mich. next, but did not pay it at the Day, and that 2 Years after he extended the Recognizance* upon his Goods, *and ſo juſtified* &c. The Plaintiff *replied, that the Money was paid 6 Jac. and concludes to the Country*, and *found for the Plaintiff*. It was moved in Arreſt that there was no Iſſue joined, becauſe the Defendant had alleged in his Plea, that the Money was not paid at Michaelmas 5 Jac. and the Plaintiff in his Replication affirmed it to be paid 6 *Jac.* which was a Year after the Day on which the Defendant had alleged the Default of Payment, and ſo no Anſwer to the Plea, and then concludes to the Country upon his own Allegation, that the Money was paid 6 Jac. without ſtaying for the Defendant's Rejoinder, that it was not then paid, but *adjudged that it is an Iſſue*, tho' not ſo good as it ſhould be, and is *helped by the Statute* 18 *Eliz.* and tho' Payment ſimply is no good Plea to avoid a Recognizance, yet after a Verdict the Defendant ſhall not take Advantage of it. Brownl. 225. Paſch. 11 Jac. Miles v. Jones.

19. In *Treſpaſs* for breaking his Cloſe, the Defendant *juſtified for a Way*, the Plaintiff *replied, De Injuria ſua propria abſque tali Cauſa*, and ſo to Iſſue, and Verdict for the Plaintiff. It was *moved* in Arreſt, *that* the Iſſue was not well joined, for *it ought to have been ſpecial*; ſed non allocatur; but adjudg'd per tot. Cur. that it was help'd by the Statute of Jeofails. Brownl. 200. Trin. 14 Jac. Swaff v. Solley.

20. In *Treſpaſs Iſſue was* taken *that a Prebendary* &c. *and all his Predeceſſors* &c. *had uſed time out of Mind to keep a Shepherd for the better keeping their Sheep feeding together in a certain Paſture, from the Sheep of T. Earl of S.* in the ſame Place, and Verdict accordingly. It was mov'd that the Preſcription was ſenſeleſs to allege that the Sheep could Time out of Mind be kept from the Sheep of the Earl of S. being only one Man's Life, and ſo the Verdict void; but adjudged for the Plaintiff; for the *Subſtance* of the Iſſue *was found* viz. the keeping the Sheep of the Prebendary feeding together, and the other Part was only a Conſequent of it. Hob. 117. pl. 146. Trin. 14 Jac. Napper v. Jaſper.

21. In

21. In *Debt on Bond for Payment of* 60 *l. upon the 25th of June*, 12 *Jac.* at his Houſe in F. The Defendant *pleaded Payment on the 20th of June* at the ſaid Houſe ſecundum Formam & Effectum Indorſamenti prædict'. The Plaintiff *replied, that he did not pay it the ſaid 20th of June*, the Jury *found he did not pay it the ſaid 20th of June*, and Judgment thereupon. It was aſſigned for Error, that the *Iſſue is taken dehors the Matter of the Condition*, and ſo an ill Plea and a void Iſſue; for altho' it may be he did not pay it the 20th of June, yet it may be paid upon the 25th of June, and altho' it was ſhewed to be an ill Plea, yet it is helped by the Statute of 32 H. 8. but reſolved it was not help'd by the Statute, for it is *merely void, and no Iſſue; but if it had been found for the Defendant, that the Payment was the 20th of June*, peradventure the Verdict had made it good, for Payment before the Day is a good Payment at the Day, and ſo Judgment in C. B. was reverſed. Cro. J. 434. pl. 2. Mich. 15 Jac. B. R. Holmes v. Brocket.

S. C cited Gilb. Hiſt. of C. B. 120. and Ibid. 113. ſays, But if the Bar be only bad in Form a Verdict will ſupply it, as if in Debt on a Bond conditioned for the Payment of 100 l. 25 Junii prox' and the Defendant pleads Payment on the 20th of June, and it is according to the Condition found that he did pay 20 l. tho' this Bar be bad in Form, becauſe it does not follow the Condition, and the Plaintiff might have taken Advantage of it on ſpecial Demurrer, yet the Verdict having found Payment before the Day, that in Law is Payment at the Day, and the Subſtance found; but where the Giſt of the Bar is good, tho' ſome of the collateral Circumſtances are omitted, which the Plaintiff by demurring generally might have taken Advantage of, yet if they go to Iſſue on the Bar, and that be found for the Defendant, the Verdict will cure this Omiſſion, becauſe the collateral Matters are admitted and waived by going to Iſſue on the Giſt of the Bar.

22. Error of a Judgment in Debt on *Bond condition'd to pay* 105 *l.* the Defendant *pleaded Payment of the aforeſaid* 100 *l. quas ad eundem ſolviſſe debuit*; the Plaintiff *replied, Non ſolvit prædict.* 105 *l. at the Day*, & hoc petit &c. It was found that he did not pay the 105 l. and Judgment for the Plaintiff. Error was aſſign'd that there is not any Iſſue join'd, that here is another Sum in the Defendant's Plea than in the Condition, and another Sum in the Replication than in the Bar, and ſo they *did not meet*, and thereby the Iſſue ill, wherefore Judgment in C. B. was reverſed. Cro. J. 585. pl. 7. Mich. 18 Jac. B. R. Sandbank v. Turvey.

G. Hiſt. of C. B. 119, 120. S. C. that it is an immaterial Iſſue not aided

23. In Debt on *Bond of* 200 *l. for Payment of* 100 *l.* 31 *Sept.* following, the Defendant *pleaded Payment* 31 *Sept.* according to the Condition, and found that he did not pay; It was aſſign'd for Error that the Iſſue and Verdict was void, being upon the Payment 31 Sept. Sed non allocatur; for there being no ſuch Day as 31 Sept. and the Jury finding the Money was not paid at that Day, nor at any Time before, they find in Effect that it was never paid, which is a good Verdict, and Judgment was affirm'd. Cro. C. 78. pl. 9. Trin. 3 Car. in Cam. Scacc. Purchaſe v. Jegon.

Jo. 140. pl. 6 Jiggon v. Purchaſe, S. C. adjudged for the Plaintiff; for the Condition being impoſſible, the Obligation was due immediately, and it was an Iſſue upon an inſufficient Bar, which being found for the Plaintiff it is help'd by the Statute.——Lat 158. Gibbon v. Purchaſe, S. C. and the Court would not arreſt the Judgment.——Nov. 85 Giggham v. Purchaſe, S. C. adjudged for the Plaintiff.——G Hiſt. of C. B. 122. S. C.——If an Iſſue be on Point that is *impoſſible in the Subſtance and Nature of the Thing*, it is not cured by the Verdict, but if it be only impoſſible *in the Manner and Form of it*, a Verdict will cure, for where the Subſtance is, no Verdict can cure it, becauſe it cannot make that true which cannot poſſibly be; but where it is only impoſſible in the Manner of it, the Thing which is poſſible may be found to be or not, and the Manner which is impoſſible totally rejected. G. Hiſt. of C. B. 121.

24. Error of a *Judgment in Debt for* 20 *l.* the Defendant *pleaded Solvit ad diem, & de hoc ponit ſe* &c. and the Plaintiff ſimiliter; and the Jury found for the Plaintiff. It was aſſign'd for Error that here was no Iſſue, for the Defendant ſhould have pleaded Quod ſolvit, & hoc paratus eſt verificare; and the Plaintiff ſhould have repled, Non ſolvit, *& hoc petit* &c. and ſo there had beeen an Affirmative and a Negative; but as it is there is no Iſſue at all. But per tot Cur. the Defendant having pleaded Payment, & de hoc ponit &c. and the Plaintiff having join'd with him,

S. C cited Sid. 290. pl. 5. Arg. and ſaid it had been denied that it is good after a Verd &c.—— Sid. 342. in pl. 5. Windham,

ham J. cited S. C. as held good after a Verdict and the Reporter obſerves that tho' this Caſe was ſaid to be denied (as above) yet now no Notice was taken as to that —— G. Hiſt. of C B 122 cites S C. that the Defendant cannot take Advantage of the Informality of his own Plea, and it is waved on both Sides when they go to Iſſue on the Subſtance of it.

him, and the *Jury finding that he was not paid*, it is well enough, and aided by the Statute of Jeofails, and ſo affirm'd the Judgment. Cro. C. 316. pl. 9 Trin. 9 Car. B. R. Parker v. Taylor.

Sty. 210. Paſch. 1649. S. C. and Roll Ch. J. held it an immaterial Iſſue, and that there can be no Judgment; for the Matter is not put in Iſſue, and order'd a Repleader.——S. C. cited Arg. Hardr. 46.——Sid. 341. pl. 5. Arg. cites S C. that a Repleader was awarded; But ſays the Court, upon the 1ſt and alſo a 2d Debate, were of Opinion that it was good after the Matter, which is the Giſt of the Action, is found by the Verdict.—— G. Hiſt. of C. B. 123 cites S.C. that it is wrong after Verdict, becauſe the Injuria ſua Propria does no more than affirm the Declaration, and does not confeſs or deny the Bar, and therefore the Giſt of the Bar is not put in Iſſue at all, but rather ſtands confeſſed by the Replication, ſince the Cauſe is not traverſed; for ſaying it was De Injuria ſua propria, is not more than ſaying, that notwithſtanding the Cauſe mention'd in the Bar, the Defendant committed the Injury, which the Bar being a ſufficient Excuſe, cannot be, but it does not in the leaſt put the Bar in Iſſue.

25. In *Aſſault and Battery*, the Defendant *pleaded ſpecially and juſtified*, the Plaintiff *replied de Injuria ſua Propria*, and had a *Verdict*; it was moved that this *Replication did not anſwer the Special Matter in the Plea, nor takes any Traverſe by an Abſque Tali Cauſa*, as it ought, *and ſo* there is *no Iſſue join'd*, and conſequently there can be no Judgment. Roll Ch. J. held this not help'd by the Statute, and that it is not a Miſtrial but no Trial, and here is no Iſſue, and adjornatur. Sty. 150. Mich. 24 Car. Jennings v. Lee.

* Lev. 183. S. C. ſays the Court at firſt doubted, but afterwards gave Judgment for the Plaintiff. —— 2 Keb. 10. pl. 26. S. C. adjornatur, and 13. pl. 33. S. C. adjornatur, and 51. pl. 6 S. C. adjudged for the Plaintiff, that it is aided as an Informal Iſſue by 32 H. 8.—G. Hiſt. of C. B. 124cites S. C. and ſays that tho' in Covenant the Defendant ought to traverſe either the Deed or the Breach, and both cannot be involved in Non fregit Conventionem, becauſe the Giſt of the Action lies on the Deed, which muſt be traverſed by itſelf; yet when the Defendant pleads a bad Plea, which is found againſt him, the Plaintiff may have Judgment either for the Inſufficiency or Falſity of the Plea. G. Hiſt. of C. B. 125.

26. The Defendant *covenanted that he was ſeiſed in Fee*, and in an Action brought, the Plaintiff *aſſign'd the Breach, that the Defendant was not ſeiſed in Fee, & ſic infregit* * [*non tenuit*] *Conventionem*; the Defendant *pleaded Non infregit &c.* and *ſo to Iſſue*, and the Plaintiff had a Verdict; it was moved for a Repleader becauſe it was an Iſſue *on two Negatives*, and would introduce great Uncertainties in Iſſues to ſuffer ſuch general and involved Pleadings; but adjudg'd, this *is* not an immaterial but *an informal Iſſue*, and *cured by a Verdict*; however, they diſliked it, and order'd that the Attorney ſhould be fined. Sid. 289. pl. 5. Trin. 18 Car. 2. B. R. Wallingham v. Coomb.

2 Keb. 280. pl. 49. S. C. by the Name of Burton v. Chapman, ſays, that in as much as *the Promiſe is confeſs'd by pleading Non-age*, the Replication is Iſſue ſufficient, eſpecially after Verdict upon Cr. 316. Taylor v Parker, and there is no Difference as to this between a Bar and a Replication, but the Iſſue after Verdict is aided, and Judgment for the Plaintiff, niſi. —— Sid. 341. pl. 5. Burton v. Chapman. S C. accordingly, tho' objected that the want of a Negative made it to be no Iſſue.——G Hiſt. of C. B. 122. cites S. C. that where the Subſtance of the Bar and the Replication be put in Iſſue, tho' it be informally, yet it is cured by the Verdict, As if an Aſſumpſit be for Wares ſold, and the Defendant pleads Nonage, and the Plaintiff replies they were for Neceſſaries, & hoc petit quod inquiratur per Patriam & prædict' Defendens and ſays this Traverſe is informal, becauſe the Plaintiff ought not to have cloſed the Iſſue, but to have given

27. In *Caſe* for Wares ſold, the Defendant *pleaded Non-age* at the Time of the Promiſe, to which the Plaintiff *replied, that the Wares were for Neceſſaries*, & hoc *petit quod inquiratur* per Patriam, *& prædictus defendens ſimiliter*; after Verdict it was moved, that here was no Iſſue nor Negative, and cited **Jennings v. Lee**, to which Windham inclined, but the other Juſtices conceived this aided by the late Stat. Car. 2. cap. 8. the right of the Cauſe being tried; Adjournatur, but afterwards the Court held it good. 2 Keb. 278. pl. 43. Mich. 19 Car. 2. B. R. Buxten v. Chapman.

given the Defendant an Opportunity of rejoining, that there may be a proper Negative to his Affirmative, yet ſince the Matter of his Replication be put in Iſſue, viz. whether they were Neceſſaries or not, the Defendant has waived all Objections to the Form, and by ſuch a Waver it appears that he is not any wiſe injured by not rejoining, and found that they were Neceſſaries, the Plaintiff ought to prevail.

28. In *Treſpaſs* of taking his Horſe, the Defendant *juſtified for a Diſtreſs for Rent* Arrear upon a Demiſe of the Place where &c. by the Defendant to the Plaintiff. The Plaintiff *replied, that the Horſe was not Levant and Couchant*; and Iſſue thereupon, and Verdict for the Plaintiff. It was moved that this was an *immaterial Iſſue*, and the Court ſeem'd to incline to that Opinion, but afterwards the Plaintiff had Judgment by the Opinion of the whole Court. Ld. Raym. Rep. 168. Arg. cites Hill. 20 & 21 Car. 2. C. B. Colwell v. Milnes.

Ibid. 169. Arg. ſays, that if it has but the Semblance of an Iſſue it ſhall be aided, and that might be the Reaſon of the Judgment in the Caſe of Colwell v. Milnes.— —S. C. cited Arg. 2 Lutw. 1578. ſays, that tho' it was moved, as appears by the Rules in that Caſe, that the Iſſue was immaterial, yet the Plaintiff had Judgment.

In Treſpaſs, Defendant *juſtified* of taking Cattle *as a Diſtreſs for Rent*, the Plaintiff *replies that they were not Levant and Couchant*; though this is an ill Replication, yet if the *Defendant takes Iſſue upon it*, and it is found againſt him, the Plaintiff ſhall have Judgment Ld. Raym. Rep. 167 170. Hill. 8 & 9 W. 3. Kempe v. Crewes. ——2 Lutw. 1573 to 1582. Kimp v. Cruwes S. C. and all the Court were of Opinion that now it ſhall not be taken that the Iſſue was not material, and ſo the Plaintiff had Judgment.

29. *Unapt Iſſues* are aided by the Statute, but not *immaterial ones*; Per North Ch. Juſtice and Scrogs J. Mod. 225. pl. 14. Trin. 28 Car. 2. C. B.

An Immaterial Iſſue no ways ariſing from the Matter is not help'd; Per North Ch. J. and Scroggs J. 2 Mod. 137 ——A Verdict cannot help an Immaterial Iſſue, becauſe what is alleged in the Pleadings is not put in Iſſue, or if it be, is not deciſive between the Parties, and ſo the Verdict is no good Foundation for the Judgment. G. Hiſt. of C. B. 118.

31. In *Ejectment* for Lands *in the County Palatine of Durham*; Upon Not Guilty pleaded, the Plaintiff had a Verdict; and upon a Writ of Error brought, the Error aſſign'd was that there was no Iſſue join'd between the Parties, for the Words *(ſuper Patriam)* were *left out*; but per Curiam, here is an Affirmative and a Negative, and that makes an Iſſue; it is true, it had been better if theſe Words had been in, but the Omiſſion of them only makes the Iſſue *informal*. So they affirm'd the Judgment. 3 Salk. 209, 210. pl. 7. 5 W. 3. B. R. Hall v. Stich.

32. To put a *Matter of Law in Iſſue* to a Jury is void. But Holt ſaid it would be help'd by a Verdict. 11 Mod. 46. pl. 11., Paſch. 4 Annæ B. R.

33 After a Verdict for the Plaintiff, it was moved that no Iſſue was join'd in the Cauſe, it being *Et hoc petit quod inquiratur* per Patriam, then theſe Words ſhould follow, *& prædictus (the Defendant) ſimiliter*, which *were omitted*. On the other Side it was ſaid that there is no Occaſion for amending this Iſſue, becauſe the Appearance of the Defendant is enter'd on the Poſtea; beſides, at the worſt it is only an Informal Iſſue, and that is amendable at another Day. The Court ſaid that in every material Iſſue join'd there muſt be a Verdict on one Side, otherwiſe there can be no Judgment, and the Plaintiff would now have Judgment for Damages on a Verdict found on an Informal Iſſue, as he alleges it to be, but on no Iſſue join'd, as the Defendant ſays; now there is a *Difference between an immaterial and an* * *informal Iſſue join'd, and* where there is *no Iſſue at all* join'd; in the principal Caſe the Iſſue was tender'd by the Plaintiff, and never join'd by the Defendant, ſo there was *no Iſſue* at all, which ſeem'd to the Court not amendable. 8 Mod. 376, 377. Trin. 11 Geo. 1726. Cowper v. Spencer.

* Where the Iſſue is *material* the Verdict will not aid it, but where it is *informal* it is help'd. G. Hiſt of C. B. 118.

(E. b) Negative

(E. b) Negative Pregnant, aided by Verdict.

See tit. Negative Pregnant.

1. IN Forcible Entry, the *Iſſue was if R. and K. diſſeiſed D. to the Uſe of K.* the *other made Title Abſque hoc that R. and K. diſſeiſed D. to the Uſe of K.* and Exception taken for Pregnancy, and yet the *Plaintiff recover'd* by Judgment, becauſe the Matter is if the Diſſeiſin was to the Uſe of K. or not, but not guilty in K. is Negative Pregnant; But the Reaſon ſeems to be * becauſe the *Verdict* paſſed with the Plaintiff, and *found the Diſſeiſin to the Uſe of K.* and therefore the Verdict *made the Plea good*, but if they had found for the Defendant that they did not diſſeiſe to the Uſe of K. then it had been ill, quære. Br. Negativa &c. pl. 33. cites 36 H. 6. 22.

* Br Negativa &c. pl. 42. S P. cites 3 H. 8. 46.

2. *Jeofail* or *ill Iſſue* as *Negative Pregnant*, *Double Plea* &c. is made good by the Verdict found with it, & *e contra if the Verdict be found the contrary*. Br. Repleader, pl. 37. cites 12 E. 4. 6.

2 Bulſt. 41. S. C. and S P. accordingly —— Yelv. 227. Glaſſe's Caſe. S. C. but reports it as an Action of Debt brought for Rent Arrear on a Leaſe

3. *Covenant to make a Leaſe* for Years to the Plaintiff of certain Land; the Plaintiff *alleges* in his Count for Breach, *that the Defendant Nihil habuit in the ſaid Land*; the Defendant *pleads Quod habuit* &c. but does *not ſhew what* his Eſtate is, a *Verdict finds Quod non habuit*; the Defendant's Plea was faulty, for he ought to have ſhewn what Eſtate he had, and to have ſhewn it in Certainty, but the Verdict has made the Iſſue good at Common Law. Judged and affirmed in Error, for the Court was good, and the Defendant's Plea vitious, and the *Verdict is found with the Count*. The Plaintiff had Judgment. Jenk. 326. pl. 43 Mich. 10 Jac. Glaſs v. Gill.

for Years, but the Pleading is the ſame, and ſo is the Judgment; for tho' the Iſſue is not ſo formally join'd as it ought, yet it is an Iſſue tried which may make an End of the Matter; for it is found that the Plaintiff had Eſtate in the Land whereof he might make the Demiſe. —— Cro. J. 312. pl. 12. Gyll v. Glaſs S C. & S. P. as in Yelv and Judgment affirm'd accordingly; but the Court held that the Defendant might have demurr'd. —— Jenk 340 pl. 97 S. C. & S. P. in Debt for Rent and Judgment affirm'd in Error —G. Hiſt. of C. B. 123. 124. cites S. C. and ſays, that tho' this had been bad on a Demurrer, becauſe by not ſhewing what Eſtate he had it is pregnant of this Negative, [viz.] that he had not ſuch an Eſtate by which he had Power to demiſe, nor that he had not ſuch an Eſtate as he could demiſe.

See tit. Repleader.

(F. b) Repleader after Verdict. In what Caſes.

1. DEBT *upon Indenture of Leaſe* for 20 Years *concerning* 10 *l. per Ann.* and other Covenants Ex utraque parte perimplendas & *ad omnes Conventiones perimplendas uterque eorum tenetur alteri by the ſame Indenture in* 20 *l.* and for Non-Payment of 10 l. at Eaſter laſt the Leſſor brought Action of 20 l. and the *Defendant ſaid, that at the Feaſt of Eaſter he was upon the Land all the Day ready to pay, and none came of the Part of the Plaintiff to receive*, the *Plaintiff ſaid, that ſuch a Day after the ſaid Feaſt* he *demanded the* 10 *l. and the Defendant refuſed to pay*, to which the *Defendant ſaid that he paid the* 10 *l. the ſame Day, and ſo to Iſſue*, and found for the Plaintiff at the Niſi Prius. And per Cur. this is Jeofail; for the *Penalty refers to the Feaſt of Eaſter only*, which is excuſed by the Tender upon the Land at Eaſter-Day, and the Plaintiff intitles himſelf by a Demand after the Penalty ſaved, by which it was awarded that they *replead* notwithſtanding it be *after Niſi Prius* when the Defendant is not de-

demandable; for yet *he has Day in Court till Judgment be given*, and in ſeveral like Caſes the Parties have repleaded; quod nota., by Award. Br. Repleader, pl. 23. cites 22 H. 6. 57.

2. Where there was a *ſubſtantial Variance between the Plea and Replication* a Repleader was awarded after Verdict. Freem. Rep. 450. pl. 613.

As in Treſpaſs, the Defendant *pleads a Licence to him for himſelf, his Wife and Children*, by the Plaintiff. The Plaintiff *replies*, that *he did not give a Licence to him and his Wife Modo & Forma*. After Verdict for the Plaintiff it was moved in Arreſt of Judgment that here was no Iſſue join'd; for the Defendant pleads a Licence to himſelf, and the Plaintiff ſays he gave none to him and his Wife. And the Court held this to be naught, and not to be aided by the Modo & Forma; for here is a ſubſtantial Difference; becauſe if the Licence were given to him for to bring on his Wife and Children, if he died this would not ſerve the Wife; but if it were a Licence to him and his Wife, if the Husband died it would ſurvive to the Wife; and thereupon the Court order'd a Repleader. Freem Rep. 450. pl. 913. Paſch. 1677. Anon.

3. In Debt upon *Bond for the Payment* of Money the *9th of Feb.* the Defendant *pleads that he paid it the 9th Day of Jan. preceding*; and *Iſſue that he did not pay it the ſaid 9th Day of Jan.* and upon that a Verdict for the Plaintiff. And now it was moved to plead again; for notwithſtanding this Verdict the Plaintiff may be paid after the 9th Day of Jan. and before the 9th Day of Feb. when the Condition was that the Money ſhould be paid, and therefore the Bond perhaps was not forfeited, nor had the Plaintiff any Title of Action; And it was argued that it was an immaterial Iſſue, notwithſtanding it was aided by the Statute. And therefore it was order'd they ſhould plead again. Comyns's Rep. 148. pl. 100. Trin. 5 Ann. C. B. Anon.

For more of Amendment and Jeofails in General, ſee other proper Titles, and the Pleadings under the ſeveral Titles throughout this whole Work.

Amercement.

(A) Amercement. For what Things an Amercement ſhall be.

Fol. 211.

1. FOR a Rent diſtrainable **no Amercement ſhall be in a Leet.** 11 H. 4. 89.

This was ſaid there by Hill privately. And 13 H. 4. 9. pl. 28. it was objected that the Lord cannot amerce a Deciner &c. for Non-Payment of Rent; but Thirn denied it, and ſaid he might, where it is due and payable on the Leet-Day.—S.C. and S. P. cited per Cur. 11 Rep. 45 a.

2. **If the Deciners ought to pay a Rent to the Leet** pro certo Letæ, **(this is not properly a Rent but a Sum in Groſs) if they do not pay it they may be amerced, for this is due and payable at the Leet.** 13 H. 4. 9.

Br. Diſtreſs, pl. 18. cites 11 H. 4. 89 [and which is part of the S.C. with 13 H. 4. 9.] and S. P. admitted.——Fitzh. pl. 57. cites 11 H. 4. 89. S. P.——S. C. cited accordingly,

accordingly, per Cur. Mich. 12 Jac. 11 Rep. 44. b. in Godfrey's Caſe.——Yelv. 186, 187. in Caſe of Godfrey v. Bullein. Mich. 8 Jac. B. R. the S. P. admitted ——Brownl. 190. S. C. & S. P. admitted, but ſeems to be only a Tranſlation of Yelv.

3. In Aſſiſe it was *found* that the *Plaintiff* was *ſeiſed and diſſeiſed, but not of ſo much* of the Land *as he ſhew'd in the Plaint, but he put no more in View than that of which he was diſſeiſed*, and therefore he recover'd by Award, and was not amerced *for the Surpluſage*, Quod Nota bene; for Diſſeiſin is as Treſpaſs, ſo that if he be guilty of part, and of part not, yet the Plaintiff ſhall recover for the Part; Quod Nota. Br. Aſſiſe, pl. 180. cites 12 Aſſ. 14.

4. Avowry for two Sheep for 2 d. and twelve Oxen for 9 d. the Defendant was amerced to 23 s. for the *Exceſs of the Diſtreſs*; Quod Nota bene. Br. Amercement, pl. 8. cites 41 E. 3. 26.

This is miſprinted (32) for (12) and ſo the other Editions are.——It muſt be for a Thing which is a common Nuſance, or elſe it is Extortion, per Fenner J to which Periam J. agreed. Godb. 135. pl. 158. Hill. 39 Eliz. cites 11 H. 4.

5. The Lord in his Leet may amerce for *common Nuſances* and the like. Br. Leet, pl. 12. cites 32 [12] H. 4. 8.

But for *Suit Service by Tenure* a Man ſhall be diſtrained and not amerced; Note a Diverſity. Br. Amercement, pl. 44. cites 12 H. 7. 14.

6. In Replevin for *Suit Real to the Leet* a Man ſhall be amerced. Br. Amercement, pl. 44. cites 12 H. 7. 14.

7. The Lord may amerce for a *common Treſpaſs*, or a Treſpaſs done *in the Land of another*, per Gawdy J. Le. 242. in pl. 327. Mich. 32 & 33 Eliz. B. R.

8. If a Tenant be amerced, and *before it be levied Tenant dies*, it is loſt; for it is Quaſi Actio Perſonalis Cro. E. 351. pl. 3. Mich. 36 & 37 Eliz. B. R. Jackman v. Hoddeſdon.

9. Lord preſcrib'd, that if Tenant do a *Reſcous*, or *drives his Cattle off the Land when the Lord comes to diſtrain*, that the Tenant ſhall be amerced by the Homage, and that the Lord may diſtrain for the ſame, and Anderſon and Rhodes J. held it a good Cuſtom, and vouch 11 H. 7. where the Lord had 3 l. for a *Pound Breach*. Godb. 135. pl. 158. Hill. 39 Eliz. Anon.

10. A Reſiant may be amerced for *Non-Attendance at the Leet*, he being warned. Mo. 88. pl. 221. Paſch. 10 Eliz. Lukin v. Eve.

(B) What Perſon may be amerc'd. [*Infant.*]

See (L) S. P.

1. IN a Writ of Partition againſt an Infant, if he pleads with the Demandant, and it is found againſt him, he ſhall be amerced. 9 H. 6. 7.

(C) Amer-

(C) Amercement. Not for a Wrong to the Lord.

1. A Man ſhall not be amerced in a Leet for a Treſpaſs to the Lord himſelf, for he ſhall not be his own Judge. 12 H. 4. 8. b. The Lord's doing ſo is not lawful, unleſs it be by Cuſtom. Br. Amercement, pl. 19. cites S. C.—— Br. Cuſtom, pl. 16. cites S. C. that it may be good by Cuſtom, eſpecially where the Treſpaſſor pays the Amercement.——Br. Leet, pl. 12 cites S. C. [tho' in the large Edition it is miſprinted (32) for (12)] accordingly, and the Lord's levying it is a good Bar to him in Treſpaſs tho' there no ſuch Cuſtom.

2. But he may be amerced for Non-payment of Certum Letæ to the Lord, he being a Deemer. 13 H. 4. 9. See (A) pl. 2. S. C. and the Notes there.

(D) Amercement affeer'd. In what Caſes it ſhall be *affeer'd*. What [*it is.*]

1. An Amercement in Latin is called Miſericordia, becauſe it ought to be aſſeſs'd mercifully, and this ought to be moderated by Affeerment of his Equals, or otherways a Writ de Moderata Miſericordia lies. Co. Litt. 126. b. S. P by which it ſeems that it ought to be leſs than the Offence. F. N. B. 75 (H) —— S. P. 8 Rep. 139. a. (c) and that the Word (Affeer) in as much as to ſay in Certitudinem ponere ſeu taxare &c.

The Writ of Moderata Miſericordia is founded on the Statute of Magna Charta, cap. 14. F. N. B. 75. (A) —— 2 Inſt. 28. S. P.

2. *Weſtm.* 1. 3 *E.* 1. *cap.* 6. *No City, Borough, Town, or Men ſhall be amerced without reaſonable Cauſe,* One *Miſchief* before this Statute *was*, it *extended* not only to natural and ſingular Men, but *to ſole Bodies politick or corporate, and not to Corporations or Companies aggregate of many*, as Cities, Boroughs, and Towns. Another Miſchief was, that many Times not only Cities, Boroughs, and Towns, but private Men alſo were amerced without Cauſe. Laſtly, that the ſaid Statute of Magna Charta extended but to him that was Liber Homo.

that ſeeing *the Words of* the Statute of *Magna Charta were Liber homo non Amercietur* &c.

For all theſe 3 this Statute provides, viz. that no City, Borough, or Town, nor any Man ſhall be amerced without reaſonable Cauſe, and according to the Quantity of his Treſpaſs, and upon this Statute the *Party grieved may have an Attachment without any Prohibition precedent*; for this Act is a Prohibition of itſelf; and yet the Mirror does take it, that all this was contained in the grand Charter. 2 Inſt. 169, 170.

And according to the Quantity of Treſpaſs, viz. every Freeman ſaving his Freehold, a Merchant ſaving his Merchandize, a Villain ſaving his Gainure, and that by his or their Peers. Here *Treſpaſs ſignifies Offence, Fault, or Default*, and ſo it is taken in many ancient Records, as taking one Example for many; the Statute that is called Ragman, ordains that Juſtices ſhall go thro' the Land, to enquire, hear, and determine the Plaints and Querels of Treſpaſſes, as well of the Bailiffs and Miniſters of the King as of others, and of other People whatſoever they be, except Appeals of Felony &c. which was underſtood as well of outragious Takings as of all Manner of Treſpaſs, Contempt, Neglect, Default or Offence to the King or any other &c. 2 Inſt. 170.

3. *Weſt.* 1. *cap.* 18. 3 *E.* 1. *The common Fine and Amercement of the whole County in Eyre of the Juſtices for falſe Judgment, or other Treſpaſs, ſhall be aſſeſs'd by the ſaid Juſtices, upon the Oaths of Knights and other* There were 4 *Miſchiefs*, or rather Grievances, *honeſt*

honeſt Men, and not by Sheriff's and Barretors, as in Times paſt hath been uſed, and the ſaid Juſtices ſhall cauſe the Parcels thereof to be eſtreated into the Exchequer, and not the whole Sum only.

before this Act; 1ſt, That this common Fine and Amercement before Juſtices in Eyre was promiſcuouſly aſſeſs'd by the Sheriff and Barretors of the County, (for ſo our Act ſpeaketh) upon the Faultleſs as well as upon the Faulty, and that after the Juſtices in Eyre were departed and gone. 2dly, That the ſame was many times by them increaſed. 3dly, That the Parcels were otherwiſe than they ought to be, to the Damage of the People. 4thly, That the ſaid Amercement was paid to the Sheriff and Barretors that could not acquit them, and therefore were often doubly charged. The Remedy by the Body of the Act conſiſteth of two Parts, Firſt, That ſuch Sums ſhall be aſſeſs'd by the Oath of Knights, and other honeſt Men, before the Juſtices in Eyre, upon ſuch as ought to pay the ſame. 2dly, That the Juſtices ſhall cauſe the Parcels to be put in their Eſtreats which ſhall be deliver'd up in the Exchequer, and not the whole Sum. 2 Inſt. 196.

Here Fine and Amercement are all one; for, as by this Act appeareth, it ought to be affeer'd, which a Fine in his proper Senſe ought not. This is Parcel of the Green-Wax ſo call'd, becauſe the Eſtreats to the Sheriff for levying of them are ſeal'd with Green-Wax. This common Amercement was a great Grievance to the People; for that the Faultleſs as well as the Faulty were (as hath been ſaid) thereby charged, and this was Diſperdere Innocentem cum Delinquente. 2 Inſt. 196.

4. Affeering *is by* the Statute of *Magna Charta*, *which wills that no Man be amerced but ſecundum Quantitatem delicti*, which cannot be known but by Affeerment. Quod nota. Br. Amercement, pl. 50. cites 10 H. 6. 7.

Put where an Amercement is *preſented by the Jury*, it ſhall be affeer'd by two Affeerors.

5. Where an Amercement is *in nature of a Fine*, there ſhall be no Affeerment; as where it is aſſeſs'd *by Stewards in a Leet*. Br. Amercement, pl. 50. cites 10 H. 6. 7. Br. Amercement, pl. 50. cites 10 H. 6. 7. per Chauntrel, quod non negatur.

6. If a *Juror appears, and is adjourn'd upon Pain, and makes Default*, in this Caſe he being to be fined to the Value of his Land by the Year, the Inquiry ſhall be by the others of the Jury, becauſe in ſuch Caſe the Court cannot know it. 8 Rep. 41. a. in a Nota of the Reporter in Grieſley's Caſe, ſays that with this accords 4 E. 4. 6. and 9 H. 4. 5.

The Jury in a Leet muſt amerce to a certain Sum, which may be mitigated and affeer'd by others,

7. If a *Jury in a Leet taxes an Amercement*, it is ſufficient without other Affeerment; for the Amercement is the Act of the Court, and the Affeerment is the Act of the Jury. 8 Rep. 40. b. in Grieſley's Caſe, in a Nota of the Reporter, and ſays that with this accords 8 H. 7 4. and cites 7 E. 3. 15. b. Aſtelie's Caſe, 45 E. 3. 29. b. and 27. a.

and therefore theſe Offices muſt not be confounded; per Hobart Ch. J. Hob. 129. Paſch. 14 Jac. in pl. 166.

An Amercement in a Court-*Leet* for an Offence preſented, need not be affeer'd; and Hob. 129. was denied; per Holt Ch. J. Show. 62. Mich. 1 W. & M. in the Caſe of Matthews v. Carey.——But the Amercement *muſt not* be *by the Jury*, *but* by the *Judgment of the Court*, Quod ſit in Miſericordia; and the Part of the Jury is only miniſterial; for they are to carry the Act of the Court into a Certainty; per Raymond Ch J. and Judgment accordingly. Gibb. 109. Mich. 3 Geo. 2 B. R Stephens v. Howard. ——Holt ſaid he never underſtood that Caſe in Hobart 129. and that in Caſe of an Amercement in a *Court-Baron*, the *certain Sum* need not be ſet by the Court, but it is enough if it be aſcertain'd by the Affeerors; and Mr. Pingelly ſaid that many Authorities are otherwiſe. 11 Mod. 71. pl. 11. Paſch. 5 Annæ, B R. Anon.

8. All Fines in a *Leet* may be aſſeſs'd by the Steward, and all Amercements may be aſſeſs'd by the Affeerors; per Frowike and Kingſmill J. Kelw. 65. pl. 5. Trin. 20 H. 7. in a Nota.

9. *Fines aſſeſs'd by the Court* ſhall not be affeer'd by any others, unleſs in Special Caſes, and this not only upon Contempts or Miſdemeanors done in Court, but upon Writs of *Capias pro Fine*, or upon *Confeſſions* &c. 8 Rep. 40. b. 41. a. in Grieſley's Caſe, in a Nota of the Reporter, cites Trin. 22 H. 7. Rot. 510. and Trin. 4 H. 8. Rot. 306.

10. A Fine impoſed by a *Steward of a Court* is good enough without any Affeering, and ſo there is a Diverſity between a Fine and an Amercement; for a Fine is always impoſed and aſſeſs'd by the Court, but an Amercement is aſſeſs'd by the Country. Reſolved per tot. Cur. 8 Rep. 38. b. Trin. 30 Eliz. C. B. Grieſley's Caſe. Sav. 93. 94. pl. 173. S. C. & S. P. accordingly.—Br. Leet, pl. 29. cites 7 H. 6. 12.

ſame Diverſity taken.——11 Rep. 43. b. ſame Diverſity taken per Cur. and ſays that with this accords 7 H. 6. 12. b. and 10 H. 6. 7. a.

11. At a Court Baron a Tenant was *preſented* for an Offence, *and if he did not amend it before* the next Court, that *he ſhall pay* ſuch a Pain, and at the next Court it was preſented that he had not amended it, and ſo he has incurr'd the Pain, this need not be affeer'd; for there is a *Diverſity between* an *Amercement* and a *Pain*; per Anderſon, quod Windham conceſſit. 1 Le. 203. pl. 282. Paſch. 31 Eliz. C. B. Caſtle v. Oldman.

12. A *By-Law* was made at a *Court-Baron*, according to the Cuſtom there uſed; whereby the *Penalty* of 20s. was *laid upon every Offender*, and afterwards at another Court a Tenant is preſented for a Breach thereof, and Ex Gratia Curiæ, the Penalty was aſſeſs'd to 6s. 8d. But adjudged ill; for that a Penalty certain cannot be affeer'd or alter'd. 3 Le. 7. pl. 21. Mich. 7 Eliz. C. B. Scarning v. Cryer. Mo. 75. pl. 205. Scarling v. Criet, S. C. accordingly.—Bendl. 159. pl. 219. S. C. adjudg'd for

the Plaintiff.——Where a Fine is certain the Steward may ſet it, and there can be no Affeerment; per Bridgman Ch. J. Cart. 29. Mich. 17 Car. 2. C. B. in Caſe of Davis v. Lowden.

13. If the *Jury amerce to a particular Sum*, there is no need of an Affeerment; per Holt Ch. J. Show. 62. Mich. 1 W. & M. in Caſe of Matthews v. Cary. Error out of the Common Pleas upon a Judgment in Debt, for

an Amercement in a *Court-Leet*. The Defendant made Default of Suit after a *general Notice*, and the Amercement affeer'd. Per Holt Ch J. The Jury may amerce in a *certain Sum* if they will, and then there needs not an Affeerment, though the *proper Way is Ideo ſit in Miſericordia*, and then an Affeerment. 11 Mod. 76. Paſch. 5 Ann. B. R. Brook v. Haſtler.——1 Salk. 56. pl. 7. Hill. 4 Annæ, B. R. S. C. that the Defendant was amerced per Cur. and it was objected that the Court ought to impoſe a Sum certain, which is afterwards to be mitigated by Affeerors; but Curia contra, and that the Amercement ought to be general, Quod ſit in Miſericordia, and that is to be aſcertain'd by Affeerors.

14. Amercements are to be affeer'd, unleſs they are *in nature of a Fine*, and then they need not, but where they are *diſcretionary*; but if they are *aſcertain'd by Cuſtom*, they ought not; 1ſt, becauſe it is in nature of a Fine for a Contempt; 2dly, becauſe the Cuſtom has aſcertain'd it; per 3 Juſtices againſt one, who thought the Cuſtom abrogated by Magna Charta, cap. 14. 8 Mod. 296. Trin. 10 Geo. 1. in the Exchequer, Morgan's Caſe. This ſeems to be the Caſe of Edwards v. Hughes, G. Equ. Rep. 209. which is the Argument of Gilbert Ch. B.

that all Amercements muſt be affeer'd by the Statute of Magna Charta 14. and it is there added, That that was the Opinion of the Court, deliver'd by the Ch. B. Gilbert.

(E) *By whom* it ſhall be *aſſeer'd.*

Br. Amercement, pl. 40. cites S. C. and ſays that three were ſworn to affeer the Amercement, and ſo they did; but that it was not uſual to do ſo, and therefore Quære; but ſays that this was the 3d or 4th Writ. Quod nota.

1. IN an Aſſiſe, if the Plaintiff does not appear, or any for him, yet three of the Aſſiſe may be ſworn to affeer the Amercement, and ſhall do it. 28 Aſſ. 26. adjudged.

If a Man be nonſuited after the *Jury* is *ready to give their Verdict*, the Court may cauſe the Amercement to be affeer'd immediately in Court by the ſame Jurors. 8 Rep. 39 b. in Griefley's Caſe, cites it as ſo held 18 E 3. 13. a.——S. C. cited accordingly in Godfrey's Caſe. 11 Rep. 43. b.

2. If a Man be amerced upon a Nonſuit by the Bailiff of an inferior Court, this ſhall be affeer'd by his Equals. 10 E. 2. Action ſur le Statute 34.

* Fol. 212.

3. 8 E. 1. Rot. Patentium Membrana 28, in Dorſo C. de L. Aſſignatur ad Taxandum per Sacramentum proborum & legalium hominum de quolibet Hundredo Comitatuum Somerſet, Dorſet, Devon, & Cornubiæ, & etiam Ballivorum Hundredorum, aliorum omnia Amerciamenta ad quæ homines Comitatuum illorum amerciati fuerunt coram Juſtitiariis noſtris de Banco, Annis Regni noſtri, 2, 3, 4, 5, & 6. et quorum nomina iidem Juſtitiarii noſtri vobis liberabunt, prout hactenus fieri conſuevit, & prout ad opus noſtrum magis videritis expedire, & mandatur Vicecomitibus Comitatuum * prædictorum quod &c. venire faciant coram vobis Sex probos &c.

Fitzh. Amercement, pl. 19. cites S. C.

4. If a Judgment is revers'd in a Writ of falſe Judgment, and the Suitors amerced, the Juſtices may affeer it. 22 E. 3. 2.

——S. C. cited by the Reporter in Griefley's Caſe, 8 Rep. 40. b. and ſays, that with this agrees the Book of Entries, Tit. Falſe Judgment, pl. 13.——S. P. D. 263. pl. 33. Trin. 9 Eliz. accordingly.

It is uſed to be aſſeſs'd *before the Juſtices of Aſſiſe, by the Oaths of* 2 *or* 3 *honeſt Men.*

5. 9 H. 3. 14. *A Freeman ſhall be amerced proportionable to his Offence, and ſaving to him his Contenement a Merchant ſaving to him his Merchandize, and a Villein his Wainage, and none of the ſaid Amercements ſhall be aſſeſs'd but by the Oaths of honeſt and lawful Men of the Vicinage,*

Br. Amercement, pl. 65. cites 7 H. 6. 12.

This Statute ſeems only an Affirmance of the Common Law. 8 Rep. 39. 40. a. And ſee there the Citations out of Glanvile, Fleta and Bracton.——2 Inſt. 27. 28. S. P.

The Word (*Free-man*) is to be underſtood a Freeholder, as appears by the Words (Salvo Contenemento ſuo) and *extends* as well *to ſole Corporations*, as Biſhops &c. as to Lay-Men but *not to Corporations aggregate* of many. Nor is the Word (Free-man) intended of *Officers or Miniſters of Juſtice.* And this Act extends to Amercements and not to Fines impoſed by any Court of Juſtice.——S. P. 8 Rep. 39. b. in Griefley's Caſe.

If a Lord of Parliament is nonſuited after Appearance, or if he be a Duke, he ſhall be amerced to 10 l. and an * Earl to 5 l. *et qui Minus Minus*, per Littleton. Br. Nonſuit, pl. 62. cites 19 E. 4. 9.——Br. Amercement, pl. 47. cites S. C. but Brook ſays, Quære if an *Earl* be not 10 *Marks*, for it ſeems that the meaneſt, as Baron, ſhall be amerced 100 s.

* S. P. becauſe he is a Peer of the Realm. Br. Amercement, pl. 23. cites 38 E. 3. 31.

Every Amercement *upon a Baron* ſhall be 100 s. per Paſton, & non negatur. Br. Amercement, pl. 2. cites 9 H. 6. 2.

Earls and Barons ſhall not be amerced but by their Peers, and no Man of the Church ſhall be amerced but according to their lay Tenements and the Quantity of his Offence.

A *Biſhop* ſhall be amerced to 100 s. becauſe he is a Peer of the Realm. Br. Amercement, pl. 48. cites 21 E. 4. 77.

Tho' this Statute be in the Negative, yet *long Uſage has prevailed againſt it*, for the Amercement of the Nobility is reduced to a Certainty, viz. a Duke 10 l. an Earl 5 l. a Biſhop who hath a Barony 5 l. &c. In the Mirror it is ſaid that the Amercement of an Earl was 100 l. and of a Baron 100 Marks. 2 Inſt. 28.——8 Rep. 40. a. S. P. accordingly.

Anciently according to this Statute the Counties (viz. Earldoms) and Baronies, were affeer'd by their Peers in Parliament. Gilb. Hiſt. View of Excheq. 81. and ſays, that he conceives Eſtreats of ſuch Miſericordia's were ſent to the Clerk of the Parliament, but by an Order of the Houſe of Lords theſe Amercements were reduced to a Certainty, that of a Duke to 10 l. and Earl 5 l. and a Baron and Biſhop 5 Marks, ſo that by that Order Amercements becoming certain there was no Occaſion of ſending them to the Houſe of Lords as they did formerly.

It is ſaid, that a *Biſhop* ſhall be amerced for an Eſcape 100 l. A Goaler ſhall be amerced for a negligent Eſcape of a Felon attaint 100 l. and of a Felon indicted only 5 l. 2 Inſt. 28.

If a *Nobleman and a common Perſon join in an Action*, and become Nonſuit, they ſhall be ſeverally amerced, viz. the Nobleman at 100 s. and the common Perſon according to the Statute, therefore when a Nobleman is Plaintiff it is politick rather to diſcontinue the Action than be Nonſuit. 2 Inſt. 28.

6. If the *Steward affeers an Amercement upon Preſentment of the Jury*, it is *void*, and does not bind. 8 Rep. 40. b. in Grieſley's Caſe, in a Nota of the Reporter, cites 45 E. 3. 27.

7. *Writ of Right againſt the Earl of Northumberland after Iſſue joined upon the mere Right, after Battail joined the Tenant made Default*, and Judgment final was given, and he was amerced; but becauſe he was a Peer of the Realm, he was awarded to be *aſſeſs'd by his Peers* according to the Form of the Statute of Magna Charta, cap. 14. Quod Nota. And ſo ſee that after the Amercement awarded the Amercement ſhall be aſſeſs'd. Br. Amercement, pl. 33. cites 1 H 6. 7.

8. Amercement *aſſeſs'd in Bank* for Nonſuit or the like, ſhall be affeer'd after *before the Juſtices of Aſſiſe in the County where it ariſes*. Br. Amercement, pl. 50. cites 10 H. 6. 7. per Chauntrell, & non negatur.

9. Amercement *in a Leet preſented by the Jury* ſhall be affeer'd *by two Affeerors*. Br. Amercement, pl. 50. cites 10 H. 6. 7. per Chauntrell, & non negatur. Kelw. 65. a. pl. 5. Trin 20 H. 7. S. P. by Frowike Ch. J. and Kingſmill.

10. *Contra* of Amercement *aſſeſs'd by the Steward* in a Leet by the beſt Opinion, for this is in Nature of a Fine. Br. Amercement, pl. 50. cites 10 H. 6. 7.

11. There is a *Diverſity* between Amercements *in Actions Real or Perſonal* of the Demandant or Tenant &c. or *upon Preſentment or Indictment* as for not repairing a Bridge or Highway &c. and the like; for ſuch Amercements according to the Stat. Magna Charta, and Weſtm. 1. 18. ought to be affeer'd per Pares; but Amercements *of Perſons having Adminiſtration of Juſtice, or of any Officer or Miniſter that has Execution of Writs &c. of the King*; for ſuch Amercements ſhall be affeer'd by the Juſtices or Judges of the Court where the Cauſe depends. 8 Rep. 40. a. in Grieſley's Caſe, in a Nota of the Reporter, which ſee there with his Reaſons.

12. If the *Sheriff returns Cepi Corpus*, and has not the Body at the Day, the Entry is Ideo &c. in Miſericordia, and it ſhall be affeer'd by the Juſtices. 8 Rep. 40. b. in Grieſly's Caſe, by the Reporter, and ſays, that with this accords the Book of Entries, Tit. Capias 19, 20. *So* if a *Writ* be *deliver'd* to the Sheriff of Record to be executed, & Vicecomes *non miſit breve*. Ibid. cites Tit. Record 2 ——*So* of a *Habeas Corpus* directed to a Sheriff, Gaoler &c and he *does not bring the Body*. Ibid.

13. If Demandant or *Plaintiff is nonſuited*, or *Judgment given againſt the Tenant* or Defendant, *or* againſt the *Bail for Non-appearance of the Principal, or againſt the Plaintiff for not proſecuting, or pro falſo Clamore* &c. the Award is, that he be in Miſericordia generally, without taxing

or

or aſſeſſing any Sum certain, and in C. B. the Clerk of the Warrants makes the Eſtreats of thoſe Amercements, and delivers them to the Clerk of Aſſiſe in every Circuit to deliver them to the * *Coroners of the ſeveral Counties* to *affeer*, and ſuch Aſſeſſments by them have been deem'd a Compliance with the Statute of Magna Charta, viz. That none of the ſaid Amercements be aſſeſſed but by the Oaths of honeſt and lawful Men of the Vicinage; and the Coroners being elected by the whole County were thought the moſt indifferent. 8 Rep. 39 b. per Cur. Trin. 30 Eliz. C. B. in Grieſley's Caſe.

* F. N. B. 75. (I). (K) 76. (A)

A Difference was taken Arg. between a *Thing done In* the Court, *and* a Thing *done Out of the Court*; that as for a Thing done In the Court, the Steward ought to amerce the Party, but for a Thing done Out of the Court the Amercement ought to be by the Homage; but it was anſwered of the other Side, and ſaid, that of Things done Out of Court the Amercement ought to be by the Steward, but affeer'd by the Homagers or Affeiors, but that 22 E. 3. St. Quintin's Caſe is, that for *Things done in* * *View of the Steward*, he ought to impoſe it, and alſo to affeer it. 2 Roll Rep. 3, 4.

14. It is the *common Courſe* throughout the Realm, that the Amercements are *aſſeſs'd by the Steward in a Court Baron*; per Cur. reſolv'd. Cro. E. 748. pl. 1. Paſch. 42 Eliz. B. R. in Caſe of Rowleſton v. Alman.

* S. P. of a Fine, by Anderſon Ch. J. Cro. E. 241. in pl. 2.

15. A *common Baker* was *amerced in a Leet for ſelling Bread againſt the Aſſize*. Per Hobart, they muſt amerce *to a certain Sum*, which may be mitigated and affeer'd by others. Hob. 129. pl. 166. Paſch. 14 Jac. in Caſe of Wilton v. Hardingham.

16. In Debt for an Amercement in a Leet it was ſhewn, that it was affeered by all the Jurors to 40 s. Upon Demurrer it was objected, that the Affeerment ought to be by *Officers elected by the Steward, and not by the Jury*, and they have a ſpecial Oath to this Purpoſe, and Judgment for the Defendant. 3 Lev. 206. Mich. 36 Car. 2. C. B. Evelin v. Davis.

(E. 2) Affeerment. Pleadings &c.

1. IN an Avowry for an Amercement in a Leet, the Defendant *alleges Preſcription* in the Uſe of this aſſeſſing by the Affeerors. Kelw. 65. a. pl. 5. Trin. 20 H. 7. Anon. per Frowike Ch. J. and Kingſmill.

In Debt for an Amercement in a Leet, the Defendant demurr'd, becauſe it was ſaid it was affeer'd, but *not ſaid by whom, nor ad eandem Curiam*, which per Cur. is ill; and Judgment for the Defendant. 3 Keb. 362. pl. 42. Mich. 26 Car. 2. B. R. Cutler v. Creſwick.

2. In *Treſpaſs* of taking a Horſe &c. if the Defendant *juſtifies for an Amercement in a Court Leet*, and that it was affeer'd by 2 Affeerors to ſo much, and that he by Virtue of a Precept diſtrain'd the Horſe within the Precinct of the Leet, he *ought to expreſs the Names of the Affeerors*. Per Cur. Kelw. 66. a. pl. 8. Trin. 20 H. 7. Anon.

3. Second Deliverance upon a Diſtreſs taken for an Amerciament in a Court Leet, the Parties were at *Iſſue if C. and D. were Affeerors of the Court aforeſaid*. Upon Exception taken, the Court were of Opinion that it ſhould be *tried by the Record*, becauſe a Leet is a Court of Record. Cro. E. 860. pl. 33. Mich. 43 & 44 Eliz. C. B. Monnop v. Thomas.

4. In Treſpaſs of taking Goods, the Defendant juſtified for ſeveral Amercements aſſeſſed in a Court Baron, but did *not ſhew any Affeerment*, and upon the firſt Argument it was adjudg'd for the Plaintiff per tot. Cur. for this Cauſe. 3 Lev. 19. Paſch. 33 Car. 2. C. B. Conyers v. Franke.

(F) [Amend-

(F) [Amercement.] In what *Actions.*

1. IN an Attaint against him who recover'd in the first Action, if the Plaintiff recovers the Defendant shall be amerced.

2. [So] If a Man recovers in an Assise, and dies, and his Wife is endowed, if in an Attaint against the Wife he recovers, the Wife shall be amerced. 40 Ass. 20. adjudged.

3. He who brings *Scire Facias*, *Quid juris clamat* &c. *upon Matter of Record* shall not find Pledges; for he shall not be amerced if he be non-suited; Per Forteſcue. Br. Amercement, pl. 49. cites 18 H. 6. and Fitzh. Pledges 1.

4. *In all Actions Perſonal*, as *Debt*, *Detinue* and the like, without Force or Diſceit to the Court, and in all Actions comprehending Force or Diſceit to the Court of Record, if the *Plaintiff is barr'd*, *or nonſuited*, *or* the *Writ abates* for Default in Matter or Form, he ſhall be amerced only and not fined. 8 Rep. 61. a. Mich. 6 Jac. in Beecher's Caſe.

5. *And* in the ſame *Actions* which are *without Force or Fraud to the Court*, the *Defendant ſhall be amerced.* Ibid.

(G) *By whom* Amercements may be. [And How.]

1. THE Juſtices in a Special Aſſiſe amerce the Sheriff, if he does not return the Aſſiſe. 7 H. 6. 13.

2. *Marlb.* 52 H. 3. *cap.* 18. *No Eſcheator, Commiſſioner, or Juſtice aſſign'd to take Aſſiſes, or to hear or determine Matters, ſhall have Power to amerce for Default of common Summons,* The *Miſchief* before this Statute *was*, that the Eſcheator, Sheriff, Coroner, Special Juſtices of Aſſiſe, and Juſtices of Oyer and Terminer, in ſpecial Caſes (whom Britton call Simple Inquirors) would upon the common Summons amerce ſuch as made Default. Now this Statute takes away their Power to amerce, Nullus &c. habeat Poteſtatem amerciandi pro defalta. 2 Inſt. 136.

But this extended not to Sheriffs in their Tourns, nor to Stewards in Leets, notwithſtanding that they be Inquirors, for that they deal with common Nuſances, or Matters concerning the Publick, and not in private Cauſes, and therefore are not reſtrain'd by this Statute. 2 Inſt. 136.

But the Chief Juſtices, or the Juſtices in Eyre in their Circuit. That is Juſtices of General Aſſiſes, whoſe Authority increaſing by divers Acts of Parliament, and coming twice every Year where the Juſtices in Eyre came but from 7 Years to 7 Years, and the Authority of Juſtices in Eyre by little and little vaniſh'd. So as if any Amercement is to be made for Default upon common Summons, upon due Certificate made thereof to the Juſtices of Aſſiſe (here call'd Capitales Juſticiarii, in Reſpect that Special Juſtices of Aſſiſe were named before) they may amerce upon ſuch Defaults, but the Eſcheator dealing Virtute Officii, did after this Statute certify the Defaults into the Exchequer, and there was the Amercement impoſed; which is worthy of Obſervation. And this Expoſition agreeth with Britton, who wrote ſoon after this Statute. 2 Inſt. 136.

3. Amerciaments in Banco, and in all other Courts ſhall be aſſeſſed *Per pares ſuos.* Br. Amerciament, pl. 25. cites 7 H. 6. 12. Ibid. pl. 65. cites S. C.

4. In *Treſpaſs* &c. the Defendant *juſtified* the Taking &c. *for that at the Sheriff's Tourn the Plaintiff was amerced for not appearing* there, being duly ſummon'd, and thereupon he was amerced by the Jury, which was aſſeer'd by 4 of the Jurors to 40 s. and certified to the next Quarter-Seſſions Jo. 300. pl. 3. S. C. adjudg'd for the Plaintiff, for the She-

riff is the Judge and the Amercement is by him, and the Jurors are only Affeerors.

Seſſions and there confirm'd, whereupon the Steward made a Warrant to him to levy it. Adjudg'd per tot. Cur. upon Demurrer that the Amerciament ought to have been aſſeſſed by the Court, and not by the Jury, as the Defendant had pleaded, becauſe it is a judicial Act. And Judgment for the Plaintiff. Cro. C. 275. pl. 13. Mich. 8 Car. B. R. Griffith v. Biddle.

(H) In what Caſes.

1. IN a Formedon, or other Action, if the Tenant comes the firſt Day and renders the Land, he ſhall not be amerced. 8 R. 2. Amercement 26. adjudged. 1 E. 3. 11. in a Warranty of Charters. Co. Lit. 126.

2. In Dower, if the Tenant renders to the Demandant her Dower after he hath taken a Day Prece partium, he ſhall be amerced, tho' this Delay was by the Aſſent of the Demandant. 18 E. 3. 39. adjudg'd; but Quære.

3. [So] In Dower, if the Tenant after he is eſſoign'd renders Dower, and avers that he hath always been ready &c. the Tenant ſhall not be in Miſericordia. 22 E. 3. 2.

Nor the Demandant in this Caſe. 22 E. 3. 2.

Br. Amercement, pl. 22, cites S. C. accordingly. —*Detinue of* 40 *Charters.* The *Defendant denied* 29, and *confeſs'd* 11, and therefore was amerced, and they were at Iſſue for the reſt. Quod nota. Br. Amercement, pl. 20. cites 38 E. 3. 3.

4. In Detinue for a Box of Charters by the Heir upon the Delivery of his Father, if the Demandant comes the firſt Day, and ſays that he hath been always ready to render them, and yet is, if the Plaintiff does not traverſe this, the Defendant ſhall not be amerced. 38 E. 3. 20. adjudged.

5. In a Writ of Dower, if the Tenant vouches the Heir of the Baron, and the Vouchee demands the Lien, and upon this the Vouchee enters into Warranty, as he who hath nothing by Deſcent &c. and the Tenant ſays that he hath Aſſets by Deſcent, upon which Judgment is given that the Demandant ſhall recover againſt the Tenant &c. the Vouchee ſhall be in Miſericordia, tho' he doth not counterplead the Warranty. 16 E. 3. Amercement 14. adjudged.

6. In a Cui in Vita, if the Tenant vouches, and the Vouchee comes the firſt Day of the Summons and renders, yet he ſhall be amerced; for when the Render is not at the firſt Day of the Original, an Amercement is due to the King. 14 E. 3. Amercement 16. adjudged.

7. In an Account as Receiver of 10 l. if the Defendant pleads Never his Receiver &c. and this is found againſt him, by which he is adjudg'd to account, and after he comes and tenders the 10 l. and ſwears upon a Book, that after the Time that the Moneys were deliver'd to him he could not find any Thing to buy for Profit, this ſhall be a good Diſcharge of the Defendant, and he ſhall not be amerced, nor the Plaintiff neither. 46 E. 3. Accompt 40.

8. [So] In an Account, if the Defendant comes the firſt Day and tenders the Money, and the Plaintiff accepts it, none of them ſhall be amerced. 2 R. 2. Accompt 45.

9. In

9. In a Writ of Debt, if the Defendant comes the first Day and appears by Attorney, and makes Defence, scilicet, Defendit vim & injuriam quando &c. and after the Attorney pleads Non sum Informatus, and thereupon Judgment is given against him, and that the Defendant be in Misericordia, this Amercement is well assess'd; for when he comes the first Day, if he will save his Amercement, he ought to render the Action to the Plaintiff, and not make Defence, as he hath done here. Mich. 4 Jac. B. R. between *Hobberlye and Lewis*, adjudged in a Writ of Error; but Mich. 3 Car. B. R. between *Barecroft and Rookes*, adjudged contra in a Writ of Error upon a Judgment in Banco, but this was not moved. Intratur Trin. 9 Car. Rot. 664. but there he came the first Day by Summons. Fol. 213. In Debt the Defendant appear'd the first Day of the Summons, and afterwards the Plaintiff recovered by Non sum Informatus, but that the Defendant non sit in Misericordia, because he came at the first Summons; but where the Defendant does not come the first Day but by mesne Process, there the Judgment is that sit in Misericordia. Yelv. 108. Mich. 5 Jac B. R. Dismo v. Sherley.

10. So in a Writ of Debt, if the Defendant comes the first Day, and imparls till the next Term, and then Judgment is given upon Non sum Informatus, the Defendant shall be amerced. H. 10 Jac. B. R. between *Dame Slaney and Vowtrey*, adjudged, quod capiatur; but it seems as if this was mistaken.

11. In an Action of Debt the Defendant comes the first Day by Attorney, and says that Non est Informatus, and thereupon Judgment is given, the Judgment shall be against the Defendant for the Debt, Damages, and Costs; but nihil in Misericordia quia venit primo Die per Summonitionem &c. Mich. 9 Car. B. R. between *Barecroft and Rookes*, adjudged in a Writ of Error upon a Judgment in Banco, because this is all one, as to the Plaintiff, as if he had confess'd the Action; for he is not more delay'd by this, and this is the Cause of the Common Pleas in such Cases. Intratur Trin. 9 Car. Rot. 664.

12. In a Replevin, if the Issue be whether the Place be Hors de son Fee, and this is found for the Plaintiff, yet the Avowant shall not be amerced, because the Action is not founded upon the Statute that wills that none shall distrain out of his Fee. 28 E. 3. Amercement 24. adjudged. 2 Inst 104. 105. S. P. that he shall not be amerced by the Statute of Marlb. but he must have an Action upon that Statute.——8 Rep. 60. b. in Beecher's Case, it is held that the Party distrain'd in the Highway cannot plead it in Bar of the Avowry, but shall be driven to his Action upon the Statute, in which the King shall have his Fine.

13. In an Action of Debt upon a Bill, and upon an Emisset, if the Defendant as to the Bill pleads Non est Factum, and as to the Emisset Non Debet, and both are found against him, and Judgment given against the Defendant quod capiatur for denying his Deed, yet Judgment ought to be given Quod est in Misericordia, as to the Emisset. Trin. 11 Car. B. R. between *Eltonhead and Deereman*, resolved, and a Judgment given in the Marshalsea reversed accordingly in a Writ of Error, because the Judgment was not That he should be in Misericordia for this. Intratur H. 10. Rot. 876. S. C. cited by Roll Ch. J. All. 74. 75. to have been adjudged, and that Judgment was reversed accordingly.

14. If *Nusance* be found to be *done in the Time of the Defendant*, he shall be ousted by the Sheriff, and the Defendant amerced. Br. Amercement, pl. 66. cites 3 E. 3. Itinere Nottingham. *But if* it was *in the Time of his Feoffor or Ancestor*, there Nusance shall be ousted, ut supra, without Amercement; for he who is not Party to the Writ cannot be amerced. Ibid.

15. In

15. In *Aſſiſe* in B. R. the *Plaintiff was eſſoign'd ſo near the End of the Term, that Day could not be given in the ſame Term*, and the *Court was to be removed*, and *Adjournment cannot be into another County*, therefore the Tenant went quit without amercing the Plaintiff. Quod nota bene. Br. Amercement, pl. 36. cites 12 Aſſ. 27.

And that the Law is the ſame, and the Reaſon the ſame, *when the Court is ouſted of Juriſdiction.*

16. Upon *Diſcontinuance in Real or Perſonal Action*, the Demandant or Plaintiff ſhall not be amerced; for it is the Act of the Court. 8 Rep. 61. a. b. cites 38 E. 3. 31. a.

Ibid. cites 38 E. 3. 7.

17. In all Caſes where the Demandant or *Plaintiff is barr'd*, the Judgment is Quod Nil capiat &c. ſed ſit in Miſericordia pro falſo Clamore inde &c. 8 Rep. 61. b. in Beecher's Caſe.

And where he ſhall be fined he ſhall not be amerced.

18. Note, where a Man is *awarded to Priſon*, there he ſhall not be amerced. Br. Amercement, pl. 56. cites 11 H. 4. 55.

Ibid.

19. *Where a Man denies his own Deed* which is *found againſt him by Verdict*, he ſhall make Fine and ſhall be impriſon'd. So if he pleads Falſe Deed or Releaſe. But if he *confeſſes the Matter before Verdict ſo that Judgment is had upon his Confeſſion*, in this Caſe he ſhall not be amerced, and ſhall *not* make *Fine*, *nor* he ſhall not be *impriſon'd*. And ſo ſee that in ſome Caſe a Mans Confeſſion ſhall not be ſo ſtrong againſt a Man as Verdict. Nota. Br. Confeſſion, pl. 3. cites 33 H. 6. 54.

20. *Decem tales return'd*, and the Plaintiff recover'd, and *no Manucaptores Juratorum* return'd, and the Defendant brought Writ of Error. Per Choke, the *Jury* ſhall not be amerced upon the Decem tales, therefore they need not return Manucaptores any more than in *Venire Facias* upon the *Habeas Corpora* they ſhall be amerced, therefore there ſhall be Manucaptores Juratorum return'd But per Littleton and Comberford Prothonotary, they ſhall be amerced as well as in the Habeas Corpora. Choke ſaid that then ought the Manucaptores to be return'd. Br. Amercement, pl. 30. cites 9 E. 4. 14.

Dower againſt two Daughters, the *one pleaded in Bar*, upon which they are at Iſſue, and the *other* pleaded *that the Demandant detain'd* from her a certain Hamper of *Evidences* concerning her Land deſcended &c. *and* in Caſe *ſhe will deliver it, ſhe is ready to render Dower.* And the *Demandant ſaid*, that *ſhe is and at all Times has been ready* to render the Hamper, by which the Demandant had Judgment to recover Dower againſt her, and neither of them was amerced. Quod nota. Br. Amercement, pl. 24. cites 21 E. 3. 9,

21. In all *Actions* Real or Perſonal, *not containing any Force or Diſceit to the Court*, if the Tenant or *Defendant comes at the firſt Day and renders the Thing* in Demand, he ſhall not be amerced, becauſe he does what the King commands by his Writ; for where the Writ is Præcipe quod reddat &c. this in Judgment of Law is, that he render it at the Return of the Writ in Court, and not en Pais. 8 Rep. 61. b. in Beecher's Caſe, and cites it as reſolv'd 5 Rep. 49. a. Mich. 39 & 40 Eliz. B. R. Vaughan's Caſe.

Judgment was given in a Writ of Partition. It was aſſign'd for Error inter al' that the Defendants came and confeſſed the Partitions, notwithſtanding which it was awarded that they ſhould be in Miſericordia, which ſhould not be in this Action where there is *no Tort objected* againſt them, *and* they *confeſs the Action.* The Court held that if the Defendants *came in upon the firſt Summons*, and ſuch Judgment he given, it is erroneous; but it was alleged they came in *upon the Pone*, and then it is good. Cro E. 64 pl. 10. Mich. 29 & 30 Eliz. B. R. Yate & al' v. Windham. ——Yelv. 2. Yate v. .... S. C. But S. P. does not appear.

Mo. 394. pl. 511. Hawle v. Vaughan S. C. and the Court in-

22. In a Writ of *Entry in the Quibus* brought *in Wales*, the Defendant *pleaded Non diſſeiſivit*, and then came the *general Pardon* of 35 Eliz. *by which all Fines, Amerciaments*, and Contempts are pardon'd; Judgment was given againſt the Defendant; Sed non in Miſericordia quia pardonatur.

tur. It was assign'd for Error that Defendant ought to have been amerced, because the general Pardon did not discharge the Amerciament. Resolved that Judgment be affirm'd, and that the original Cause of the Amerciament was the Tort and Contempt that he did not render the Land to the Demandant, and the original Cause being pardon'd the Amercement is consequently pardon'd also. 5 Rep. 49. Mich. 39 & 40 Eliz. B. R. Vaughan's Case.

clined accordingly.—Jenk. 258. pl. 54. S. C. adjudg'd and affirm'd in Error.—Co. Litt. 126. b. S. P.

23. If a Man be *convicted before the Sheriff in Recaption* he shall be amerced. Br. Amercement, pl. 51. cites F. N. B. 73.

F. N. B. 73. (D) S P. but if he be convicted before the Justices in such Writ, he shall be fined and not amerced.——11 Rep. 43. b. (h) cites S. C. and S. P. of Recaption before the Justices, and adds viz. in a Court of Record, and says that with this accords 9 H. 5. 1. b.——S. P. 8 Rep. 41. a. in Grietley's Case, in a Nota of the Reporter cites F. N. B. 73. (D)

24. In Case of a *Retraxit* the Plaintiff ought to be amerced; for this is a stronger Case than a Nonsuit, as being a voluntary Acknowledgment that he has no Cause of Action. 8 Rep. 59. a. Mich. 6 Jac. in the Exchequer in Beecher's Case.

The Judgment in Retraxit is, Quod nil capiat per Breve suum

præd' sed sit in Misericordia pro falso Clamore &c. 8 Rep. 62. b. in Beecher's Case.

25. In *all Writs of Præcipe quod reddat*, as Writ of *Right*, *Formedon*, *Quod permittat* of Estovers, Common &c. or Præcipe *quod faciat*, as Writ of *Customs and Services* &c. if the *Demandant is barr'd* or *nonsuited*, or if his *Writ abates*, because it is vitious in Matter or Form the Demandant shall be amerced. 8 Rep. 60. b. in Beecher's Case.

So in all the said Writs of Præcipe if *Judgment is given against the*

Tenant he shall be amerced. 8 Rep. 60. b. in Beecher's Case.

26. *Debt* was brought *against* N. *an Executor*, who came in and *pleaded Plene Administravit*. The *Plaintiff confessed the Plea and prayed Judgment of Assets Quando acciderint*. The Judgment was in Misericordia, and the Court doubted at first whether it was erroneous for that Cause. But because it appear'd that the *Executor did not come in Primo die* they affirm'd the Judgment notwithstanding. Vent. 94. 96. Trin. 22 Car. 2. B. Noell v. Nelson.

Lev. 286. S. C. and Twisden took the Exception to the Misericordia, because the Plaintiff is not delay'd,

the Plea being a Confession of the Action; but the others held that it is not a direct Confession, but *quasi an Admittance of the Debt*, and it was after Imparlance, and they affirm'd the Judgment ——Sid. 448. pl 11. S. C. and as to the Exception taken by Twisden J. it was answer'd that the Judgment is well because it is according to the Entries and Bergman's Case, which was as Here.——2 Saund. 226. S. C. says Judgment was affirm'd as to this Point upon a Precedent read of a Judgment accordingly in Mary Shipley's Case; and that upon arguing this Case in the House of Lords, where Vaughan Ch. J. supplied the Place of the Ld. Keeper, it was urged that by what appears by the Record, the Defendant pleaded the very Day of the Declaration; to which Vaughan answer'd that then it should be enter'd that they *venerunt primo die*, and for want of such Entry it shall not be intended that he pleaded the first Day, and therefore shall be amerced for the Delay, and that Judgment was affirmed by the House of Lords. But the Reporter says, that the Opinion of Vaughan seems to him not to be Law; for in a Quare Impedit, if the Bishop imparles and after pleads that he claims nothing but as Ordinary, whereupon the Plaintiff has Judgment against him, yet the Bishop shall not be amerced because he excuses himself of Tort, tho' he had delayed the Plaintiff, which he takes to be a Case in Point —— But there is a Note in the Marg. of 2 Saund. 227 that Cro. 93. and Hob 200 is against this Opinion of Saunders; And 1 D. 461. Amerciament (H) pl. 17 makes a Quære of Saunders's Opinion, and says he takes the Law to be otherwise, and cites Cro J. 63. and Hob. 200.

(I) For what Cauſe. Upon *Abatement* of Writs.

1. IF a Writ abates by the Act of God, the Plaintiff or Demandant ſhall not be amerced. Co. Lit. 127.

2. So if a Writ abates without any Default of the Plaintiff he ſhall not be amerced. Co. Lit. 127.

Br. Amercement, pl. 12 cites S. C. & S. P. in a Warrantia Chartæ.—

3. In an Action brought by two, if the Writ abates by the Death of one of them, the other ſhall not be amerced; becauſe it is by the Act of God without the Default of the Party. *43 Aſſ. 18. adjudged. 48 E. 3. 23. Co. Lit. 127.

Fitzh. Amercement, pl. 13. cites S. C. accordingly ——8 Rep. 60. b. S. P. accordingly in Beecher's Caſe, and cites S. C. and 46 E 3. tit. Account 40. 5 E. 3. 3. 22 H. 6. 7. 38 E. 3. 31. 7 H 6. 36. 41 Aſſ. 14

* This ſeems to be miſprinted; for I do not obſerve S. P. there.

Br. Amercement, pl. 63. cites S. C. & S. P. in Champerty.

4. If two join in a Perſonal Action, and one in Nonſuit, which in Law in the Nonſuit of the other, yet the other ſhall not be amerced, becauſe this is not his Fault. 47 Aſſ. 3. adjudged.

——8 Rep. 61. a. S. P. in Beecher's Caſe.

5. In Treſpaſs for taking his Corn, if upon the Pleading the Right of the Tithes comes in Queſtion, by which the Writ abates, yet the Plaintiff ſhall not be amerced, becauſe there is not any Default in him. 38 Ed. 3. 6. 6.

Fol. 214.

6. If a Writ abates by the Act of the Plaintiff or Demandant, or for * Matter of Form, the Plaintiff or Demandant ſhall be amerced. Co. Lit. 127.

* S. P. 8 Rep. 61. b. in Beecher's Caſe accordingly, be it in Writ Real or Perſonal.

Debt by Bill, which was that A. B. *petit* 100 *Marks*, eo quod *defendens recognovit ſe debere* 100 *l. præd'* where *Libras was not expreſſed before*, and therefore was abated, and the Plaintiff ſhall be amerced for ill Bill, which abated. Br. Amercement, pl. 26. cites 7 H. 6. 36.

In all *Judicial Proceſs*, if the Writ

7. If a Writ, which is grounded upon a Record, abates, the Plaintiff ſhall not be amerced. Fitzh. Amercement 8.

abates, the Plaintiff ſhall not be amerced; becauſe the Proceſs is founded upon a Judgment, and Record. 8 Rep. 61. a. in Beecher's Caſe, cites 11 H. 4. 55. b. in Quid Juris clamat, Scire Facias &c 21 E. 3. 23. 9 E. 3. 32. in per quæ Servitia. 18 H. 6. Tit. Pledges 1.

Quid Juris clamat was brought *by a Feme Covert without her Baron*, becauſe the Fine was levied to her when

8. As if a Quid juris clamat abates, the Plaintiff ſhall not be amerced, becauſe this is grounded upon a Record.

9. So if a Scire Facias abates, the Plaintiff ſhall not be amerced. 44 Ed. 3. Amercement 8. 41 E. 3. there accordingly.

10. If a Scire Facias to execute a Fine abates by the Plea of Once executed in his Anceſtor, the Plaintiff ſhall be amerced. 30 Ed. 3. 27. b. adjudged, but Quære.

ſhe was ſole, and therefore the Writ was abated; Quod Nota; and there it was agreed, that in this Action, and in Scire Facias, if the Plaintiff be nonſuited, the Plaintiff ſhall not be amerced. Br. Quid Juris clamat, pl. 23. cites 11 H. 4. 7.

11. *Avowry for Rent*, and *Return was awarded*, by which the *Defendadt ſued Scire Facias* upon this Judgment *to have Execution of the Rent*, where no Judgment was given of it, but to have Return, and the Writ was

was abated without amercing the Plaintiff; *Quære Cauſam*, whether becauſe it was a *Judicial Writ*, or becauſe it was *abated by the Law*. Br. Amercement, pl. 57. cites 21 E. 3. 23.

12. *Treſpaſs between an Abbot and Prior* for Corn, the *Defendant juſtified for Tithes*, and therefore the Court was ouſted of Juriſdiction, and the Plaintiff not amerced, for no Default in him. Br. Amercement, pl. 21. cites 38 E. 3. 7.

13. *Quare Impedit* abated by theſe Words, *ut dicitur*, where it ſhould be *ut dicit*, the Plaintiff being an Earl ſhall be amerced at 100s. and therefore he diſcontinued the Proceſs; Quod Nota; becauſe he is a Peer of the Realm. Br. Amercement, pl. 23. cites 38 E. 3. 31.

(K) Upon a *Nonſuit.*

1. IN a Writ founded upon a Record, if the Plaintiff be Nonſuit yet he ſhall not be amerced. 11 H. 4. 7. In all *Judicial Proceſs*, if the Plaintiff be nonſuited, he ſhall not be amerced, becauſe the Proceſs is founded on a Judgment and Record. 8 Rep. 61. a. Mich. 6 Jac. in Beecher's Caſe.

2. As in a Quid juris clamat, if the Plaintiff be Nonſuit yet he ſhall not be amerced. 11 H. 4. 7. per Skrene. Br Amercement, pl. 16. cites S. C. & S. P. by Skreene and Hanke ——Ibid. pl. 49. cites 18 H. 6. S. P. by Forſcue.——Fitzh. Amercement, pl. 7. cites S. C. accordingly, and that for the Reaſon in pl. 1. ſupra.

3 So if the Plaintiff in a Scire Facias to execute a Fine be Nonſuit, the Plaintiff ſhall not be amerced. 11 H. 4. 7. per Hank. 30 Ed. 3. 27. b. Br. Amercement, pl. 16. cites S. C. & S. P. by Skrene and Hanke.——Br. Amercement, pl. 49. cites 18 H. 6. S. P. by Forſcue. And Fitzh. Pledges 1.——Fitzh. Amercement, pl. 8. cites 44 E. 3. that in Scire Facias the Writ was abated, and the Plaintiff was not amerced, and ſays, that 41 E. 3. is accordingly.

4. In *Aſſiſe*, the Plaintiff was *nonſuited when the Jury returned to give their Verdict*, and was amerced to a Mark. Br. Amercement, pl. 37. cites 22 Aſſ. 32. The Plaintiff was nonſuited *in* 3 *Aſſiſes the one after the other*, by which the Court amerced him to 5 Marks for the Vexation; Quod Nota. Br. Amercement, pl. 31. cites 9 E. 4. 33.

5. Note, per Browne, that if *two bring an Action Real*, and the *one is Nonſuited after Appearance*, he who is nonſuited ſhall not be amerced. Br. Amercement, pl. 3. cites 38 H. 6. 11.

6. If the Demandant or *Plaintiff is nonſuited in any Action, (certain ſpecial Caſes excepted)* the Judgment is Ideo conſideratum eſt quod præd' Quer' & Plegii ſui de proſequendo ſint in Miſericordia &c. 8 Rep. 61. b. in Beecher's Caſe.

(L) What

(L) What Persons shall be amerced. [*Infant.*]

S. P. Arg. 2 Le. 4 in pl. 4.—Ibid. 185. in pl. 231.

1. AN Infant being Plaintiff or Demandant shall not be amerced, and this is the Reason that he shall not find Pledges. Co. Litt. 127.

—S. P. 8 Rep. 61. b. in Beecher's Case, and this is by reason of the Imbecility of the Age; but the Entry is Ideo in Misericordia, sed pardonatur quia Infans, cites 43 Ass. 45. and several other Books—Palm. 518. Hill. 3 Car. B. R. in Case of Young v. Young, it was agreed by all that an Infant shall not find Pledges, because it shall not be intended that they sue out of Malice, and cites 44 Ass. 55. accordingly; but that there it is said, Ideo in Misericordia, sed pardonatur quia Infans; but says this is not so, but the Use de Misericordia est nihil quia Infans, and Infant shall not be amerced; and cited Fitzh. Amercement 10. and Infant 14. and Co. Ent. 226. to the same Purpose.

2. In a Quare Impedit against an Infant, if the Plaintiff hath a Writ to the Bishop, the Infant shall be amerced. 44 Ed. 3. Amercement 10.

See pl. 5. and the Notes, and see pl. 8.—

3. An Infant Defendant shall be amerced if he pleads with the Demandant, and the Matter is found against him. 9 H. 6. 7. Dubitatur 2 Ed. 3. 32.

Judgment in Dower was given *against an Infant*, who appeared by Guardian. The Record certified that the Defendant was in Misericordia. It was assign'd for Error, that being an Infant he ought not to be amerced. The *Record was amended* by Rule of Court, and made Nihil in Misericordia quia Infans. Cro. C. 410. pl. 5. Trin. 11 Car. B. R. Smith v. Smith.

4. If an Infant in Reversion be received, and pleads in Bar, and this upon Demurrer is adjudged against him by the Court, he shall not be amerced. Dubitatur 38 Ed. 3. 33. per Curiam.

Br. Coverture, pl. 43. cites S. C.

5. So if an Infant be attainted of a Disseisin, he shall not be amerced. 43 Ass. 45. adjudged.

that the Amercement shall be pardoned, because he is an Infant.——Br. Amercement, pl. 43. cites S. C. accordingly.

6. If an Infant brings an Action, and the Matter is found against him, he shall be amerced. 17 Ed. 3. 7. 5. b. Contra D. 17 Eliz. 338. 41.

Br. Amercement, pl 61. cites S. C.

7. [So] If an Infant brings an Action, and this is abated for his Infancy, he shall be amerced. 41 Ass. 14.

of an Appeal brought by him, says he was amerced, but that it was pardoned for his Infancy.——Br. Fine for Contempts, pl. 37. cites S. C. that the Infant was amerced, but did not make Fine.——See pl. 8.

* Fitzh. Imprisonment, pl. 10. cites S. C. & S. P. admitted,

8. But when an Infant is amerced, he shall be pardon'd of course. 17 E. 3. 75. b. adjudged * 30 Ass. 18. 41 Ass. 14. † 43 Ass. 45. adjudged 44 Ed. 3. Amercement 10.

but he was awarded to be imprisoned. † Br. Imprisonment, pl. 75. cites S. C. & S. P. accordingly.——Bulst. 172. but false paged (162) cites S. C.——See pl. 5. in the Notes there.

5 Rep. 49. a. cites S. P. adjudged accordingly in a Præcipe quod reddat in C B. Mich 15 & 16 Eliz.

9. If an Infant brings an Action by Prochein Amy, and pending the Action comes of full Age, and makes an Attorney, and after is nonsuit, he shall be amerced. D. 17 Eliz. 338. 41 Curia.

——Co. Litt. 126. b 127. a. S. P. accordingly.——Mo. 394

394 pl. 511. S. P. cited by Tanfield, as Mich. 15 & 16 Eliz.——Roll Rep. 294. S. P. cited by Coke Ch. J. as held about 16 Eliz that if the Judgment had been given againſt him during his Minority he ſhould not be amerced, and ſo if he *had confeſs'd the Action as ſoon as he came of full Age*; but if he poſtpones it, and does not do it as ſoon as he is of full Age, he ſhall be amerced——3 Bulſt. accordingly by Coke Ch. J.—— S. P. accordingly; otherwiſe if he had been an Infant when he was nonſuited. Jenk. 258. pl. 54.——See pl. 13. S. P.

10. If an Infant brings an Action of Treſpaſs by Guardian againſt two, and the Defendant pleads Not guilty, and at the Niſi Prius the Plaintiff appears in Perſon, and a Verdict is found for the Plaintiff for Part, and Not Guilty for the reſt, and one of the Defendants Not guilty, and Judgment is given for the Plaintiff for that for which the Verdict is given for him, and Quod nil capiat per Billam for the reſt, and as to him that is found Not guilty, Sed nihil de Miſericordia pro falſo Clamore &c. Quia querens tempore * tranſgreſſionis prædictæ factæ infra Ætatem exiſtebat, yet this is good, and no Error. Trin. 11 Car. in Camera Scaccarii, between *Methwold and Anguiſh*, adjudged in a Writ of Error, and the firſt Judgment given in the King's Bench affirm'd, notwithſtanding I urged this to be an Error, and they took a Diverſity between this and an Nonſuit. * Fol. 215.

11. The King being Plaintiff or Demandant ſhall not be amerced. Co. Litt. 127. F. N. B. 31. (F) S. P.—Ibid. 101.

(A) S. P.——S. C. & S. P. cited accordingly, Br. Amercement, pl. 53.——S.C. & S. P. cited 8 Rep. 61. b. in Beecher's Caſe, and this by reaſon of the Dignity of his Perſon.

12. The Queen, the Wife of the King, ſhall not be amerced. Paſch. 13 E. 1. B. Rot. 52. where the Judgment is againſt the Queen, and in Miſericordia Nihil, eo quod Conſors Regis. Br. Amercement, pl. 53. S. P. cites New Nat. Brev. 101.

——S. P. 8 Rep. 61. b. in Beecher's Caſe, accordingly; for in this Reſpect ſhe participates of the Prerogative of the King. ——Co. Litt. 127. a. ——She is a Perſon exempt. Br. Nonability, pl. 59. cites 18 E. 3. 12.

13. If a Præcipe is brought againſt an Infant, and pending the Plea he comes of full Age, he ſhall be amerced for the Delay after he comes of full Age. Mich. 15, 16 Eliz. B. adjudged. Quod vide. Co. 5. in *Vaughan's Caſe*, 49. S. P. cited by Tanfield as Mich. 15 & 16 Eliz. Mo. 394.

in the Caſe of Hawle v. Vaughan.——See pl. 9. S. P.

14. In Quare Impedit, if a Lord of Parliament, as *Duke*, *Earl*, *Baron*, or other *Peer* of the Realm, is nonſuited in Action *after Appearance*, he ſhall be amerced. Br. Amercement, pl. 47. cites 19 E. 4. 9.

(L. 2) Of whom. Sheriffs and Officers.

1. IN Aſſiſe a Bailiff, who had *return'd Villeins*, was amerced, and Non Omittas awarded. Quod nota bene. Br. Amendment, pl. 39. cites 26 Aſſ. 28.

Br. Proceſs, pl. 31. cites S. C. — Br. Retorn de Briefs, pl. 31. cites S. C.

2. *Exigent againſt J. N. the Father*, and the *Son who was of the ſame Name render'd himſelf*, and the *Sheriff return'd Reddidit ſe*, and the Plaintiff ſaid that he who appears is *another Perſon*, and not the Defendant, by which the Sheriff was amerced, and Diſtringas ad Habendum Corpus iſſued againſt him, by reaſon that he return'd Reddidit ſe, where he who appeared is another Perſon. Br. Amercement, pl. 14. cites 7 H. 4. 11.

3. The Sheriff returned *Cepi Corpus*, and *at the Day had not the Party* at the Bar, but *Protection was caſt for him*, and yet the Sheriff was amerced for his falſe Return. Br. Amercement, pl. 18. cites 11 H. 4. 57.

4. Where a Sheriff *returns 7 d. in Iſſues upon Diſtreſs*, he ſhall be amerced, becauſe it is *leſs than Coſts of the Writ*, which is 13 d. Br. Amercement, pl. 27. cites 19 H. 6. 8. per Forteſcue.

5. In Debt the Sheriff *return'd Quarto exactus* upon Exigent, the *Plaintiff averr'd*, *that* the Defendant is *outlaw'd*, and had *Certiorari to the Coroners*, who *certify'd*, that he is outlaw'd, and the Sheriff was amerced 50 l. Br. Amercement, pl. 32. cites 32 cites 36 H. 6. 24.

Br. Retorn de Briefs, pl. 3. cites S. C. per Fitzherbert J. for clear Law, quod non negatur.

6. If the Sheriff *returns no Year upon the Serving of Proclamations upon Exigent*, and miſtakes the *County*, as T. Sheriff of K. where it ſhould be Sheriff of L. he ſhall be amerced, and this in the ſame Term that he made the Return; for in another Term after he ſhall not be amerc'd. Br. Amercements, pl. 1. cites 27. H. 8. 29.

7. The Sheriff *return'd a Non eſt Inventus* upon an Attachment awarded againſt W. who is *a Juſtice of Peace*, *and* as the Plaintiff was informed, *was at the laſt Quarter Seſſions holden for the County*, and for this the Sheriff was amerced 5 l. Cary's Rep. 62. Anno 2 Eliz. Stradling v. Pembrooke (Earl of)

8. The Sheriff cannot be amerced for *returning two ſmall Iſſues*; for it lies not in the Conuſance of the Court whether they are too ſmall or not, but the Party is put to his Averment; per Coke Ch. J. Roll Rep. 336. Hill. 13 Jac. B. R. Goats's Caſe.

9. The Sheriff is to be amerced *for the Faults of his own Bailiffs*, for the Sheriff is the Officer to the Court, and not they. L. P. R. 71. cites Hill. 22 Car. 1. B. R.

10. *If* the Sheriff be *amerced* by the Court for the not doing a Thing belonging to his Office, *and yet* he *continues to neglect to do it*, contrary to the Rule of this Court, the *Court may encreaſe the Amercements* upon him *until* he perform his Duty therein; for the greater the Offence is, the greater the Puniſhment ought to be. L. P. R. 71. cites Trin. 23 Car. 1. B. R.

11. Amercements *ſet* upon the Sheriff *upon the Motion of the Party*, if they be not eſtreated into the Exchequer *may be with a Reſpectuatur*, that is, be reſpited *if the Party grieved*, who cauſed him to be amerced, *will conſent* thereunto, otherwiſe it cannot be; for tho' the Amercements be due to the King, yet they were ſet upon the Sheriff for an Injury done to the Party. L. P. R. 71. cites Trin. 23 Car. 1. B. R.

12. The Sheriff of York was amerced for *not returning a* Writ of *Habeas Corpus cum Cauſa*, *tho'* he was *commanded not to do it by the* Biſhop then *Preſident* there. L. P. R. 71. cites 14 E. 3. Crompt. Juriſd. p. 78. [b]

13. A Sheriff, nor any other Perſon *out of his Office*, cannot be amerced by the Court, for then he is not an Officer to the Court; but a *Diſtringas muſt iſſue* out againſt him, to diſtrein him and make him come in; for he is not now counted preſent in Court as when he was Sheriff, or other Officer. L. P. R. 71. cites Mich. 23 Car. 1. B. R.

14. It

14. It is the conſtant Practice for Sheriffs to take *Bail Bonds* according to 23 H. 8. *from Perſons taken up upon Attachment*, and no Remedy againſt him upon a *Cepi* returned, if he *has him not at the Day*, but to amerce him, per Cur. 12 Mod. 557. Mich. 13 W. 3. Sheriff of Cumberland's Caſe.

(M) *Who* ſhall be amerc'd.

1. IF Baron and Feme are vouch'd as in the Right of the Feme, and Judgment is given againſt him, and the Feme is to be amerced, they ſhall be amerced, tho' the Feme be within Age, the Husband being of full Age. 16 Ed. 3. Amercement * 16. adjudged. * This is miſprinted, and ſhould be pl. 14. —Attaint paſs'd againſt the *Baron and Feme*, and therefore they were amerced and taken. Br. Amercement, pl. 9. cites 42 E. 3. And Brooke ſays, and ſo ſee that Feme Covert may be amerced.

2. And this Amercement ſhall not be pardoned of Courſe. 16 Ed. 3. Amercement * 16. adjudged. * This is miſprinted, and ſhould be pl. 14.

3. In an Action upon the Caſe againſt Baron and Feme for ſcandalous Words ſpoke by the Feme, and Judgment is given againſt both, as well the Husband as the Wife ſhall be amerced. Hobart's Reports 170. between *Staſf and Nelſon*, per Curiam admitted. Hob. 127. pl. 159. Mich. 12 Jac. S. C. & S. P. admitted.——

Brownl. 16. S. C. accordingly.——Mo. 869. pl. 1206. S. C. admitted accordingly.——S. C. cited accordingly, Cro. J. 633. in pl. 5.——See Tit. Amendment (F) pl. 9. S. C.——See (Q) pl. 4.

4. If a Judgment given in an inferior Court be reverſed upon a Writ of falſe Judgment, the Suitors ſhall be amerced. 22 Ed. 3. 2. Fitzh. Amercement, pl. 19. cites S. C. ——S. C. cited by the Reporter in Grieſley's Caſe. 8 Rep. 40. b.——The Suitors were amerced. D. 263. a. pl. 33. Trin. 9 Eliz. Anon ——They ſhall be amerc'd to the End they may be more wary, and take better Advice to do Juſtice. 2 Inſt. 196.—— Mod. 249. pl. 7. Trin. 29 Car. 2. C. B. Anon. the Suitors were amerc'd.

5. If he in Reverſion prays to be received upon the Default of the Leſſee, and loſes by Plea, he ſhall be amerced. 38 Ed. 3. 33. admitted.

6. In an Attaint, if Leſſee for Life hath Aid of him in Reverſion, and they join and loſe, he in Reverſion ſhall be amerced as well as the Leſſee. 40 Aſſ. 20. adjudged.

7. If an Action be brought againſt 4 Executors, and one only appears, by which he is put to anſwer by the * Statute, who pleads plene Adminiſtravit, upon which Iſſue being joined, all appear at Niſi Prius, and there it is found for the Plaintiff, tho' in this Caſe Judgment may be againſt all four Executors to recover de bonis Teſtatoris, yet he only, that pleaded, ſhall be amerced, and not the other three, for their Appearance at the Aſſiſe is not any Appearance, they not having pleaded before to Iſſue. Mich. 9 Car. B. R. between *Cruſe and Berrie*, adjudged in a Writ of Error. Intratur. 6 Trin. Rot. 1163. Cro. C. 564 pl. 9. Mich. 15 Car. B. R. Proctor v. Chamberlaine, S. P. in Error of a Judgment in C. B. and Error was aſſign'd, becauſe it was in Miſericordia againſt the 4 where 3 of them never appeared, and that againſt him who appeared no Miſericordia ought to be, becauſe he came in upon the Day of Summons; and for this and other Reaſons it was reſolv'd, that he that appeared (being taken in Execution) ſhould be diſcharged.

* 9 E. 3. cap. 3.

8. In

Roll Rep. 293. Hill. 13 Jac. S. C. & S. P. and Judgment for Reverſal Niſi ſuch a Day, at which Day the Reporter ſays nothing was ſaid, and therefore he believes that Judgment was reverſed.—Cro. J. 439. pl. 12. Mich. 15 Jac. B. R. S. C. and Judgment reverſed accordingly, it being only that the Wife ſit in Miſericordia.—3 Bulſt. 150. S. C. and S. P. agreed, per tot. Cur. and Judgment reverſed.

8. In an Action of Trover and Converſion againſt Baron and Feme for the Converſion of the Feme during the Coverture, if the Feme be found Guilty by Verdict, and the Baron Not Guilty, yet both ſhall be in Miſericordia, for the Amercement is not for the Converſion, but for the Delay of the Suit, and the Non-rendring the firſt Day, of which the Baron is as well guilty as the Feme. Mich. 15 Jac. B. R. between *Wood and his Wife* againſt *Sutcliffe*, per Curiam the Judgment reverſed. Hill. 13 Jac. B. R. accordingly, per Curiam.

Fol. 216.

9. In a Writ of Dower, if the Tenant vouches the Baron and Feme as in the Right of the Feme, as Heir to the Husband of the Demandant, and the Vouchees demand the Lien, upon which the Lien is ſhewn, and they enter into (*) Warranty as thoſe who have nothing by Deſcent, and the Tenant ſays, that they have by Deſcent, upon which Judgment is given againſt the Tenant &c. the Feme only ſhall not be amerced without the Baron, but both. 16 E. 3. Amercement 14. adjudged.

10. In *Detinue* the *Defendant pray'd Garniſhment againſt W.* and had it, and at the Day the *Plaintiff and Defendant made Default*, and *W. appear'd*, and recover'd the Writing by Award, and the *Plaintiff and Defendant were amerced*, and a Diſtringas awarded againſt the Defendant to deliver the Writing. Br. Amercement, pl. 6. cites 40 E. 3. 39.

11. A *Man recover'd in Aſſiſe*, and *died*, and his *Feme was endow'd*, and *Attaint was brought againſt the Feme, who pray'd Aid of the Heir*, and had it, and *they join'd and loſt* the Land, by which both were amerced. Quod nota. Br. Amercement, pl. 64. cites 42 E. 3. 26.

12. Note that a *Baron* ſhall not plead nor be impleaded by Name of Baron, but by Name of Knight or Eſquire, and yet he ſhall be amerced in the Exchequer as a Baron; for Baron is not a Name of Dignity. Quod nota. Br. Amercement, pl. 52. cites 32 H. 6. 30.

13. *Debt by a Biſhop and J. S. as Executors* of J. N. the *Defendant waged his Law*, and if he performs it, then the Biſhop ſhall be amerced to 100s. becauſe he is a Peer of the Realm, by which he was nonſuited and ſever'd, and the other appeared, and the Defendant did his Law, and ſo the Amercement of the Biſhop ſaved. Br. Amercement, pl. 48. cites 21 E. 4. 77.

(N) In what Caſes where the Defendant [* or one of the Defendants] is found *Guilty of Part.*

* See pl. 1, 2, 3, 4. and ſee (Q)

Br. Amercement, pl. 28. S. C. accordingly.—Treſpaſs *againſt 2 for chaſing in his Park* at D. who *pleaded Not Guilty*, and the *one was found Guilty at ſuch a Day to the Damages of* 30 *s. and the other Guilty at another Day to the Damage of* 13 *s.* It was awarded, that the Plaintiff *ſhould be amerced*, becauſe he is acquitted of the Treſpaſs done *in common with the other*. Br. Treſpaſs, pl. 58. cites 47 E. 3. 10.

1. In a Writ of Forcible Entry againſt ſeveral, for entring with Force and holding out with Force, if ſome are found Guilty of the Forcible Entry, and Not Guilty of the holding out with Force, the Plaintiff ſhall be in Miſericordia for this. 19 H. 6. 32.

2. So if ſome are found Guilty of the holding with Force, and that they enter'd peaceably, the Plaintiff ſhall be amerced for this. 19 H. 6. 32. Br. Amercement, pl. 28. S. C. accordingly.

3. If a Man brings an Aſſiſe againſt the Tenant and Diſſeiſor of a Rent-Service, and the Tenant is acquitted, and the Diſſeiſor found Guilty, the Demandant ſhall be amerced for the Tenant. 17 E. 3. 46. b. adjudged. *Aſſiſe againſt A. and B.* it is found that *B. diſſeiſed* the Plaintiff *and infeoffed A.* and that A. did not diſſeiſe the Plaintiff, there the Plaintiff ſhall recover, and yet ſhall be amerced for his falſe Plaint, and *yet he cannot do otherwiſe* but to ſay that Both diſſeiſed him; Quod Nota. Br. Amercement, pl. 34. cites 7 Aſſ. 14. —— Br. Aſſiſe, pl. 123. cites S. C.

4. So in an Aſſiſe of a Rent againſt one Tenant and two Diſſeiſors, if he recovers againſt the Tenant and one Diſſeiſor, and the other is acquitted of the Diſſeiſin, the Demandant ſhall be amerced for him. 31 Aſſ. 31. adjudged. Br. Amercement, pl. 42. cites S. C. and ſays, that ſo it is in all Caſes, unleſs where the Plaintiff is an Infant, or the like. If Part be found for the Plaintiff. or Demandant, and Part againſt him, he ſhall recover and be amerced as to the other.——S. C. cited 8 Rep. 61. a. ——Br. Amercement, pl. 27. cites 19 H. 6. 8.

5. In an Aſſiſe for ſeveral Rents, if the Defendant be found a Diſſeiſor of one Rent, and not of the other, the Plaintiff ſhall be amerced for this Rent, of which no Diſſeiſin is committed. 17 E. 3. 75. b. adjudged. Aſſiſe ſaid, that the *Plaintiff was ſeiſed and diſſeiſed*, but *not of ſo much Land as was put in the Plaint, but* he was diſſeiſed *of ſo much as he put in View*, by which he recovered by Award without amercing the Plaintiff; Quod Nota; for the Surpluſage in the Plaint he was not amerced. Br. Amercement, pl. 35. cites 12 Aſſ. 14.

6. In an Account upon a Receipt of Parcel by another's Hand, of which the Defendant traverſes the Receipt, upon which they are at Iſſue, and of the other Parcel upon a Receipt by the Hands of the Plaintiff himſelf, to which the Defendant wages his Law, ſo that the Plaintiff takes nothing by his Writ as to this, but is in Miſericordia. 14 Ed. 3. Amercement 17. adjudged. And in this Caſe though the Inqueſt after paſs againſt the Defendant for the Reſidue, yet he ſhall not be amerced. 14 Ed. 3. Amercement 17. per Shard.

7. *Treſpaſs of* 300 *Fiſh to the Damage of* 10 *l.* the Jury *found* upon the Iſſue *four Fiſh, and but* 8 *d. in Damages*, by which the *Plaintiff recover'd and was amerced* Pro falſo Clamore. And ſo ſee that where any Part is found againſt the Plaintiff, he ſhall be amerced. *But* the Reaſon why the Plaintiff was amerced, was ſuppoſed to be becauſe he counted of 300 Roches and Perches, and the Jury found but four Roches, quod nota; for he ſhall *not* be amerced *becauſe the Jury found leſs Damages than the Plaintiff counted*, for this is very often uſed without any Amercement. Br. Amercement, pl. 27. cites 19 H. 6. 8.

(O) In what Caſes where the *Judgment* is given againſt the Defendant *for Part*.

Roll Rep. 411. pl. 54 S. C & S. P. obiter per Coke quod fuit conceſſum per G. Crooke and ſeveral Clerks

1. IN an Action of Covenant for ſeveral Covenants broke, if the Plaintiff be barred for one he ſhall be amerced for this, tho' he recovers for the other. Trin. 4 Jac. B. R. between *Waſſel and Yelſon* agreed.

——In *Debt*, the *Defendant was acquitted of Part*, and for the reſt the Plaintiff recover'd, and there was no Judgment. Quod *Quærens ſit in Miſericordia*; and for this Cauſe Judgment was reverſed. Cro. E. 699 pl. 12. Mich. 41 Eliz. B. R. Luſſer v. Legar.——Ibid. ſays that another Judgment at the ſame time was reverſed for the ſame Cauſe between Cheſold v. Wyatt. —— S. P. accordingly by Glyn Ch. J. 2 Sid. 137.

Roll Rep. 411. pl. 54. S. C. adjornatur —— 3 Bulſt. 230. Elkin v. Waſtell, S. C. adjudg'd, and affirm'd in Error.—— In falſe Impriſonment, where the Defendant juſtifies for ſeveral Cauſes, and

2. In an Action upon the Caſe upon a Promiſe to do two things, ſcilicet, to pay ſo much for certain Lands ſold, and if the Vendee ſells it again for more than he paid, to pay ſo much more; and the Defendant pleads in Bar a Releaſe, which is adjudged no Bar for part; (ſcilicet, for the laſt Sum) and a Bar for the firſt Sum, he ſhall be in Miſericordia for this Sum of which he is barred, though it be an intire Promiſe, and he could not have an Action but upon both Parts, for he might have acknowledged himſelf ſatisfied of that which he had releaſed. Trin. 14 Jac. B. R. between *Waſſell and Yelton*.

3. In Treſpaſs againſt two, if one be found Guilty to [the] Damage [of ſo much] by himſelf, and the other is found Guilty to [the] Damage [of ſo much] by himſelf, in this Caſe each Defendant ſhall be amerced ſeverally, and the Plaintiff ſhall alſo be ſeverally amerced againſt each of them. Co. 5. *Specot's* Caſe, 58. b.

ſome of them are found good and others not, the Defendant ſhall not be amerced for this Falſity; for there was good Cauſe for the Arreſt, and this is only a Defence and not by way of Action as an Avowry is. Jenk. 184. pl. 87.——See (T) pl. 3. S. C.——And ſee (Q) pl. 5. and the Notes there

Br. Executors, pl. 76.

4. In *Debt of* 40 *l. againſt Executors*, who *pleaded Fully adminiſter'd*, and it was *found* that they had in their Hands *the Day of the Writ to the Value of* 20 *l.* by which the Plaintiff recovered 20 l. and as to the other 20 l. the Plaintiff was amerced. Br. Amercement, pl. 29. cites 21 H. 6. 41.

5. In *Ejectment of a Manor, and carrying away the Plaintiff's Goods*, the *Ejectment was found, but nothing was found as to the Goods* being carried away. The Plaintiff had Judgment to recover the Land, and the Book ſays Nota, that the Plaintiff ought to be amerced pro falſo Clamore as to the Goods carried away whereof nothing is found &c. D. 89. a. pl. 111. Trin. 7 E. 6. Clifford v. Warren.

6. In *Treſpaſs* of Goods carried away, *Part was found for the Plaintiff, and Part againſt him.* Adjudged in B. R. that the Plaintiff recover for Part, and be in Miſericordia pro falſo Clamore for the Reſidue; and upon Error brought in the Exchequer-Chamber the Judgment was affirm'd. Mo. 692. pl. 956. Palmer v. Sherwood.

But *in Treſpaſs or other Actions wherein the Plaintiff declares ad Damnum*, if leſs be found than he declares for, the

7. In *Debt upon the Statute* 33 H. 8. *of buying pretended Titles*, the *Plaintiff demanded* 50 l. *for the Value of the Land*, and the Jury *find the Value* 20 *l.* the Plaintiff had Judgment to recover one Moiety of the 20 l. and the Queen the other, but no Judgment was for the Reſidue of the 50 l. viz. that the Plaintiff ſhould be in Miſericordia pro falſo Clamore, and therefore Judgment was reverſed. Cro. E. 257. pl. 34. Mich. 33 & 34 Eliz. B. R. Savery v. Tey.

Plaintiff ſhall not be amerced becauſe the Action is grounded upon an Uncertainty. Ibid.

8. In

8. In an *Action againſt a Hundred* on the Statute of Winton, the *Defendants were found Guilty as to Part, and quoad Reſiduum Not Guilty*, and Judgment for the Plaintiff for ſo much as is found for him, and that Defendants ſint in Miſericordia; and Quoad Reſiduum that Querens Nil capiat &c. & ſit in Miſericordia. And held well, and the Plaintiff well amerced for his falſe Proſecution; and Judgment affirm'd. Cro. J. 348. pl. 1. Trin. 12 Jac. B. R. Oldfield v. the Hundred of Witherly.

9. Caſe for that the Defendant being *Maſter of a Ship ſailing in the Thames, did ſo negligently govern the ſame that it Violenter ruebat on the Plaintiff's Hoy* loaded with Goods, and floating at Anchor there, and broke and drowned it ad damnum &c. Upon Not guilty pleaded, the *Jury found that quoad the negligently governing the Ship, and ſo in the very Words in the Declaration, that the Defendant is Guilty*, and aſſeſs Damages to 50 l. & *quoad reſiduum* de Præmiſſis *Not Guilty*. And Judgment was given as to that quoad præd' the Plaintiff ſit in Miſericordia pro falſo Clamore; but there being no Reſiduum of which the Defendant could be found Guilty, the Judgment againſt him pro falſo Clamore was reverſed. Raym. 390. Trin. 32 Car. 2. B. R. Muſtard v. Harnden.

(P) In what Caſes where the Defendant is found *guilty of Part*, *or* is adjudged guilty *upon Demurrer*.

Fol. 217.

1. IN Treſpaſs for a Battery and Impriſonment, if the Defendant pleads to Iſſue for Part of the Matter and Time, for the reſt pleads a ſpecial Juſtification, upon which the Parties demur, and this is adjudg'd againſt the Defendant, and the Plaintiff comes & fatetur ſe ulterius nolle proſequi as to the Iſſue, yet he ſhall not be amerced for this, becauſe he hath Judgment againſt the Defendant for part. Trin. 15 Jac. between *Lvely and Stoley*, adjudged at Serjeants-Inn in a Writ of Error and the Judgment affirmed. Hob. 180. pl. 216. S. C. does not appear. —— 2 Bulſt. 326. S. C. but not S. P. —— Roll Rep. 264. pl. 37. S. C. but not S. P. ——

Cro. J. 439. pl. 11. S. C. but S. P. does not appear —— Jenk. 336. pl. 77. S. C. but not S. P.

Avowry was *of taking two Diſtreſſes for ſeveral Cauſes*. Iſſue was joined as to one and found for the Plaintiff, and a *Noli proſequi* enter'd as to the other. Herne the Secondary ſaid the Practice was in ſuch Caſe, to enter it without a Miſericordia; And ſo was the Opinion of the Court, but Time was given to ſearch for Precedents. 2 Sid. 136 Hill. 1658 B. R. Young v. Wakeman. —— Beecher's Caſe in 8 Rep. was ſtrongly objected in this Caſe; but it was anſwer'd that the Noli proſequi in that Caſe was enter'd for the Whole, which in this Caſe it was not. Ibid.

2. In an Action upon the Caſe for ſaying, the Plaintiff was a ſtrong Thief, if it be found that the Defendant ſaid all the Words but the Word (ſtrong) and that he did not ſay this, the Plaintiff ſhall have Judgment upon the Words found, and ſhall not be amerced for the Word (ſtrong.) Dubitatur D. 6 E. 6. 75. 22.

3. In an Action of Waſte in domibus & gardino, if upon the Writ of Enquiry of Waſte the Defendant be found guilty in domibus, and not guilty in gardino, the Plaintiff ſhall be in Miſericordia for the Garden. 14 E. 3. Waſte 27. S. C. cited Cro. C. 453. pl. 24. Hill. 11 Car. B. R. in Caſe of King v.

Fitche, and admitted by Berkley J. But he ſaid that where Waſte is aſſigned in cutting down 20 Trees, and the Waſte is found in cutting down of 2 Trees and ſo varies only in Quantity, it is otherwiſe. But Jones and Crooke doubted thereof.

In Treſpaſs for *killing two Deer* in his Park, the Defendant was found guilty of One only and acquitted of the other, and therefore the Plaintiff was amerced to 100 s he being a Lord. Br. Amercement, pl. 2. cites 9 H. 6. 2. Ld. Fitzwater's Caſe.

4. In

Treſpaſs for *Aſſault and Battery*, and the Defendant pleaded Not Guilty, and the *Aſſault found againſt him* to the Damages of 20 Marks, *and as to the Battery Not guilty*, and therefore the Plaintiff *recovered* 20 Marks *for the Aſſault* and was amerced for the reſt, and barred. Br. Treſpaſs, pl. 40. cites 40 E. 3. 40.——Br. Amercement, pl. 7. cites S. C. and S. P. accordingly.

4. In Treſpaſs for the Battery of his Servant, and the Taking of his Timber, if the Defendant be found guilty of the Taking of the Timber, and not guilty of the Battery of the Servant, the Plaintiff ſhall be amerced for this. 22 Aſſ. 76. adjudged.

5. In *all Actions Real and Perſonal*, if Part be found for the Demandant or Plaintiff, and Part againſt him, the Demandant or Plaintiff ſhall be amerced, unleſs no Default be in him. 8 Rep. 61. a. Mich. 6 Jac. in Beecher's Caſe.

Palm. 269. Yerly v. Turnock, S. C. ſays that Lea Ch. J. at another Day agreed to the Opinion of Doderidge and Chamberlaine, and Judgment affirm'd.—2 Roll Rep. 252. [but it is wrong paged, and ſhould be 232, and there is another 252.] S. C. but S. P. does not appear.

6. In *Caſe for diſturbing him of his Common*, the Jury *found that the Plaintiff had a leſs Quantity of Common, and fewer Acres than he alleged.* Judgment was Quod defendens ſit in Miſericordia, and alſo the Plaintiff in Miſericordia pro falſo Clamore &c. for that Land which is found againſt him. This was aſſign'd for Error, and that he ought not to be in Miſericordia; for that it is not material. But Doderidge and Chamberlaine held it to be no Error; for he having declared falſely, tho' he has Cauſe to recover, he ſhall be in Miſericordia, becauſe his *Complaint was falſe* in ſome Part; but Lea Ch. J. doubted; but afterwards Judgment was affirm'd. Cro. J. 629. 630. pl. 2. Hill. 19 Jac. B. R. Eardley v. Turnock.

(Q) In what Caſes, where *one* Defendant is found *guilty*, *and* the *other not.*

See (N) pl. 1, 2, 3, 4.

* Fitzh. Amercement, pl. 9. cites S. C. accordingly.——*Aſſiſe againſt Baron and Feme and others.* The *Baron and Feme pleaded a Record*, and the Plaintiff denied it, and they *failed at the Day*, and the other pleaded to the Aſſiſe by Bailiff, and the Plaintiff before Trial againſt the other at his Prayer, and upon *Damages releaſed* had Judgment againſt the Baron and Feme alone upon the Failure of the Record, and the Plaintiff not amerced againſt the others. Br. Amercement, pl. 10. cites 44 E. 3. 24.—— ——S. P. Br. Amercement, pl. 62. cites 44 Aſſ. 33.

1. In an Aſſiſe againſt two, if it be adjudged againſt one upon his Plea, and the Demandant releaſes his Damages, and hath Judgment preſently for the Land againſt him, relinquiſhing his Suit againſt the other, he ſhall not be amerced for the other. 44 Aſſ. 33. * 44 E. 3. 24. adjudged.

* Br. Amercement, pl. 62. cites S. C. accordingly.——† Fitzh. Tit. Amercement, pl. 9. cites S. C. accordingly.

2. In Proceſs againſt ſeveral, and one is found guilty, and the Plaintiff prays Judgment againſt him, relinquiſhing his Suit againſt the reſt, he ſhall not be amerced for them. * 44 Aſſ. 33. † 44 E. 3. 24.

8 Rep. 61. a. in Beecher's Caſe, S. P. accordingly, and ſays that *in all Actions Real and*

3. In Treſpaſs againſt ſeveral for a Battery, if one Defendant be found Not guilty, and the reſt Guilty, yet the Plaintiff ſhall be amerced as to him who is found Not guilty. 22 Aſſ. 76.

4. In Treſpaſs againſt Baron and Feme, ſuppoſing that they both committed the Treſpaſs, if the Feme be found Guilty of the Treſpaſs before Coveture, but the Baron Not guilty, the Plaintiff ſhall not be amerced

amerced quoad the Baron; for the Baron ought to be named for Conformity. * 22 Aſſ. 87. adjudged; (but Nota, the Baron is ſuppoſed a Treſpaſſer.)

Perſonal, where all or Part is found againſt one Tenant or Defendant, and nothing or Part only againſt the other, the Demandant or Plaintiff ſhall be amerced, unleſs no Default be in them; for in the Caſe of Battery brought againſt the Baron and Feme, the Plaintiff can have no other Writ in ſuch Caſe, and conſequently no Default in him, and cites 22 Aſſ. 8. 7 Aſſ. 14 31 Aſſ. 31 21 H. 6. 41 a. 40 E. 3. 40. a.

* Fitzh. Amercement, pl. 23. cites S. C. accordingly. ——Br. Amercement, pl. 38. cites S. C. accordingly ——Fitzh. Briefe, pl. 761. cites S. C. but the Point of Amercement does not appear there.——See (M) pl. 3.

5. In Trover and Converſion of 1000 Load of Coal againſt 3 Perſons, if one of the Defendants is found Guilty of 100 Load, and not guilty of the reſt, and another guilty of 100 Load, and not guilty of the reſt, and the 3d guilty of 100 Load, and not guilty of the reſt, in this Caſe the Plaintiff ſhall not be amerced againſt any of them, becauſe each of them is found guilty of Part, tho' ſeverally. Mich. 2 Car. between *Warne and others*, Plaintiffs, *and Player*, Defendant, adjudged in a Writ of Error in Camera Scaccarii, this being aſſign'd for Error, Mr. Litt. being of Counſel in the Caſe.

Cro C. 54. 55. pl. 8. Player v. Warn & Dews, in the Exchequer Chamber, S. C. reports that there was one, and only one Miſericordia againſt the Plaintiff pro falſo Clamore ſuo. And the Error aſſign'd was, That there ought to have been ſeveral Judgments of Ideo in Miſericordia againſt the Defendants, and it being otherwiſe is Error. But reſolved that there ſhall be but one Judgment only of Miſericordia, tho' the Defendants are ſeverally found Guilty, and that ſo are the Precedents, and thereupon Judgment was affirm'd. [But no Objection appears there to have been made as to the Amercement of the Plaintiff.]

(R) In what Caſes, where the *Recovery* is *againſt one*, and *not againſt the other*.

Fol. 218.

1. IN an Aſſiſe againſt two, if the Plaintiff recovers againſt one, and the other is found Not guilty, the Plaintiff ſhall be amerced as to him. 23 Aſſ. 18. adjudged.

A Writ of Entry in the Quibus was brought againſt the Mother and her Son an Infant, and it was found that the Mother diſſeiſed, but that the Son did not and Judgment was that Petens in Miſericordia pro falſo Clamore againſt the Son. D. 312. pl. 85. Trin. 12 Eliz. Anon.

(S) At what *Time*.

1. IN an Account, if the Defendant be adjudged to account, Judgment ſhall be preſently, before the final Judgment, Quod ſit in Miſericordia, quia non prius computavit. Mich. 14 Jac. B. R. *Farrey's Caſe*, adjudged in a Writ of Error, and affirm'd by the Clerk to be the Courſe.

2. And in this Caſe, if he be after found in Arrearages, Judgment ſhall be again Quod ſit in Miſericordia. Mich. 14 Jac. B. R. *Farrey's Caſe*, adjudged.

3. In *Aſſiſe* the *Defendant made Default the firſt Day.* The Aſſiſe ſhall be awarded by his Default; and if it remains for *Default of Jurors*, yet they ſhall not be amerced, becauſe it is *at the firſt Day*; but Habeas Corpora ſhall be awarded. Br. Amercement, pl. 41. cites 30 Aſſ. 17.

See (S) pl. 2. (T) *How* it ſhall be aſſeſs'd. Where two Amercements. The Defendant ſhall *not* be amerced *twice in one Action.*

Hill. 32 Eliz. B. R. in Error out of C. B.—— 3 Le. 198. pl. 251. in C B. the S. C. but S. P. does not appear.

1. IN a Quare Impedit, if the Plaintiff recovers the Preſentation againſt the Defendant, and thereupon Judgment is given upon Demurrer to have a Writ to the Biſhop, and upon this the Defendant is amerced, and after a Writ is awarded to inquire of the Damages, and the other Points of the Writ, and found accordingly, and Judgment alſo given for this, the Defendant ſhall not be amerced again. Co. 5. *Specot* 58. b.

——And. 189. pl. 225. S. C. but S. P. does not appear.——Goldsb. 35. pl. 10. & 52. pl 1. S. C. but S. P. does not appear.——Jenk. 259. pl. 55. ſays this Amercement is not double, but a Repetition of the former.

5 Rep. 58. b. in Specot's Caſe, ſays that with this accords 9 E. 3. 6. per Herle, and 22 H. 6.

2. In one Action againſt the ſame Defendant or Tenant, if the Defendant or Tenant pleads one Plea to Part, and another Plea to the reſt, or confeſſes Part, and pleads to Iſſue for the other, and ſeveral Iſſues are found againſt him, yet the Defendant or Tenant ſhall not be twice amerced. Co. 5. 58. b.

See (O) pl. 3. S. C.— 5 Rep. 58. b. in Specot's Caſe, ſays that this appears in 47 E. 3. 20.

3. In Treſpaſs againſt two, if one be found Guilty to [the] Damage [of ſo much] by himſelf, and the other found Guilty to [the] Damage [of ſo much] by himſelf, in this Caſe each Defendant ſhall be ſeverally amerced, and the Plaintiff alſo ſhall be ſeverally amerced againſt each of them. Co. 5. 58. b.

——But ſee (Q) pl. 5. and the Notes there.——If there are 20 Iſſues, and found for the Defendant, yet there ſhall be but one Miſericordia; per Glyn Ch. J. 2 Sid. 137. Hill. 1658.

Comb. 353. ſays that the Authorities cited for the 6th Reſolution [which ſeems to

4. In *all Caſes Real or Perſonal*, when there is *but one Tenant or Defendant*, he ſhall not be twice amerced; but where there is *but one Demandant or Plaintiff, and divers Defendants*, the Plaintiff may be amerced ſeveral times. 8 Rep. 61. a. in Beecher's Caſe, cites 9 E. 3. 6. 31 Aſſ. 31. 21 H. 6. 41. a. 40 E. 3. 40. a.

mean this Paragraph in the Caſe, there being only 4 Reſolutions properly ſo call'd] in Beecher's Caſe, 8 Rep. 61. do not warrant that Reſolution.

In *Dower* the Defendant *confeſs'd as to Part*, and Judgment

5. When a Man *confeſſes the Action as to Parcel, and denies the reſt*, which is *found againſt him*, he ſhall not be twice amerced, but once amerced only. Br. Amercement, pl 56. cites 11 H. 4. 55.

quod ſit in Miſericordia; and *as to the reſt he pleads in Bar*, and upon Demurrer Judgment is given againſt him quod ſit in Miſericordia; and this was objected in Error that a Man ought not to be twice amerc'd in the ſame Action; ſed non allocatur; for *both Judgments are final, and independent of one another*, but otherwiſe where one Judgment is *interlocutory only, and dependent on another*, as quod computet

computet in Account. 1 Salk. 54. Hill. 7 W. 3. B. R. Ld. Gerard v. Lady Gerard.——3 Lev. 401. S. C. but S. P. does not appear.——Skin. 592. pl. 6 Lady Gerard's Caſe. S. C. & S. P. and Judgment affirmed per tot. Cur. For the 2d Amercement was for a new Delay.—1 Salk. 253. pl. 3. S. C. & S. P. and Judgment accordingly.——12 Mod. 84. S. C. but S. P. does not appear.——Comb. 352. S. C. and Judgment accordingly.——Ld. Raym. Rep. 72. S. C. & S. P. and Judgment accordingly. And ſo Judgment given in C. B was affirmed.

6. *Debt* brought [*Part*] *upon a Leaſe*, and *Part upon a Buying* &c. and they were at Iſſue *upon the Leaſe*, and *as to the reſt the Defendant tender'd it*, and *the Plaintiff received it*, and therefore took nothing by his Writ for this Part, and was amerced, and it is ſaid, that if the *Leaſe be found againſt him*, he ſhall be amerced *again*; but 9 E. 3. per Herle, Judgment ought not to have been given till the Iſſue had been tried; for the Defendant ſhall not be twice amerced, and then Judgment ſhall be given for both. Br. Amercement, pl. 17. cites 11 H. 4. 55.

7. The Plaintiff may be amerced twice in one Action, as where the Lord Fitzwater brought *Treſpaſs againſt two for hunting and killing two Deer*, and *one acquitted*, and the *other found guilty of killing one only*, and he was amerced 100 s. againſt him who was acquitted, and another 100 s. againſt the other on his Acquittal as to the other Deer. Br. Amercement, pl 2. cites 9 H. 6. 2. Lord Fitzwater's Caſe.

8. Note, where a *Sheriff had two Exigents againſt one* upon *Capias Utlagatum* upon Condemnation, and *Superſedeas comes* to him *before the* 5th *County* held, and yet he *returned the Party outlawed*, *and* alſo returned *two Copies of the Exigents*, *and not the very Writs* of Exigents by which he was amerced to 20 *l. for the one Return*, and 20 *l. for the other*, and to 30 *l. for the Falſity of the Return of the one Copy*, and to *ſo much for the Return of the other Copy*, viz. 100 *l. for all.* * And by the Juſtices, that which is ſo aſſeſſed upon a Miniſter of the Court is called an Amercement, and not a Fine. But where a Stranger to the Court makes a Miſpriſion, and ſhall make amends, there that which is aſſeſſed upon him is called a Fine, and not an Amercement. Br. Amercement, pl. 45. cites L. 5. E. 4. 5. Br. Fine for Contempt, pl. 39 cites S. C. and ſame Diverſity.

9. It was admitted, Arg. that the Defendant ſhall be but once amerced in one Action *for one Default*, but ſaid, that if there are many Defaults the Defendant ſhall be amerced ſeverally for the *ſeveral Defaults* for every Offence. 2 Le. 4. 5. Mich. 31 & 32 Eliz. in pl. 4. Ibid. 186. in pl. 231.—*Error* was brought upon *Judgment in an Account*, Error was aſſigned, becauſe *upon the firſt Judgment* quod computet, it was enter'd Defendens *in Miſericordia*, *and upon the* 2d. Judgment *alſo Defendens in Miſericordia*, and ſo *twice puniſhed*, but that was not allowed, becauſe there were 2 *ſeveral Judgments*, and Manwood ſaid, that ſo it was adjudged between Brown and Marſh. Noy. 134. Brown v Barwick.

10. *Ejectment againſt four of* 20 *Acres*; *three are found Guilty of* 10 *Acres*, and *Not Guilty of the reſt*, and *the fourth is found Not Guilty generally.* Judgment was, that the Plaintiff, quoad the three pro falſo Clamore for ſo much as they were acquitted of, & pro falſo Clamore againſt the fourth be in Miſericordia. Error was aſſigned, that there ought to be two Amercements. The Prothonotaries ſaid, that the uſual Courſe is to make Entries in ſuch Manner, but that ſometimes they find them made thus, viz. that quoad the three for ſo much whereof they are acquitted ſit in Miſericordia, and as to the fourth quod ſit in Miſericordia. Cro. C. 178. pl. 1. Hill. 5 Car. B. R. Deckrow v. Jenkins.

(U) What

(U) What Court may impoſe it.

Br. Amercement, pl. 25. cites S. C. but S. P. does not appear.——Ibid. pl. 65. cites S C. but S. P. does not appear there.——As if Bailiff will not return a Precept when the Steward commands him. Br. Leet, pl. 29 cites S. C. —— Ibid. pl. 14. cites S. C. & S. P. accordingly.

1. A Court Leet **may impoſe a Fine** upon an Officer **if he will not do his Office upon Command.** 7 H. 6. 12. b.

Ibid. pl. 65. cites S. C. that it is by the *Judge of the Court* —Br Fine for Contempts, pl. 18. cites S C. & S. P as to the Steward of a Leet; for a Fine is always aſſeſſed by the Diſcretion of the Juſtices; and Brooke ſays it ſeems there that Coroners and Eſcheators may aſſeſs a *Fine upon the Sheriff for not returning a Panel.*

2. A Fine is aſſeſſed by the *Juſtices* or *Steward of* the *Leet*, *Coroner*, *Eſcheator* &c. Br. Amercement, pl. 25. cites 7 H. 6. 12.

3. For *Conviction in Recaption in a Court of Record* the Party ſhall be fin'd, but if in a Court Baron it ſhall be only an Amercement. Br. Fine for Contempts, pl. 60. cites F. N. B. 73 (D)

4. If any Contempt or *Diſturbance* to the Court be committed *in any Court of Record*, the Judges may impoſe on the Offenders a reaſonable Fine, and a *Leet* being ſuch Court, and the *Steward Judge there*, he may impoſe ſuch Fine on ſuch Offenders. 8 Rep. 38. b. Reſolv'd per tot. Cur. Trin. 30 Eliz. C. B. in Grieſley's Caſe.

S. P. 11 Rep. 43. b. accordingly. Mich. 12 Jac. in Godfrey's Caſe.——Godb. 381. pl. 467. Paſch. 3 Car. B. R. Waterman v. Cropp, S. P.

5. Courts which are *not of Record* cannot impoſe a Fine, nor commit any to Priſon. Reſolved per tot. Cur. 8 Rep. 38. b. Trin. 30 Eliz. C. B. in Grieſley's Caſe.

6. C. preſcrib'd to have a *Water-Court* within his Manor of Graveſend, and that they have uſed there *to inquire of* all Miſ-orders and *Miſdemeanors of Watermen there*, and to have the Fines and Amercements of the ſame Court. One of the Jury there ſworn refuſed to give his Verdict, whereupon the Steward amerced him 20 s. The Queſtion was, what Court this was? and whether the Steward could aſſeſs a Fine? Adjornatur. Le. 216. pl. 299. Mich. 32 & 33 Eliz. C. B. Ld. Cobham v. Brown.

* S. P. per Coke Ch. J. Roll Rep. 74. Mich. 12 Jac in Caſe of Bullen v. Godfrey.—And Ibid. 35. in S. C. Coke Ch. J. ſays, that the Leet is the only Court, the Phœnix, as he calls it, which can fine, and yet cannot impriſon.——4 Inſt. 84. cap. 8 cites it as adjudged 3 Jac. in the Exchequer, in Sir Tho. Thimblethorp's Caſe, and afterwards in Waller's Caſe, that the Chancery had not Power to aſſeſs a Fine for not performing a Decree.

7. Some Courts may * *Fine but not impriſon*, As the Leet; ſome *cannot fine nor impriſon, but amerce*, As the County-Court, Hundred, Court-Baron &c. for no Court can fine or impriſon which is not a Court of Record; ſome *may impriſon but not fine*, As the Conſtables at Petty-Seſſions for an Affray made in Diſturbance of the Court; ſome *cannot fine, impriſon, nor amerce*, As the Eccleſiaſtical Courts held before the Ordinary, Archdeacon &c. or their Commiſſaries, and ſuch as proceed according to the Canon or Civil Law; and ſome *may fine, impriſon, and amerce*, as the Caſe requires, As the Courts of Record at Weſtminſter and elſewhere. 11 Rep. 43. b. 44. a. Mich. 12 Jac. ſays it was obſerved in Godfrey's Caſe.

And it ſeems he has a *diſcretionary*

8. The *Sheriff in his Tourn* may impoſe a Fine on all ſuch as are guilty of any *Contempt in the Face of the Court*; for he ſtill continues a Judge of

of Record; and there ſeems to be no Doubt but he may impoſe what reaſonable Fine he thinks fit upon a *Suitor refuſing to be ſworn*, or upon a *Bailiff refuſing to make a Panel* &c. or upon a *Tithingman neglecting to make his Preſentment*, or upon a *Juror refuſing to preſent the Articles wherewith they are charged*, or upon a Perſon duly *choſen Conſtable refuſing to be ſworn*. 2 Hawk. Pl. C. 58. cap. 10. S. 15.

Power either to award a Fine or an Amercement for Contempts to the Court, and ſays, that there ſeems to be no Doubt but that the Sheriff in his Torn might *at Common Law*, as the Steward of a Court Leet ſtill may, award an Amercement of any Perſon indicted *for any Offence not capital* within his Juriſdiction, *without any farther Proceeding or Trial*, and the Statute of 1 E. 4. cap. 2. clearly ſuppoſes him to have had a Power of impoſing ſuch Fines. 2 Hawk. Pl. C. 58. cap. 10. S. 17.

9. O. was fin'd by the *Council of the Marches of Wales* for refuſing to appear to a Bill there. Per Coke Ch. J. *no Engliſh Court* can Fine, and tho' Mountague Serjeant urg'd, that their Inſtructions gave them a Power to fine, yet Coke ſaid, it is clear that they cannot, this being only a *Non-feaſance*, but if it had been after Sentence it had been ſomething; beſides, O. being impriſon'd for Non-payment brought a Hab. Corpus, the Return whereof was not that they uſed to Fine before the Statute which confirm'd the Court, and therefore the Court held it clear that it was not good. Roll. Rep. 339. pl. 56. Hill. 13 Jac. B. R. Oliver's Caſe.

10. *Admiralty* Court, which is *no Court of Record*, may puniſh one that reſiſts the Proceſs of their Court, and may fine and impriſon for a *Contempt* to their Court acted *in the Face of it*; but ſhould they proceed to give the Party *Damages*, a *Prohibition* would be granted. Vent. 1. 20 Car. 2. B. R. Sparkes v. Martin.

(W) Fine for a *Contempt*. In what Caſes for ſuing in Contempt *of the Court*.

1. If one Man arreſts another in London coming to the Common Pleas to anſwer a Writ at the Suit of the ſame Man, **becauſe he ought to have his Privilege, the Plaintiff ſhall be fined for the Contempt to the Court.** 9 H. 6. 55. Curia. Br. Fine for Contempts, pl. 1. cites S. C.—— Br. Fine pur Contempts, pl. 24. cites 14 H. 7. 7. S. P. accordingly.——8 Rep. 60. a. in Beecher's Caſe, cites S. C. accordingly, and 9 H. 6. 55.

So where an Attorney arreſted J. S. in the Country, and when J. S. came to London he arreſted him again in London for the ſame Debt. Anderſon told him that if one be ſued here for a Debt, and is after arreſted in another Court for the ſame Debt, the Penalty is Fine and Impriſonment, and that is both the Law and Cuſtom of this Court, and they committed him to the Fleet. Goldsb. 30. pl. 5. Mich. 28 & 29 Eliz. Anon ——And in Beecher's Caſe, 8 Rep. 60. a. it is reſolved 7thly, and laid down as a Rule, That where any one uſes the Countenance of the Law (which was inſtituted to make an End of Controverſies and Vexation) for double Vexation, he ſhall be fined.

2. But if another Man had arreſted him, **who was not Plaintiff in the Writ in Banco, he ſhould not be fined.** 9 H. 6. 55. Curia.

3. If the Plaintiff in a Suit in Banco be arreſted at the Suit of the Defendant in London, before the Return of the Writ in Banco, **this is a Contempt to the Court, and for this he ſhall be fined and impriſoned.** 11 H. 6. 22. Br. Fine pur Contempts, pl. 56. cites S. C. and is that the Plaintiff was coming towards the Court of C. B. to proſecute his Action, and the Defendant arreſted him in London, and the Defendant was fined and impriſoned for his Contumacy to the Court.——Fitzh. Fines, pl. 13. cites S. C.

4. In Treſpaſs the Defendant was *return'd Nihil*, whereupon the *Plaintiff came to London to ſue out another Capias*, and the *Defendant arreſted him in London*, and the *Plaintiff brought Writ of Privilege, by which the Body of the Plaintiff and the Cauſe was removed.* The Plaintiff pray'd to be diſmiſs'd, and that the Defendant be fined for the Arreſt pending this Suit; but denied per Cur. For it may be that the Defendant had no Conuſance that Plaintiff had a Suit againſt him in C. B. but otherwiſe it would be if the Proceſs had been ſerved upon the Defendant, becauſe this, as it ſeems, is Conuſance. But if the *Plaintiff pending his Suit had arreſted the Defendant in London*, he ſhould be fined; for he had Conuſance of his own Suit. Br. Fine for Contempts, pl. 40. cites 4 E. 4. 15.

(X) Who ſhall be fined.

Fol. 219.

1. IN an Action upon the Statute of Marlbridge, for driving a Diſtreſs out of the County, if the Defendant juſtifies as Bailiff to J. S. by Special Matter, and it is adjudged againſt him, he ſhall be amerced; for though he juſtifies as Bailiff, yet this is not proved. 30 Aſſ. 38.

Br Treſpaſs, pl. 255. cites S. C. & S. P. but ſays that the Defendant ſhall be ranſomed, and that a Capias was awarded againſt him.—And the Year-Book ſays the Court doubted whether he ſhould be ranſom'd, or only amerced by the Statute; and that it was awarded by Sharde, by Aſſent of all the other Juſtices, that he be ranſom'd, becauſe he could not prove that he was Bailiff, but rather the Reverſe.——See (D. a) pl. 1, 2. S. C.

2. But otherways it had been if J. S. had been a Party to the Writ. 30 Aſſ. 38.

Br. Treſpaſs, pl. 255. cites S. C. —(D. a) pl. 2. S. C.

(Y) *For what* Cauſes a Fine may be impoſed.

1. A Court that hath Power to fine may command the People to keep Silence, upon a Pain. 7 H. 6. 12.

2. A Court Leet may command the Bailiff to execute his Office, as to make a Pannel upon a Pain, and if he doth it not, he ſhall forfeit it. 7 H. 6. 12. b.

Br. Leete &c. pl. 14. & 29. cites S. C.——S. C. cited and agreed per tot. Cur. 8 Rep. 38. b. in Griefley's Caſe.——So if a *Tithing-man refuſes to make Preſentment* in a Leet, the Steward ſhall impoſe a reaſonable Fine upon him. Ibid. per Cur. cites 10 H. 6. 7. a.

3. If a Juror at the Bar will not ſwear, he may be fined. 7 H. 6. 12. b.

Br. Fine for Contempt, pl. 18. cites S. C.——If a Juror in a Leet *departs without giving Verdict*, the Steward ſhall fine him. 8 Rep. 38 b. per Cur. cites Lib. Intrat. in Amercement in Debt, Fol. 149.

4. If any of the Jury give their Verdict to the Court, before they are all agreed of their Verdict, they may be fined. 43 Aſſ. 10.

Br. Fine for Contempt, pl. 32. cites S. C.

5. In

5. In Treſpaſs, if the Defendant pleads the Releaſe of the Plaintiff, he ſhall not be fined to the King, becauſe this is not any Confeſſion of the Treſpaſs. 11 H. 6. 29. S. P. and ſo of an Accord with Satisfaction, which is not a Denial of the Treſpaſs, the Defendant ſhall not make Fine; for where the Defendant *pleads in Bar*, there the King ſhall not have Fine; but *contra of a Releaſe made after Verdict*. Br. Fine for Contempts, pl. 41. cites 4 E. 4. 29.

6. *Vouchee comes by Covin* of the Demandant, and therefore he was attach'd, and confeſs'd it, and made Fine. Br. Fine for Contempts, pl. 54. cites 22 E. 3. Fitzh. Voucher, pl. 133.

7. *Bailiff* convicted for *diſtraining Vi & Armis, where no Rent was arrear, or the like*, ſhall be fined; otherwiſe if the Lord himſelf was ſo convicted; for Non ideo puniatur Dominus per Redemptionem. Br. Fine for Contempts, pl. 48. cites 30 Aſſ. 28.

8. A *Jury* was put in a Houſe to treat of the Iſſue; *the 12th Man went away, and could not be found*; and upon informing the Court thereof, another was ſworn and added to the other 11, and when the 12th came he was awarded to Priſon, and made Fine. Br. Fines for Contempts, pl. 53. cites 34 E. 3. Fitzh. Office of Court, pl. 12.

9. *Jurors* were fined half a Mark each *for taking Money after their Verdict* given, tho' no Agreement was made for it before. Br. Fines for Contempts, pl. 31. cites 39 Aſſ. 19. A *Juror* was indicted for *taking five Marks for being ſworn and to deliver a Thief indicted of Felony*, and the Juror was fined to the King. Br. Fines for Contempts, pl. 33. cites 40 Aſſ. 43.

10. *Lord of a Leet* made a Fine of 40 s. becauſe *his Steward took Indictment of the Death of a Man in his Leet*, which did not belong to his Leet, and ſo incroach'd upon the King; And *alſo* took Indictment *of Robbery at D. where there is no ſuch Vill in this County*, but in another. Br. Fine for Contempts, pl. 49. cites 41 Aſſ. 30. Br. Fine for Contempts, pl. 36. S. P. cites 3 H. 7. 1.

11. If one be by Mainprize and fails at the Day, and the *Mainpernors come by Capias or Voluntarily*, they ſhall be fined. Br. Fines for Contempts, pl. 1. cites 2 H. 4. 14. S. P. where Judgment is given againſt the Defendant, but in ſuch Caſe the Mainpernors ſhall not be condemned in the Sum; but otherwiſe if they give Security for the Sum in Demand, as upon Iſſue upon Cap. ad Satisfaciendum or the like. Br. Fine for Contempts, pl. 57. cites 11 H. 6. 31.

12. One was *Mainpernor for the Defendant in Appeal of* Death, and the *Defendant did not come*, and Exigent upon Proceſs iſſued againſt the Mainpernor, whereupon he rendered himſelf and made Fine, and had a Superſedeas; Quod Nota. Br. Fine for Contempts, pl. 10. cites 8 H. 4. 7.

13. One who offer'd himſelf to be *Pledge* for another *for the Peace, ſwore he could expend* 40 s. *a Year*, and upon another Examination *confeſs'd he could expend but* 20 s. a Year, and was ſent to the Fleet till he had made Fine; Quod nota. Br. Fine for Contempts, pl. 20. cites 7 H. 6. 25.

14. In Treſpaſs, *ſeveral were condemn'd*, and the *Plaintiff ſaid that one of them was in the Hall, and pray'd to have an Officer to bring him in*, and had one, *who upon the ſhewing of the Plaintiff arreſted W. N.* at whoſe Requeſt he tarried with him till he had a Writ of Privilege out of B. R. and then he carried him to C. B. but the Court was up before his Return thither, and then he *let him go at large*; But per Cur. he is not chargeable as for an Eſcape, as a Sheriff ſhould be that takes a Man by Writ, becauſe he has a Priſon to keep him in, and the Writ aſcertains the Perſon whom he is to take, whereas here he was inform'd only by the Party without any Record, and if the Party when he comes into Court

Court will deny his being the ſame Perſon, they ought to let him go, tho' they know him to be the ſame Perſon, their knowing him being not as Judges of Record; But they were of Opinion that the Cryer ſhould be fined for his Delay and Demeanor. Nota. Br. Fine for Contempts, pl. 4. cites 33 H. 6. 55.

S. P. for he is not Judge of him but the Juſtices are his Judges.

15. If a *Felon reads as Clerk*, and the Arch-deacon or *Ordinary refuſes him*, he ſhall be fined. Br. Fine for Contempts, pl. 7. cites 34 H. 6. 49.

Br. Fine for Contempts, pl. 43. cites 9 E. 4. 28.——Ibid. pl. 37. S. P. and cites S. C.——S. P. and ſo for admitting Felon as Clerk who is not Clerk. Ibid pl. 27. cites S. C.

But the Demanding of him upon Pain muſt be at the Prayer of the Party,

16. A *Juror* made Fine to a Year's Value of his Land, becauſe he *appear'd and was challenged and tried in, and made Default when he ſhould be ſworn.* Br. Fine for Contempts, pl. 28. cites 36 H. 6. 27.

and not otherwiſe. Br. Fine for Contempts, pl. 42. cites 4 E. 4. 35.

17. If the *Sheriff or his Bailiff ſerves a Writ every Man is bound to aid him*, and this by the Common Law, and if they do not, being requeſted by the Sheriff, they ſhall be fined; As if the Sheriff *requires them to take a Felon*, and they refuſe, they ſhall make Fine. Br. Fine for Contempts, pl. 37. cites 3 H. 7. 1.

S. P. and ſo if he takes a Bill before Verdict given. Ibid. pl. 61. cites 36 H. 6.

18. A *Juror that eats and drinks* before the Evidence be fully given, ſhall be fined; ſo if he eats or drinks in the Houſe before or after they are agreed of their Verdict. Br. Fine for Contempts, pl. 25. cites 14 H. 7. 30.

—D. 55. b. pl. 10. Trin 35 H. 8. S P. as to eating &c. admitted.——Ow. 38. Trin. 30 Eliz. in Calton's Caſe ſuch Jurors as had eat were fined 5 l. and committed to the Fleet.

Sav. 93. pl. 173. S. C. and adjudged good.

19. The Homage at a Court Leet Time out of Mind had elected a *Conſtable*, and becauſe J. S. was *elected according to the Cuſtom* for the next Year, and *refuſed* to take the Oath, and departed in Deſpight of the Court, the Steward fined him 5 l. and reſolved good, and that without any affeering. 8 Rep. 38. Trin. 30 Eliz. C. B. Grieſley's Caſe.

20. A Fine aſſeſſed by a Steward in a Court Leet for *not coming to Court and doing Suit*, is not warrantable *without a Preſentment that he ought to do Suit* at Court; but in ſuch Caſe he ſhall rather be amerced than fined. For Anderſon ſaid that for ſuch *Offences* as are *within the Conuſance of the Steward as Judge*, and of which he hath the View, he may aſſeſs a Fine; but not of others, unleſs preſented, & non conſtat to the Steward if Reſident or not, or what Cauſe he had for his Abſence. Cro. E. 241. pl. 2. Trin. 33 Eliz. C. B. Hall v. Turbet.

21. If the Tenant or Defendant *Relicta Verificatione cognoſcit Actionem*, he ſhall be fined for his Falſity. 8 Rep. 60. a. Mich. 6 Jac. in the Exchequer in Beecher's Caſe.

(Z) In what Actions a Man ſhall be fined by Judgment.

Br. Fine for Contempts, pl. 15. cites cites 12 H. 4. 6. and 15. S. P. by Hull clearly.——2 And. 160. S. P. Arg.

1. A Man ſhall not be fined in an Audita Querela. 12 H. 4. 15. b.

2. In

2. **In an Action** upon the Statute of Marlebridge for driving a Diſtreſs into another Country, **the Defendant ſhall be ranſom'd (which admits that this ſhall be fined.)** 30 Aſſ. 38. See (D. a) pl. 1. 2 — Br. Treſpaſs, pl. 255. cites S. C ——

2 Inſt. 106. S P. as of a Thing done againſt the Peace. ——Br. Fine for Contempts, pl. 50. cites 30 Aſſ. 28. but it is miſprinted and ſhould be (38.) and ſo are the other Editions.

3. **In an** Aſſiſe of a Rent, **if the Tenant be** found Guilty of a Diſſeiſin with Force, by reaſon of a Reſcue **made by him,** without Vi & Armis, **he ſhall be fined, tho' this be not within the Statute.** 33 H. 6. 20. b. Br. Fine for Contempts, pl. 46. cites S. C. —— S P. in Aſſiſe, [generally as it ſeems;] but otherwiſe if the Diſſeiſin be found without Force; for there he ſhall be only amerced; for the Writ of Aſſiſe does not mention Vi & Armis, but Injuſte & ſine judicio Diſſeiſivit. 8 Rep 59 b. Mich. 6 Jac. in the Exchequer, per Cur. in Beecher's Caſe, cites S. C. —— S. P. accordingly, by reaſon of the Force; and if the Defendant brings *Certificate of Aſſiſe, which is return'd Tarde*, yet Capias pro Fine ſhall iſſue. So if the Defendant *brings Attaint*; but contrary upon *Writ of Error*. Br Fine for Contempts, pl. 46. cites 33 H. 6. 21.

4. 10 E. 1 Rot. Finium Memb. 9. **Fine taken for not proſecuting an Appeal &c.**

5. He who is outlaw'd upon Indictment of Treſpaſs at the Suit of the King, ſhall make Fine and Ranſom. Br. Utlagary, pl. 37. cites 22 Aſſ. 47.

6. A Man ſhall be fined in *Maintenance*. Br. Fine for Contempts, pl. 21. cites 19 H. 6. 4.

7. *Juſtices of Treſpaſs* lies *without Vi & Armis*, and therefore Fine ſhall not be made there; contra in Writ of Treſpaſs Vi & Armis. Br. Fine for Contempts, pl 52. cites 8 E. 4. 15. per Littleton.

8. In *Quo Warranto* a Man makes Default, whereby iſſues Venire Facias, and he makes Default at the Day, the Liberty ſhall be ſeiſed for ever; per Catesby. But he held that no Capias pro Fine ſhould iſſue, becauſe Non conſtat whether he had it by Right or by Wrong; but by Choke J. it ſhall be intended now that he had it by Wrong, ſince he does not come to ſhew his Title, and therefore Capias pro Fine ſhall iſſue. Quære. Br. Fine for Contempts, pl. 23. cites 15 E. 4. 7.

9. In Actions in which *the Offence is ſuppoſed with Force, or in Deceit of the Court*, if the Defendant *confeſſes the Action at the firſt Day*, yet he ſhall be fined and impriſoned; for his Appearance and Confeſſion is a Manifeſtation of, and no Satisfaction for, his Offence. 8 Rep. 61. b. Mich. 6 Jac in Beecher's Caſe.

10. The Defendant was outlaw'd *upon an Information for ſeducing a young Gentleman to marry a young Woman of a lewd Character*, and *fined* 5000 *l.* It was moved that he could not be fined upon the Outlawry, becauſe in Miſdemeanor the Outlawry does not enure as a Conviction for the Offence, as it does in Felony or Treaſon, but as a Conviction of the Contempt for not pleading, which is puniſhable by a Forfeiture of his Goods and Chattels; and if he might be fined now, he muſt be fined again on the principal Judgment, and it was held irregular. 2 Salk. 294 1 W. & M. B. R. The King v. Tippin.

11. After a *Capias Utlagary* return'd *non inventus*, the Court may ſet a *Fine* upon the Party abſent. Cumb. 36. Mich. 2 Jac. 2. B. R. The King v. Whitacre.

(A. a) For what Cauſes a Man ſhall be fined.

Br. Amercement, pl. 56. cites 11 H. 4. 55 S. P accordingly. —2 Bullt. 230. S. P.

1. IN an Action, if a Man denies his Deed, and this is found againſt him by Verdict, he ſhall be fined for his Falſity, and the Trouble to the Jury. Co. 8. *Beecher*, 60. * 33 H. 6. 54. b. Curia, † 9 E. 4. 24. D. 3 E. 6. 67. 19. admitted. 7, 8 El. 245. 65. ‡ 34 H. 6. 20. adjudged.

admitted by Judgment, Paſch. 12 Jac. Jones v. Croſs.———See (G. a) pl. 1. S. P.

* Br. Fine for Contempts, pl 3. cites S C & S. P agreed. ——Br Amercement, pl. 5. cites 33 H. 6. 50. accordingly ——Fitzh Fines, pl. 16 cites 33 H 6. accordingly.

† Fitzh. Fines, pl. 25. cites S. C. accordingly.

‡ Br. Fine for Contempts, pl. 3 cites S C.———Fitzh. Pledges, pl 3. cites S C.

He who *denies the Deed of his Anceſtor*, which is found againſt him, *ſhall be amerced*; *but* if it was *his own Deed*, he *ſhall be fined*. Br. Amercement, pl. 5. cites 33 H. 6. 50 —— *But* where a Man *denies his own Deed*, ſo that he is convicted of it, *and awarded to Priſon for the Denying*, there he ſhall not be amerced; for where a Man ſhall be impriſoned, he ſhall not be amerced Br. Amercement, pl. 17. cites 11 H. 4. 55.

See (G. a) pl. 2.—— In this Caſe, and the Caſe above, he ſhould be fined and

2. So in an Action of Debt, if the Defendant pleads the Acquittance of the Plaintiff, and the Plaintiff denies it, and this is found for him by Verdict, the Defendant ſhall be fined for his Falſity, as well as if he had denied his own Deed. 33 H. 6 54. b. Curia. Co. 8. *Beecher*, 60.

impriſoned; but in either Caſe *if after his Plea he confeſſes the Matter*, he ſhall be amerced only; for the Judgment is only upon the Confeſſion, and the Plea is waived. Br. Amercement, pl. 5. cites 33 H. 6. 50. ——Br. Fine for Contempts, pl. 3. cites S C.——Fitzh. Fines, pl. 16. cites S. C. & S. P. per Priſot; quod fuit conceſſum, by the Prothonotaries.

In *Debt* the *Defendant pleaded the Plaintiff's Releaſe*, and the Plaintiff denied it to be his Deed, and it was *found Not his Deed*. The Judgment was Quod ſit in Miſericordia, and not Quod capiatur; but all the Juſtices and Barons held it well enough, becauſe *it was the Deed of another* which he pleaded; ſo that tho' it be falſe, he ſhall not be impriſon'd; but otherwiſe where he denies his own Deed; and Judgment affirm'd. Cro. E. 844. pl. 31. Trin. 43 Eliz. in the Exchequer-Chamber, Walker v. Hancock.

As where an *Attaint varies from the firſt Record in the Name of the Plaintiff*, this

3. If a Writ abates through the Default of the Plaintiff himſelf, he ſhall be fined. 34 Aſſ. 9.

4. As if a Writ abates for that the Plaintiff or Defendant is miſnamed, the Plaintiff ſhall be fined; for this is his own Fault. 34 Aſſ. 9. adjudged.

being his own Default he ſhall be fin'd. But per Sharde, it is otherwiſe if it be not by his own Default. Br. Fine for Contempts, pl. 30. (bis) cites 54 Aſſ. pl. 9. but it ſeems miſprinted for (34 Aſſ. pl. 9.) and ſo are the other Editions.

* Br. Fine pur Contempts, pl. 30. (bis) cites S. C. & S. P. accordingly.

5. If the Plaintiff be nonſuit, he ſhall be fined. * 34 Aſſ. 9. admitted † 41 Aſſ. 8.

† Br. Appeal, pl. 74. cites S C.——Fitzh. Corone, pl. 219. cites S. C.

Fol. 220.

6. If a Writ abates for Want of Form, the Plaintiff ſhall not be fined. 34 Aſſ. 9. For this is not the Fault of the Plaintiff.

Br. Fine for Contempts, pl. 30. (bis) cites 54 Aſſ. 9. per Sharde: but ſeems miſprinted for 34 Aſſ. 9. and ſo are the other Editions.

7. So

7. So if a Writ abates for want of Matter in Law. 34 Aſſ. 9. Br. Fine for Contempts, pl. 30. (bis) cites 54 Aſſ. 9. by Sharde, but ſhould be 34 Aſſ. 9. and ſo are the other Editions.

8. In all Appeal of Mayhem againſt ſeveral, if ſome of them are found Guilty, and the Plaintiff prays Judgment againſt them, and relinquiſhes his Suit againſt the reſt, he ſhall be fin'd for his not proceeding againſt the reſt. 22 Aſſ. 82. adjudged. Fitzh. Corone, pl. 182. cites S. C. accordingly. ——Br. Appeal, pl. 60. cites S. C.

9. If one *denies his Tally of Debt ſealed*, he ſhall not make Fine as he ſhall upon denying his Deed. Br. Fine for Contempts, pl. 51. cites 4 E. 2. Fitzh. Fine 115 & 116.

10. If a Man *at a Juſtice Seat makes a falſe Claim* by claiming more than he ought, he ſhall be fin'd for ſuch falſe Claim. 4 Inſt. 297. cap. 73. cites 8 E. 3. Itin. Pick. fol. 15. Lanc. fol. 64.

11. For *all Contempts done to any Court of Record againſt the Command of the King by his Writ under his Great Seal*, the Offender ſhall be fin'd and impriſon'd, As in Quare non admiſit, Quare incumbravit, Attachment upon Prohibition &c. 8 Rep. 60. a. in Beecher's Caſe, cites 19 E. 3. Quare non admiſit 7. 23 E. 3. 22. 26 E. 3. 25. 20 E. 2. Corone 233. Standf. 132.

12. But when the Tenant or Defendant *ſe retraxit or receſſit in Contemptum Curiæ*, this is not any Contempt againſt the Command of the King by his Writ. 8 Rep. 60. a. b. in Beecher's Caſe.

13. In *Appeal of Mayhem, by which he loſt his Hearing*, it appeared upon Examination that he is not maim'd, but can hear very well, and therefore ſhall be fin'd for his falſe Appeal. Br. Fine for Contempts, pl. 12. cites 8 H. 4. 21.

14. If the *Defendant in Replevin claims Property falſely*, and this be found in a Proprietate Probanda, he ſhall be find and impriſon'd. Br. Fine for Contempts, pl. 14. cites 11 H. 4. 4. Br. Return de Brief, pl. 108. cites S. C. accordingly. ——

15. But otherwiſe where a *Servant claims Property for his Maſter*, and the Property is found againſt him, there the Maſter ſhall not be fin'd. Br. Fine for Contempts, pl. 14. cites 11 H. 4. 4. Br. Property, &c. pl. 14. cites S. C. accordingly. ——Fitzh. Proprietate Probanda, pl. 1. cites S. C. that the Defendant in Replevin claimed the Property to be in his Maſter, whereupon a Writ of Proprietate Probanda was awarded as it was ſaid; and Huls ſaid, that if the Property be found in the Plaintiff, the Defendant ſhall be fin'd &c. ——8 Rep. 60. a. in Beecher's Caſe, S. P. that he ſhall be fined and impriſon'd.

16. In *Replevin* the Defendant *avow'd for Damage feaſant*, and found for the Avowant, and upon a Returno habendo and an Averia elongata returned, and a Withernam awarded, the Plaintiff on bringing the Money into Court prayed Stay of the Withernam; but the whole Court was clear againſt it, becauſe the Plaintiff having *eſloigned the Cattle*, which *is a Contempt*, ought to pay a Fine, and aſſeſſed a Fine accordingly, and then the Plaintiff had his Prayer. 2 Le. 174. pl. 211. Mich 29 & 30 Eliz. C. B. Anon.

17. If *two are Fighting*, and *others are looking on*, who do not endeavour to part them, and *one is killed*, the Lookers-on may be indicted and fined to the King; Per Popham, quod Yelverton conceſſit. Noy 50. Wilburn's Caſe. S. P. accordingly, 3 Inſt. 53. cap. 7. that if thoſe that are preſent when any Man is ſlain do not their beſt Endeavour to apprehend the Manſlayer, they ſhall be fined and impriſoned.

18. In *Debt by an Executor*, the Defendant *pleaded a Releaſe of the Teſtator made to himſelf*, but *found againſt him*, and Judgment in Miſericordia. Error was brought, becauſe it ought to be a Capiatur, he having pleaded a falſe Deed. [No Judgment or Opinion of the Court is mention'd.] Cro. J. 255. pl. 12. Mich. 8 Jac. B. R. Gybſon v. Harbottle.

(B. a) To whom, and how the Fine may be impoſed

If a *Statute preſcribes a certain Sum*, and does not refer it to the Diſcretion of the Court, this Court of King's-Bench cannot make any

1. If a Man be indicted for Extortion in his Office as Bailiff to a Sheriff, and found Guilty, yet he cannot be fin'd to the Party grieved in any Sum. Hill. 11 Car. B. R. *Brunſden's Caſe*, in a Writ of Error upon a Judgment at the Seſſions at Sarum, and the Judgment reverſed per Curiam, becauſe the Judgment was to render treble Damages to the Party grieved, this not being upon any Statute that warrants it.

Mitigation of it, per Coke and Doderidge J. but Coke ſaid, that it is otherwiſe where the Statute does not preſcribe a certain Sum, but ſays that it ſhall be *double the Value*, or in ſuch Manner. Roll Rep. 194. Paſch. 13 Jac. B. R. The King v. Wray.

If Fines are ſet at the Seſſions, the Court of B R. is to

2. Fines aſſeſſed in Court by Judgment upon an *Information*, cannot be afterwards qualified or *mitigated*. Cro. Car. 251. Paſch. 8 Car. B. R. The King v. Sir Ja. Wingfield & al'.

judge of them, whether ſet with or without Cauſe, and to mitigate them when impoſed exceſſively. Vent. 336. Paſch. 31 Car. 2. B R. Anon.

A Fine *ought to be abſolute*, and not conditional; and therefore a Fine, unleſs ſuch a Thing be done in Futuro, is void; and by Common Law a Fine for *Non-repairing of Highway* was * for the Default in not repairing the Highway, and ought to be abſolute; but by a late Statute the Fine is to go towards the Repair, per Holt 12 Mod. 318. Mich. 11 W. 3. Anon. * In Caſe it ſhould not be repaired by ſuch a time. See Kelyng's Rep. 34.

(C. a) Impriſonment. Capiatur. Againſt what *Perſons* Judgment ſhall be quod capiatur.

* The Impriſonment almoſt in all Caſes *is only to retain him till he has made Fine*, and therefore if he offers

1. If an Infant be Plaintiff in an Attaint, and this is found againſt him by Verdict, he ſhall be impriſoned. 30 Aſſ. 18. adjudged

his Fine he ought to be delivered immediately, and the King cannot juſtly retain him in Priſon after the Fine tendered. Br. Impriſonment, pl 100. cites it as determined in Parliament Anno 2 M. 1.—— The Attaint was upon Oath paſſed againſt his Father. Br. Impriſonment, pl. 64. cites S. C.——Fitzh. Impriſonment, pl. 10. cites S. C.

Fitzh. Impriſonment, pl. 10. cites S. C. accordingly

2. And the Impriſonment ſhall not be pardoned of Courſe. 30 Aſſ. 18. adjudged.

———Br. Impriſonment, pl. 64. cites S. C. that the Infant was adjudged to Priſon.

Br Amercement, pl 61. cites S. C. but that is that he was

3. If an Infant brings an Appeal, and this is abated becauſe it does not lie during his Infancy (admit this to be Law) yet he ſhall not be impriſoned. 41 Aſſ. 14.

amerced, but it was pardoned by his Nonage.———Fitzh Age, pl. 74. cites S. C. but is as to his being amerced

4. If

4. If an Infant be attainted of a Diſſeiſin in an Aſſiſe, the Judgment ſhall be * quod capiatur. 43 Aſſ. 45. adjudged. But this ſhall be † pardon'd of Courſe. 43 Aſſ. 45. adjudged.

* Br. Impriſonment, pl. 36. cites 9 Aſſ. 7. contra that an Infant Diſſeiſor with Force ſhall *not* be impriſoned. —— † Br. Impriſonment, pl. 55. cites S. C. per Cur. becauſe he is an Infant. ——Br. Coverture, pl. 43. cites S. C.

5. In an Aſſiſe againſt Baron and Feme, if the Feme be received upon the Default of the Baron, and pleads in Bar, and acknowledges an Ouſter, and the Demandant takes Iſſue upon the Bar, and this is found for the Demandant, the Tenant ſhall not be impriſoned for this Confeſſion of an Ouſter, becauſe ſhe is a Feme Covert. 37 Aſſ. 1. adjudged.

Br. Impriſonment, pl. 69 cites S.C. accordingly, nor ſhall the Baron be impriſoned, tho' before the Default he and his Feme pleaded in Bar; for his Plea was waved by his Default, and therefore by Award they both went quit.——Fitzh. Impriſonment, pl. 2. cites S C.

In Aſſiſe *Feme Covert was found Diſſeiſor with Force and Arms*, and therefore ſhe was committed to Priſon. Br. Impriſonment, pl. 45. cites 16 Aſſ. 7.——Br. Coverture, pl. 36. cites S. C.

6. If a Feme Covert be found guilty of a Treſpaſs before the Coverture ſhe ſhall be impriſoned. 22 Aſſ. 87.

Br. Impriſonment, pl. 53. cites S C. and the Feme was impriſoned, but nothing is mention'd there of the Treſpaſs being before the Coverture.

Attaint paſſed againſt the Baron and Feme, and therefore they were amerced and taken, and ſo ſee *Feme Covert* taken and amerced. Br. Amercement, pl. 9. cites 42 E. 3. 26.

7. If a Biſhop be attainted of a Treſpaſs againſt the Peace he ſhall not be taken as another Man, becauſe he is a Prelate. 29 E. 3. 42.

D. 315. a. pl. 9. cites Paſch. 29 E. 3. 30. S. P. accordingly. ——Ibid. pl. 99. Trin 14 Eliz. S. P. adjudged.——S. C. cited Arg. Mo. 768 ——*Attaint by the Biſhop of Hereford*, who was *Nonſuited*, by which he was taken; Quod nota. Br. Impriſonment, pl. 32. cites 6 Aſſ. 5.

8. But it ſeems if he be attainted in a Præmunire upon 27 E. 3. the Judgment ſhall be quod capiatur &c. for this is expreſsly given by the Statute againſt all Men. Dubitatur. 39 E. 3. 7. b.

9. In an Attachment upon a Contempt againſt a Prior for refuſing to admit the Vadelet of the King to a Corody, if he be attainted thereof he ſhall be impriſoned. Dubitatur 38 Aſſ. 22.

Br. Impriſonment, pl. 100. cites 38 Aſſ 32. but ſeems miſprinted, and that it ſhould be (22.) as in Roll ——Upon a Nihil return'd againſt a Prior Capias was denied, but there they ſaid that upon Reſcous or Contempt return'd it lies. Mo. 768 Arg. cites 27 H. 8. 22.——And that in Treſpaſs a Nihil was return'd againſt a Prior, whereupon a Capias was prayed; ſed non allocatur, becauſe it is a Name of Dignity, and preſumed that he has Aſſets in another County. Ibid. Arg. cites 7 H. 4. 2.

10. If a Biſhop be attainted in a Writ of Oyer and Terminer for burning of Houſes, the Judgment ſhall not be quod capiatur. 29 Aſſ. 33. adjudged.

Attaint by the *Biſhop of Hereford* who *was Nonſuited*, and therefore was taken; Quod Nota. Br. Impriſonment, pl. 32. cites 6 Aſſ. 5.——Fitzh. Judgment, pl. 215. cites S. C.

11. If a Prioreſs be attainted in an Aſſiſe of a Diſſeiſin againſt her own Deed ſhe ſhall be impriſoned. 40 Aſſ. 16.

Br. Impriſonment, pl. 20. cites S. C.——Ibid. pl 93. cites S. C. accordingly.

12. If a Baron of Parliament be found a Diſſeiſor with Force in an Aſſiſe, the Judgment againſt him ſhall be Quod capiatur, Hill. 23 El.

Cro. E. 170. pl. 9. Lord Stafford v.

Thynne S.C. adjudged and affirm'd; 13 El. B. R. the Lord *Stafford's Case*, adjudged and affirmed in a Writ of Error.

for it is upon a Diſſeiſin found, in which Caſe a Fine is given by the Statute, and no Perſon being exempt therein, it ſhall bind a Nobleman as well as any other. And for a Contempt a Capias lies againſt a Nobleman, and this Fine is for the Contempt to the Law.

Fol. 221. Cro. E. 503. pl. 26. S. C. adjudged and affirmed

13. So in Debt upon an Obligation againſt a Baron of Parliament, if the Defendant pleads Non eſt Factum, and the Iſſue is found againſt him, the Judgment againſt him ſhall be Quod capiatur. Tr. 39 El. B. R. between the Earl of *Lincoln and Flower*, adjudged in a Writ of Error.

in Error; becauſe upon this Plea found againſt him a Fine is due to the Queen, and none ſhall have Privilege againſt her, and therefore a Capias pro Fine well lies.

S. P. Br. Impriſonment, pl. 45. cites 16 Aſſ. 7 ——

14. In Aſſiſe two were found *Diſſeiſors with Force and Arms*, and the *one was an Infant of* 18 *Years*, therefore he was not awarded to Priſon, but the other was awarded to Priſon. Br. Impriſonment, pl. 43. cites 14 E. 3. 18.

S. P. Br. Coverture, pl. 36. cites 16 Aſſ. 7.

The Baron ſhall not be impriſoned for his Feme, nor ſuffer corporal Puniſhment for his Feme, nor for her Default. Br. Impriſonment, pl. 100. (bis) cites 43 E. 18.

15. In Treſpaſs of *Battery againſt Baron and Feme*, the *Feme was found Guilty and the Baron not*, and therefore the Feme was impriſoned and the Baron not. And note, that *in every Caſe of Force*, where any Force is found in Treſpaſs *Vi & Armis*, Falſe Impriſonment, or Aſſiſe, the Judgment ſhall be Quod defendens Capiatur; For he ſhall be impriſoned for a Fine for the King. Br. Impriſonment, pl. 53. cites 22 Aſſ. 87.

Aſſiſe againſt an *Infant* who *pleads*

16. An *Infant* ſhall not be impriſon'd for *pleading a falſe Deed*. Br. Impriſonment, pl. 62. cites 28 Aſſ. 10.

Jointenancy by Deed with a Stranger, which paſſes againſt him by Proof of Witneſſes or the like, he ſhall be impriſoned, per Babbington and Marten, becauſe the *Statute is general* and does not except an Infant; But Paſton contra; for an Infant ſhall not ſuffer corporal Puniſhment by Statute unleſs Infant be expreſſed by Name in the Statute. Br. Impriſonment, pl. 101. cites 3 H. 6. 51.

Judgment was given againſt an *Infant* quod capiatur, whereupon Error was brought, and this was aſſign'd. Williams J. ſaid that there is no Caſe in Law to warrant ſuch Judgment againſt an Infant, Quod capiatur (*unleſs only in the Caſe of Felony.*) And the whole Court agreed with him herein, that this is a clear Error, and for that Reaſon the Judgment was reverſed. Bulſt. 172. [but miſpaged 162.] Trin. 9 Jac. Daby v. Holbrooke.

Br. Fines for Contempts, pl. 11. cites S. C.

17. *Feme brought Appeal of the Death of her Husband*, and the *Baron was brought into Court*, and the *Feme* appoſed if he was not her Baron, who *ſaid that ſhe ſuppoſed he had been dead*, where in Fact he was alive, by which ſhe was impriſon'd for her falſe Appeal, and the Baron went at large; for it ſeems that he was not of Covin with the Feme in bringing the Falſe Appeal. Br. Impriſonment, pl. 106. cites 8 H. 4. 18.

18. A *Mayor and Commonalty* who are attainted of Diſſeiſin with Force, ſhall not be impriſon'd, becauſe they are a Corporation. Br. Impriſonment, pl. 95. cites 21 E. 4. 13. & 14. per Pigot.

(D. a) *Who* shall be imprisoned.

1. IN an Action upon the Statute of Marlbridge, for driving a Distress out of the County, if the Defendant justifies as Bailiff to J. S. and pleads a Special Justification, and this is adjudged against him, he shall be imprisoned; for though he justifies as Bailiff, yet it is not proved. 30 Ass. 38. adjudged. Br. Trespass, pl. 255. cites S. C.——See (X) pl. 1. S. C.

2. But it had been otherwise if J. S. whose Bailiff he was, had been Party. 30 Ass. 38. Br. Trespass, pl 255. cites S. C.

3. If an Attaint be brought against one who was not Party to the first Recovery, he shall not be imprisoned. 8 H. 4. 23. b. In Attaint *one came a latere*, and was received, and *maintain'd the first Oath*, and it was *found against him*, yet he was not committed to Prison. Br Imprisonment, pl. 41. cites 14 Ass. 2.——S Rep. 60. a. in Beecher's Case, S. P. cites 14 Ass. 2. 42 E. 3. 26. b. 9 E. 4. 33.

4. If an Attaint be brought against a Feme, Tenant in Dower of the Possession of her Husband, upon a Recovery by her Husband, if she maintains the Oath or not, and this is found against her, and the Jury attainted, yet she shall not be imprisoned, because she is not the Person that recovered. * 41 Ass. 18. adjudged. 40 Ass. 20. adjudged. * Br. Attaint, pl. 80. cites S. C.—Fitzh Attaint, pl 58. cites S. C. *Attaint by Baron and Feme*, which passes against them, they shall be amerced and imprisoned. Quod nota. Br. Imprisonment, pl. 5. cites 42 E. 3. 26.

5. But otherways it had been, if it had been found against the Party himself who recover'd in the first Action, if he maintained the Oath in the Attaint. * 41 Ass. 18. 8 H. 4. 23. b. * Br. Attaint, pl. 80. cites S. C —— S. P. Br. Imprisonment, pl. 74. cites S. C. But contra if his Heir or Assignee maintain the Oath who were not Parties; Per Mombray J.

6. So if he had not maintain'd it, but had made Default, and the Jury after had been attainted. 41 Ass. 18. admitted. Br. Attaint, pl. 80. cites S. C.

7. In Trespass against Baron and Feme, if the Feme be found Guilty and the Baron Not guilty, the Baron shall not be imprisoned. 22 Ass. 87. adjudged. Br. Imprisonment, pl. 53. cites S.C.

8. In Trespass against Baron and Feme, if the Feme be found Guilty, and the Baron Not guilty, the Baron shall not be imprisoned. * 22 Ass. 87. adjudged. Contra Mich. 15 Jac. B. R. in † *Wood and Sutcliff's Case*, by the Clerks. Trin. 4 Jac. B. R. Rot. 376. between ‡ *White and Halse*, adjudged in a Writ of Error upon a Judgment in Banco, where it was in an Action of Battery against Baron and Feme, and the Baron found Not guilty, and the Feme Guilty, the Judgment was Quod capiantur as well the Baron as the Feme, because the Baron is Party to the Action, and ought to pay the Fine of the Feme. Pasch. 11 Car. B. R. between ‖ *Mayow and Cockshott*, per Curiam, resolved in a Writ of Error upon a Judgment in Banco, in an Ejectione Firmæ against Baron and Feme; but the Judgment reversed for another Cause. Pasch. 11 Car. Mich. 14 Car. B. R. between *Brown and Clugg*, in a Writ of Error upon a Judgment in the Marshalsea, and the first Judgment affirm'd as to this. * Br. Imprisonment, pl. 53. cites S.C. —See (C. a) pl. 6. † See (M) pl 8. S. C. and the Notes there. ‡ Cro. J. 203. pl. 3. Hales v. White, S. C. adjudg'd and affirm'd in Error, tho' it was insisted that it should have

been a Miſericordia only for the Baron

this. Intratur Paſch. 14 Car. Rot. 325. Contra Mich. 3 Jac. B. R. between *Anſham and Shaftsbury.*

And Mann the Secondary ſhew'd the Court that ſo it was adjudg'd in the Exchequer-Chamber in Error of a Judgment in this Court.

‖ Cro. C. 406. pl. 5 S. C. & S. P. aſſign'd for Error; but it was anſwer'd on the other Side, that the Judgment ought to be Quod capiantur, that it is only for the Fine to the King, and the Impriſonment is only till the Fine is paid, and the Baron ought to pay it; for the Feme cannot; and to prove this he cited a Precedent in B. R. Trin. 4 Jac. between Lewis and White, adjudg'd in Point, and affirm'd in Error. And Broom the Secondary ſaid that all the Precedents are ſo, and the Judgment was affirmed as to this Point; but on another Error aſſign'd, it was reverſed.——Cro. C. 513. pl. 8 Mich. 14 Car. B. R. in Battery againſt Baron and Feme, for Battery by the Feme, and found againſt them, it was reſolved that the Capiatur ſhould be againſt the Baron only; and the Clerk of the Crown and Secondary inform'd the Court that ſo were all the Precedents, tho' the Wrong is done by the Feme only.

* See (M) pl. 8. S. C. and the Notes there

† Cro. E. 381. pl. 34. Percy v. Bardolf, Hill. 37 Eliz. in the Exchequer-Chamber, S. C. & S. P. and Judgment reverſ'd accordingly.

* Fol. 222.

9. In an Action of Debt againſt Baron and Feme, upon an Obligation of the Feme before Coverture, they plead Non eſt Factum, and this is found againſt them, both ſhall be impriſon'd, ſcilicet, the Baron as well as the Feme; for the Baron is guilty of a Falſe Denial of the Deed, (which is the Cauſe of the Impriſonment) as well as the Feme. Mich. 15 Jac. B. R. in * *Wood and Sutcliff's Caſe*, per Curiam and the Clerks; and this was ſaid by G. Croke that it was ſo adjudg'd 3 Jac. in *Baldock's Caſe*, Hill. 37 El. 31. in Camera Scaccarii, between *Say and Bardoiſe*, adjudged in a Writ of Error for the Reverſal of the firſt Judgment. Intratur Mich. 33, 34 El. Rot. 470. between † *Bardolf and Percie and his Wife*, (it ſeems as if this was the ſame Caſe before-mention'd in 37 El. where the firſt Judgment was that the Baron * ſit in Miſericordia, and that the Feme capiatur; and this was reverſed, becauſe it was not that the Baron and Feme capiantur.

——Mo. 704 pl. 982. S. C. in the Exchequer-Chamber, adjudged accordingly.——S. C. cited Roll Rep. 294. as adjudged accordingly, and Coke Ch. J. ſaid it is a ſtrong Caſe.———S. P accordingly, and ſo in Treſpaſs done by the Feme dum ſola, both ſhall be taken for the Fine; to which the Prothonotaries agreed. Het. 53. Mich. 3 Car. C. B. Johnſon v. Williams.— ——S. P. by Dier and the Clerks, Dal. 39 pl. 11. 4 Eliz. Anon. held accordingly; and the Caſe in Het. 53. ſeems only a Tranſlation of Dal.

10. In *Replevin* the *Attorney of the Defendant ſhall gage Deliverance, and ſhall find Surety thereof*, or ſhall go to the Fleet. Br. Impriſonment, pl. 78. cites 1 H. 7. 11.

(E. a) In what *Actions* and *Caſes* the Judgment may be Quod capiatur.

See (F. a) pl. 9. S. C. —Br. Impriſonment, pl. 40. cites 12 Aſſ. 33. S. P.

1. In an Aſſiſe againſt three, if they are found Diſſeiſors, and that one of them only came with Force, yet all ſhall be impriſoned. 2 Ed. 3. 43. adjudged.

———Fitzh. Impriſonment, pl. 22. cites S. C. & S. P. accordingly.——S. P. Br. Impriſonment, pl. 30. cites 2 Aſſ. 8. Brooke ſays the Reaſon ſeems to be, becauſe *in Treſpaſs all ſhall be Principal*, and none Acceſſory.

* Br. Impriſonment, pl. 88. cites

2. In an Aſſiſe, if the Tenant be attainted of a Diſſeiſin with Force, he ſhall be impriſoned. * 17 Aſſ. 14. adjudged. 23 Aſſ. 11. adjudged.

judged. † 24 Aſſ. 2. adjudged. ‡ 2 Aſſ. 8. adjudged. ¶ 2 Ed. 3. 43. adjudged. S. C. but S. P. does not appear.

—Fitzh. Impriſonment, pl. 9. cites S C. but not S. P.——Br. Diſſeiſor, pl. 40. cites S. C. but S. P. does not appear. † It ſeems this ſhould be 24 Aſſ. 3. that Plea being the very S P. which pl. 2. is not. ‡ Br. Impriſonment, pl. 30. cites S C. which ſee at pl. 1. ſupra, it being S. P. of that Plea ——See (F. a) pl. 9. S. C. ¶ Fitzh. Impriſonment, pl. 22. cites 2 E. 3. but is S. P. with pl. 1. ſupra.

3. In an Aſſiſe, if the Tenant be attainted of a Diſſeiſin, he ſhall be taken. 43 Aſſ. 9. Br. Impriſonment, pl. 94. cites

S. C but S. P. does not clearly appear.——See (F. a) pl. 7. and the Notes there.——Fitzh. Impriſonment, pl 1. cites S C.

He who is *attainted as Diſſeiſor* in Aſſiſe ſhall be impriſon'd, and if it be *found that he carried away the Goods*, this is Attainder with Force without more, and the *Court ex Officio ought to inquire of the Force*. Br. Impriſonment, pl. 82. cites 11 H. 4. 15. 17.

4. Though it be without Force. 27 Aſſ. 30. adjudged. Br. Impriſonment, pl. 59. cites S. C. & S. P. admitted——But 8 Rep. 59. b. in Beecher's Caſe ſays, that where the Diſſeiſin is without Force, he ſhall only be amerced; for the Writ of Aſſiſe makes no Mention of Vi & Armis, but injuſte & ſine Judicio diſſeiſivit.——2 Inſt. 236. S. P. but the Court Ex officio ought to enquire of the Force, tho' if they do not it is no Error, as has been adjudged.

5. In an Aſſiſe of Nuſance, if the Defendant be found Guilty, he ſhall be impriſoned. * 32 Aſſ. 2. adjudged. Contra † 19 Aſſ. 6. admitted. * Br Impriſonment, pl. 68. cites S. C. accordingly.——

Fitzh. Aſſiſe, pl. 109. cites S. C. accordingly. —— † Br. Impriſonment, pl. 50. cites S. C.

6. But if a Man be attainted of a Nuſance upon a Preſentment at the Suit of the King, he ſhall not be impriſoned. 19 Aſſ. 6. adjudged.

7. In an Aſſiſe by Tenant by Statute Merchant, if the Tenant be attainted of a Diſſeiſin with Force, he ſhall be impriſoned. 43 Aſſ. 9.

8. In an Aſſiſe, if the Tenant by his Plea does not deny his Ouſter, though he be after found a Diſſeiſor without Force, yet he ſhall be impriſoned. 28 Aſſ. 15. adjudged. In Aſſiſe, if the Defendant pleads a *Plea in which an Ouſter is not deny'd*, which paſſes againſt him, he ſhall be impriſoned, tho' he *does not confeſs any Ouſter*, and he who *confeſſes an Ouſter, and* the Iſſue is *found againſt him*, ſhall be impriſoned. Br. Impriſonment, pl 90. cites 28 Aſſ. 15. and 33 Aſſ. 6.

9. In all Actions of Treſpaſs general quare Vi & Armis, if the Defendant be found Guilty the Judgment ſhall be quod capiatur. Trin. 15 Jac. between *Wheatly and Stone*, adjudged per totam Curiam in a Writ of Error at Serjeants Inn. Vide the ſame Caſe, Hobart's Reports 242. Hob. 180. pl. 215. S. C. —S. P. for if Judgment be againſt Defendant, he ſhall be

fined and impriſoned; for to every Fine Impriſonment is incident, and always when the Quod Defendens capiatur, this is as much as to ſay Quod capiatur quouſque finem fecerit. 8 Rep. 59. b. per Cur. Mich. 6 Jac. in Beecher's Caſe.——S P. Br. Treſpaſs, pl. 125. cites 19 H. 6. 8.——S. P. Br. Impriſonment, pl. 20. cites 19 H. 6. 8 ——Br. Fine for Contempts, pl. 22. cites S. C.

10. In Treſpaſs, if the Plaintiff declares that he levied a Plaint in London, and upon Proceſs J. S. was arreſted by a Serjeant, and that the Defendant Vi & Armis reſcued him, per quod he loſt his Debt, and upon Not Guilty pleaded it is found for the Plaintiff, the Judgment hereupon ought to be quod Defendens capiatur; for tho' the Nature of the Action is properly an Action upon the Caſe, as touching the Loſs of the Debt of the Plaintiff, yet this being with Force to the Serjeant, who was a Miniſter as well to the Plaintiff as the Court, Hob 180. pl. 215 S. C. —8 Rep 59. b. S. P. per Cur

the Action may be Vi & Armis. Hobart's Reports 242. between Doyley and Stone.

Hob. 180. pl. 215. cites Pasch. 14 Jac. Spear's Case, S. C. adjudg'd and affirm'd in Error.——8 Rep. 59. b. in Beecher's Case, S. P. accordingly.——If in B. R. the Bill be Trespass general, neither saying Vi & Armis, nor upon the Case specially, he may use it to either. Hob. 180. at the End of pl. 215.

11. In Actions of Trespass upon the Case, if the Defendant be found Guilty, the Judgment shall not be Quod capiatur, but Quod sit in Misericordia. Trin. 15 Jac. between *Spere and Stone*, adjudged.

See (Z) pl. 2. S. C. — Br. Trespass, pl. 255. cites S.C.

12. In an Action upon the Statute of Marlebridge for driving a Distress out of the County, the Defendant, being found Guilty, shall be imprisoned. 30 Ass. 38. adjudged, that he shall be ransomed, which admits, as it seems, that he shall be imprisoned.

D. 177. b. pl. 33. S. C. [pl. 32. is a D. P.]

13. In an Action of Debt upon the Statute of 1 & 2 Ph. & Ma. cap. of Distresses, by which the Defendant shall forfeit to the Party grieved for the driving a Distress out of the Hundred 5 l. and treble Damages, if the Defendant be found Guilty the Judgment shall be Quod capiatur. D. 2 El. 177. 32. Quære.

14. In Trespass contra Pacem for trampling his Corn, if it be found that the Cattle of the Defendant escaped, but not contra Pacem, and trampled the Corn, yet the Defendant shall be imprisoned, for he ought to keep his Cattle at his Peril. 27 Ass. 56. adjudged.

Fol. 223.

15. In an Action upon the Case upon an Assumpsit, if the Defendant be found Guilty, the Judgment shall not be Quod capiatur, but Quod sit in Misericordia. H. 10 Jac. B. R. per Curiam.

16. In an Action of Debt upon the Statute of Usury for treble the Sum lent, for taking more than 8 per Cent. if the Defendant be found Guilty, the Judgment shall be Quod capiatur, because he took it contrary to the Provision of the Statute. Pasch. 17 Car. B. R. between *Lovell and Bidgood*, it was so.

So in Debt on the 1 & 2 P. & M. for taking more than 4 d. for a Distress, and found for the Plaintiff. The Judgment being in Debt for Non-payment, and not upon the Statute, ought to be in Misericordia. Cro. C. 559. pl. 3. Mich. 15 Car. B. R. North v. Wingate.——S. P. admitted, Arg. that in Actions founded upon the Statute of Tithes, and other such Statutes, Judgment shall be Quod sit in Misericordia, but whether it should be so in an Action on the Statute De Scandalis Magnatum was the Question in the principal Case; sed adjornatur. Sid. 233. pl. 35 Mich. 16 Car. 2. in Case of Proby v. Marquess of Dorchester.——Lev. 148. S. C. says, the Court seemed to think the Misericordia sufficient, but adjornatur.——Keb. 813, 814. pl. 90. S. C. adjornatur, but says, the Court inclined that no Capiatur is ever enter'd in such Action on the Statute.

17. In an Action of Debt upon the Statute of 2 Ed. 6. for not setting forth of Tithes, if Judgment be given for the Plaintiff, the Judgment shall be Quod sit in Misericordia, and not Quod capiatur, because this is but a Debt given in Recompence of Tithes, this is the usual Course.

S. P. per Cur. 8 Rep. 59. b. Mich. 6 Jac. in Beecher's Case, and that the Judgment shall be Quod pro falsitate & deceptione præd' [viz. Curiæ] capiatur.—— But in Action Personal the Deceit between Party and Party, which is in the Nature of Action upon the Case, the Defendant shall not be fined and imprisoned, but only amerced; for there is no Deceit done to the Court, but to the Party. Ibid. 59. b. 60. a.

18. In a Writ of Deceit against the Party who recovered in a real Action and the Sheriff, if it be found that no Summons was made, he that recovered before shall be imprisoned. 2 Ed. 3. 48. b. adjudged.

* Br. Imprisonment, pl. 13. cites S. C.

† Br. Attaint, pl. 84. cites S. C.——8 Rep. 60. a. in Beecher's Case, S. P. cites 14 Ass. 2. 42 E. 3 26. b. 9 E. 4. 33.

19. So if a Man recovers in a Writ of Attaint, by which the first Jury is attainted, he that recovered in the first Action shall be imprisoned. 2 Ed. 3. 50. b. * 8 H. 4. 23. b. † 50 Ass. 4.

In

In *Attaint* the Grand Jury paſs'd for the Plaintiff, and againſt the Petit Jury, and Judgment was given that the Defendant and alſo the Petit Jury capiantur; quod nota bene. Br. Impriſonment, pl. 65. cites 30 Aſſ. 24.

20. But if a Man recovers in an Attaint againſt the Tertenant, who was not privy to the firſt Recovery, he ſhall not be impriſoned. Pen. 4. 23. b. Br. Attaint, pl. 26. cites S. C. becauſe he was a Stranger to the Aſſiſe. —— If he was not Party to the firſt Record as *Tenant by Reſceipt*, or other Tertenant, he ſhall not be fined. 8 Rep. 60. a. cites 14 Aſſ. 2. 42 E. 3. 26. b. 9 E. 4 33.

21. In *Per quæ Servitia*, if the *Tenant* comes, and *will not attorn* to the Plaintiff *nor plead in Bar*, he ſhall be impriſon'd, and ſo he was, becauſe he would not *do Fealty*, and the next Day he came back and did the Fealty; and he who could not ſay any thing againſt Homage, and yet would not *do Homage*, was awarded to Priſon, and after he did the Homage. Quod nota. Br. Impriſonment, pl. 105. cites 13 E. 1. and Fitzh. Per quæ Servitia 23.

22. Thoſe who *counſel to make a Diſſeiſin with Force*, by which it is done, ſhall be impriſoned. Br. Impriſonment, pl. 88. cites 17 Aſſ. 14. Fitzh. Impriſonment, pl. 9. cites S. C. & S. P. accordingly. ——— Br. Diſſeiſor, pl. 40. cites S. C & S. P. accordingly.

23. In Nuſance thoſe who *ſeiſed the* * Meinor, which could not be but with Force and Arms, were not awarded to Priſon; quod nota. The Reaſon ſeems to be, becauſe it was *in their own Soil.* Quære if in another's Soil. Br. Impriſonment, pl. 50. cites 19 Aſſ. 6. * Is a Taking in the Act, or with the Thing upon him.

24. Where the *Defendant will not gage Deliverance in Replevin*, or *pleads an inſufficient Plea in Bar of the gaging Deliverance*, he ſhall be impriſon'd. Br. Impriſonment, pl. 79. cites 20 E. 4. 11. per Littleton. Br. Return de Brief, pl. 100 cites S. C.

25. In *Conſpiracy* againſt thoſe who cauſed a Defendant in Aſſiſe *to plead Villeinage* falſely in Delay of the Plaintiff, *by which the Writ was abated*, they pleaded Not guilty, and were found Guilty, and were impriſoned. Br. Impriſonment, pl. 58. cites 26 Aſſ. 62. 27 Aſſ. 12.

26. The *Petit Jury* who are *attainted in Attaint* ſhall be taken. Quod nota. Br. Impriſonment, pl. 20. cites 40 Aſſ. 20. Br. Attaint, pl. 26. cites 8 H. 4. 23. S. P. ——— Ibid. pl. 72. cites 30 Aſſ. 24. S. P. ——— Ibid pl. 84. cites 50 Aſſ. 4. S. P.

27. In *Conſpiracy*, if the Defendant be attainted, he ſhall be impriſon'd. Br. Impriſonment, pl. 77. cites 46 Aſſ. 11. Br. Conſpiracy, pl. 31. cites S. C. —— S. P. Br. Impriſonment, pl. 89. cites 27 Aſſ. 59.

28. The *Plaintiff recover'd in Writ of Deceit againſt the Sheriff and the Tertenant, who recover'd againſt him in Præcipe* quod reddat, *where he was not ſummon'd*, and the Sheriff and the Defendant who recover'd in the firſt Action were taken. Quod nota. Br. Impriſonment, pl. 10. cites 50 E. 3. 18.

29. Treſpaſs *Quare Vi & Armis piſcat' fuit in D.* &c. and *found Guilty in Part, and in Part againſt the Plaintiff*, and *Judgment was that the Plaintiff recover 8 d. Damages, and that the Defendant ſhall be impriſon'd.* Br. Impriſonment, pl. 20. cites 19 H. 6. 8.

30. In *Quid Juris clamat*, if the *Defendant* appears, and *will not attorn*, he ſhall be awarded to Priſon till he will attorn. Br. Impriſonment, pl. 26. cites 37 H. 6. Br. Quid Juris clamat, pl. 18. cites 37 H 6. 14.

31. If a Man impriſonable by the Law is *impriſon'd, and finds Mainpriſe*, and after *makes Default*, Capias pro Fine ſhall iſſue; but *contra where a Man who is not impriſonable is impriſon'd, and goes by Mainpriſe*, and after makes Default, *no Capias ſhall iſſue.* Br. Exigent, pl. 70. cites 2 E. 4. 1.

32. In

Br. Fine for Contempts, pl. 21. says it ſeems that for an Offence againſt any Statute, which is a Prohibition in itſelf that a Man ſhall not do ſuch an Act, the Offender ſhall be fined.

32. In all Caſes where a *Thing is prohibited by any Statute*, the Offender ſhall be fin'd and impriſon'd. 8 Rep. 60. b. in Beecher's Caſe.

In *Raviſhment of Ward* the Plaintiff had Judgment on Not guilty pleaded.

32. In *Falſe Impriſonment*, *Aſſiſe* &c. *where the Diſſeiſin is found with Force*, and ſuch like, and *always where Force is found* it ſhall be Parcel of the Judgment that the Defendant capiatur, viz. he ſhall be impriſon'd pro Fine Regi fiend'. Br. Judgment, pl. 65.

It was aſſign'd for Error, becauſe the Judgment was Quod capiantur, tho' there is no Vi & Armis in the Writ or Count, and therefore ſhould have been a Miſericordia only. Sed non allocatur; for being an *Offence againſt a Statute Law*, the Judgment is well enough; and ſo are the Precedent in the Book of Entries 568, and Judgment affirm'd. Cro. J. 631. pl. 4. Hill. 19 Jac. B. R. Burbolt v. Kent.

33. An Action was brought *on the Statute of Winton* againſt a Hundred, and the Defendants were found guilty of Part, and Judgment Quod ſint in Miſericordia. It was aſſign'd for Error that Judgment ſhould have been Capiantur, becauſe the Action ſuppoſes that they did it in Contempt &c. Sed non allocatur; for this is only in a *Non-feaſance*, and *not in a Male-feaſance*, and ſo Judgment ſhall be in Miſericordia. Cro. J. 348. pl. 1. Trin. 12 Jac. B. R. Oldfield v. the Hundred of Witherly.

34. A *Judgment was* given *in London before the Lord Mayor* upon the Statute 5 Eliz. *for uſing a Trade*, whereby the Demand was of 40 s. a Month. It was aſſign'd for Error that the Judgment was Quod eſſet *in Miſericordia*, whereas it ought to be Quod capiatur; and for that and another Error Judgment was reverſed. Cro. J. 538. pl. 5. Trin. 17 Jac. B. R. Miller v. Regem.

35. Information in C. B. upon the *Statute* 5 & 6 E. 6. *of Ingroſſers*, and Judgment was Quod ſit in Miſericordia, whereas it [was moved that it] ſhould be capiatur, it be againſt the Statute. Sed adjornatur. 2 Roll Rep. 400. Mich. 21 Jac. B. R. Anon.

36. Judgment in *Battery* for the Plaintiff was Capiatur. It was aſſigned for Error, becauſe the Battery was *before the General Pardon*, and ſo the Fine pardon'd, of which the Court ought to take Notice; ſed non allocatur; For the Court need not take Conuſance thereof without Demand of the Party, and it does not appear whether he was a Perſon excepted or not. Cro. C. 32. pl. 3. Paſch. 2 Car. in the Exchequer-Chamber, Swaine v. Roberts.

See tit. Amendment and Jeofails (P) pl. 3.

37. 16 & 17 *Car.* 2. *cap.* 1. Enacts, that *no Judgment after Verdict, Confeſſion by* Cognovit Actionem, *or* Relicta Verificatione *ſhall be reverſed for Want of* Miſericordia *or* Capiatur, or that a Capiatur is enter'd for a Miſericordia.

In Treſpaſs, Aſſault and Battery &c. there can be no Capiatur. Fine ſince the Statute 5 & 6 W. & M. but the Plaintiff is to have 6 s. and 8 d. in Coſts to pay ſo much to the King for the Fine. Before this

38. 5 & 6 *W. & M. cap.* 12. *Whereas divers Suits and Actions of Treſpaſs, Ejectment, Aſſault and Falſe Impriſonment are brought, and upon Judgment enter'd the reſpective Courts do (ex Officio) iſſue out Proceſs againſt ſuch Defendant and Defendants, for a Fine to the Crown, for a Breach of the Peace thereby committed, which is not aſcertained, but is uſually compounded for a ſmall Sum of Money by ſome Officer in each of the ſaid Courts, but never eſcheated into the Exchequer; which Officer, or ſome of them, do very often outlaw the Defendants for the ſame, to their very great Damage;*

S. 2. *For Remedy whereof, Be it enacted by the King and Queen's moſt excellent Majeſties, by and with the Advice and Conſent of the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, That from henceforth no Writ or Writs, commonly called Capias pro Fine, in any of the ſaid Suits and Actions in any*

of

of the ſaid Courts ſhall be ſued out or proſecuted againſt any of the ſaid Defendant or Defendants, or any further Proceſs thereupon; but the ſame Fines, and all former Fines yet unpaid, are and ſhall thereby be remitted and diſcharged for ever. Yet nevertheleſs the Plaintiff or Plaintiffs in every ſuch Action ſhall (upon ſigning Judgment therein, over and above the uſual Fees for ſigning thereof) pay to the proper Officer who ſigneth the ſame, the Sum of 6 s. and 8 d. in full Satisfaction of the ſaid Fine, and all Fees due for or concerning the ſaid Fine, to be diſtributed in ſuch Manner as Fines and Fees of this Kind have uſually been, and not otherwiſe; which ſaid Officer and Officers ſhall make an Increaſe to the Plaintiff or Plaintiffs of ſo much in their Coſts to be taxed againſt the ſaid Defendant and Defendants.

Act where the Fine was pardoned, the Judgment was enter'd Nihil de Fine quia pardonatur. So it is now in C. B. upon this Statute; for they enter their Judgments there Nihil de Fine quia remittitur per Statutum; but in B. R. Judgment is enter'd up without any Notice taken of the Fine; for the Law is alter'd and taken away in Effect by this Statute, and therefore not like the Caſe of a Pardon; for that does not alter the Law, but excuſe the Party. 1 Salk. 54 pl. 2. Mich. 8 W. 3. B. R. Linſey v. Clerk.——5 Mod. 285. S. C. and it being inſiſted that it will be Error now to have a Capias awarded ſince the Act prohibits the Execution by remitting the Fine, the Court was of Opinion that the Capias ſhould be wholly omitted. ——Comb. 387. S. C. and per Holt, no Mention at all is now to be made of the Fine, and the Court ſeemed to agree. —— Carth. 360. S. C. and after Debate the Court held that no Capiatur ſhall be enter'd nor any thing in Lieu thereof.—— 12 Mod. 104. S. C. accordingly per Cur.

(F. a) In what *Caſes* the Judgment ſhall be Quod Capiatur.

1. In an Aſſiſe for a Rent-ſeck, if the Defendant be found a Diſſeiſor by Denyer only, the Judgment ſhall not be Quod Capiatur, but only in Miſericordia without any finding whether it was Vi & Armis or not; for this could not be Vi & Armis. * Otherwiſe enter'd Aſſiſe en Rent 1. See otherwiſe enter'd Aſſiſe in Office 2. capiatur pur tout where Diſſeiſin Vi & Armis is for other Things in the ſame Aſſiſe.

* See Raſtal, 78. b. and 75. b.

2. In an Aſſiſe of a Rent-Charge againſt ſeveral Tertenants, if it be found that the Plaintiff diſtrain'd for this, and one of the Defendants without conſent of the reſt made a Reſcous, though the other are Diſſeiſors by the Denier they ſhall not be impriſoned, but only he who made the Reſcous. * 39 Aſſ. pl. 4. † 40 Ed. 3. 24. ‡ 40 Aſſ. 3.

* Br. Impriſonment, pl. 70. cites S.C. accordingly. ——Fitzh. Aſſiſe, pl. 335. cites S. C. accordingly. † Br. Aſſiſe, pl. 16. cites S. C. ‡ Br. Aſſiſe, pl 16. cites S. C.—— Fitzh. Aſſiſe pl. 339. cites S. C.

3. If a Man grants a Rent out of Land, and after, againſt his own Deed, diſſeiſes the Grantee of the Rent, if he be attainted of this in an Aſſiſe he ſhall be impriſoned. 29 Aſſ. 6. Quære. Contra * 30 Aſſ. 33. adjudged becauſe it is partly the Act of the Tenant.

* Br. Impriſonment, pl. 66. cites S.C. that he was not adjudged to Priſon as in Aſſiſe of Land; for Thorpe ſaid that of Land all is his own Act, but of Rent it is alſo the Act of the Tertenant in Payment of it. ——Fitzh. Impriſonment, pl. 5 cites S. C. and S. P. by Thorpe accordingly.

4. The ſame Law where the Diſſeiſin is of Land againſt his own Deed, being thereof attainted in an Aſſiſe. 40 Aſſ. 16 Adjudged.

Br. Impriſonment, pl. 93 cites S.C. accordingly.——In Aſſiſe it was ſaid that the *Defendant leaſed to the Plaintiff for Life, and after enter'd and continued Seiſin for 3 Years* to the Damage of 4 l. by which the *Plaintiff recover'd*, and the Defendant was impriſon'd for the Diſſeiſin againſt his own Deed; for the Leaſe was for Years, and after the Leſſor confirmed his Eſtate by Deed for his Life, and the Plaintiff was taken. Br Impriſonment, pl 34 cites 8 Aſſ. 20.——*Contra* it ſeems if it had been leaſed *without Deed in Writing*. Br. Ibid.

Br Imprisonment, pl. 60. cites S. C. tho' the Feoffment be not shewn by Deed.—— Br. Titles, pl. 47. cites S. C.

5. If a Man be attainted of a Disseisin against his own Feoffment, though the Feoffment was without Deed, yet he shall be imprisoned. 28 Ass. 8. adjudged 31.

In Assise it was *found that* the *Tenant infeoffed the Plaintiff upon Condition* and enter'd, and yet was not imprisoned for the Disseisin. Per Thorpe, the Cause was inasmuch as it was a Feoffment upon Condition, but if it had been a *Feoffment simple* he should go to Prison. Br. Imprisonment, pl. 67. cites 30 Ass. 34.——Fitzh. Imprisonment, pl. 3. cites S. C. and Thorpe took the same Diversity as above [but the Book seems misprinted in adding afterwards] wherefore he was awarded to Prison &c.

6. If a Man makes a Feoffment upon Condition, and re-enters without Performance of the Condition, and after is attainted of this Disseisin, he shall be imprisoned. Contra 30 Ass. 34. adjudged, but Quære.

Br. Imprisonment, pl. 94. cites S.C. but the Case there is, that he who is attainted for distraining my Tenant for Rent without Title, and levies it by Distress without Title, and is thereof attaint in Assise, shall go to Prison, and yet the Force was to the Tenant and not to the Plaintiff.

* So it is in the Lib. Ass 43. pl. 9.

7. In an Assise of a Rent-Service, if it be found that the Tenant claimed the Seigniory and distrained the Tenant of the Land for this, where he had no Seigniory, and so disseised the Plaintiff, the Tenant shall be imprisoned, for the Trespass done to the Tenant * [of the Land] was at the same Time a Disseisin to the Plaintiff. 43 Ass. 9. adjudged.

* Fol. 224.

Br. Imprisonment, pl. 69. cites S.C. and says that the Feme shall not be imprisoned, because she was Covert at the Time of the Confession.——See (C. a) pl. 5. S. C. and the Notes there.

8. In an Assise against Baron and Feme, if they plead a Bar and confess an * Ouster, upon which Bar the Plaintiff takes Issue, and then the Baron makes Default, and the Feme is received and pleads the same Plea in Bar, and the Plaintiff takes Issue thereupon, and this is found against the Tenant, the Baron shall not be imprisoned for the Ouster which he confesses in his Bar, because the Assise was not taken upon this, but this was waved by the Plea of the Feme. 37 Ass. 1. adjudged.

Br. Imprisonment, pl. 30. cites S. C. Brooke says the Reason seems to be, because in *Trespass all shall be Principal*, and none Accessory. ——Br. Imprisonment, pl. 40. cites 12 Ass. 33. S. P.

9. In an Assise against several who are found Disseisors, if it be found that one came with Force, all shall be imprisoned. 2 Ass. 8. adjudged.

10. If *Guardian takes Feoffment in Custodia sua* this is Disseisin, and he shall be imprisoned if the Infant will bring Assise against him, and the Matter is found; Quod Nota. Br. Assise, pl. 451. (450) cites 8 E. 2. Itin. Canc. Ass. Fitzh. pl. 417.

11. He who *would not suffer the Plaintiff to distrain for Rent-charge Arrear* was awarded Disseisor with Force, for it *countervails Rescous*, and therefore he was imprisoned. Br. Imprisonment, pl. 36. cites 9 Ass. 7.

12. *Contra* of him who makes Disseisin by *Denial when the Rent is demanded*. Br. Imprisonment, pl. 36. cites 9 Ass. 7.

Br. Assise, pl. 192. cites S. C.

13. In Assise the *Tenant justify'd by Release for Life to the Plaintiff, rendring Rent with Clause of Re-entry, and that he re-enter'd for Non-payment* of such Rent due at such a Day &c. and the *other said that the Defendant first distrained for the same Rent, and was possessed of the Distress at the Time of the Re-entry*, and found accordingly, and therefore the Defendant was imprisoned for the Ouster confessed; Quod Nota. Br. Imprisonment, pl. 42. cites 14 Ass. 11.

14. In

14. In Aſſiſe, if *Releaſe is found* by Verdict *which was not pleaded*, the Defendant who made the Releaſe ſhall not be committed to Priſon; Quod Nota bene. Br. Impriſonment, pl. 47. cites 16 Aſſ. 15.

15. In Aſſiſe, becauſe the Defendant *made Diſſeiſin contrary to his own Deed of Releaſe and Confirmation*, therefore he was awarded to Priſon; Quod nota bene. Br. Impriſonment, pl. 49. cites 18 Aſſ. 3.

16 The *Party* was committed to the Fleet, becauſe he *appeared by Attorney, and did not put in Warrant* of Attorney *before Judgment*. Br. Impriſonment, pl. 108. cites 38 E. 3. 8.

And Note, that an *Attorney* was committed to the Fleet, becauſe he *did not put in his Warrant* of Attorney for his Client before Verdict. Br. Impriſonment, pl. 108. cites 41 E. 3. 1.

17. *For Contempt* the Party ſhall be taken and impriſon'd; Nota. Br. Impriſonment, pl. 6. cites 44 E. 3. 25.

Br. Corody, pl 2 cites 44 E. 3. 24.

18. *In every Caſe where a Man ſhall make Fine* he ſhall be impriſon'd. Br. Impriſonment, pl. 2. cites 34 H. 6. 24.

(F. a. 2) Upon what Plea.

1. A *Siſe* was *adjourned* into Bank *upon Demurrer of Baſtardy*, and the *Defendant at the Day would have pleaded Releaſe*, and was not ſuffered; for *it was not made after the Adjournment*, and the Plaintiff recovered, and notwithſtanding that the Deed of Releaſe *appeared to be falſe*, and Ouſter is confeſs'd, yet the Defendant was not impriſoned, for the Juſtices are out of the County where the Aſſiſe was brought, but Brooke ſays it ſeems to him, that the Reaſon is, becauſe the *Plea of the Releaſe was not admitted*; for the Juſtices of Bank upon Adjournment ſhall give ſuch Judgment as the Juſtices of Aſſiſe ſhould give in the County. Br. Impriſonment, pl. 54. cites 23 Aſſ. 5.

2. In Aſſiſe, if the Tenant *pleads Jointenancy by Deed*, which *paſſes againſt him, but he is acquitted of the Diſſeiſin*, and all the reſt paſſes againſt the Plaintiff, yet he ſhall be impriſoned by the Statute by reaſon of the falſe Iſſue of Jointenancy; Quod Nota by the Statute de Conjunctim Feoffatis. Br. Impriſonment, pl. 102. cites 24 E. 3. 72.

3. In Aſſiſe, becauſe the Defendant had confeſſed Eſtate in the Plaintiff, and pleaded in Bar that which was adjudged no Bar, therefore the Aſſiſe was awarded in Right of *Damages*, and the Defendant adjudged *Diſſeiſor by his Counterplea*, and he was taken; Quod Nota. Br. Impriſonment, pl. 63. cites 28 Aſſ. 1.

(F. a. 3) Pleading falſe, or denying true, Deeds or Records.

1. IF an *Infant* Defendant in Aſſiſe *pleads a falſe Record or* falſe *Deed*, he ſhall not be impriſoned, by the Reporter; but Quære inde; for to this none anſwered. Br. Impriſonment, pl. 37. cites 10 Aſſ. 1.

2. In

S. C cited In Beecher's Cafe. 8 Rep. 60 a. accordingly; for it is not his Act but the Act of the Court, and he does not deny the Record abſolutely, but that Non habetur tale Recordum, and cites alſo 16 Aſſ. 19.——If in *Aſſiſe againſt two*, the *one vouches the other who enters and pleads Recovery againſt the Father of the Plaintiff in Bar*, the *Plaintiff ſays that Nul tiel Record*, and the Defendant has Day to bring it in; and the *Defendant at the Day brings in his Record*, yet the Plaintiff ſhall not be impriſoned for the denying the Record. Br. Impriſonment, pl. 48. cites 16 Aſſ. 19.

2. In Aſſiſe *Record* was pleaded, *to which the Plaintiff was Party, who denied it*, and after it was *found againſt him*, and yet the Plaintiff was not impriſon'd. Br. Impriſonment, pl. 38. cites 10 Aſſ. 10.

3. He who pleads *Jointenancy by Deed or by Fine*, which paſſes againſt him, ſhall be impriſoned. Br. Impriſonment, pl. 85. cites 24 E. 3. 51.

4. He who *pleads a Deed* which is *adjudged againſt him by Raſure*, Interlining, or other Suſpicion, ſhall be impriſon'd, and ſhall make Fine, as well as if it had been found againſt him by Jury or Confeſſion. Br. Impriſonment, pl. 84. cites 24 E. 3. 74.

(G. a) Impriſonment by the Court. Upon what Pleas. For *denying his [or his Anceſtor's] Deed.*

* Br. Impriſonment, pl. 7. cites S. C. † Fitzh. Judgment, pl. 189. cites S. C.

1. IF a Man denies his own Deed, and this is found againſt him by the Country, he ſhall be impriſoned. * 45 Ed. 3. 11. † 23 Ed. 3. 21. b. adjudged. D. 3 Ed. 6. 67. 19. 26 Aſſ. 5. ‡ 34 H. 6. 24. per Forteſcue.

‡ Br. Fine for Contempt, pl. 5. cites S. C——Br. Impriſonment, pl. 2. cites S. C.——S. P. Br. Impriſonment, pl. 1. cites 33 H. 6. 54. *And* if he pleads Falſe Deed, which is found againſt him by Verdict, in thoſe Caſes he *ſhall make Fine, and ſhall be impriſoned*.——*But if he confeſſes the Plea falſe before Verdict*, he ſhall be *amerced*, and ſhall not be fined nor impriſoned. Br. Impriſonment, pl. 1. cites 33 H. 6. 54. and M. 34 H. 6. 20. accordingly.——Br. Fine pur Contempt, pl. 3. cites S. C. & S. P. For the Judgment ſhall be given upon the Confeſſion of the Action, and the Plea is waved——S. P. The Defendant ſhall be fin'd. 8 Rep. 60. in Beecher's Caſe.——See (C. a) pl. 1.

* Br. Fine for Contempts, pl. 3. cites S. C. ——Fitzh. Fines, pl. 16. cites S. C.

2. So if the Defendant pleads the Deed of the Plaintiff in Bar, and the Plaintiff denies it, and this is found Not his Deed, the Judgment ſhall be againſt the Defendant quod capiatur for the Falſity. * 33 H. 6. 54. b. Curia. D. 3 E. 6. 67. 19. adjudged. 23 Aſſ. 11. adjudged. † 26 Aſſ. 5. ‡ 6 Aſſ. 4. adjudged.

† Br. Impriſonment, pl. 56. cites S. C. ‡ Br. Impriſonment, pl. 31. cites S C.——See (A. a) pl. 2.

S. P. Br. Impriſonment, pl. 7. cites 45 E. 3. 11. but he ſhall be condemned by Default.

3. But if a Man pleads a Releaſe in Bar of an Obligation, and after makes Default, by which Judgment is given againſt him, yet he ſhall not be impriſon'd. 45 E. 3. 4.

Br. Impriſonment, pl. 7. cites S. C. —This was ſaid obiter by Candiſh, and he concludes it with an (Ut Credo,) and the Year-Book ſays Quære.

4. So if a Man brings Debt upon an Obligation, and the Defendant pleads his Acquittance, and the Plaintiff confeſſes it, he ſhall not be impriſoned for the Suit; for he never denied his Deed. Quære. 45 E. 3. 11.

5. If

5. If a Man pleads a Deed of the Plaintiff or his Anceſtor made to the Anceſtor of the Defendant who pleads it, and this is found againſt him, he ſhall not be impriſoned for his Falſity, becauſe he could not know whether this was his Deed or not, being made to his Anceſtor. 28 Aſſ. 10. Curia. Contra 28 Aſſ. 9. adjudged. Contra * 26 Aſſ. 5. * Br. Impriſonment, pl. 56. cites S. C.—— Br. Impriſonment, pl. 61. cites 28 Aſſ. 9. contra, that *Deed of the Anceſtor of the Plaintiff made to the Anceſtor of the Tenant* was pleaded in Bar, and it was found falſe, by which the Tenant was awarded to Priſon. —— S. P. accordingly, if the Tenant or Defendant *uſes a Deed* made to him or his Anceſtor, and pleads it, *and it is found falſe*, he ſhall be impriſon'd; for there is Default in him, becauſe he takes upon him to plead it in the Affirmative: but he who *denies the Deed of his Anceſtor*, ſhall not be impriſoned; *contra* of him who *denies his own Deed*. Br. Impriſonment, pl. 56. cites 26 Aſſ. 5 per Finch and Trenche.—Br. Fine for Contempts, pl. 5. cites S. C. and ſame Difference.—S. P. accordingly, 8 Rep. 60. a. in Beecher's Caſe.

6. If a Man recovers in an Aſſiſe by Default againſt A. who afterwards ſues a Certificate upon the Releaſe of the Anceſtor of the Plaintiff with Warranty, and the Inqueſt being taken by Default, find this to be a good Deed, yet the Defendant in this Certificate ſhall not be impriſoned. 26 Aſſ. 5. Br. Impriſonment, pl. 56. cites S. C. but S. P. does not appear there.——

Fitzh. Judgment, pl. 189. cites 25 E. 3. 21. That Tenant in Aſſiſe ſued Certificate upon the Deed of the Anceſtor of the Plaintiff, which the Plaintiff denied, and by Niſi Prius it was found for the Tenant, whereupon double Damages were awarded to the Tenant upon the Statute, and that the Plaintiff capiatur &c. Quod nota bene.

7. [So] if a Man denies the Deed of his Anceſtor, and this is found againſt him, yet he ſhall not be impriſon'd. * 26 Aſſ. 5. † 34 H. 6. 24. per Forteſcue; but he ſhall be amerced. * Br. Impriſonment, pl. 56. cites S. C. † Br. Impriſonment, pl. 2. cites S. C —— S. P. 8 Rep. 60. in Beecher's Caſe —— 2 And. 160. S. P. Arg. cites 15 E. 3. —— See pl. 1. in the Notes there. —— See (A. a) pl. 1, 2. and the Notes there. accordingly,

8. In Aſſiſe the *Tenant pleaded Releaſe of the Plaintiff made to one, Que Eſtate he has*, and it was *found againſt him*, and therefore he was impriſon'd, as well as if the Deed had been made to himſelf. Quære. Br. Impriſonment, pl. 33. cites 8 Aſſ. 15. In Aſſiſe the *Deed pleaded by Aſſignee was denied, and found againſt him*, and he was not impriſon'd; for the Deed was not made to him; and the ſame if it had been made to his Anceſtor. Br. Impriſonment, pl. 39. cites 11 Aſſ. 26.

9. A *Mayor and Commonalty* who deny their Deed, which is found againſt them, ſhall not be impriſon'd, becauſe they are a Corporation. Br. Impriſonment, pl. 95. cites 21 E. 4. 13. & 14.

10. Debt by an Executor. The *Defendant pleaded a Releaſe of the Teſtator made to himſelf*, and upon Non eſt Factum found againſt him, and Judgment in Miſericordia, Error was brought, becauſe it ought to have been a Capiatur; for that he pleaded a Falſe Deed. Cro. J. 255. pl. 12. Mich. 8 Jac. B. R. Gybſon v. Harbottle.

(H. a) In what Caſes it may be *ſaved* by Matter ſubſequent.

1. If a Man, where his own Deed is pleaded againſt him, pleads Non eſt Factum, and after at the Niſi Prius, or before Verdict, Relicta Verificatione cognovit this to be his Deed, he ſhall not be impriſoned, but only amerced. Paſch. 3 Jac. B. R. between * *Davage* and * Cro. J. 64. pl. 2. Devis v. Clerk, S. C. accordingly

by Fenner and Williams, but Gawdy e contra, and (cæteris absentibus) Judgment was affirm'd in Error.—

and Clerk, per Curiam, which Intratur Hill. 43 El. Rot. 526. and there it was said, so is the common Course of the King's Bench and Common Pleas. Contra 2 H. 6. B. R. 134. cited D. 3 El. 6. 67. adjudged contra Co. 8. *Beecher* 60. Trin. 16 Jac. B. R. between *and † Waring*, such a Judgment affirm'd in a Writ of Error. Hill. 10 Jac. B. R. between *Trian and Beecher*, adjudged, and said to be the common Course, which Intratur Mich. 10 Jac. Rot. 556.

Noy 4. Bavage v. Clark, S C. ruled per Cur. accordingly.———S C cited Raym. 195.——S. C. cited by the Reporter in his Remarks. 2 Saund. 192. and approved by him.——Kelw. 42. a. pl. 4. Pasch. 17 H. 7. S. P. per Cur. accordingly, obiter.——D. 67. b. Marg. pl. 19. cites Pasch. 16 J. B. R Alderman Pigot's Case, which was Debt upon Obligation in the Vill of Salop. The Defendant pleaded Non est Factum, but afterwards Relicta Verificatione cognovit Actionem, and Judgment was Ideo in Misericordia; and upon Error brought, 8 Rep. 60. was vouch'd that it should be Capiatur; but of the other Side was vouch'd 33 H 6. 54. e contra, and said that the Precedents warrant it, and the Court seemed to incline that In Misericordia was good enough, and ordered that Precedents be search'd, & adjornatur.———S. P. accordingly; for the Issue not being tried, but the Action confess'd, the usual Course is only Quod sit in Misericordia. Cro. J. 420. pl. 11. Hill. 14 Jac. B. R. Ashmore v. Ripley.——Jenk. 336 pl. 79. S. C. accordingly.———S. P. accordingly; for Judgment of Capiatur is not given for the Delay, but rather for the Falsity, and then when he comes in before Verdict, and confesses the Truth, he has saved his Fine. 2 Roll Rep. 45 Trin. 16 Jac. B. R. † Geerard v. Warren.——S. P and upon Error assigned, Beecher's Case was vouch'd that it ought to be Capiatur; but because Cro. J. 64 Devis v. Clerk, is, that it shall be In Misericordia, and so the Books vary, adjornatur. Raym. 195. Mich. 22 Car. 2. B. R. Mortlock v. Charleton.———Mod. 73. pl. 28. S. C adjornatur.——2 Saund. 191. S. C. says that at the first opening this Case Twisden J. was strongly of Opinion that it should be Capiatur, but that afterwards hæsitavit; and the Reporter says he believes the Parties agreed, and that no Judgment was given; and says that the Authority of Beecher's Case was the Cause of the Doubt, it being there said positively that a Capiatur shall be enter'd; but the Reporter says, that none of the Books there cited warrant that Opinion, and then proceeds to examine them severally; which see there.

Raym. 202. Mich. 22 Car. 2. B. R. Powell v. Row, S. P. adjornatur.

2. In Maintenance the Plaintiff *after Verdict* for him, and *before Execution*, made a *Release of all Actions, Suits, and Demands*, yet this does not discharge the King's Fine, but he was compell'd to find Surety for it. *Contra* if the Release had been *before Verdict*. Br. Fine for Contempts, pl. 21. cites 19 H. 6. 4.

3. After Issue in *Trespass* the *Defendant confess'd the Issue*, and the *Plaintiff confess'd that he would not sue Writ of Inquiry of Damages*, and it was pray'd that he should be fined to the King; but Prisot said the Plaintiff cannot have Judgment of Damages, and where he cannot have that, the Defendant shall not be fined; otherwise it would be, had the Issue been found against him by Verdict, and so it seems like to a Nonsuit; quod Moyle concessit. Br. Fine for Contempts, pl. 6. cites 34 H. 6. 43. and says the like Judgment is vouch'd 35 H. 6. and 4 E. 4. 29.

3. In *Debt for the King*, the Defendant *pleaded Non est Factum*, which was *found against him* by Nisi Prius, and *before the Day in Bank the King pardoned him all Debts and Quarrels*, and *at the Day in Bank the King had Judgment to recover*, where, by the denying his Deed, the King ought to have had a Fine. The King demanded Execution, and the Defendant pleaded the Pardon, and well, and the King was thereby barr'd of his Execution, and yet the Defendant was compelled to find Bail for the King's Fine for denying his Deed; for though the Debt and Execution be pardoned, yet *the Fine* is not, because this *commences by the Judgment which was after the Pardon*, and so a Title subsequent; and if the Judgment be erroneous by reason of the Pardon, yet it is good till defeated by Error or Attaint; Quod Nota. Br. Fine for Contempts, pl. 47. cites 35 H. 6. 1. & 25.

(I. a) Im-

(I. a) [Impriſonment.] For what *Cauſes*.

Fol. 225.

1. IF the Proceſs in an Attaint be diſcontinued, by which the Writ abates, the Plaintiff ſhall not be impriſon'd. 32 Aſſ. 13. adjudged.

2. But otherwiſe it had been if he had been Nonſuit after Appearance. 32 Aſſ. 13. admitted. * 19 Aſſ. 13. adjudged. † 6 Aſſ. 5. adjudged. 20 E. 3. Attaint 43.

* Br. Impriſonment, pl. 87. cites S. C.

† Br. Impriſonment, pl. 32. cites S. C——Fitzh. Judgment, pl 215. cites S. C.

In *Attaint* the *Plaintiff was eſſoigned after Appearance* contrary to the Statute of Weſtm. 1. cap. 41. by which Nonſuit was awarded, and alſo it was awarded that the Plaintiff Capiatur, and ſo ſee that upon *Nonſuit in Attaint* the Plaintiff ſhall be impriſoned. Br. Impriſonment, pl. 57. cites 26 Aſſ. 25.

3. In an Aſſiſe, if the Tenant pleads a Bar, and confeſſes an Ouſter of the Plaintiff, and the Demandant takes Iſſue upon the Bar, and this is found againſt the Tenant, he ſhall be impriſoned for the Ouſter which he confeſs'd. 37 Aſſ. 1.

4. If a Man be barr'd of an Appeal of Mayhem, becauſe he was Nonſuit after Appearance of the Defendant in another Appeal, the Plaintiff ſhall be impriſoned. 40 Aſſ. 1. adjudged.

Br. Appeal, pl. 71. cites S. C.

If in Appeal of *Death*, *Robbery*, or any other Appeal of *Felony* or Maihem the Plaintiff be *barr'd or Nonſuit*, or if the *Writ abates by his own Default*, he ſhall be fined and impriſoned. 8 Rep. 60. a. Mich. 6 Jac. in the Exchequer, in Beecher's Caſe, cites 8 H. 4. 17 a. 20. for the Malice is greater when it concerns Life.

Appeal of Death againſt R. S. of D. where the *Writ was abated becauſe there was No ſuch Vill, Hamlet, nor Place known* by Name of D. and therefore it *was awarded that the Plaintiff* take nothing by his Writ, and that he *ſhall be taken*, and ſo ſee that the Plaintiff ſhall be taken upon Appeal where his Writ abates. Br. Impriſonment, pl. 25. cites 4 H. 6. 16.——Brooke ſays, *the ſame* ſeems to be *of Nonſuit*. Ibid.

5. In an Appeal againſt two, if the Appeal againſt one be found falſe, the Plaintiff ſhall be impriſoned. 1 Aſſ. 9. adjudged.

Br Impriſonment, pl. 29. cites S. C——Br. Appeal, pl. 49 cites S. C.

6. In Treſpaſs, if the Iſſue be found againſt the Plaintiff, he ſhall be impriſoned. Mich. 42 & 43 El. B. R. between *Bartholomew and Deighton* adjudged, and though the Fine due to the King is pardoned by the general Pardon by Parliament, yet the Judgment ſhall be Quod capiatur, and not Quod ſit in Miſericordia. Mich. 42 & 43 El. B. R. between *Deighton and Bartholomew* adjudged in a Writ of Error.

Cro. E. 778. pl 11. S. C. and Judgment being given for the Plaintiff in C. B. it was aſſigned for Error that the Offence to the Queen is pardoned by the General Pardon, and therefore the Judgment ſhould have been a Nihil only for the Queen, and not a Capiatur; and that the Entry uſually is either De Miſericordia Nihil, or Non capiatur, quia pardonatur. But Kemp and the Prothonotaries ſaid, that ſometimes they enter it ſo, and ſometimes not; and the Court held it to be no Error, Quia non conſtat, that he was not a Perſon excepted; and therefore the Judgment was affirmed.

7. In an Indictment of Barretry, if the Defendant be found Guilty, and upon this Judgment is given that the Defendant ſhall be committed to Gaol ibidem remanſurus per two Months, without Bail or Mainprize, & quod ſolvat Domino Regi pro fine Simmam 100 Marcarum, & quod ſit in Miſericordia, this Judgment is erroneous, becauſe when the Defendant is fined the judgment ought to be Quod capiatur, for he ought to be impriſoned till he hath paid the Fine, and

Cro C. 340. pl. 4 S. C. Curia adviſare vult.

and the Imprisonment in this Case for two Months is another Punishment inflicted upon him for his Offence, which is for a certain Time, and therefore cannot amount to a Capiatur for a Fine. Dill. 9 Car. B. R. *Chapman's Case*, in a Writ of Error upon such a Judgment given by the Justices of Assise in Comitatu Devoniæ this was a Doubt per Curiam, and Precedents commanded to be searched, and after the Fine was estreated into the Exchequer, and levied, and then the Defendant did not prosecute his Writ of Error.

8. In Assise, if the *Tenant pleads Release*, which is found against him, he shall be imprisoned for pleading a false Deed; Quod Nota bene. Br. Imprisonment, pl. 31. cites 6 Ass. 4.

S. P. notwithstanding that by this Suit he is to defeat the first Judgment; Brooke says the Reason seems to be, because the Verdict shall be intended true till it be reversed in Fact; Contra it is said elsewhere upon Writ of Error. Br. Execution, pl. 77. cites S. C.——Br. Imprisonment, pl. 103. cites S. C. accordingly.—S. P. If the Defendant *brings Attaint*. Br Fine for Contempts, pl. 46. cites 33. H. 6. 21.

9. *Attaint* was brought *in C. B. of a Verdict before Justices of Oyer and Terminer*, and because *it appeared by the Record that the Plaintiff* in the Attaint had not made Fine for the Trespass of which he was convicted, therefore the Justices committed him to the Fleet for the Fine &c. Br. Imprisonment, pl. 44. cites 16 Ass. 4.

Br. Trespass, pl. 237. cites S. C.

10. The Defendant was convicted of *Assault where he struck at the Plaintiff and did not touch him*, and was condemned in half a Mark, and was taken, and yet he did not beat him. Br. Imprisonment, pl. 52. cites 22 Ass. 60.

11. Punishment of *Treasure-trove*, *Wreck*, *and Waif taken and carried away*, is not by Life and Member, but by Fine and Imprisonment. Br. Appeal, pl. 63. cites 22 Ass. 99.

12. One that *went arm'd into the Palace* was disarm'd, and commanded to the Marshalsea Prison, and was not admitted to Bail till the Will of the King was known. Br. Imprisonment, pl. 23. cites 24 E. 3. 33.

13. *Appeal of Maihem*, *in which A. is made Principal and B. Accessory*, the *Plaintiff was nonsuited after Appearance*, *and brought another Appeal*, *and made B. Principal and A. Accessory*, which was pleaded for Estoppel, by which it was awarded that the Plaintiff take nothing, and that the Plaintiff Capiatur &c. Br. Imprisonment, pl. 71. cites 40 Ass. 1.

Br. Imprisonment, pl. 73. cites S. C.

14. For Disceit to the Court for *imbezzling an Exigent*, the Plaintiff recovered 10 l. Damages, and the Defendant was committed to Ward, to be imprisoned till he had made Fine to the King, and Gree to the Party. Br. Fine for Contempts, pl. 34. cites 41 Ass. 12.

15. In *Attaint pass'd against the Plaintiff*, Judgment shall be that he take nothing by his Writ, et quod sit in Misericordia & Capiatur. Br. Imprisonment, pl. 76. cites 43 Ass. 46.

16. In Trespass the Defendant pleaded Villeinage in the Plaintiff, who replied that he was frank, and of Frank Estate, and not his Villein, upon which they are at Issue; and the Plaintiff surmised that the *Defendant took all his Goods pending the Issue*, and yet he did not make any Fine. Br. Fine for Contempts, pl. 17. cites 9 H. 5. 1.

See (E. a) pl. 9.

17. In all Actions *Quare Vi & Armis*, as *Rescous*, *Trespass Vi & Armis &c.* if Judgment be given against the Defendant, he shall be fined and imprisoned; for *to every Fine Imprisonment is incident*, and always when the Judgment is Quod Defendens capiatur, it is all one as to say Quod Defendens capiatur quousque Finem fecerit. 8 Rep. 59. b in Beecher's Case, cites 19 H. 6. 8. b. 34 H. 6. 24. 11 H. 4. 25. 30 Ass. pl. 28.

18. A *Bailiff return'd Languidus in Prisona*, and upon Examination confess'd that he is in good Health. The Bailiff shall be imprison'd and fined. Br. Fines for Contempts, pl. 58. cites 31 H. 6. 42.

19. He

19. He who *comes in by Return of Cepi Corpus* ſhall go to Priſon. Br. Impriſonment, pl. 83. cites 33 H. 6. 26.

20. If the Defendant *brings Certificate of Aſſiſe*, which is *return'd Tarde*, yet Capias pro Fine ſhall iſſue. Br. Fine for Contempts, pl. 46. cites 33 H. 6. 21. *Contra upon Writ of Error.* Br. Fine for Contempts, pl. 46. cites 33 H. 6. 21.

21. A Man *ſued Corpus cum Cauſa out of London*, and it was found by Examination that *the Action by which he claim'd Privilege in Bank was ſued by Covin*; for the Plaintiff in Bank diſallow'd his Suit againſt this Priſoner; for the Suit was *diſcontinued by two Years, and now revived* by the Plaintiff and the Attorney *in Advantage of the Priſoner*, where another Suit thereof was taken of later Time againſt the Priſoner, by which upon the Examination of the Matter the Attorney and the Plaintiff in this Court, for their Falſity, were committed to the Fleet, and were fined, and the Priſoner remanded to London. Br. Privilege, pl. 43. cites 16 E. 4. 5.

22. If one *uſes the Countenance of Law* (the Inſtitution whereof was to put an End to Controverſies and Vexation) *for double Vexation*, he ſhall be fined; *As* if a Man *ſues in C. B.* and after *ſues him in London for the ſame Cauſe*, or in any ſuch like Court, the Plaintiff ſhall be fined for this unjuſt Vexation. 8 Rep. 60. a. Mich. 6 Jac. in Beecher's Caſe, cites 9 H. 6. 55. 14 H. 7. 7. a. Br. Privilege, pl. 19. cites 14 H. 7. 6. S. P. by Read and Fineux.

23. *And* in a *Recaption* the Defendant ſhall be fined and impriſoned for his double Vexation. 8 Rep. 60. a. in Beecher's Caſe. This ſhall be puniſh'd either by Amercement or Fine &c in regard of the Court in which the Action is brought; as if Judgment be in C B. the Defendant ſhall be fined and impriſoned; but if the Writ is Vicontiel, the Judgment in the County ſhall not be Quod Capiatur, becauſe no Court can fine and impriſon but Courts of Record, and therefore in the laſt Caſe he ſhall only be amerced; and tho' the Writ, viz. of Recaption, is of Record, yet ſince the Judges who are the Suitors are not Judges of Record, neither is the Court a Court of Record, they cannot fine or impriſon, and ſo in all like Caſes. Ibid. 60. b. cites F. N. B 73. (D) 8 E. 4. 5. 34 H. 6. 24. ——8 Rep 120. a. S. P. accordingly.——11 Rep. 43. a. S. P. accordingly.

24. In all Caſes where a *Thing is prohibited by any Statute*, the Offender ſhall be fined and impriſoned. 8 Rep. 60. b. Mich. 6 Jac. in Beecher's Caſe, cites 35 H. 6. 6. 19 H. 6. 4. in Maintenance.

25. In an *Attaint*, if the *Plaintiff is nonſuited or barr'd*, he ſhall be fined and impriſoned. 8 Rep. 60. a. Mich. 6 Jac. in the Exchequer, in Beecher's Caſe, cites 32 Aſſ. 9. 42 E. 3. 26. b. *So* if the Attaint paſſes *againſt the Defendant*, if he was *Party to the firſt Record*, he ſhall be fined and impriſoned. *But if* he was Party to the firſt Record, as *Tenant* by Reſceipt, or other Tertenant, he ſhall not be fined. 8 Rep 60. a. in Beecher's Caſe, cites 14 Aſſ. pl. 2. 42 E. 3. 26. b. 9 E. 4. 33.

(K. a) Fines and Amercements. Where impoſed jointly or ſeverally.

1. *Champerty by* 2. The *one was nonſuited*, and he and his Pledges de Proſequendo were amerced, and the other and his Pledges not, notwithſtanding that the Nonſuit of the one in this Action ſhall be the Nonſuit of both, and nevertheleſs they two found one and *the ſame Pledges*, but they were *amerced as Pledges of the one, and not* as Pledges of *the other*. Br. Amercement, pl. 11. cites 47 E. 3. 6.

2. In *Aſſiſe againſt* 2, the *Diſſeiſin is found with Force*, tho' the Diſſeiſin is joint, yet the Fine ſhall be ſeveral. 11 Rep. 43. a. per Cur. cites 10 E. 3. 10. a.

S. P & S. C. cited 11 Rep. 43. a. per Cur.

3. If a *Treſpaſs* be done *by two* jointly, yet they ſhall be amerced ſeverally. F. N. B. 75. (G)

——Roll Rep. 74. S. P. and cites S. C.

11 Rep. 43. a. S. C. cited per Cur.

4. If *two ſue* a Plaint *and are nonſuited*, the Amercement ſhall be ſeveral. F. N. B. 75. (G)

5. When a *Judgment* is given in B. R. or in C. B. &c. *againſt two*, & Ideo in Miſericordia, yet when it is aſſeered by the Coroners en Pais, the Amercement ſhall be laid upon them ſeverally. 11 Rep. 43. a. b.

6. When there are *diverſe Defendants*, and they are by the Law to make Fine, the Judgment is *Ideo Capiantur*, yet it ſhall be conſtrued Reddendo ſingula ſingulis, and *they ſhall be taken by a ſeveral Capias pro Fine.* 11 Rep. 43. b.

As where ſeveral were ſhooting at Pricks and he who gave Aim was killed with an Arrow, all the Town was amerced; Per Coke Ch. J. Roll Rep. 75. cites 22 E. 3 Corone 238. and 2 E. 3. 14[illegible]. where the Amercement is upon a Village, Town, or County it ſhall be Joint, *otherwiſe it would be Infinite* to aſſeſs every one in particular, Quod fuit conceſſum per Curiam.

7. In ſome Caſes the Fine or Amercement ſhall be *impoſed upon diverſe jointly*, as upon a *County*, an *Hundred*, and ſo upon a *Vill* &c. As for the Eſcape of a Murderer &c. 11 Rep. 43. b. cites 22 E. 3. Corone 238. 2 E. 3. ibid. 147. 3 E. 3. ibid. 302. 316. &c. and 10 E. 3. 10. a. and ſays that this is for the Uncertainty of the Perſons and for Infiniteneſs of Number.

8. In *Actions Perſonal*, as *Debt*, *Detinue* &c. if *one Plaintiff appears and the other is nonſuited* (which in Law Perſonal Actions is the Nonſuit of Both) he that ſurvives or appears ſhall not be amerced, for there is no Default in him, but in the other only who does not appear. 8 Rep. 61. a. Mich. 6 Jac. in the Exchequer in Beecher's Caſe cites 47 E. 3. 6. b. 43 Aſſ. 3. 7 H. 6. 36. 38 E. 3. 31. 41 Aſſ. 14.

* Br. Amercement, pl. 3. cites S.C. † Br. Amercement pl. 48. cites S.C.

9. If the one Demandandant in a * Real Action, or the one Plaintiff in a Perſonal Action *where Summons and Severance lies*, As in *Debt by Executors* if one be nonſuited and the other proceeds, he that is nonſuited ſhall not be amerced. 8 Rep. 61. a. cites 28 H. 6. 11. b. † 21 E. 4. 77. b.

Roll Rep. 32. pl. 4. Bullen v. Godfrey S.C. adjornatur. ——Ibid. 73. pl. 16. S.C. reſolv'd accordingly per tot. Cur.

10. The *Steward* at a Court Leet Time out of Mind had *uſed to ſwear* 12 or more Inhabitants *to be Chief Pledges*, *and they* at every Leet being ſworn, had *uſed to preſent that they the ſaid Chief Pledges ſhould pay to the Lord* of the Manor for Head-Money, or *Pro Certo Letæ* 10 *s. and to pay it accordingly at the ſame Leet.* The 12 Chief Pledges being ſworn to inquire &c. *refuſed to make ſuch Preſentment*, whereupon the Steward for the Contempt impoſed a Fine of 6 l. upon them all jointly; but reſolved that the ſame ſhould have been impoſed ſeverally, the *Refuſal of the one being not the Refuſal of the other.* 11 Rep. 42. Mich. 12 Jac. Godfrey's Caſe.

11. One Fine was impoſed upon *two Coroners for not returning an Outlawry*, Roll Rep. Arg. 34. cites 4 H. 9. 24. and ibid. 35. the Court ſaid they agreed the Caſe of the two Coroners that a Joint Fine ſhall be upon them, and that ſo it is upon the *Sheriffs of London*, becauſe they are but as one Officer to the Court. Paſch. 12 Jac. B. R.

Sid. 174 pl. 6. S. C.

12. An *Information* was exhibited againſt ſeveral *for a Confederacy* to impoveriſh the Farmers of the Exciſe, and being convicted, the whole Court agreed that they ſhould *all* be *fined* not jointly but *Separatim according to their ſeveral Abilities*, whereupon one was fined 1000 Marks and the others 300 Marks each. Lev. 125. Hill. 15 & 16 Car. 2. B. R. the King v. Sterling & al'.

(L. a) Pleadings.

(L. a) Pleadings.

1. IN *Account or Avowry* for Amercement in Courts he need not to *ſhew the Names of the Preſenters*, per Needham J. *Contra in Debt* for Amercements, per Pigot Serjeant. Br. Pleadings, pl. 38. cites 9 E. 4. 21. Br. Lete, pl. 16. cites 9 E. 4. 40.——Br. Dette, pl. 113. cites S. C. and S. P.———Br. Count, pl. 95. cites S. C. and S. P.——Br. Account, pl. 56. cites S. C. and S. P. by Pigot; but Brooke ſays Quære the Difference.———In ſecond Deliverance Judgment upon Demurrer was given againſt the Conuſance, becauſe he pleaded it was preſented Coram Sectatoribus, and does not ſhew their Names. 3 Le. 7. S. pl. 21. Mich. 7 Eliz. C. B Scarning v. Cryer.———Mo. 75. pl. 205. Scarling v. Cryett S. C.——Bendl. 159. pl. 219. S. C. and the Pleadings.

2. In an Avowry for an Amerciament in a Leet the Defendant ſhall *allege Preſcription in the Uſe of this affeering by Affeerors*. Per Frowike and Kingſmill. Kelw. 65. a. pl. 5. Trin. 20 H. 7. in a Nota.

3. In Treſpaſs for taking a Gelding &c. the Defendant pleaded that the Plaintiff was Tenant of ſuch a Manor, and it was preſented at Court that the Plaintiff had ſurcharged the Common, for which he was amerced 6 s. and 8 d. and aſſeer'd by J. N. and J. D. and that he as Bailiff diſtrain'd the Gelding &c. Upon Demurrer it was objected becauſe it was *Præſentatum fuit* only *that he ſurcharged* &c. and did *not allege in Facto that he ſurcharged*. Sed non allocatur; for it ſuffices for the Bailiff to take Conuſance of the Preſentment and no more, & non refert as to him whether it be true or not. Cro. E. 748. pl. 1. Paſch. 42 Eliz. B. R. Rowleſton v. Alman.

4. In Replevin, the Defendant made Conuſance as Bailiff for an Amercement, the Plaintiff pleaded De Injuria ſua propria and *traverſed the Preſcription to hold Court and to amerce*. The Court held the Avowry for the Amercement inſufficient, becauſe it was *not alleged in Facto that the Plaintiff did not appear after Summons*; but only Præſentatum fuit per Homagium, that he did not appear. Cro. E. 885. pl. 26. Paſch. 44 Eliz. C. B. Parham v. Norton. Mo. 643. pl. 887. S. C. but S. P. does not appear. —— 2 And. 178. pl. 100. S. C. but S. P. does not appear. —— So in Replevin the Defendant avow'd for an Amercement upon a *Preſentment* by the Homage *for not repairing a Houſe*, being a cuſtomary Tenant of the ſaid Manor. It was aſſign'd for Error inter al' that the Avowry was only that Præſentatum fuit that he had not repair'd, but did *not ſay in Facto & Catagorice &c. that he had not repair'd*, that being a Matter traverſable. The Judgment was reverſed, [but for which Error, or whether for all, non conſtat.] Le. 242. pl. 327. Mich. 32 & 33 Eliz. B. R. Blunt v. Whitacre.

5. In Treſpaſs Quare *Clauſum fregit*, the Defendant juſtified diſtraining for Amercement in the Sheriff's Tourn, impoſed on the Plaintiff for incroaching upon the King's Highway. It was moved in Stay of Judgment that it did *not ſhew that it was preſented before the Juſtices of the Peace at their Seſſions* according to the Statute of 1 E. 4. cap. 2. which ſays that the Juſtices of Peace ſhall award Proceſs againſt the Perſon ſo indicted before the Sheriff, which was not done in this Caſe. Coke Ch. J. ſaid this Statute *extends not to Treſpaſſes not Contra Pacem* (as in this Caſe the Encroachment is;) for otherwiſe the Lord of a Leet could not diſtrain for an Amercement without ſuch Preſentment before Juſtices of the Peace. And tho' the Statute ſpeaks of Felony, Treſpaſs &c. the ſame is to be meant of other things of the ſame Nature, which is proved by the Clauſe in the Statute, viz. that they ſhall be impriſoned; which cannot be in the principal Caſe; to which Warburton and Winch J. agreed. Godb. 190. pl. 271. Trin. 10 Jac. C. B. Hardingham's Caſe. 2 Brownl. 120. Barney v. Hardingham S. C. adjornatur.

6. In

6. In Treſpaſs, the Defendant juſtified by an Amerciament in a Court Leet againſt a common Baker for ſelling Bread againſt the Aſſiſe in Locis Vicinis, and that by a Precept out of the Court he diſtrain'd for it; adjudg'd the Plea ill, becauſe it did *not ſet forth that the Amerciament was for an Offence done within the Juriſdiction* of the Leet, which ſhall not be preſumed unleſs ſpecially pleaded; beſides it ſets forth that the Plaintiff was amerced, but did *not ſay to what Sum.* Hob. 129. pl. 166. Paſch. 14 Jac. Wilton v. Hardingham.

Godb. 277. pl. 392. Hill. 16 Jac. B.R. the S. C but S. P. does not appear.

7. One was impriſoned for a Fine aſſeſſed upon him for *depaſturing his Sheep within the Bounds of the Foreſt*, the Defendant juſtified for that *Præſentatum fuit that he depaſtured* them there. And the Queſtion was, whether this be ſufficient without alleging in Facto that he depaſtured them there. And Mountague Ch. J. held it ſufficient to ſay Præſentatum fuit. 2 Roll Rep. 177. Trin. 18 Jac. B. R. Webb and Tucke's Caſe.

See 3 Le. at the End of the Caſe of Scarning v. Cryer, in pl. 21. Mich. 7 Eliz. C B. S. P. accordingly. —— Mo. 75. pl. 205. S. C. &

8. In *Debt upon an Amercement in a Court Baron for a Treſpaſs in the common Fields with his Hogs*; It was moved in Arreſt of Judgment, that it was *not alleged that any Treſpaſs was committed, but only that Præſentatum fuit*, that a Treſpaſs was committed; and for this Cauſe Haughton held it to be ill; and ſaid, that ſo it had been adjudged in this Court before during his Time. Cro. J. 582. pl. 2. Mich. 18 Jac. B. R. Armyn v. Appletoſt.

S. P. accordingly. —— Bendl 160. pl. 219. S. C. & S. P. accordingly.

Cro. C. 300. pl. 3. S. C. adjudged by 3 Juſtices (abſente the Ch. J.) accordingly. — Jo. 300. pl. 3. S. C. adjudg'd accordingly.

9. In Treſpaſs for taking a Bullock &c. The Defendant juſtified, for that the Plaintiff was *preſented for not appearing at the Sheriff's Tourn*, being debito modo Summonitus, and *amerced by the Jury, and affeered* by 4 of the Jury to 40 s. *and certified to the next Quarter Seſſions, and there confirmed, whereupon by a Warrant to him from the Steward he took and ſold it* &c. Upon a Demurrer it was inſiſted that the Amercement ought always to be aſſeſſed by the Court; for it is a judicial Act, and ſhall be affeer'd by the Affeerors appointed; and that it being levied by the Defendant as Bailiff by Warrant of the Steward of the Court is ill, becauſe by the Statute 1 *E.* 4. *cap.* 2. it is expreſsly appointed, that *no Fine or Amercement in the Tourn ſhall be levied, unleſs it be certified at the next Seſſions of the Peace by Indenture, and inroll'd there, and Proceſs made from the Juſtices of Peace of the Seſſions to the Sheriff*, none of which Circumſtances were obſerved here, and ſo adjudged for the Plaintiff. Cro. C. 275. pl. 13. Mich. 8 Car. B. R. Gryffith v. Biddle.

10. An *unreaſonable* Fine impoſed by a Court Leet for a *Contempt in Court* was ſet aſide, and Judgment for the Plaintiff. 2 Jo. 229. Mich. 34 Car. 2. B. R. Berrington v. Brooks.

11. Debt for Amercement in a Leet, and ſhewed that Defendant was preſented and amerced, and that the Amercement was affeered by all the Jurors to 40 s. Upon Demurrer it was objected, that it was *not ſhewn to what Sum the Amercement was*, and yet ſome Precedents are ſo, as Raſt. Ent. 553. a. b. 109. b. Judgment was given for the Defendant. 3 Lev. 206. Mich. 36 Car. 2. C. B. Evelin v. Davis.

Ibid. 138. ſays, if it had been in Replevin where the Defendant made Conuſance in the Right of the Lord, it might be well enough as here pleaded; but where it is to juſtify by way of Excuſe, you muſt aver the Fact, and allege it

12. In Treſpaſs for taking a Tankard, the Defendant juſtified as *Bailiff* for an Amercement in a Leet, and that he by a Precept of the Dean and Chapter, Lords of the Leet, diſtrained the ſaid Tankard. Upon Demurrer it was objected, that he *ought to ſhew* that the *Precept* was *directed to him by the Steward of the Court*, and then to ſet forth the Warrant, without which he cannot juſtify to diſtrain for an Amercement; and of this Opinion was the whole Court, and Judgment for the Plaintiff. 3 Mod. 137. Mich. 3 Jac. 2. B. R. but adjudged 1 W. & M. Matthews v. Cary.

to

to be done, and ſet forth the Warrant itſelf, and the taking Virtute Warranti; for a Bailiff of a Liberty cannot diſtrain for an Amercement Virtute Officii, but muſt have a Warrant from the Steward or the Lord -- ——Carth 73. S C. and ſame Diſtinction taken by Holt Ch. J. and adjudged for the Plaintiff; for a Bailiff cannot diſtrain otherwiſe than by a Precept directed to him by the Steward of the Court.

13. An *Avowry for a Diſtreſs by a Precept from the Court Leet*, ſetting forth the holding of the Court, and the Plaintiff an Inhabitant within the Leet, muſt not only ſet forth the Preſentment by the Jury of the Fact done, but *muſt aver that the Fact was committed*, and ſaying Licet ipſe fuit Culpabilis is not ſufficient. Gibb. 108. pl. 9. Mich. 3 Geo. 2. B. R. Stephens v. Howard. And the Difference between Treſpaſs and Replevin is very well founded and ſupported by Ibid.

Authority, per Raymond Ch. J. with whom agreed the whole Court.

(M. a) Diſcharged. *How.* By Word without Writ, *or by Writ.*

1. WHERE the *Lord or Juſtice of Peace commands a Vagrant to Priſon*, in ſuch Caſe *the Lord or Juſtice* of Peace *may command the Bailiff to let him go at large again*, and the Reaſon is, *becauſe they may award him to Priſon upon Suggeſtion.* Br. Impriſonment, pl. 27. cites 14. H 6. 8. per Cur. *As* the *Chancellor* of England may award a Man to the Fleet, *or a Juſtice* may

command a Man to the Fleet or other Priſon *for Rebellion in his Preſence*, and in ſuch Caſes they may diſcharge him without Writ. Ibid.

But where a Man is *taken by Writ, or awarded to Priſon by Writ*, there he cannot be diſcharged without Writ or Command of the King; note the Difference. Ibid.

2. A Writ was directed to the *Sheriff* of Yorkſhire, who *iſſued a Warrant to the Bailiff of the Liberty* of Pomfret, *who did not return the Writ, for which he was amerced 50 l. at ſeveral Times*, and eſtreated into the Exchequer; afterwards the Parties agreed, and upon producing a Certificate from the Plaintiff's Attorney that the Debt was paid, theſe Amercements were diſcharged upon Motion to the Barons. 1 Salk. 54. pl. 3. Mich. 9 W. 3. in Scacc. Eyres v. Smith. Ibid. 55. the Reporter adds a Nota, that the Clerks ſaid that the Court uſes not to diſcharge Amercements, but allow You to compound them.

(N. a) Of a Vill &c.

1. AT Common Law, if *a Man* be *killed in a Town* in the Day-time, viz. *ſo long as there is full Day*, and the Murderer eſcapes, the Town ſhall be amerced. 7 Rep. 6. b. cites 21 E. 3. Corone 238. D. 210. b. in pl. 25. S. P. obiter, tho' the Murder be done in

an open Field or in a Lane &c. Hill. 4 Eliz.——*But if* it was *done in the Night*, and the Felon eſcapes, the Town ſhall not be amerced by the Common Law, becauſe in ſuch Caſe no Laches or Negligence can be imputed to the Inhabitants of the Vill; per Cur. 7 Rep. 6. b. Trin. 29 Eliz. C. B. in Caſe of Milburn v. Dunmow Inhabitants

A Stroke was given about 4 a Clock in the Afternoon of the 10 Jan. and *about* 8 *a Clock in the ſame Evening the Party died*, and then the Murderer eſcaped; The Queſtion was, whether the Town ſhould be amerced? and it was urg'd, that it was not Felony till the Party died, and there none ſhould be charged with the Offender till the Party was dead; and per Wray, it would be hard that the Town ſhould be amerced in this Caſe; for tho' in Diſcretion the Town might have ſtay'd the Party, yet it is not bound to do ſo &c. 3 Le. 207. pl 268 Paſch. 30 Eliz. B. R. the Town of Green in Suſſex's Caſe.——Le. 107. pl. 145. S. C. in totidem Verbis, but adds that the Court took Time to adviſe.

2. 3 *H. 7. cap.* 1. *recites, That the Law of the Land is, that if any Man be ſlain in the Day, and the Felon not taken, the Townſhip where the Death or Murder is done ſhall be amerced, and if any be wounded in Peril of Death, the Party that ſo wounded him ſhould be arreſted and put in Surety till perfect Knowledge be had whether he ſo hurt ſhould live or die*; *and* enacts, that *if any Perſon be ſlain or murdered in the Day, and the Murderer eſcapes untaken, the Townſhip where the Deed is ſo done ſhall be amerced for the ſaid Eſcape, and the Coroner ſhall have Authority to inquire thereof upon View of the dead Body, and ſo may the Juſtices of Peace, and certify them into the King's Bench.*

A *Preſentment* grounded *on this Statute ſet forth, that J. S. was killed at C. and that the Murderer fled away in the Night*, and therefore it was quaſhed, and the Amercements diſcharged; for it appears that the Vill is not liable to be amerced within the Statute; for by the Statute the Eſcape muſt be in the Day. Sty. 14. Paſch. 23 Car. B. R. the Vill of Charleton in Kent's Caſe.

3. If a Man kills another *in his own Defence*, and eſcapes &c. the Town ſhall be amerced as an ancient Mark of the Common Law that made it Felony. 2 Inſt. 315.

2 Hawk. Pl. C. 74. cap. 12. S. 2. ſays, that by the Common Law, if any Homicide be committed, or dangerous Wound given, whether with or without Malice, or even by Miſadventure or Self-defence, in any Town, or in the Lanes and Fields thereof, in the Day time, and the Offender eſcape, the Town ſhall be amerced, and if out of a Town, the Hundred ſhall be amerced.

4. If a *Murder* be committed *in the Day-time* in a *Town not incloſed*, and the Murderer is not apprehended, the Townſhip ſhall be amerced; but if incloſed, whether in the Night or the Day, the Townſhip ſhall be amerced. 3 Inſt 53. cap. 7.

5. If *Hue and Cry* is made by the Foreſt Law *for Vert or Veniſon*, and any Townſhip or Village follow not the Hue and Cry, they ſhall be amerced at the Juſtice Seat. 4 Inſt. 294. cap. 73.

6. If a *dead Body* in a Priſon, or other Place, whereupon an Inqueſt ought to be taken be *interr'd, or ſuffered to lie ſo long that it putrifies before the Coroner has viewed it*, the Gaoler or Townſhip ſhall be amerced. 2 Hawk. Pl. C. 48. cap. 9. S. 23. ſays it has been adjudged.

7. *Information* was brought *againſt* the Defendants, for that they were incorporated by the Name of *Mayor and Commonalty of London*, and it was *a walled City*, and had Sheriffs, Juſtices of Peace, and Coroners within themſelves, and by Law they ought to ſuppreſs Riots and unlawful Aſſemblies. Notwithſtanding which, in June 4 Car. in the Day-time, *Doctor Lamb was ſlain in a Tumult, and none of the Offenders taken, nor any Perſon known nor indicted for that Felony.* They appeared and confeſſed the Offence, & poſuerunt ſe in gratiam Curiæ, and they were amerced 1500 Marks; and it was conceived that it was an Offence at the Common Law to ſuffer ſuch a Crime to be committed in a walled Town in the Day-time, and none of the Offenders to be known or indicted. Cro. C. 252. pl. 2. Paſch. 8 Car. B. R. the King v. the Mayor &c. of London.

8. If one be *kill'd in a Vill*, and the *Coroner makes no Inqueſt*, the Vill muſt be amerced; per Twiſden; for probably the Coroner had no Notice of it, and if there was an Inqueſt it muſt be returned by the Certiorari; per Cur. Keb. 278. pl. 74. Paſch. 14 Car. 2. B. R. Ld. Buckhurſt, Wentworth and Bellaſis.

For more of Amercement and Fines in General, ſee **Diſtreſs, Error, Judgment, Trial**, (Z. b) (A. c) (G. g) and other Proper Titles.

(A) Amicus

(A) Amicus Curiæ.

1. IN *Writ of Entry* the *Tenant made Default after Default*, and a *Stranger came and ſaid that he himſelf pending the Writ had recovered the Tenements by Verdict of Aſſiſe againſt the Demandant and the Tenant* &c. and pray'd that no Judgment be made of his Franktenement &c. yet the Demandant had Judgment to recover Seiſin. Thel. Dig. 200. lib. 13. cap. 14. S. 1. cites Mich. 2 E. 3. 43.

2. In *Scire Facias out of a Fine*, the *Tenant ſaid that the Queen had a Writ of Diſceit pending againſt him to reverſe this Fine, becauſe the Tenements are Parcel of a Manor of which the Queen is ſeiſed, which is Ancient Demeſne* &c. upon which another Day was given to all the Parties, at which Day the Demandant was received Ex Gratia, to anſwer and plead to the Writ of Deceit, to which he was a Stranger. Thel. Dig. 200. lib. 13. cap. 14. S. 3. cites Trin. 26 E. 3. 65.

3. In Scire Facias a *Stranger* came and *pray'd that the Writ be abated for Default apparent in the Writ*, but the Court had not any Regard thereto, for the Tenant pleaded to the Action. Thel. Dig. 200. lib. 13. cap. 14 S. 3. cites 26 E. 3. 72.

Every Stranger as Amicus Curiæ may move the Court of *Matter apparent in the Writ*, and the Court ex Officio is bound to abate the Writ, if it be vicious, for *falſe Latin* or *Default of Form* &c. Thel. Dig 200. lib. 13. cap 14. S 5. cites Hill * 4 H. 6. 16. and 9 H. 6. 39. * Br. Brief, pl 210 cites S C.——Br. Falſe Latin &c. pl. 96. cites S. C. * Br. Office del Court, pl 6. cites S. C. & 41 E. 3. 21 ——Hardr. 86. Arg. cites S. C——Br. Error, pl. 49. S. P. by Brooke —— A Stranger may inform the Court of Error. Br. Error, pl. 50. cites 11 H. 4. 62. 65 92. per Huls.

4. In *Formedon* the Tenant traverſed the Gift, and a *Stranger* came and *ſaid that the Reverſion was in an Infant*, being *in Ward of the King, and that the Tenant pleaded by Colluſion* &c. and pray'd that they would not &c. Et non allocatur, becauſe none anſwer'd for the King or for the Infant. Thel. Dig. 200 lib. 13. cap. 14. S. 4. cites Mich. 2 H. 6. 5.

5. *So* it is of Matter apparent *in the Count*. Thel. Dig. 200. lib. 13. cap. 14. S. 5. cites Mich. 19 H. 6. 10.

6. *So* of Matter apparent *in an Avowry*. Thel. Dig. 200. lib. 13. cap. 14. S. 5. cites Mich. 34 H. 6. 8.

7. *So* it is *of an Office or Indictment found for the King*. Thel. Dig. 200. lib. 13. cap. 14. S. 5. cites Mich. 5 E. 4. 8. b. 7 E. 4. 17.

8. Any as Amicus Curiæ may *ſhew* to the Court *that* the *one Plea goes to the Whole*, and the Court ex Officio ſhall diſcharge all but that. Br. Deux Plees, pl. 23. cites 5 E. 4. 124.

9. Upon an Outlawry the Queſtion was whether one, as Amicus Curiæ, might appear and *quaſh an Inquiſition found upon* the *Outlawry for Matter inſufficient apparent*, Nicholas and Parker, Barons, took it clearly upon the Book of 7 E. 4. that an Amicus Curiæ might ſhew Cauſe to quaſh an Inquiſition, and ſaid that Bennet's Caſe, which had been urged to the contrary, went off by Agreement of the Parties. Hardr. 85, 86. Mich. 1656. in the Exchequer, The Protector v. Geering.

10. Serjeant Maynard being denied offering Exceptions in Arreſt of Judgment, on a Conviction of Forgery, unleſs his Client was preſent, urged, that as Amicus Curiæ he might *inform them of an Error in the Proceedings*, to prevent their giving a falſe Judgment at any time, tho' he could not move in Mitigation of the Fine, *without his Client's Preſence*;

; but the Court ſaid the Party ought to be preſent in both Caſes. Show 297. pl. 297. Paſch. 35 Car. 2. B. R. The King v. Buckeridge.

11. Any one, as Amicus Curiæ, may move to quaſh an *Indictment apparently vitious*, be the Crime what it will; per the Ch. J. Cumb. 13. Hill. 1 & 2 Jac. 2. B. R. The King v. Vaux.

12. In a Caſe upon the Statute of Frauds, Sir Geo. Treby, as Amicus Curiæ, informed the Court that he was preſent at the making that Statute, and what was the *Intention of the Parliament*. Comb. 33. Mich. 2 Jac. 2. B. R. in the Caſe of Horton v. Ruesby.

13. If an *Action be abated*, any one as Amicus Curiæ may move to have the *Verdict ſet aſide*, even the Defendant himſelf. Cumb. 170. Mich. 1 W. & M. in B. R. Dove v. Martin.

For more of Amicus Curiæ in General, ſee other Proper Titles.

Ancient Demeſne.

(A) *What* ſhall be ſaid Ancient Demeſne.

Fol. 321.

1. A N Acre of Land may be Ancient Demeſne, which is Parcel of a Manor which is not Ancient Demeſne. 30 Ed. 3. 12. admitted. Land which is Frank-fee may be held of a Manor of Ancient Demeſne. * 11 H. 4. 86.

* Br. Ancient Demeſne, pl. 15. cites S. C. & S. P. agreed.

2. That which is approved by the Lord out of his Waſtes, cannot be Ancient Demeſne. 5 Aſſ. 2. For the Waſtes are Part of the Demeſne.

For that which is in the Hands of the Lord Time out of Mind cannot be Ancient Demeſne, but that which was held by the Tenants before Time of Memory. Br. Ancient Demeſne, pl. 26. cites S. C.——Br. Ibid. pl. 32. cites 21 Aſſ. 13. S. P. as to the approving out of the Waſte; but tho' no Anſwer was given directly to ſuch Plea pleaded, yet Brooke ſays it ſeems clearly that ſuch Land ſo approved is Frank-fee, becauſe it is taken out of the Demeſnes.——No Land which is in the Hands of the Lord can be ſaid to be Ancient Demeſne. Br. Ancient Demeſne, pl. 6. cites 41 E. 3. 22. per Kirton.

3. Note, that that Part of the Manor which is Ancient Demeſne, which is in the Hands of the Lord or of the King, viz. the Demeſnes, *is Frank-fee*, and *that which is in the Hands of the Tenant is Ancient Demeſne only*. Br. Ancient Demeſne, pl. 32. cites 21 Aſſ. 13.

Thoſe Manors are call'd Ancient Demeſne of the Crown *which were in the Hands of St. Edward the Confeſſor, or William the Conqueror*, and ſo expreſs'd in the Book of Domeſday, made or begun in the 14th Year of William the Conqueror. 4 Inſt. 269

4. All that was under the Title of *the King's Land in the Time of King E. the Confeſſor, or held of W. the Conqueror*, is Ancient Demeſne; and that which is under other Titles is not Ancient Demeſne; for thoſe were not the King's Land at this Time, and therefore not Ancient Demeſne. Br. Monſtraverunt, pl. 1. cites 40 E. 3. 44.

5. There

5. There cannot be Ancient Demeſne unleſs there is a *Court and Suitors* &c. Per Coke Arg. 2 Le. 191. Trin. 28 Eliz. in pl. 240. S. P. So if there be but one Suitor; there being a

for that the Suitors are Judges, and therefore the Demandant muſt ſue at Common Law, Failure of Juſtice within the Manor. 4 Inſt. 270. cap. 58.

6. In Ejectment brought of Lands in Ancient Demeſne, it was reſolved that *Copyhold Lands* are as the Demeſnes of the Manor, and are the Lord's Freehold, and therefore not impleadable but in the Lord's Court. Cro. J. 559. pl. 5. Hill. 17 Jac. B. R. Pymmock v. Helder. It was admitted that Copyholds being Parcel of the Manor are

pleadable at Common Law; and the Franktenements held of the Lord are pleadable only in the Lord's Court. 3 Lev. 405. Mich. 6 W. & M. in C. B. in Caſe of Smith v. Frampton.

7. *No Lands* are Ancient Demeſne *but Lands holden in Socage*, and conſequently Lands held by Knight-Service * &c. in Fee, are not Ancient Demeſne. F. N. B. 13. (D) * The Tranſlations of Fitzh. N. B. are (by Knights Service and in Fee) but the French Edition is as here.——F. N. B. 14. (B) S. P. accordingly; for the Tenants in Ancient Demeſne are called Sokemans, viz. Tenants of the Plough.——Br. Ancient Demeſne, pl. 41. cites S. C.——S. P. Arg. Le. 232. in pl. 315.——2 Le. 190. Arg in pl. 240.——4 Inſt. 270. cap. 58. S P.

All thoſe that hold of theſe Manors in Socage are Tenants in Ancient Demeſne, and they plow'd the King's Demeſnes of his Manors, ſow'd and harrow'd the ſame, mow'd and made his Meadows, and other ſuch Services of Husbandry, for the Suſtenance of the King and his honourable Houſhold, Maintenance of his Stable, and other like Neceſſaries pertaining to the King's Husbandry. 4 Inſt. 269.

8. The *Rent* may be Parcel of the Manor, and ſo may the *Services*, *tho' the Land is Frank-fee*, and whatever is holden of the Manor is not Part; per Eyre J. And per Holt, Land *holden of the Manor* cannot be ſaid to be Part of the Manor. 12 Mod. 13. Mich. 3 W. & M. Parker v. Winch.

(A. 2) Tried How.

1. ANcient Demeſne was *tried per Patriam*, but no Argument made of it; but the Parties joined Iſſue upon it, and all found for the Plaintiff. Quod nota. Br. Ancient Demeſne, pl. 27. cites 8 Aſſ. 35. Br. Mortdanceſtor, pl. 19. cites S. C. and 10 E. 3. and

M. 9 E. 2. accordingly.——S. P. Br. Ancient Demeſne, pl. 29. cites 9 Aſſ. 9.

2. Recordare came into *Ancient Demeſne* to remove the Plea, becauſe the *Tenant claim'd to hold at the Common Law*, and at the Day they were *at Iſſue* upon the Cauſe *if the* Land was *Ancient Demeſne or not*, *and found for the Demandant*, by which he *recover'd Seiſin* of the Land *in Bank*. And ſo ſee that they hold Plea in Bank, upon Original commenced in the Court of Ancient Demeſne. Br. Cauſe de Remover, pl. 29. cites 30 E. 3. 22.

3. Where a Man *pleads Ancient Demeſne* &c. the Court will not write for the Record of Domeſday to prove it, but the *Party ſhall have Day at his Peril to bring it in*, and ſo he had &c. Quære if C. B. may write to them; for Neſcitur quæ earum eſt altior Curia, and the *other Party may bring in the ſame Record* ſub pede Sigilli *to prove it Frank-fee*, if he will. Br. Record, pl. 33. cites 39 E 3. 6. Br. Ancient Demeſne, pl. 23. cites S. C.——Br. Monſtraverunt, pl. 2. cites S. C

In Writ of Entry ſur Diſſeiſin, Iſſue being taken whether the Manor of S in Com S. was Ancient Demeſne

Demeſne or not. The Court order'd the Tenant to have the *Book of Domeſday* in Court ſuch a Day at his Peril, and it was *brought into C. B.* accordingly *by Mittimus out of Chancery, with the Certiorari which iſſued out of Chancery, and directed to the Treaſurer and Chamberlain of the Exchequer &c.* by which Record it was found Ancient Demeſne, and Judgment that the Tenant eat i de ſine Die, and that the Demandant ſhould ſee in Ancient Demeſne ſi &c. D. 250. b. pl. 87. cites a Precedent Mich. 3 H. 8. in C. B. Rot. 341.

Iſſue was whether the *Manor of Otterbury* was Ancient Demeſne, and the Court *awarded Quod querens habeat Recordum Libri de Domeſday hic in Octab. Hillarii.*

4. It appears that all the Land which is intitled in the Domeſday Book in the Exchequer under Tit. *Terræ Regis*, Terræ *E. Regis & Confeſſoris*, or *Terræ Regis W. Conqueſtoris*, is Ancient Demeſne; and thoſe which are intitled under other Titles, as *Terræ Epiſcopi S.* &c. thoſe are not Ancient Demeſne, and Plea was made there, where it was ſhewn that the *Manor of D. was Ancient Demeſne*; that *in this Vill are 3 Manors of one Name, and that they hold of the Manor which is under this Tit. Terræ* Epiſcopi E. and not of the Manor, which is under this Title *Terræ Regis*; quod nota, and ſo he confeſs'd, and avoided the Record which was ſhewn to prove the Ancient Demeſne. Br. Ancient Demeſne, pl. 5. cites 40 E. 3. 45.

At the Day the Plaintiff had the Book brought into Court by a Porter. It appear'd that *Edward the Confeſſor, Anno* 18 Regni ſui, *had given this Manor to the Abbat of R. and* that *it was not under the Title de Terræ Regis*; for all Lands held in Ancient Demeſne which the Confeſſor had, were written by William the Conqueror, Anno 20 of his Reign, in the Book of Domeſday, under the Title de Terræ Regis, and theſe are all held in Ancient Demeſne at this Day; but thoſe which were given away by the Confeſſor, and which are not written in Domeſday under that Title, are not Ancient Demeſne, and a Reſpondeas Ouſter was awarded. Cited by Holt Ch. J. 1 Salk. 57. pl. 2 as Paſch. 9 Jac. in C. B. Rot. 3265. Sanders v. Welch.

And by him it was adjudged that the *Manor of T. which was in the Hands of the Earl of Cheſter at the Time of the making of the Domeſday Book*, was Ancient Demeſne, per Concilium Regis, becauſe it *had been ſome Time in the Seiſin of the King.*

5. It is in a manner agreed that the Land in the *Domeſday* Book which comes under Tit. *Terræ Regis E.* or under *Terræ Regis only*, which *is intended W. the Conqueror*, in whoſe Time the Book was made, ſhall be intended Ancient Demeſne; and the Plaintiff *ſhew'd divers Charters by Inſpeximus, which rehearſed that W. the Conqueror dedit, conceſſit, & confirmavit* &c. the ſaid Manor, to prove that it was Land of W. the Conqueror, and becauſe *Dedimus may be a Confirmation*, and the Grant of Land in Poſſeſſion &c. therefore per Belk. this is no Trial that it was the Land of W. the Conqueror, or of King E. and alſo that Ancient Demeſne *ſhall not be tried by Charter*, nor in other manner *but only by the Domeſday Book*; quod nemo negavit, and therefore the Plaintiffs were nonſuited, and by him the *Lands of other Lords are alſo in the Domeſday Book under other Titles.* Br. Ancient Demeſne, pl. 9. cites 49 E. 3. 22.

Quære inde, and the Manor above was under Tit. *Terræ St. Stephani*, and therefore not Ancient Demeſne as held there. Ibid.

6. In *Aſſiſe* the *Tenant ſaid that he held for* Term of *Life*, the *Reverſion to the King, and pray'd Aid* of him, and had it, and Procedendo came after into the Chancery, and *the King ſaid* upon the Aid *that the Land is within K. which is Ancient Demeſne* of the King, *as of the Dutchy of Lancaſter*, and held of K. and was certified accordingly by the Domeſday Book. And per tot. Cur. this is not to the Purpoſe, becauſe the King may have his Action of Deceit; and per Cheney and Culpeper, *The King, of a Thing of the Dutchy, ſhall be as a common Perſon*, and that by Leaſe for Life by the Dutchy Seal, if the Tenant in Aſſiſe prays Aid of the King, the Aſſiſe ſhall be taken immediately. Br. Ancient Demeſne, pl. 15. cites 11 H. 4. 85.

7. *No Cauſe is ſufficient to remove a Plea* out of Ancient Demeſne, *but that which makes the Land Frank-fee*; per Brian. Br. Ancient Demeſne, pl. 35. cites 1 H. 7. 30.

Iſſue was taken whether Lands contain'd in

8. If Ancient Demeſne is *pleaded of a Manor*, and denied, this ſhall be *tried by the Record of the Book of Domeſday* in the Exchequer; *but* if Iſſue be taken that *certain Acres are Parcel* of the Manor which is Ancient Demeſne,

Demeſne, that ſhall be tried *per Pais*; for it cannot be tried by that Book. 9 Rep. 31. a. in the Caſe of the Abbot de Strata Marcella.

a Fine were Ancient Demeſne, pretending that they were Parcel of the *Manor of Bowden* in the County of Northampton, which was pretended to be Ancient Demeſne, and the Book of Domeſday being brought into Court, it appeared that the Manor of Bowden in the County of Leiceſter was, but not the Manor of Bowden in the County of Northampton; and tho' it was inſiſted that the Manor of Bowden *was both in the County of Leiceſter and Northampton*, yet it was not regarded, the Domeſday Book being againſt the Plaintiff. Brownl. 43. Trin 15 Jac. Griffin v. Palmer. —— Hob. 188. pl. 230. Anon. but S. C. accordingly, and that ſo the Plaintiff was barr'd.

9. In Ejectment for Land in Long-hope in the County of Glouceſter, the Iſſue was, whether it was Ancient Demeſne or not, and at the Trial the Domeſday-Book was brought in by an Officer of the Exchequer, by which it appear'd that Hope was Ancient Demeſne, but nothing was mention'd of Long-hope, thereupon they offered to prove by the Steward of the Manor and others that it was the ſame as was formerly called Hope, and lately had got the Name of Long-hope. And Windham J. was for examining the Witneſſes, but all the Court e contra, and that he had fail'd of the Record to prove the Iſſue; and if the Truth was as ſuppoſed, they might have help'd it in Pleading, that it was known by the one Name and the other, and that Long-hope and Hope are one and and the ſame Vill. Sid. 147. pl. 6. Trin. 15 Car. 2. B. R. Holdy v. Hodges.

Lev. 106. Holdage v. Hodges S. C. accordingly; and that Windham J thought it might be ſupplied by Proof of Witneſſes, becauſe this is a Trial by the Court upon the Book and not by Jury, and compared it to a Trial of Infancy by Inſpection and Affidavits; but Cæteri e contra, and ſo it was ruled.

(B) What Privileges the Tenants ſhall have. * Toll Free.

See Tit. Toll (E) pl. 1. 2.

* The Reaſon why ſuch Tenants are diſcharged of Toll, is becauſe the Lands of Edward the Confeſſer, and William called the Conquerer, ſet down in the Book of Domeſday were Ancient Demeſne, and ſo called Terræ Regis, and they were to provide Victuals for the King's Garriſons in thoſe troubleſome Times &c. They had this Privilege among others that quiete exercerent aratra & terram excolerent; this was ſaid by Coke to have been found by him in an Ancient Reading. 2 Le. 191. in pl. 240.

† Br. Ancient Demeſne, pl. 14. cites S. C. but is only a ſhort Note referring to another Place, but mentions nothing Particularly as to this Point, and the Place referred to is miſprinted.

‡ Fitzh. Toll, pl. 8 cites S. C. —— F. N. B. 228. (D) S. P.

In an Action on the Caſe for not paying Toll, the Defendant ſaid that he held certain Lands of R. Lord of the Manor of H. which Manor is Ancient Demeſne, of which Manor all the Tenants have been free to ſell or buy Beaſts or other Things for the Manurance of their Lands, and Maintenance of their Houſes, without paying Toll in any Market or Fair &c. and ſo juſtifies that he came to the ſame Market and bought certain beaſts, as the Plaintiff had declared, and that ſome of them he uſed about his Manurance of his Lands, and ſome of them he put into Paſture to make them fat, and more fit to be ſold, and afterwards he ſold at ſuch a Fair &c. And the Opinion of the Court was with the Defendant. 2 Le. 191. pl. 240. Arg. cites 7 H. 4. 111.

1. They may ſell or buy Oxen, or other Beaſts to manure their Land, and maintain their Houſe, without paying Toll in every Market and Fair throughout the Realm. † 7 H. 4. 44. b. F. N. B. 228. A. ‡ 9 H. 6. 25. b. or other Place.

2. If a Tenant be a Common Merchant to buy and ſell Cattle in a Fair and Market, and he buys Cattle to ſell again, and within half a Year after ſells them again at a Fair, yet he ſhall not pay Toll, but is within the Privilege. 7 H. 4. 44. b. Curia.

Br. Ancient Demeſne, pl. 14. cites S. C. but S. P. does not appear.

—— See Tit. Toll (E) pl. 1. and the Notes there.

3. So

Br. Ancient Demeſne, pl. 14. cites S. C. but S. P. does not appear. ——Br. Action ſur le Caſe, pl. 37. cites S. C.

3. So in this Caſe, if he ſells them the next Market after he bought them, yet he is within the Privilege. 7 H. 4. 44. b. Curia.

Fitzh. Toll, pl. 8. cites S. C.——2 Inſt. 221. S. P. cites S. C.——F. N. B. 14 (E) S. P.——Ibid. 228 (D) S. P. * [Theſe Words ſeem to be ſuperfluous]

4 They ſhall be diſcharged of Toll for Things coming from the Tenement of which they are ſeiſed in Ancient Demeſne, * ſold for their Suſtenance. 9 H. 6. 25. b.

Br. Ancient Demeſne, pl. 22. cites S. C. and S. P. by Newton Ch. J.——S. C. and S P. cited Arg. 2 Le. 191. pl. 240. —— 2 Inſt. 221. S. P.

5. So they ſhall be diſcharged for Things ſold ariſing upon the Soil held. 19 H. 6. 6. 66. b.

Fitzh. Toll, pl 8. cites S. C. and S. P. by all the Juſtices clearly.——F N B. 228 (A) ſays they ſhall be quit of Toll for their Goods and Chattles which they merchandize with others, as well as for their other Goods; for the Writ is general *Pro Bonis & Rebus ſuis* &c.—— And Ibid. (D) Tenants at Will within Ancient Demeſne ſhall be diſcharged of Toll as well as the Free Tenants, or the Tenants for Life or Years of Lands in Ancient Demeſne ſhall be diſcharged of Toll for their Goods——They ſhall be diſcharged of Toll of all Things bought for their own Uſe. 2 Le. 191. Arg. cites 28 Aſſ. ult. by Thorp, Green and Seton.

6. So they ſhall be diſcharged of Toll for their Goods bought for the Support of their Eſtate, according to the Quantity of their Tenement in Ancient Demeſne, as for their Cattle and other Things neceſſary. 9 H. 6. 25. b.

Br. Ancient Demeſne, pl. 22. S. C. and S. P.

7. They ſhall be diſcharged of Toll for Things which they buy to manure their Soil. 19 H. 6. 6. 66. b.

Br. Ancient Demeſne, pl. 22. cites S.C. and S. P. accordingly.——In Treſpaſs, the Plaintiff ſhew'd that the Town of Leiceſter was Ancient Demeſne, and that the Inhabitants thereof had uſed to be diſcharged of Toll; and that the Queen by her Letters Patents had commanded all Bayliffs, Mayors, Sheriffs &c, that thoſe of Leiceſter ſhould be diſcharged of Toll, notwithſtanding which the Defendant took Toll &c. and tho' he did not ſhew that it was taken of ſuch Things which were for Proviſion for their Houſes or manuring of their Lands, Shute J. was of Opinion that an Inhabitant within Ancient Demeſne, tho' he be not a Tenant, ſhall have the Privileges. Adjornatur. 2 Le. 190. pl. 240. Trin. 28 Eliz. B. R. Town of Leiceſter's Caſe.

8. Quære if they ſhall be diſcharged of Toll of all Things which they ſell and buy. 19 H. 6. 6. 66. b.

Cro. E. 227. pl. 13 Paſch. 33 Eliz. B. R. Ward v. Knight S. C. and was for Tithes of Cables for Merchandize, and adjudged for the Defendant; but gave no publick Reaſon for it; but privately did agree between themſelves for the Subſtance of the Matter; for Wray ſaid, there is no Reaſon they ſhould be diſcharged for Merchandize, and that ſo are the Books——Le. 231. pl. 315. Trin. 30 Eliz. B. R. the S. C. adjudged Quod Quereus nil capiat per Billam. ——2 Inſt 221. S. P. accordingly. ——S. P. Arg. 2 Le. 191. pl. 240.

9. Nota, in Juſtice Hutton's Reports there is cited one *Ward's* Caſe to be adjudged in B. R. 28 Eliz. touching the Toll of the Town of Leiſtock in Suffolk, where it was adjudged that the Privilege of Ancient Demeſne does not extend to him that is a Merchant, or that trades and gets his Living by buying and ſelling, but the Privilege was annexed to the Perſon in Reſpect of the Land, ſcilicet, becauſe they manure the Demeans of the King, and provide Corn for the Garriſons of the King, and Purveyance was not then in uſe, but the Privilege is intended for thoſe Things which ariſe or are to be uſed in the Land, or for his Family that manures the Land.

S. P. Br. Tenant per Copie, pl. 25. cites F. N. B. fo. 228.

10. The Tenants in Ancient Demeſne ſhall go *quit of Toll.* Br. Ancient Demeſne, pl. 49. cites the Regiſter, fol. 260.

(C) *Who*

(C) *Who* ſhall be *a Tenant to have the* Advantage of the *Privilege. In Reſpect of* the *Eſtate.*

Fol. 322.

1. TEnant in Fee of Ancient Demeſne ſhall have the Privilege to be Toll-Free in Fairs and Markets. 9 H. 6. 25. b. Fitzh. Toll, pl. 8. cites S. C.

2. So Tenant at Will of Ancient Demeſne ſhall have the Privilege to be Toll-Free. 9 H. 6. 25. b. Fitzh. Toll, pl. 8. cites S. C. accordingly. —— F. N. B. 28. (D) S. P. accordingly, and ſo of *Tenant for Years.* —— S. P. by Shute J. 2 Le. 191. in pl. 240. cites 37 H. 6. 27. by Moile.

(C. 2) What other Privileges they ſhall have beſides being Toll-free.

1. THoſe of Ancient Demeſne *ſhall not ſue at the Sheriff's Tourns*, and they ſhall be *excepted from Juries and Aſſiſe.* Br. Ancient Demeſne, pl. 43. cites F. N. B. fol. *166. Tenants of Ancient Demeſne ſhall be *exempt from the Leet, View of Frank-Pledge*, and from *Sheriffs Tourns* Br. Ancient Demeſne, pl. 49. cites the Regiſter fol. 181. * F. N. B. 166. (F)

2. Franktenants in Ancient Demeſne, and Tenants at Will, ſhall be quit of Toll, *Pontage*, and the like, and the Lord alſo. Br. Ancient Demeſne, pl. 43. cites F. N. B. fol. 128. Br Tenant by Copy &c. pl. 25. cites S. C. & S. P. accordingly.

—Br. Privilege, pl 56. S. P. accordingly. —— S. P. and ſo of Paſſage. F. N. B. 14. (E) and 228. (B) —— S. P. and ſo of Murage. Arg. 2 Show. 75. in pl. 59.

3. To the End theſe Tenants might apply themſelves to their Labours for the Profit of the King, they had ſix Privileges. *1ſt. That they ſhould *not be impleaded* for any their Lands &c. *out of the ſaid Manor*, but have Juſtice adminiſtered to them at their own Door by the little Writ of Right Cloſe directed to the Bailiffs of the King's Manors, or to the Lord of the Manor, if it be in the Hands of a Subject, and if they were impleaded out of the Manor, they may abate the Writ. † 2dly, They *cannot be impanell'd to appear at Weſtminſter or elſewhere* in any other Court upon any Inqueſt or Trial of any Cauſe. ‡ 3dly, They are *free and quiet from all Toll* in Fairs or Markets for all Things concerning Husbandry and Suſtenance. || 4thly, *And of Taxes and Tallages* by Parliament, unleſs they be ſpecially named. ** 5thly, And *of Contribution to the Expences of the Knights of the Parliament* &c. †† 6thly, If they be ſeverally diſtrained for other Services, they all, for ſaving of Charges, may *join in a* Writ of *Monſtraverunt*, albeit they be ſeveral Tenants. Theſe Privileges remain ſtill, altho' the Manor be come to the Hands of Subjects, and altho' their Service of the Plough is for the moſt Part altered and turned into Money. 4 Inſt. 269. * F. N. B. 11. (F) S. P. accordingly. † F. N. B. 14. (E) S. P. unleſs they have Lands at the Common Law. —— And Ibid. in the new Notes there (c) ſays, that is, if they have not other Lands in Frank-fee, and cites 42 Aſſ. 8. —— But yet they ſhall be ſworn out of it in Perſonal Actions Br. Ancient Demeſne, pl. 42. —— 4 Inſt. 270. cap. 48 S. P.

‡ See (B || F. N. B. 14. (E) S. P. accordingly. ** F. N. B. 14. (E) S. P accordingly —— Ibid 228. (C) S. P. accordingly. —— Br. Privilege, pl 56. S. P. cites F. N. B. †† F. N. B. 14. (D) &c. Tit. Writ of Monſtraverunt. —— And they ſhall be acquitted from Amerciements of the County. F. N. B. 14 (E) in the new Notes there (b) cites Clauſ. 12 H. 3 Memb. 11. and ſays ſee 32 E. 3. Monſtraverunt 6. and Rot. Parl. 6 E. 3. No. 3.

Vent. 344. Anon. S. P. accordingly, and ſeems to be S. C.

4. Ancient Demeſne is no *Exemption* for ſerving the Office of a *High Conſtable*. 2 Show. 75. pl. 59. Trin. 31 Car. 2. B. R. the King v. Bettſworth.

(D) In Reſpect *of the Perſon.*

Fitzh. Toll, pl. 8. cites S. C. but S. P. does not appear.

1. IF a Lord be a Tenant, and lives in Ancient Demeſne, he ſhall be diſcharged for all his Houſhold, having Regard to the Quantity of his Tenement. 9 H. 6. 25. b.

(E) *In what Actions* and Suits it will be a *good Plea.*

Br. Ancient Demeſne, pl. 20. cites S. C. and the S. P. ſeems admitted by Babbington J. ——Ibid. pl. 37 cites S. C. and S. P. ſeems admitted. ——See pl. 18.

1. WHERE by Recovery in the Action the Land will be Frank Fee, Ancient Demeſne is a good Plea. 8 H. 6 35.

Br. Ancient Demeſne, pl. 21. cites S. C. the Tenant pleaded that the Land was Ancient Demeſne, and pleadable in the Court there by Petit Writ of Right Cloſe &c. and demanded Judgment if the Court would take Conuſance. ——4 Inſt. 270. cap. 58. S. P. accordingly. ——It was agreed, that no Freehold held in Ancient Demeſne, could be recovered in the Court of the King, and that tho' the Freehold were not to be recovered by the Action, yet *if the Poſſeſſion was to be recovered by the Action* brought in the King's Court, Ancient Demeſne is a good Plea. 47 Hill. 10 Jac. in pl. 53. —— 2 And. 178. pl. 101. Hill. 43 Eliz. S. P. accordingly, and therefore it was held a good Plea in Ejectment. Smith v. Arden. ——In all Real Actions it is a good Plea. 4 Inſt. 270. cap. 58.

2. In Real Actions Ancient Demeſne is a good Plea. 8 H. 6. 1.

Fitzh. Ancient Demeſne, pl. 10. cites 46 E. 3. 1. S. P. accordingly. ——S. P. Hob. 47. in pl. 53. accordingly, and cites 46 E. 3. 1. ——Br. Ancient Demeſne, pl. 7. cites 46 E. 3. 1. S. P. accordingly. ——5 Rep. 105. a. S. C. & S. P. cited accordingly, per Cur.

3. In a Writ of Ward of Land, Ancient Demeſne is a good Plea. 46 Ed. 3. 2.

* Br. Ancient Demeſne, pl. 16. cites S. C. & S. P. accordingly, per tot. Cur. —— 4 Inſt. 270. cap. 58. S. P. ——S. C. cited accordingly, per Cur. 5 Rep. 105. a.

4. In a Writ of Meſne is a good Plea, becauſe the Tenancy may come in Debate in this Writ. * 21 Ed. 3. 10. ‡ 28 Ed. 3. 95. adjudged.

‡ Fitzh. Meſne, pl. 17. cites S. C. & S. P. accordingly. ——Fitzh. Ancient Demeſne, pl. 26. cites S. C. accordingly.

* Br. Ancient Demeſne, pl. 20. cites S. C. but S. P. does not appear there

5. In Replevin Ancient Demeſne is a good Plea, becauſe by Intendment the Freehold will come in Debate. 4 H. 6. 19. * 7 H. 6. 35 b. 21 Ed. 3. 10. 51. 29 Ed. 3. 9. 30 Ed. 3. 12. b. adjudged contra. ‡ 17 Ed. 3. 52. 75. till the Realty comes in Debate, becauſe he may traverſe the Taking.

‡ Fitzh. Ancient Demeſne, pl. 14. cites S. C. & S. P. ——Br. Ancient Demeſne, pl. 4. cites 40 E. 3. 4. S. P. agreed accordingly. ——Godb. 63. pl. 76. cites S. C. agreed per Cur. to be a good Plea. ——Ibid. pl. 7. S. P. ſaid to be accordingly, and cites 46 E. 3. 1. ——4 Inſt. 270.

2-0. S. P.—— Bulſt. 108. Hill. 8 Jac. B. R. in a Nota ſays it was agreed by the whole Court, and that ſo is the Book of 10 H. 7. 14.———Ow. 24. Paſch. 36 Eliz. C. B. in Owen's Caſe, S. P. accordingly obiter, and cites 40 E. 3. 4.

6. In a Writ of Account againſt a Bailiff of a Manor, Ancient Demeſne of a Manor is a good Plea. 8 H. 6. 34. Br. Ancient Demeſne, pl. 20. cites

S. C. but S. P. does not appear.———Ibid. pl. 37. cites S. C. but S. P. does not appear there.——— Br. Ancient Demeſne, pl. 7. cites 46 E. 3. 1. S. P. accordingly.——14 H. 8. 5. a. cites S. P. as adjudged in 46 E. 3. 2. becauſe it is of the Profits of the Land, which is Ancient Demeſne; which will follow the Nature of the Land itſelf.———4 Inſt. 270. S. P.———S. C. cited accordingly, per Cur. 5 Rep. 105. a.———S. P. Hob. 47. in pl. 53.

7. In an Aſſiſe Ancient Demeſne is a good Plea. 7 H. 6. 35. b. Br. Ancient Demeſne,

pl. 20. cites S. C. but S. P. does not appear.———*In Aſſiſe of Rent iſſuing out of* Land in *Ancient Demeſne and Land Guildable*, there Ancient Demeſne is no Plea. Br. Ancient Demeſne, pl. 3. cites 20 H. 6. 33. ———*And if* Aſſiſe be brought, and *the Lord of Ancient Demeſne be named*, there Ancient Demeſne is no Plea; for no Ancient Demeſne can be in the Hands of the Lord. Ibid.

In *Aſſiſe for a Rent*, Ancient Demeſne of the Land is a good Plea, becauſe that Court has Authority to hold Plea of the Land out of which the Rent iſſues, and therefore a fortiori, of the Rent; Arg. D. 8. a. Trin. 28 H. 8. in pl. 14.

8. In a Writ of Account againſt a Guardian in Socage Ancient Demeſne is a good Plea, becauſe the Tenancy may come in Debate, for the Defendant may ſay, that the Land is held by Knights-Service. 21 Ed. 3. 10. adjudged. Br. Ancient Demeſne, pl. 16. cites S. C. & S. P. accordingly, per tot. Cur.

——— 5 Rep. 105. a. S. P. accordingly, per Cur. —— And ſo [generally, as it ſeems] in Actions of Account, where by common Intendment the Realty ſhall come in Queſtion. 4 Inſt. 270. cap. 58.

9. In a Writ of Admeaſurement of Paſture Ancient Demeſne is a good Plea, for tho' no Land be demanded, yet by this the Common ſhall be admeaſured, and by this the Land will be Frank-Fee. 8 H. 6. 34. Br. Ancient Demeſne, pl. 20. cites S. C. & S. P. by Cottington,

for by the Judgment the Land will be Frank-fee.—Ibid pl. 37. cites S. C. & S. P. by Cottington.

10. In a Partition between Tenants in Common Ancient Demeſne is a good Plea, for tho' this does not demand Land directly, yet upon the Matter he demands it a latere, and ſo the Recovery in this Action will make it Frank-Fee. Tr. 12 Jac. B. between *Grace and Grace*, per Curiam. S. P. and S. C. cited, and adjudg'd a good Plea according to this Caſe of Grace v.

Grace, but becauſe ſeveral Diſcontinuances were found upon the Record, Judgment was given for the Demandant. Raym. 249. Hill. 30 & 31 Car. 2 C. B. Pont v. Pont.

11. In Treſpaſs for trampling his Graſs, Ancient Demeſne is no Plea. 8 H. 6. 34. Br. Ancient Demeſne, pl. 37. cites

S C. but S. P. does not appear there.———Thel. Dig. 114. lib. 10. cap. 24. S. 4. cites S. C. & S. P. accordingly.——S. P. and ſo of *cutting his Trees*. Br. Ancient Demeſne, pl. 7. cites 46 E. 3. 1 ——S. P. by Warberton J. Cro E. 826. in pl. 29.——It is no Plea in Treſpaſs Quare Clauſum fregit; for by common Intendment the Title of the Freehold will not come in Debate 4 Inſt. 270.

This Privilege does not extend *to meer Perſonal Actions*, as *Debt upon a Leaſe*, *Treſpaſs*, *Quare Clauſum fregit*, and the like, in which by common Intendment the Title of the Freehold ſhall not come in Debate. 4 Inſt. 270. cap. 58.

12. In a Writ of Treſpaſs Quare Columbare fregit, & Columbas interfecit, Ancient Demeſne is no Plea. 47 Ed. 3. 22. b.

13. In Treſpaſs contra Pacem, tho' the Realty comes in Debate, yet Ancient Demeſne is no Plea, becauſe they cannot hold Plea in Ancient Demeſne of a Plea contra Pacem. 17 Ed. 3. 52. Fitzh. Ancient Demeſne, pl. 14. cites S. C. but

S. P. does not clearly appear.—— In Treſpaſs Vi & Armis, ſo that the King is to have a Fine, it is holden that Ancient Demeſne is no Plea; by Warburton J. Cro. E. 826. in pl. 29.———S. P. and ſo upon

upon the Statute 5 R. 2 tho' the Freehold comes in Debate, yet Ancient Demeſne is no Plea, and cites 46 E. 3. 1. and 2 H. 7. 17. and the Cauſe is, as one Book ſays, that the Iſſue is upon the Wrong; and the other Book ſays the Court of Ancient Demeſne has no Juriſdiction. Hob. 47. in pl. 53.——S. P. as to the Stat. 5 R. 2 accordingly; for no Land is to be recovered, but only Damages. Br. Ancient Demeſne, pl. 36. cites 2 H. 7. 17. and ſays that 21 E. 4. is accordingly.

Fol. 323.

14. In Detinue for a Charter of Feoffment of certain Land which is Ancient Demeſne, and Count of a Battment in a Town which is Ancient Demeſne, yet Ancient Demeſne ſhall not be any Plea. 3 Ed. 3. Itinere North' Title Ancient Demeſne 22. 43 Ed. 3. Ancient Demeſne 35.

* Orig. is (tanque il avoit ſuis ces Chateux.)—The Words in Fitzh. Execution, pl. 118. S. C. are (tanque que il avoit ſue ſes Chateux par le Statute,) and ſays the Plaintiff had Judgment to recover his Seiſin and his Damages.——2 Inſt. 397. cites S. P. Mich 31 E. 1. Coram Rege Ebor. Ranulp. de Huntingfield's Caſe.——In Aſſiſe brought by *Tenant by Elegit*, Ancient Demeſne is a good Plea. Br. Ancient Demeſne, pl. 33. cites 22 Aſſ. 45.

15. In an Aſſiſe by Tenant by Statute-Merchant, Antient Demeſne is no good Plea, becauſe the Plaintiff does not demand the Freehold, but [to hold the Lands as Chattle for a certain Time] till he hath Satisfaction. 2 Ed. 2. Ancient Demeſne 24.

Note that the *Statute which gives Aſſiſe for Tenant by Elegit ſhall not extend to give it in Ancient Demeſne*, and therefore there does not lie Aſſiſe for Tenant by Elegit, tho' the Sheriff makes Execution there; for it appears elſewhere that the *Sheriff cannot make Execution* in Ancient Demeſne; for he *cannot meddle with the Land*. Br. Parliament, pl. 81. cites 22 Aſſ. 45.——*And* alſo Brooke ſay, it ſeems to him that there is another Reaſon that they cannot have it there, which is, *becauſe all their Actions are by Writ of Right, and ſhall make Proteſtation of what Action he pleaſes, but this ſhall be only of an Action given at Common Law*, and the Elegit and Aſſiſe for Tenant by Elegit is by Statute, with which thoſe who had Conuſance of Pleas before the Statute, or the Sheriff in his Torn, Steward in his Leet, or ſuch like, ſhall not meddle, unleſs the Statute gives them Authority by expreſs Words in thoſe Courts. Nota bene. Ibid.——S. C. cited 5 Rep 105. b. per Cur. accordingly, That where any Intereſt in the Land ſhall be bound, or that the Realty ſhall come into Debate, it is reaſonable that thoſe in Ancient Demeſne, who beſt know to try and determine them, ſhall have Conuſance thereof——S. C. cited Hob. 48. and Hobart Ch. J. ſaid he was of Opinion, that tho' an Aſſiſe could not lie in the King's Court for one that has Execution by Elegit of Land in Ancient Demeſne, yet he may have Aſſiſe in the Court of the Manor by Writ of Right-Cloſe, and Proteſtation to ſue it in the Nature of an Aſſiſe, tho' the Aſſiſe in this Caſe be given by the Statutes.

16. In a Juris Utrum of his free Alms, Ancient Demeſne is not any Plea, for it cannot be Ancient Demeſne and Frankalmoign. 32 Ed. 1. Ancient Demeſne 39.

Br. Ancient Demeſne, pl. 20 cites S.C. and S. P. accordingly by Babbington——Hob. 48. cites S. C. accordingly and for the ſame Reaſon, and adds that the Reaſon thereof is, becauſe the Common Law, being as ancient as their Privilege is, may not endure, that by Pretence of Privileges, there be a Failure of original Right as that Caſe is. But of new Rights or Remedies brought in by Statutes (which are not preſumed to intend the Prejudice it is otherwiſe.)

17. In a Quare Impedit Ancient Demeſne is no Plea, becauſe if it ſhould be granted there ſhould be a Failure of Right, for there they cannot grant a Writ to the Biſhop. 7 H. 6. 35. b.

Waſte was brought againſt Tenant for Life, and the Tenant ſaid that the Lands are Ancient Demeſne; and the Opinion of the whole Court was, that it is a good Plea to the Juriſdiction, becauſe the Plaintiff ſhall recover the Place waſted. Br. Ancient Demeſne, pl. 37. cites 8. H. 6. 34.——Br. Ibid. pl. 20. cites S. C. and 7 H. 6. 35.

18. So in an Action of Waſte, Ancient Demeſne is no Plea, becauſe in Ancient Demeſne they cannot upon the Diſtreſs returned award a Writ to inquire of the Waſte according to the Statute, for the Sheriff ought, by the Statute, to go in Perſon, which cannot be ſupplied by their Officer, and ſo there ſhould be a Failure of Right and the Land ſhall not be Frank-Fee by a Judgment in this Action at the Common Law, becauſe he could not have it within Ancient Demeſne. * 7 H. 6. 35. M. 37 El. B. between *Green and Baker*, by 3 Juſtices, Walmſly doubting thereof. Contra 8 H. 6. 34 by all the Juſtices.

Action

Action of *Waſte upon the Statute does not lie in Ancient Demeſne*, and *if it was brought at the Common Law Ancient Demeſne is a good Plea*; for thoſe are not bound by the Statute. And ſo ſee that Ancient Demeſne is not excepted in the Statute, and yet they are not bound by the Statute. Br. Parliament, pl. 17. cites 8 H. 6. 34. 35.——Br. Parliament, pl 101. cites S. C.

Waſte lies *by Writ of Right* in Ancient Demeſne, and *ſhall have Proceſs at the Common Law*, viz. Diſtreſs infinite. Per Boef and Littleton *quære* inde; for Writ of Waſte was not at the Common Law. Br. Ancient Demeſne, pl. 40. cites 32 H. 6. 25.

In Action of Waſte the Defendant made Defence; and pleaded to the Juriſdiction of the Court, becauſe the Land was Ancient Demeſne, and the Defendant was ruled to plead over, becauſe it is but a Perſonal Action; and per tot. Cur except Walmſley, the Statute extends to Ancient Demeſne; and cites 2 H 7 17. and 21 E. 4. 3. that Ancient Demeſne is no good Plea in an Action on the Statute of Glouceſter. Ow. 24. Paſch 36 Eliz. C B Owen's Caſe.——Hob. 47. in pl. 53. cites 7 & 8 H. 6. that a Writ of Waſte lies not in the King's Court, tho' it be of a Leaſe for Years; and ſays the Reaſon of the Caſe of an Action of Waſte - H. 6 35 and 8 H. 6 34. is, that if a new Action be given by Statute which lies in the King's Courts, and will not lie in Ancient Demeſne, yet if the Action meddles directly with the Poſſeſſion, you ſhall rather loſe your Action than have it in the King's Court to the Prejudice of the Privilege of Ancient Demeſne.

19. Action by *Writ of Right, according to the Cuſtom of the Manor, cannot be brought by the Tenant by Elegit.* The Reaſon ſeems to be inaſmuch as the Elegit is given by the Statute of *Weſtm. 2. cap.* 18. which is after the Cuſtom, which Statute is general, and yet does not bind Ancient Demeſne; and ſo ſee ſeveral Statutes are which are general, and do not except Ancient Demeſne, nor County Palatine, nor the *Cinque Ports*, and yet by the reaſonable Intendment of the Statute thoſe ſhall not extend to them; and the Reaſon alſo is, that Men of thoſe Places do not come to the Parliament as Knights and Burgeſſes, and therefore it ſeems that *Ceſſavit* does not lie in thoſe Places. Quære of *Writ of Meſne with Forejudger*. Br. Parliament, pl. 99. cites 22 Aſſ. 45.

20. Note, that *Land which is Ancient Demeſne cannot be put in Execution* by the Sheriff. Br. Parliament, pl. 99. cites 22 Aſſ. 45.

Lands in Ancient Demeſne were adjudged to be extendable upon a Statute-Staple or Statute-Merchant. Mo. 211. pl. 351. cites it as about 25 Eliz B R. Martin v. Wilks.——Ibid. cites S P. adjudged Hill. 11 Jac. C. B. Rot. 2541. Cox v. Barnesby.——5 Rep. 105. b S P. accordingly per Cur. obiter.——2 Inſt. 397. S. P. cites 7 H. 7. 1. ——4 Inſt. 270. S. P. and that it is the ſame in Elegit; cites 2 E. 2. Execution 118. 15 E. 3. ibid. 62. 8 E. 5. ibid 36. 7 H. 4. 19. 19 H. 6 64.——Brownl. 254. Hill 10 Jac. Coke v. Barnſley, S. P held accordingly, that it is extendable for Debt ——Hob. 47. pl. 53. Cox v. Barnſly, S. C. adjudged accordingly.

21. *Formedon in Deſcender* is given by the Statute, and yet Ancient Demeſne is a good Plea; per Cokain J. But per Martin J. Thoſe of Ancient Demeſne *cannot implead by Action given by the Statute*; for they are not Parties to the making of it, nor to the Election of Knights and Burgeſſes, nor they do not contribute to the Expences of them, ſo that this Action does not lie there, *but they may have Action according to their Cuſtom*; for London has no Action of Waſte by the Statute; but note that they have Action of Waſte in their Huſtings by their Cuſtom. Br. Ancient Demeſne, pl. 20. cites 7 H. 6. 35. and 8 H. 6. 34.

22. *Rediſſeiſin after Diſſeiſin* or Writ of Waſte does not lie in Ancient Demeſne; for they *cannot award Writ* to the Sheriff *to inquire* of Waſte, *nor the Sheriff nor Coroner cannot there inquire of the Rediſſeiſin or After-Diſſeiſin*. Br. Waſte, pl. 141. cites * 23 [32] H. 6. 25. per Boef and Littleton. Br. Ancient Demeſne, pl. 40. cites 32 H. 6. 25. accordingly.

* All the Editions of Brooke are miſprinted (23) for (22;) beſides there is no ſuch Year as 23 in the Year-Book.——4 Inſt. 270. S. P. accordingly as to Rediſſeiſin, becauſe the Proceedings therein is by the Statutes appointed to be made by the Sheriff Aſſumptis ſecum Coronatoribus Comitatus &c. and in Antient Demeſne there are no Coroners; but otherwiſe it is in an Action of Waſte.

23. In *Ejectment* the Defendant pleaded Ancient Demeſne. It was objected on Demurrer that this Action is in Nature of Treſpaſs, and ſo the Plea not good; but adjudged that the Plea is good in Ejectment, becauſe 2 And. 178. pl. 101. Smith v Arden, S. C.

adjudged a good Plea. —Cro. E 826. pl. 29. S. C. and Walmſley and Kingſmill held it a good Plea, becauſe it touches the Realty; but Warburton e contra, becauſe the Action is merely perſonal. Anderſon was abſent, and afterwards the Demurrer was waived, and the Defendant pleaded the General Iſſue.——S. C. cited per Cur. Hob. 47. in pl 53.——S. C cited 2 Roll Rep. 181.——S P. 4 Inſt. 270.——S. P. by 2 Juſtices accordingly, and agreed to by the whole Court. Bulſt 108. Hill. 8 Jac. in a Nota there.——S. P agreed per tot. Cur. but otherwiſe *after Imparlance*. Het. 177. Trin. 7 Car. B R Anon.—Ancient Demeſne is a good Plea in Ejectment; per Cur. Comb. 40. Mich. 2 Jac. 2. B. R. Anon.

cauſe by common Intendment the Right and Title of the Land may come in Queſtion, and in this Action the Plaintiff ſhall recover the Poſſeſſion of the Land, and have Execution by Hab. Fac. Poſſeſſionem. 5 Rep. 105. a. Hill. 43 Eliz. C. B. Alden's Caſe.

And per Skipwith, the Tenant

24. A Man may ſue a Writ of *Warrantia Chartæ* at the Common Law for a Warranty made of Lands in Ancient Demeſne. F. N. B. 135. (K)

ſhall have Warranty againſt the Lord in the Lord's own Court. F. N. B. 135. (K) in the new Notes there (b) cites 16 E. 3. Cauſe a Remover 15. Reg. 12. 30 E. 3. 13.

Lill. Pr. R. Fo. 8. ſays Defendant cannot plead Antient Demeſne without a Rule of Court for that Purpoſe.

25. In Ejectment the Defendant pleaded that it is *Parcel of ſuch a Manor, which is Ancient Demeſne* &c. The Plaintiff replied that the Tenements mention'd are *pleadable at Common Law, abſque hoc* that thoſe Tenements are Parcel de Antiquo Dominico. Demurrer to it, and Judgment for the Defendant. Per Cur. The Traverſe is ill; you ſhould have *traverſed* that the Manor was Antient Demeſne, and that ſhall be try'd by Domeſday Book; or elſe you ſhould have traverſed that thoſe Tenements were held of that Manor. Show. 271. Trin. 2 W. & M. Hopkins v. Pace.

(F) By *Matter ſubſequent.*

* Fitzh. Ancient Demeſne, pl. 10. cites S. C. as to Treſpaſs, but mentions nothing of the Freehold's coming in Debate.

1. IN Treſpaſs, if upon pleading the Freehold comes in Debate, Ancient Demeſne is a good Plea. * 46 Ed. 3. 1. b. Contra † 7 H. 6. 35. b. becauſe then the King will loſe his Fine. Contra ‡ 17 Ed. 3. 52. becauſe the Court there cannot hold Plea of an Action || contra Pacem.

† Br. Ancient Demeſne, pl. 20. cites S. C. but S. P. does not appear there.

‡ Fitzh. Ancient Demeſne, pl. 14. cites S. C. but S. P. does not appear there

|| See (E) pl. 13. and the Notes there.

It is no Plea in an Action of Treſpaſs where the Freehold is to be recovered or brought in Queſtion, by Hobart and Winch. Brownl. 234. Hill. 10 Jac. in Caſe of Coke v. Barnſley.

Fitzh. Ancient Demeſne, pl. 10. cites S. C. but nothing of Common is mentioned there.

2. In Treſpaſs for trampling his Graſs, if the Defendant juſtifies by Force of a Common, and ſo he did it ſine Injuria, Ancient Demeſne is no Plea, becauſe the Concluſion hath made the Iſſue upon the Perſonalty, not upon the Common which touches the Freehold. 46 Ed. 3. 2.

———Br. Ancient Demeſne, pl. 7. cites S. C. but nothing of Common is mentioned there.———Hob. 47. pl. 53. it was urged per Cur. that in Treſpaſs Vi & Armis, or upon the Statute 5 R. 2. tho' the Freehold comes in Debate, yet Ancient Demeſne is no Plea, and cites 46 E. 3. 1. and 2 H. 7. 17. and that the Reaſon is, as one Book ſays, that the Iſſue is upon the Wrong, and that the other Book ſays, the Court of Ancient Demeſne has no Juriſdiction.

(G) *What*

(G) *What Perſon may plead it.* Who *in reſpect of* his *Eſtate.*

1. A Leſſee for Years cannot plead Ancient Demeſne. 41 Ed. 3. 22. b. None ſhall plead Ancient Demeſne but the Tenant of the Franktenement, and not a Leſſee for Years. Fitzh. Ancient Demeſne, pl. 9. cites S. C. —— Br. Ancient Demeſne, pl. 6. cites S. C. but I do not obſerve S P. there.

None ſhall plead Ancient Demeſne *but the Tenant*, and *not the Diſſeiſor*, or the like. Br. Ancient Demeſne, pl 6. cites 41 E. 3. 22. —— Br. Ancient Demeſne, pl. 17. ſays, it ſeems that none ſhall plead it but the Tenant, and cites 21 E. 3. 25. —— Ibid. pl. 46. cites 21 Aſſ. 2.

2. The Lord in an Action againſt him, cannot plead Ancient Demeſne, for it is Frank-fee in his Hands. 41 Ed. 3. 22. 1 Ed. 3. 14. Fitzh. Ancient Demeſne, pl. 9. cites S. C. & S. P. for there it is to defeat the Eſtate and make it Ancient Demeſne again, and he cannot have Writ of Diſcent to make it Ancient Demeſne again where he himſelf is Tenant or Party. —— Br Ancient Demeſne, pl. 6. cites S. C. & S P. —— Ibid. pl. 3. cites 20 H. 6 33. S. P. accordingly. —— The Demeſne Lands of a Manor, and the Manor itſelf, which is called Ancient Demeſne, is pleadable at Common Law; and in the Common Pleas. F. N. B. 11. (M)

3. So in an Action againſt the Lord and others, the Lord cannot plead it, nor the others, becauſe they are joined with him. 41 Ed. 3. 22. Br. Ancient Demeſne, pl. 6. cites S. C.

—— Fitzh. Ancient Demeſne, pl. 9. cites S. C.

4. If the Lord brings an Action againſt the Tenant, Ancient Demeſne is no Plea, for the Action is brought to defeat the Eſtate of the Tenant, and to make it Frank-fee. * 41 Ed. 3. 22. b. Quære, for if the Tenant bars the Demandant by Judgment, peradventure this will make the Land Frank-fee, which ſhall not be againſt the Will of the Tenant, altho' the Lord agrees thereto. 1 Ed. 3. 14. * Br. Ancient Demeſne, pl. 6. cites S. C. & S. P. accordingly, by Belke. —— Fitzh. Ancient Demeſne, pl. 9. cites S. C. & S. P. accordingly.

(H) At what *Time* it may be *pleaded.*

Fol. 324.

1. At the Grand Cape returned the Plaintiff releaſed the Default, Ancient Demeſne is a good Plea. 8 H. 6. 1. In *Præcipe* quod reddat the *Demandant at the Grand Cape releaſed the Default, and counted* againſt the Tenant, and he came and defended the Tort and Force, and demanded Judgment if the Court would take Conuſance; for he ſaid, that the Land is held of one J. as of the Manor of B which is Ancient Demeſne, and the Land pleadable in the Court there by Petit Writ of Right Cloſe Time out of Mind. Br. Ancient Demeſne, pl. 21. cites 8 H. 6. 1.

2. In a Replevin after Deliverance made by the Sheriff, the Defendant in Banco may plead, that the Place where &c. is Ancient Demeſne &c. 30 Ed. 3. 12. b. adjudged.

3. In Formedon the Tenant was not allowed to plead Ancient Demeſne *after the View*. Fitzh. Ancient Demeſne, pl. 12. cites Hill. 50 E. 3. But in *Præcipe* quod reddat, after the View the Tenant ſaid, that the Land is held of the Manor of D which is *Ancient Demeſne*, and *pleadable* &c. Judgment

ment if the Court will take Conuſance, and there it was agreed that he may plead this Plea *after the View*; for it is a Plea which comes upon the View; and ſo ſee a Plea to the Juriſdiction after the View. Br. Ancient Demeſne, pl. 10. cites 50 E. 3. 9.

4. The Prayee in Aid ſhall not plead Ancient Demeſne, becauſe the Tenant has affirmed the Juriſdiction before by the *Aid-Prayer*. Br. Ancient Demeſne, pl. 15 cites 11 H. 4. 85.

Br. Fines, pl. 47. cites 21 E. 3. 20.

5. *Fine* by Tenant in Tail was reverſed by Writ of *Diſceit*. The *Iſſue in Tail is remitted*, and ſhall avoid all Eſtates made by him; for *the Fine is void between the Parties*, but he muſt ſue a *Sci. Fa* againſt any that has a Freehold. Cro. E. 471. [bis] pl. 33. Paſch. 38 Eliz. B. R. Cary v. Dancy.

S. P. in Ejectment, but the Court doubted if good, becauſe ſuch Lands are not impleadable at the Common Law, and therefore it came timely enough when he had not pleaded any other Plea; ſed Curia adviſare vult. Cro. C. 9. pl. 8. Paſch. 1 Car. C. B. Marſhalss Caſe.——Palm. 406. Marſhall v. Allen, S. C. cites it as adjudged Trin. 4. Jac. Clarke v. Lampton, that Ancient Demeſne was no good Plea after Imparlance, but in the principal Caſe Doderidge held, that tho' in other Caſes a Plea to the Juriſdiction is not good after Imparlance, yet it is otherwiſe in Ancient Demeſne, becauſe if Judgment be given in B. R. the Lord will reverſe it by Diſceit, and the Judgment will be voidable; and Jones ſaid that this ſeem'd a reaſonable Opinion.——Lat. 83. S. C. and ſeems taken from Palm.——D. 210. b pl. 27. cites S. C.

6. It is a good Plea in Ejectment, but *not after Imparlance*, agreed by all. Het. 177. Trin. 7 Car. C. B. Anon.

(I) What Act or Thing will make it Frank-fee.

Shewing a Fine levied in the King's Court

1. SOME Books are, generally, that a Fine levied in the King's Court will make it Frank-fee. F. N. B. 13. C. 7 H. 4. 3. b. 28. of the ſame Land, is a good Cauſe to prove the Lands to be Frank-fee. F. N. B. 13. (C) ——[And therefore] a Recovery in the Court of Ancient Demeſne of Lands which were made Frank-fee before by a Fine levied at Common Law was falſified for this Cauſe. Br. Ancient Demeſne, pl. 12. cites 7 H. 4. 3.——And tho' the King be Lord of ſuch Manor, yet ſuch Fine will make it Frank-fee, and he ſhall be put to his Writ of Diſceit as well as a common Perſon. Br Ancient Demeſne, pl. 13. cites 7 H. 4. 27.—— ——If a Fine and Recovery be levied or ſuffered thereof in C. B. this makes the Land Frank-fee ſo long as they ſtand in Force. 4 Inſt. 269, 270. cap. 58.

If a *Fine* be *levied by the Tenant* of Ancient Demeſne, the Nature of the Tenancy was changed for the Time, and the Lord had loſt his Seigniory for the Time the Fine ſtood in Force unrepealed; but yet every other who is to demand by *Title Paramount* ſhall have Action in Ancient Demeſne. Fitzh. Cauſe de Remover Plea, pl. 10. cites Mich 50 E. 3. 24. per Kirton.——Such Tenant ſhall not have the Privilege till the Fine be reverſed; per Clench; Quod fuit conceſſum. 2 Le. 192. Trin. 28 Eliz. in pl. 240.

So if one Party pleads it, the other

2. A Fine with a Grant and Render to the Tenant without Execution will make it Frank-fee. 40 Ed. 3. 4. b. ſhall be compelled to anſwer to it. Br. Ancient Demeſne, pl. 4. cites S. C ——Fitzh. Ancient Demeſne, pl. 8. cites S. C. & S. P. accordingly——F. N. B. 13. (C) in the new Notes there (a) at Pag. 28. of that new Edition, cites S. C. [but miſprinted 40.] and S. P. per Thorp and Thirn.

If a Fine be levied *ſur Conuſance de Droit and Releaſe*, hereby there

3. So a Fine upon a Releaſe with Warranty to the Tenant, will make it Frank-fee, becauſe he is eſtopped to ſay it is Ancient Demeſne againſt the Fine, in which he affirms the Juriſdiction of the Court in which it is levied. 21 Ed. 3. 25. adjudged. is no Tranſmutation of the Poſſeſſion, nor is the Tenancy altered as to the Lord &c (or any Stranger to the Fine) cites 40 E. 3. 4. per Candiſh, but Belk. contra, cites 18 E. 2. Ancient Demeſne 37. but as to the Parties themſelves, the Tenancy is changed by way of Eſtoppel, per Wilby; and ſo it was adjudged; for if ſuch Conuſor brings an Aſſiſe againſt the Conuſee, or e converſo, no Exception of Ancient Demeſne lies. 21 E 3 25. F. N. B. 13. (C) in the new Notes there (a)

And

And therefore if the *Lord* be a *Party*, by ſuch Fine the Tenancy is changed, and alſo he ſhall never have a Writ of Diſceit. F. N. B. 13. (C) in the new Notes there (a) cites 30 E. 3. 13. b. or 17. per Green.

4. A Recovery at the Common Law in an Aſſiſe will make it Frank Fee. 11 H. 4. 86. Br. Ancient Demeſne, pl. 15. cites S.C.

but I do not obſerve S. P there.——Shewing a Recovery had in the King's Court in a Præcipe quod reddat &c. is a good Cauſe to prove the Lands to be Frank Fee. F. N. B. 13. (C)——By a Recovery of Land at Common Law it becomes Frank-Fee for ever; but a Recovery againſt the Tenant is reverſible by the Lord by Writ of Diſceit; and ſuch a Recovery makes it only Frank-Fee Quouſque it continues unreverſed; but where it is reverſed it becomes Ancient Demeſne again. 1 Salk. 57. pl. 2. Hill. 12 W. 3. B. R. Hunt v. Burne.

5. So Fine upon a Releaſe without Warranty will make it Frank-Fee. Dubitatur 40 Ed. 3. 4. b. Fitzh. Ancient Demeſne, pl. 8. cites S. C. accordingly.

——Br. Ancient Demeſne, pl. 4. cites S. C. and S. P. accordingly, and that it is the ſame if it be *upon Render*.

6. If the Tenant levies a Fine in a Writ of Warranty of Charters, this does not make the Land Frank-Fee, becauſe the Land does not paſs by this. 21 Ed. 3. 32. b.

7. If the Tenant levies a Fine of this without any original Writ, yet this will make the Land Frank-Fee till it be reverſed, for this is not void, but only voidable. 26 H. 8. Aſſiſe 13. adjudged.

8. If a Manor of Ancient Demeſne comes to the King, and he aliens the Manor to another, the Tenements held of the Manor continue Ancient Demeſne as they were before, for the King paſſes only the Services of them, but the Demeſnes are Frank-Fee. 21 Ed. 3. 56. * 21 Aſſ. pl. 13. *Br. Ancient Demeſne, pl. 32. cites S.C. accordingly.

9. If the Land comes to the King this makes it Frank-Fee. * 17 Ed. 3. 52. 75. b. 21 Ed. 3. 46. b.
Contra 18 Ed. 3. 19. 21 Ed. 3. 56. † 21 Aſſ. pl. 13. adjudged. * Fitzh. Ancient Demeſne, pl. 14. cites S. C. accordingly.

† Br. Ancient Demeſne, pl. 32. cites S. C. and S. P. accordingly, that the Land of the Tenants coming into the Hands of the King or of the Lord, does not change the Nature of it if he does not make Feoffment thereof.

10. If the Land which is Ancient Demeſne comes to the King, this makes the Land Frank-Fee, and if the King leaſes it for Life, yet it will be Frank-Fee. 11 H. 4. 86. a. b. Br. Ancient Demeſne, pl. 15. cites S.C. and S. P. accordingly.

11. So if he grants it over in Fee rendring Rent, or without Rent, it will be Frank-Fee. * 17 Ed. 3. 52. 75. b. 21 Ed. 3. 46. b. 56. † 21 Aſſ. pl. 13. adjudged. * Fitzh. Ancient Demeſne, pl. 14. cites S.C. and S. P.

ſeems admitted. † Br. Ancient Demeſne, pl. 32. cites S. C. but S. P. does not appear.

12. If the Lord infeoffs another of the Tenancy, this makes the Land Frank-Fee, becauſe the Services are extinguiſhed perpetually. * 41 Ed. 3. 22. b. ‡ 50 Ed. 3. 10. 3 H. 6. 47. 18 Ed. 3. 19. 30 Ed. 3. 12. b. admitted. 19 R. 2. Ancient Demeſne 41. Curia. * Br. Ancient Demeſne, pl. 6. cites S. C. and S. P. by Belke.——Fitzh Ancient Demeſne, pl. 9 cites S. C. and S. P. by Belke. † Fitzh. Ancient Demeſne, pl. 12. cites 50 E. 3. but is a D. P.——Br. Ancient Demeſne, pl. 10. cites S. C. The Tenant pleaded that the Tenements in Demand are not held of the Manor and ſo Frank-Fee Sidenham ſaid this may be true, and yet the Land may be Ancient Demeſne, as by *Feoffment before the Statute, or by Gift in Tail after the Statute* the Donee or Feoffee held of the Donor or Feoffor, and yet the Land is Ancient Demeſne; for it is *held of the Manor by a Meſne* tho' it be *not* held *immediately*; but Clopton e contra, and that *when the Lord cannot call them to his Court* the Ancient Demeſne is gone. Br. Ancient Demeſne, pl. 10. cites 50 E. 3. 9.

|| Fitzh. Ancient Demeſne, pl. 1. cites S. C. but S P. does not appear. ——Br. Ancient Demeſne, cites S. C. but S. P. does not appear.

Fitzh. Avowry, pl. 59. cites Hill. 49 E. 3. S. C.

13. So if he leaſes for Life without Deed. 50 Ed. 3. 24. b.

And Br. Ancient Demeſne, pl. 11. cites 50 E. 3. 24 S. C. but I do not obſerve any thing of its being (without Deed) in either of thoſe Books.——Fitzh. Cauſe de Remover Plea, pl. 10. cites S. C. and S. P.

Fitzh. Ancient Demeſne, pl. 12. cites Hill. 50 E. 3. but

14. So if the Lord releaſes to the Tenant all his Right in the Tenancy, this makes the Land Frank-Fee. 49 Ed. 3. 7. b. 50 Ed. 3. 10.

S. P. does not appear there.——Br. Ancient Demeſne, pl. 10. cites 50 E. 3. 9. S. C. and S. P. accordingly by Clopton, and agreed by Treſilian.

The Caſe was ſued by Th. B. to remove the Favol out of Ancient Demeſne by Charter of the Lord, which will'd, That where the ſaid Th. B. held of him two Houſes and five Rodd of Land in W. in Ancient Demeſne according to the Cuſtom of the Manor, the Lord by Deed of Dedi & Conceſſi & Confirmavi Terras Prædictas to the ſaid Th. B. in Fee, & Quod hanc habeat libertatem quod ipſe & hæred' ſui habeant & teneant prad' Præmiſſa de ſe & Hæred' ſuis per Servic' 7 s. pro omnibus Serviciis, Auxiliis, Finibus, Tallag' Mercat' & omnibus aliis Secularibus demandis ad Communem Legem with Warranty to him and his Heirs to hold as at Common Law, and bore Date Anno 45 E. 3. and the other ſaid that he is a Stranger to this Deed made between the Lord and Tenant, and therefore he is not bound by it, and ſaid that the Land was Ancient Demeſne &c. & non allocatur, but was compelled to anſwer by Award, and then he ſaid that this Land was made to the Seiſin of the Tenant, he then being ſeiſed, and ſo it is only a Confirmation, and yet per Belk. this makes the Land Frank-Fee and pleadable at the Common Law. Brooke ſays, and ſo ſee that a Lord may alter the Tenure by his Confirmation but not the Eſtate of the Tenant, and by him if the Title of the Demandant be elder than the Confirmation, he ſhall ſue in Ancient Demeſne, and if he recovers, the Land ſhall be Ancient Demeſne as at firſt; for the Poſſeſſion, upon which the Confirmation is made, is deſtroy'd, & adjornatur. Br. Ancient Demeſne, pl. 8. cites 49 E. 3. 7.——Br. Confirmation, pl. 5. cites S. C.——Fitzh. Avowry, pl. 59. cites Hill. 49 E. 3. S. C. and S. P. accordingly.——S. P. tho' the Eſtate of the Tenant be not changed, nor any Tranſmutation of Poſſeſſion for the Tenant, yet the Quality of his Eſtate is changed, and ſhall never afterwards be impleaded by a Petit Writ of Droit-Cloſe, and the Land by the Confirmation is diſcharged of the Cuſtoms of the Manor. 9 Rep. 140 a. in Beaumont's Caſe cites 49 E. 3. 7. a. b.

Fol. 325.

* Fitzh. Ancient Demeſne, pl. 12. cites 50. E. 3. but

16. If the Lord grants the Services of a Tenant of a Manor in Ancient Demeſne, and the Tenant attorns, this makes the Tenancy to be Frank-Fee. * 50 Ed. 3. 10. 30 Ed. 3. 13.

S. P. does not appear ——Br. Ancient Demeſne, pl. 10. cites S. C. and S. P. by Treſilian; for his Seigniory is determined.——4 Inſt. 270. cap. 58. S. P.

* Br. Ancient Demeſne, pl. 3. cites S. C. but S. P. does not clearly appear.

17. If the Lord diſſeiſes the Tenant, this makes the Land Frank-Fee againſt him as long as it is in his Hands. * 20 Hen. 6. 33. † F. N. B. 12 E. ‡ 41 Aſſ. 7.

† F. N. B. 12 (E) ‡ Br. Ancient Demeſne, pl. 34. cites S. C. but S. P. exactly does not appear.——Fitzh. Ancient Demeſne, pl. 18. cites S. C. and S. P. ——But if the Tenant recovers againſt the Lord before Feoffment, this makes it Ancient Demeſne again. Br. Ancient Demeſne, pl. 6. cites 41 E. 3 22.——Br. Ancient Demeine, pl. 10. cites 50 E. 4. 9. S. P.——If the Lord diſſeiſes his Tenant and makes a Feoffment, and the Tenant recovers or re-enters, yet the Land is Frank-Fee; for the Seigniory is gone. Br. Ancient Demeſne, pl. 10. cites 50 E. 3. 9.

* Br. Ancient Demeſne, pl. 34. cites S. C & S P. as to the Election of the Tenant, but no

18. But this ſhall not bind the Tenant but at his Election; for he may have a Writ of Right-Cloſe againſt him if he will. F. N. 12 [E.] 30 Ed. 3. 13. * 41 Aſſ. 7.

mention of a Diſſeiſin of the Tenant by the Lord.——

Fitzh.

Fitzh. Ancient Demeſne, pl. 18. cites S. C. & S. P. per Wiche accordingly; but that it is e contra if the Lord be diſſeiſed by the Tenant.——Fitzh. Ancient Demeſne, pl. 9. cites 41 E. 3. 22. S P. by Cheld.

19. That which comes to be Parcel of the Demeſnes of the Manor is Frank-fee; for if the Lord be diſſeiſed thereof he ought to have an Aſſiſe at Common Law. 41 Aſſ. 7. adjudged. Fitzh. Ancient Demeſne, pl. 18. cites

S. C. & S. P.——Br. Ancient Demeſne, pl. 34. cites S. C. & S. P. accordingly.

20. If the Lord infeoffs another of the Tenancy, ſaving the Ancient Services, this makes the Land Frank-fee; for he cannot hold it by the Ancient Services. 19 R. 2. Ancient Demeſne 41.

21. If a Plea be removed into Bank out of an Ancient Demeſne Court, becauſe the Lord will not ſuffer Right to be done there, this makes the Land Frank-fee always. 11 Ed. 3. Cauſe de Remover, Plea 21.

22. If the Lord acknowledges a Fine in a Monſtraverunt, and by this abridges the Services of the Tenant, this makes the Land Frank-fee. 30 Ed. 3. 13. b. Fitzh. Ancient Demeſne, pl. 30. cites S. C. & S. P.

by Fiſh.——A *Releaſe* was made *by Fine* by the Lord to the Tenant of the Land, in E. 2d's Time, *De omnibus Servitiis & Conſuetudinibus ſalvis Servitiis infra ſcriptis*, (*viz.*) *pro Una Virgata Terra 2 s. Rent, Sect. Cur. & Relevic*, and the Releaſe was De Uno Meſuagio & Una Virgata Terræ. The *Cuſtom* of Ancient Demeſne is *extinct* by the Releaſe, but the Rent, Suit of Court, and Relief remain by the Saving, as the Remnant of the Ancient Seigniory. Adjudged. Mo. 143. pl. 285. Mich. 25 & 26 Eliz. Griffith v. Clerk.

23. If the Lord by Deed confirms to the Tenant, to hold freely by the Services before due, this makes the Land Frank-free. 30 Ed. 3. 13. Fitzh. Ancient Demeſne, pl. 30. cites S. C. accordingly.

24. [So] If the Lord confirms to the Tenant to hold freely by certain Services for all Services, this makes the Land Frank-fee, becauſe the Ancient Cuſtoms are changed, and he ſhall hold according to the Deed. Dubitatur 30 Ed. 3. 12. b. Fitzh. Ancient Demeſne, pl. 30. cites S. C. &

S. P.——See pl. 25. the S. P.

25. If the Lord by Deed confirms to the Tenant to hold by certain Services for all Services, this will make the Land Frank-fee, becauſe he is now to hold according to the Deed. 21 Ed. 3. 32. b. Br. Ancient Demeſne, pl. 18. cites S. C. that

26. [So] If the Lord confirms to the Tenant to hold by leſs Services, this will make the Land Frank-fee. 21 Ed. 3. Cauſe de Remover, Plea 18. Plea was removed out of Ancient Demeſne,

becauſe the Tenant claim'd to hold the Lands at Common Law, and at the Day the Parties came, and the Tenant ſet forth a Deed of Confirmation, in Proof &c. that the Lord had confirm'd his Eſtate to hold by certain Services for all Services; and the beſt Opinion was, that the Confirmation does not alter the Eſtate nor Nature of the Land, and thereupon the Tenant pleaded other Plea.——Fitzh. Ancient Demeſne, pl. 30. cites 30 E. 3. 12.

27. If the Lord joins with a Tenant in a Fine, upon a Writ of Warranty of Charters of the Land, this will make the Land Frank-fee. 21 Ed. 3. 32. b.

28. If the Lord by Fine acknowledges the Tenancy to be the Right of the Tenant, Come ceo que il ad de ſon done, this makes the Land Frank-fee. 30 Ed. 3. 13. b. Fitzh. Ancient Demeſne, pl. 30. cites

S. C. & S. P. accordingly, by Greene.

29. If

Fitzh. Antient Demeſne, pl. 30. cites S. C. & S. P. by Finch, where the Warranty is by Deed.

29. If the Lord warrants to the Tenant the Ancient Cuſtoms, this does not make the Lands free. 30 Ed. 3.

30. If the Lord confirms to his Tenant to hold by certain Services for all Services during his Life, this will make the Land Frank-fee during his Life; but this will be Ancient Demeſne again after his Death. 21 Ed. 3. 33.

31. If the Lord makes an Acquittance to the Tenant of the Services for a certain Time, it ſeems this makes the Land Frank-fee for the Time. Contra 30 Ed. 3. 13. b.

* Br. Ancient Demeſne, pl. 38. cites S. C. and ſays it was agreed that Render of [or confeſſing the Action by] the Tenant for Life, does not make the Land to be Frank-fee, unleſs Judgment be given. * The Word in Roll is (Reſpondera l'Action,) but ſeems to be miſprinted for (Rendra) viz. renders the Action.

32. In a Præcipe quod reddat of Land in Ancient Demeſne, if the Tenant * anſwers to the Action, yet the Land is not Frank-fee by this, unleſs Judgment be given thereupon. 2 Ed. 4. 26.

33. A *Writ of Right Cloſe* is brought, and *pendant* the Writ the *Tenant accepts a Fine ſur Conuſance de droit come ceo* &c. yet the Land remains Ancient Demeſne as to that Action, becauſe he has affirmed his Plaint before the Fine; and ſo it was holden. F. N. B. 13. (C) Marg. in the Engliſh Editions, cites 12 H. 7. Rot. 103.

Fol. 326.

(K) [*What Act &c.*] By whom. [*Will make it Frank-fee.*

Br. Ancient Demeſne, pl. 11 cites S. C. but I do not obſerve S. P. there.

1. If the Tenant levies a Fine of the Land, this makes it Frank-fee till the Lord has repealed it by a Writ of Diſceit. 50 Ed. 3. 25.

——Fitzh. Cauſe de Remover Plea, pl. 10. cites S. C. but I do not obſerve S. P. there. ——S. P. per Clench, quod fuit conceſſum. 2 Le. 192. in pl. 240.

See (I) pl. 10, 11. S. P.

2. If the King makes a Feoffment of the Land, this makes it Frank-fee. 2 Ed. 3. 40. b. per Scroop.

See (I) pl. 11, 12. S. P.— This is miſprinted; for there are not ſo many Pages in that Year.

3. [So] if the Lord of a Manor makes a Feoffment of Ancient Demeſne Land, this makes the Land Frank-fee. 2 Ed. 3. 40. b. per Scroop.

(L) [*What Act &c.*] To whom [*will make it*] *Frank-fee.*

1. If the Lord confirms to the Diſſeiſor of the Tenant to hold at Common Law, if the Diſſeiſee re-enters or recovers, the Land ſhall be Ancient Demeſne again. 49 Ed. 3. 9.

2. [So]

2. But in 50 Ed. 3. 10. 25. it is held, if the Lord diſſeiſes the Tenant, and makes a Feoffment, and after the Tenant recovers in Ancient Demeſne, yet the Seigniory is not revived. Fitzh. Ancient Demeſne, pl. 12. cites 50 E. 3. but S. P. does not appear there. ——Br Ancient Demeſne, pl. 10. cites 50 E. 3. 9. S. C. & S. P. accordingly, by Clopton, and agreed by Treſilian.—— Br. Ancient Demeſne, pl. 6. cites 41 E. 3 22. S. P. ——The coming of the Land into the Hands of the Lord does not change the Nature of it, unleſs he makes a Feoffment thereof. Ibid. cites 21 Aſſ. 13.

3. If the Land be made Frank-fee as to thoſe in Poſſeſſion, yet it ſhall not be ſaid to be Frank-fee as to thoſe who claim Paramount this making of it Frank-fee. 50 Ed. 3. 24. b. Fitzh. Avowry, pl. 59. cites 49 E. 3. S. C. and S. P. accordingly, by Perſay.——Br. Ancient Demeſne, pl. 11. cites S. C. & S. P. accordingly.

4. If the King ſeiſes Land in Ancient Demeſne without Title, and aliens it to another to hold of him, if after the Patent be repeal'd, and he, that hath the Right, reſtored to the Land, the Land ſhall be Ancient Demeſne again. 21 Ed. 3. 46. b.

5. If the *Cuſtom* within a Manor of Ancient Demeſne was *that the youngeſt Perſon ſhall inherit* the Land held by the Cuſtom, tho' the *Lord releaſes or confirms to hold by leſs Service*, ſo that he has loſt the Seigniory of Ancient Demeſne, yet becauſe the Nature of the Tenancy is not changed, having Regard to the Nature of the Inheritance, (for the youngeſt Son ſhall have the Lands as he had before) but as againſt the Lord it is changed ſo that it ſhall not be Ancient Demeſne. Fitzh. Avowry, pl. 59. cites Hill. 49 E. 3. by Kirton.

(M) *By whom* it may be *made Frank-fee.*

1. If the Tenant in Ancient Demeſne makes a Feoffment in Fee, and the King confirms it, this ſhall not bind the Lord, as it ſeems, without his Conſent, but he may avoid it. Contra 1 Ed. 3. 5. but Quære.

2. [So] If the Tenant in Ancient Demeſne makes a Feoffment in Fee by Leave of the King, given by Charter, yet this does not make the Land Ancient Demeſne [Frank-fee,] without ſhewing the Charter of Feoffment of the King, or the Lord of the Manor. 2 Ed. 3. 40. b.

(N) *What Perſons* ſhall be *bound by making it Frank-fee.*

1. If Land in Ancient Demeſne held of the King be made Frank-fee by a Fine levied, this will bind till the King avoids it. * 7 H. 4. 29. ‡ 11 H. 4. 86. b. * Br. Ancient Demeſne, pl. 13. cites 7 H. 4. 27. S. C. & S. P. and the King ſhall be put to bring a Writ of Diſceit as well as a common Perſon ‡ Br. Ancient Demeſne, pl. 15. cites 11 H. 4. 85. S. C. ——Br. Diſceit, pl. 37. cites S. C. but not directly S. P. but is, that if the Tenant ſuffers the Land to be recovered at Common Law in a Præcipe quod reddat, and will not plead Ancient Demeſne, the King ſhall have Action of Diſceit.

2. Altho' a *Fine* be *levied by a Diſſeiſor*, yet the *Diſſeiſee*, as it ſeems, *ought to ſue at Common Law, but when he has recovered* the Tenements *they ſhall be Ancient Demeſne again*, cites 3 E. 3. 33. and therefore if in ſuch Caſe Judgment be given in the Court of Ancient Demeſne, and the Recoveror enters, in Treſpaſs brought againſt him for this Entry, he cannot juſtify by Force of the Recovery there, for it was coram non Judice. F. N. B. 13. (C) in the new Notes there (a) in Pag. 28. of that new Edition, cites 7 H. 4. 3. accordingly.

(O) In what Caſes it may be *made Ancient Demeſne again without a Writ of Diſceit.*

1. IF a Fine ſur Render be levied of Land which is Ancient Demeſne, the Claim of the Lord within the Year will not avail to ſave the Nature of the Tenancy, becauſe every Claim ſuppoſes a ſubſequent Action. 1 Ed. 3. 5. 26.

1 Salk. 210. pl. 1. Mich. 9 W. 3. C. B. S.C. but S.P. does not appear. — 3 Salk. 35. S. C. but S. P. does not appear. — Ld. Raym. Rep. 177. S. C. but S. P does not appear.

2. A *Scire Facias* does not lie to reverſe a Fine levied in C. B. of Lands in Ancient Demeſne, but it muſt be by original Writ of Diſceit ſued out of Chancery; for the Lord was not Party to the Record of the Fine, and that Fine was reverſed. 3 Lev. 419. Trin. 7 W. 3. C. B. Zouch v. Thompſon.

(O. 2) Juriſdiction of the Court.

S. P. as to Grand Aſſiſe and Foreign Voucher, and ſo if he *pleads a Foreign Plea*,

1. IF the *Tenant* in Ancient Demeſne *puts himſelf in Grand Aſſiſe in Writ of Right* it ſhall be removed, and yet the Land ſhall remain in Ancient Demeſne as before; for there they *cannot do the Parties Juſtice without permitting Removement*, where they themſelves cannot make Grand Aſſiſe. So of a *Foreign Voucher*. Br. Ancient Demeſne, pl. 35. cites 1 H. 7. 30. per Catesby and Townſend.

which cannot be tried in the Lordſhip there, then a *Superſedeas* ſhall be granted *out of the Chancery*, directed unto the Lord of Ancient Demeſne, or his Bailiffs, if the Writ were directable to the Bailiffs, that they ſhould ſurceaſe &c. and the Party Defendant ſhall ſue his Writ of Warranty of Charter, againſt the Vouchee &c. F. N. B. 13. (G)——The Plea ſhall be removed to be tried, and *afterwards remanded to be adjudged*, 14 H 4 26. And cites 19 H. 6 53. that on a *Foreign Voucher* Day was given to the Party himſelf in C. B to determine his Warranty, and there a Summons ad Warrantizand' iſſued and the Vouchee came and vouch'd over B who enter'd into Warranty and vouched over, cites 5 Ed. 6. Dy. 69. See the Tenant in a *Writ of Right Cloſe* ſued in Nature of a Writ of Right at Common Law, and puts himſelf on the Grand Aſſiſe; and therefore the Plea was removed by Recordare; but it was afterwards remanded by the Court; for by the Cuſtom they may elect a Jury inſtead of the Grand Aſſiſe, Stafford's Caſe Dyer 111. See 1 H. 7. 29. contra. F. N. B. 13. (G) in the New Notes there. (b)

Br. Execution, pl. 26. cites S. C.— Br. Ancient Demeſne, pl. 44. cites S. C.—— After Judg-

2. Where a Man *recovers* Land and Damages *in Aſſiſe in Ancient Demeſne* Court, which is only a Court Baron, there *upon Execution the Bailiff may ſell the Beaſts and deliver the Money* to the Recoveror in Execution of his Damages, notwithſtanding that 4 H. 6. 17. be to the contrary. And per Huls, if a Man recovers Damages in Ancient Demeſne, the Bailiff may make Execution in Land which is Frank-Fee held of the

the Manor, viz. in taking of Beaſts there for the Damages. Br. Court Baron, pl. 3. cites 7 H. 4. 27.

ment in *Ejectment*, for Lands held in Ancient Demeſne a Writ of *Execution was awarded out of B. R. to the Suitors, who returned that* they did not execute the Writ, becauſe *the Land was Frank Fee, as it appear'd to them by a Tranſcript of a Fine to them ſhewn*; but this Return was diſallowed, becauſe the *Parties themſelves had allow'd the Juriſdiction* of the Court at firſt; and this of the Frank-Fee ought to have been pleaded that the other Party might have anſwer'd to it, which he cannot after Judgment. Mo. 451. pl. 615. Paſch. 38 Eliz. Gybon v. Bowyer.

3. In Ancient Demeſne are Frank-Tenants and Cuſtomary-Tenants who held by Copy of Court-Roll, and the *Frank-Tenants ſhall have Monſtraverunt and Writ of Right Cloſe*, and the *Copy-Tenants ſhall have only Plaint in the Baſe Court there*, nota. Br. Ancient Demeſne, pl. 41. cites F. N. B. 11. 12.

Frank-Tenants in Ancient Demeſne *ſhall implead and be impleaded* there *of their Land in the Court of Ancient Demeſne by Writ*, and *Copy-Tenants by Bill*, and not otherwiſe, per Judicium Curiæ. And Hank ſaid it was well debated in Parliament, and agreed there ſimiliter, and yet the Cuſtom of the Manor was that the Copy-Tenants ſhall implead there by Writ; and per tot. Cur. this is contrary to Law, and not allowable; and for this Cauſe a Writ of Falſe Judgment brought in ſuch Caſe of Copyhold was abated by Award; quod nota. Br. Ancient Demeſne, pl. 45. cites 14 H. 4. 33. ——F. N. B. 12. (B) in the New Notes there (a) cites 14 H. 4. 34. and 1 H. 5. 12. and Nat. Brev. 16 ——And ibid (b) ſays Note 14 H. 4. 34. it was adjudged, That if one recovers againſt Tenant by the Verge in Ancient Demeſne by Writ of Right Cloſe, the Tenant ſhall not have a Writ of Falſe Judgment, nor aſſign this for Error, for then he ſhould be reſtored to a Freehold which he never loſt, but always continued in the Lord. But it ſeems the Recovery is void and may be avoided by Plea, cites 1 H. 5. 12. And ſo it is tho' they are Lands at Common Law. 18 H. 6. 28.

4. Note by Boeſe and Littleton, that *Waſte* lies *by Writ of Right* in Ancient Demeſne, and ſhall have *Proceſs in Infinitum*; Quære inde. Br. Tenant per Copie &c. pl. 23.

5. Recordare to remove a Plea out of Ancient Demeſne, which is there without Writ. It was objected that this is not well removed; for Ancient Demeſne cannot hold *Plea of Land without Writ*; but Fitzh. ſaid that they may hold Plea *of Aſſiſe of freſh Force* without Writ and otherwiſe, as they do in Ancient Boroughs, and therefore well removed; Quod quære. Br. Ancient Demeſne, pl. 1. cites 26 H. 8. 4.

6. A *Writ of Right-Cloſe* was directed to the Bailiffs of the Manor, and the *Plaintiff recover'd*. The Tenant brought a Writ of *Falſe Judgment*, and aſſign'd for *Error that the Writ was directed to the Bailiffs*, whereas it appears by the Record that the Court was held before the Suitors and not before the Bailiffs; but the Judgment was affirm'd. 3 Le. 63. pl. 94. Hill. 19 Eliz. C. B. Abrahal v. Nurſe.

Bendl. 279. pl. 287. S. C. and the Pleadings, and ſays that that Error was not allow'd.——S. C. cited Lutw. 714. Arg. and ſays the Judgment was affirm'd upon good Conſideration, tho' the Error aſſign'd was objected as ſtrong as poſſibly it could be.

This Court *is in Nature of a Court Baron* wherein the *Suitors are Judges*, and is *no Court of Record*, for Brevia Clauſa Recordum non habent. 4 Inſt. 269.

Tho' the Writ is directed to the Bailiffs, yet the Suitors are the Judges. F. N. B. 11. (G) in the new Notes there (a) cites Mich. 17 & 18 Eliz. Rot. 1381.

7. The Plaintiff's *Bill* is *to be relieved for Copyhold Lands*, the Defendant doth *demur for that the Lands are Ancient Demeſne* Lands of her Majeſty's Manor of Woodſtock, and there only pleadable, it is order'd a Subpœna ſhall be awarded to the Defendant to make a better Anſwer. Cary's Rep. 122. cites 21 & 22 Eliz. Wilkins v. Gregory.

8. An Action of *Maintenance in the Nature of* an Action of *Treſpaſs* lies in Ancient Demeſne. 2 Inſt. 208.

9. Nota, the *Demandant* in a Writ of Right-Cloſe *cannot remove the Plea* out of the Court of the Lord for any Cauſe, the *Tenant may* remove the ſame *for 7 Cauſes*, viz. 1ſt, for that he *holdeth it ad Communem Legem*, as if a Fine or Recovery be levied or ſuffered thereof in the Court of C. B. this maketh the Land Frank-fee ſo long as they ſtand in Force.

S. P. as to the Demandant, nor can the Tenant remove the Plea out

2dly,

of the Lord's Court, unleſs for Cauſes which prove the Land to be Frank-fee, and not Ancient Demeſne. F. N. B. 13. (B)——— And ibid. in the new Notes there

2dly, if the Land be *not holden of the Manor*, being Ancient Demeſne. 3dly, if the Land be *holden by Knights Service*; for as has been ſaid, the Service of the Plow and Husbandry is the Cauſe of the Privilege. 4thly, if there be *no Suitors, or but one* Suitor; for that the Suitors are Judges, and therefore the Demandant muſt ſue at the Common Law, for that there is a Failer of Juſtice within the Manor. 5thly, if the *Tenant accepts a Releaſe* of his Lord of his Seigniory, *or the Seigniory be otherwiſe extinguiſhed*, by reaſon of the Seiſin of the King, or otherwiſe. 6thly, or if the *Lord diſſeiſes his Tenant, and makes a Feoffment in Fee.* 7thly, if the Lord *grants the Services of his Tenant, and the Tenant attorns.* 4 Inſt. 270.

(a) cites 34 H. 6 35. accordingly, per Cur. But cites 2 E 3 29. contra; but ſays that ibid. 35. ſeems to agree; and cites alſo 3 H. 4 14. where he is but Bailiff he may maintain the Plea, or if he be Party the Parol ſhall be remanded; yet if the Bailiff be Couſin and Heir to the Plaintiff, it is good Cauſe of Removal. Yet ſee 6 H. 4. 1. that he was Bailiff of the Robes to the Plaintiff was held no Cauſe of Removal, per Cur. and therefore remanded, and if the Court does not do right, he is put to his Writ of Falſe Judgment, 12 H. 4. 17. 13 H. 4. 14. Nor is it Cauſe of Removal that the Proceſs there was miſawarded, 9 H. 6. 25. Nor when the Bailiff is Demandant, 11 H. 6. 10. per Cur.

Ancient Demeſne is no Plea in Ejectment for Copyhold Lands.

10. *Franktenements holden of the Manor*, are only pleadable in the Court of the Lord; but *Copyholds*, which are Parcel of the Manor, are pleadable at the Common Law. Admitted. 3 Lev. 405. Mich. 6 W. & M. in C. B. Smith v. Frampton.

Ld. Raym. Rep. 43. Paſch. 7 W. 3. in C. B. Brittel v. Bade. ——1 Salk. 145. pl. 4. Brittle v. Dade, S. C. accordingly.

(O. 3) The Force and Effect of Fines in Ancient Demeſne, and of Fines at Common Law of Ancient Demeſne Lands.

Dal. 12. pl. 21. Paſch. 7 E. 6. S. C. held accordingly by Hales, becauſe this

1. LANDS in Ancient Demeſne, which are *partible* between Heirs Males, are *alien'd by Fine levied at Common Law.* The Queſtion was, whether the Courſe of Inheritance is thereby alter'd, and made deſcendible to the Heir at Common Law. It ſeem'd by the better Opinion that it is not. D. 72. b. pl. 4. Mich. 6 E. 6. Anon.

Cuſtom goes with the Land, and not in reſpect of the Seigniory which is Ancient Demeſne; for if the Lord himſelf purchaſes theſe Lands, his Heirs ſhall inherit together, and yet in his Hands the Land is Frank-fee. But Mountague Ch. J. e contra, and ſaid that it is not like to the Cuſtom of Gavelkind; but Browne J agreed with Hales.

And. 71. pl. 144. Elmes's Caſe, S. C argued, and ſays the Tenant died before Judgment, which thereupon was ſtay'd, and nothing more done.

2. The *Tenant in Tail* of Franktenement in Ancient Demeſne, *levied a Fine* there on a Plea of Covenant ſecundum Conſuetudinem Manerii, which is without Proclamation; and *in a Formedon* there brought the *Tenant pleaded the Fine* to be a Bar to the Tail by the Cuſtom, and Judgment there given accordingly; upon which a Writ of Falſe Judgment was brought, and if the Cuſtom of barring Tails be averrable againſt the Statute de Donis, which is within Memory, was aſſigned for Error. No Judgment was given, but the Reporter adds a Nota, That if the Judgment be reverſed in C. B. the Plaintiff ſhall not have Judgment there to recover Seiſin of the Land which is Ancient Demeſne, but only that he be reſtored to his Action &c. which will be adjudged in the Lord's Court, according to their Cuſtom, which is, that ſuch Fine is a ſufficient Bar to the Tail. D. 373. pl. 13. Mich. 22 & 23 Eliz. Anon.

(P) Diſceit. *Who* ſhall have it.

1. IF a Fine be levied at the Common Law of Land in Ancient Demeſne, the Lord may avoid it by a Writ of Diſceit. 1 Ed. 3. 5. 26. b. Fol. 327.

2. A Termor may have this Writ, and make it Ancient Demeſne again, at leaſt during his Time. 1 Ed. 3. 5. 26. b.

3. *The King* may have a Writ of Diſceit. Br. Ancient Demeſne, pl. 15. cites 11 H. 4. 85.

(P. 2) Diſceit. Againſt whom it lies.

1. WHERE a *Fine* is levied *of Lands in Ancient Demeſne, by which* Fine *divers Remainders are intail'd*, it ſuffices to bring *Writ of Diſceit* to annul this Fine *againſt the Tenant of the Land only*, without naming thoſe in Remainder. Thel. Dig. 48. lib. 5. cap. 17. S. 2. cites Trin. 26 E. 3. 65. Ld. Raym. Rep. 177. S. C.—3 Salk. 35. S. C. reſolved accordingly.

2. Diſceit lies *againſt the Conuſee himſelf as well as againſt the Conuſor*, becauſe he is equally Party to the Fine, and it is the Fine that works a Prejudice to the Lord. 1 Salk. 210. pl. 1. Mich. 9 W. 3. C. B. Zouch v. Thompſon.

3. This Writ lies againſt the *Heir of the Conuſee or Conuſor*; for this is a Real Diſceit, and not like a Perſonal Wrong which dies with the Perſon; for by this the Lord is diſinherited and debarr'd of the Perquiſites ariſing from his Court, which is a permanent Injury in the Realty, and by no means dies with the Perſon of him that did it. 1 Salk. 210. pl. 1. Mich. 9 W. 3. C. B. Zouch v. Thompſon. Ld. Raym. Rep. 177. S. C. & S P. adjudged accordingly.—S C. cited accordingly Lutw. 713.

and ſays it was objected that the Baron and Feme were joint Conuſors, and therefore the Writ being brought only againſt the Heir of the Baron was ill, and that it ſhould have been againſt the Heir of the Feme only. Sed non allocatur, becauſe the Tertenant is the proper Party to this Action, and others, if neceſſary, may be brought in by Sci. Facias; and cites Fitzh. Fines 30.——3 Salk. 35. S. C. accordingly.——3 Lev. 419. Trin. 7 W. 3. C. B. the S. C. but S. P. does not appear.

(Q) Diſceit. *At what Time* it lies.

1. THE Lord may have a Writ of Diſceit as well within the Year after the Fine levied as after. 1 Ed. 3. 5. 26. b.

2. It lies *after* a Fine levied, and *the Money paid to the King*, tho' the Fine be not ingroſs'd. Agreed. Mo. 6. pl. 21. Hill. 3 E. 6. Anon.

3. It lies *after 5 Years after the Fine levied*, becauſe the Fine was Coram non Judice, and merely void. 1 Salk. 210. pl. 1. Mich. 9 W. 3. C. B. Zouch v. Thompſon. And the five Years Non-claim is nothing in this Caſe; for a

Fine may eſtabliſh the Right of another, but cannot eſtabliſh its own Defects. Ibid. and Ld. Raym. Rep. 179. S. C.—— 3 Salk. 35. S. C & S. P. reſolved accordingly.

(R) *What* ſhall be *reverſed.* What makes the Land Frank-fee.

* Fitzh Diſceit, pl. 37. cites S. C. † Fitzh. Diſceit, pl. 44. cites S. C. accordingly.

1. IF a Fine be levied in Bank of Land, of which Parcel is at Common Law, and Part Ancient Demeſne, yet the Fine ſhall be annull'd for that which is Ancient Demeſne. 7 Hen. 4. 44. and ſhall ſtand for the Reſidue. * 17 Ed. 3. 31. b. † 21 Ed. 3. 20. b. adjudged.

——F. N. B. 98. (P) S. P. accordingly ——Ibid. in the new Notes there (a) cites 7 H. 4. 44. 17 E. 3. 31. 21 E. 3. 20.——S. P. where in ſuch Caſe the Lord reverſes the Fine by Writ of Diſceit as to the Lands, which are Ancient Demeſne, it ſhall ſtand for the Reſidue, and *a Mark ſhall be made upon the Fine in Nature of a Cancelling of that which is Ancient Demeſne*, and the Record ſhall ſtand for the Remainder. Kelw. 43. in pl. 10. Paſch. 17 H. 7. by Vavilor.

See Le. 290. pl. 396. and 3 Le. 120. pl. 172. Lee v. Loveday. And ſee Tit. Fines (E. b. 2) pl. 8. in the Notes, and Tit. Fine (L. b) pl. 8.

If there is any *Remainder* limited by the Fine, the Remainder-man ſhall be *ſummoned* to ſhew Cauſe, if they can, why the Fine ſhould not be reverſed. 21 Aſſ. 79. b. pl. 13.——S. P. Br. Diſceit, pl. 21. cites 21 Aſſ. 13.

2. In a Writ of Diſceit to reverſe Fines in Ancient Demeſne, *after Aſſignment the Conuſee ſhall be made a Party.* Vent. 211. per Hale Ch. J. Paſch. 24 Car. 2.

S. C. & S. P. cited as reſolved accordingly, Lutw. 713. Arg.—— 1 Salk. 210. pl. 1. S. C. but S. P. does not appear.—— 3 Salk. 35. S. C. but S. P. does not appear.——3 Lev. 419. S. C. but S. P. does not appear.

3. A Fine levied in C. B. of Lands in Ancient Demeſne, was annull'd on a Writ of Diſceit brought by the Lord. It was inſiſted that tho' it was reverſed as to the Lord, yet it may remain good as to the Tenant; but it was adjudged by the Court, that a Fine may be *reverſed as to Part of the Land, and remain good as to the Reſidue; but* it can *not* be reverſed *in toto as to one Man, and remain good in toto as to another*, which muſt be in this Caſe, if this Fine remains good as to the Tenant, and be reverſed in toto as to the Lord. Ld. Raym. Rep. 179. Hill. 8 & 9 W. 3. Zouch v. Thompſon.

(S) *After* the *Reverſal of that which makes the Land Frank-fee, who ſhall have it.*

* Br. Diſceit, pl. 38. cites S. C. and ſays it was agreed that the Fine ſhould be annull'd againſt the Lord; but Quære if by this it ſhall be avoided between the Parties. † Fitzh. Diſceit, pl. 37. cites S. C. ſays it was awarded to be reverſed in toto, and that it was touch'd, that he who was in the Land by ſuch Render ſhall maintain his Poſſeſſion upon Reverſal of the Fine; for that it was good between the Parties, and that this Judgment of Reverſal ſhall aid him in his Poſſeſſion. ‡ Br. Fines, pl. 36. cites S. C.——Fitzh. Fines, pl. 30. cites S. C. and by Hull, the Fine is void in toto.——4 Inſt. 270. cap. 58. S. P. accordingly.

1. IF a Fine be reverſed in Diſceit, the Conuſor ſhall have it again, becauſe the Fine was void; for that it was Coram non Judice. Contra * 7 H. 4. 44. † 7 Ed. 3. 31. b. Dubitatur ‡ 8 H. 4. 24.

2. If

2. If a Man levies a Fine at Common Law unto another, of Land which is in Ancient Demeſne, the Lord of Ancient Demeſne ſhall have a Writ of Diſceit againſt him, who levied the Fine, and * [him] who is Tenant [and] ſhall avoid the Fine, and there he who ought to give [gave] the Land, ſhall be reſtored unto his Poſſeſſion and Title which he gave by the Fine, becauſe the Fine and Gift thereby is avoided; but if he who levied the Fine has, after the Fine, *releaſed unto him who hath the Poſſeſſion by the Fine* by his Deed, or confirm'd his Eſtate in the Land by his Deed, then it ſeems that he unto whom the Releaſe or Confirmation is made ſhall have and keep the Land, notwithſtanding that the Fine be avoided, becauſe this Releaſe or Confirmation made unto him being in Poſſeſſion, hath made his Eſtate firm and rightful againſt him and his Heirs who releaſed or confirmed. F. N. B. 98. (A)

10 Rep. 50. a. in Lampett's Caſe, cites S. C. and ſays that this Opinion was confirm'd for good Law per tot. Cur. in the principal Caſe; and yet after the Fine levied the Conuſor had not any Right in the Land, but only a Poſſibility of having the Land again, after the Fine reverſed by Writ of Diſceit, to be brought by the Lord of whom the Land was held ——S. C. cited Arg. Lutw. 512

N. B. This Paragraph, as well as others in that moſt excellent Work, are very badly tranſlated; as are likewiſe great Numbers of the Books of Reports; but this here is corrected according to the original French, which otherwiſe was not intelligible, or the Senſe perverted.

* The Engliſh Tranſlations are (he.)

(T) Declaration and Pleadings.

1. IN *Aſſiſe Iſſue* was taken *that the Land was Frank-fee, and not Ancient Demeſne, without any Denial that the Manor of which* &c. *was Antient Demeſne.* Br. Ancient Demeſne, pl. 2. cites 9 Aſſ. 9.

Aſſiſe of Tenements in B. The Defendant pleaded that the Tenements *are Parcel of the Manor of P. which is Ancient Demeſne &c. Judgment of the Writ.* Finch ſaid it is *Frank fee, priſt* by the Aſſiſe; and by the Opinion of the Court it ſhall not be try'd by the Aſſiſe; for *it is not denied but that the Manor is Ancient Demeſne.* Br. Trials, pl. 120. cites 22 Aſſ. 45. ——*By which he ſaid* that thoſe Tenements were *Frank fee Time out of Mind, without ſhewing How* &c. and yet the other was compell'd to anſwer, and were put upon the Country. Ibid.

2. *None who refuſes the Franktenement in Aſſiſe* can plead Ancient Demeſne, and hence it ſeems that *none ſhall plead* Ancient Demeſne *but the Tenant of the Frank-tenement*; per Herle. Br. Ancient Demeſne, pl. 28. cites 9 Aſſ. 2.

3. In *Aſſiſe of Rent againſt two*, the *one pleaded Hors de ſon Fee, as ſeveral Tenant of the Parcel, Judgment if without Specialty*, and *the other as Tenant of the Reſidue ſaid that the Land out of which* &c. *is held of the Manor of D. which is Ancient Demeſne* &c. *Judgment of the Writ* &c. The *Plaintiff ſaid that Frank-fee priſt*, and had the Averment, *without ſaying that they are of other Nature than the Manor itſelf* &c. but it was ſaid that *otherwiſe it had been if the Manor itſelf, or Moiety, third Part, or other Parcel of it, had been in Demand.* Note the Diverſity; and it was ſaid, that * firſt it ſhall be inquired by the Aſſiſe if the Land be Ancient Demeſne or not; for if it be found, all the Writ ſhall abate. Quod nota. Br. Ancient Demeſne, pl. 29. cites 9 Aſſ. 9.

And ſo note that *in Aſſiſe of Rent* Ancient Demeſne of the Land is a good Plea; and ſee Ancient Demeſne tried by Aſſiſe, viz. per Petriam; and therefore not always by the Book of Domeſday; and ſee that the Tenant ſhall conclude Judgment of the Writ, and not Judgment if the Court will take Conuſance; quod *mirum!* Br. Ancient Demeſne, pl. 29. cites 9 Aſſ. 9

* Br. Brief, pl. 265. cites S. C.

4. *None* ſhall plead Ancient Demeſne *but he who is Tenant*, and *not the Diſſeiſor.* Br. Ancient Demeſne, pl. 31. cites 21 Aſſ. 2.

5. *Aſſiſe*

6 *Aſſiſe by Executors of Tenant by Elegit*, the *Tenant ſaid, that the Land was Parcel of the Manor of B. which is Ancient Demeſne*, and the *other ſaid, that the Tenements are and were Frank-fee*, and pleadable at Common Law, and the other awarded to anſwer to it, notwithſtanding that it is not denied, but that it is Parcel of the Manor which is Ancient Demeſne, and by common Pretence this ſhall be as the Manor is, by which *others ſaid that Ancient Demeſne, Priſt*, by Aſſiſe, and if it be found that the Land is Ancient Demeſne, the Writ ſhall abate, and the Executors ſhall recover; for *they cannot have Writ of Right upon the Cuſtom of the Manor for the Feebleneſs of their Eſtate*, but *Quære with Proteſtation* &c. Br. Ancient Demeſne, pl. 33. cites 22 Aſſ. 45.

6. He who alleges Ancient Demeſne *ought to bring in the Record*, and the *Court would not write for it*, but gave Day to the Party at his Peril, and he failed at the Day, and the other Party for his Diſpatch brought it in ſub Pede Sigilli, which teſtified that it was Frank-fee &c. Br. Ancient Demeſne, pl. 23. cites 39 E. 3. 6.

The Demandant cannot ſay that the Land is not Ancient Demeſne, for this is the Concluſion upon the two precedent Propoſitions, viz 1ſt. that the Manor is Ancient Demeſne, and 2dly, that the Land in Demand is Parcel of the Manor, for this Concluſion follows from the Premiſſes, and therefore cannot be denied, per Cur. 11 Rep. 10. b. cites S. C. and 48 E. 3. 11. a. b. ——He ought to plead to the Nature of the Manor that it is not Ancient Demeſne, or that the Land in Demand is not Parcel of it. Le. 333. Arg. cites S. C. but miſprinted, as 21 inſtead of 41 E. 3. 22.

7. In *Præcipe* quod reddat the *Tenant ſaid, that the Land was Parcel of the Manor of D. which is Ancient Demeſne*, and pleaded by Petit Writ of Right, and demanded Judgment if the Court would take Conuſance; Kirton ſaid it is Frank-fee, and it was held that he ſhould not have the Averment, becauſe *he did not deny but that the Manor is Ancient Demeſne*, and that this Land is Parcel, and *therefore ſhall be intended to be of the ſame Nature*, by which the Demandant paſſed over. Br. Ancient Demeſne, pl. 6. cites 41 E. 3. 22.

8. After Ancient Demeſne pleaded the Tenant cannot *diſclaim*; for *by the pleading Ancient Demeſne he has accepted the Tenancy*, and therefore cannot diſclaim after; Quære. Br. Ancient Demeſne, pl. 6. cites 41 E. 3. 22.

9. In *Aſſiſe* of Land, the Defendant ſaid, that the Land is held of the Manor of B. and ſo Parcel, which Manor is Ancient Demeſne, and pleads by Petit Writ of Right Cloſe; Judgment if the Court will take Conuſance. Tank ſaid, the *Plaintiff is Lord of the Manor, and the Land in Plaint is Parcel of the Demeſnes* of the Manor, *and in the Hands of the Tenants at Will, and* that the *Tenant at Will infeoffed the Tenant*, which is Diſſeiſin to the Plaintiff; Judgment if the Court ought not to take Conuſance, and the Aſſiſe awarded, and the Ancient Demeſne no Plea, in as much as that which is in the Hands of the Lord is Frank-fee, and that which is in the Hands of the Tenant is Ancient Demeſne. Br. Ancient Demeſne, pl. 34. cites 41 Aſſ. 7.

10. *Monſtraverunt by three* againſt one, and the *Defendant as to two of them ſaid, that they were his Villeins*, Judgment if they ſhall be anſwered, and *to the third prayed that he aſcertain the Court if the Manor be Ancient Demeſne or not*, and per Cur. this ought to be done at the Prayer of the Defendant, tho' the Tenant does not plead that it is Frank-fee. Br. Ancient Demeſne, pl. 9. cites 49 E. 3. 22.

11. *Aſſiſe againſt ſeveral*, the *one Defendant appeared and accepted the Tenancy, and ſaid, that the Land is held of one E. as of his Manor of D. which is Ancient Demeſne*, and pleadable by Petit Writ of Right Cloſe, Judgment if the Court will take Conuſance; and the *Plaintiff ſaid that the Land is, and always was pleadable at Common Law, abſque hoc that it was pleadable within the ſaid Manor*, upon which the Tenant demurred; Quære of this Pleading; for it ſeems that he *ought to have ſaid that the*

the Land is Frank-fee, and not Ancient Demeſne; but upon the Matter the Opinion of all the Court was, that in as much as the Plaintiff has not deny'd but that the Manor of D. is Ancient Demeſne, and that this Land is held of the Manor, but that it ſhall be taken Ancient Demeſne without ſpecial Matter ſhewn to the contrary, as Unity of Poſſeſſion in the Lord, or Fine levied at Common Law, or the like. Br. Ancient Demeſne, pl. 2. cites 3 H. 6. 47.

12. Where *Rent* is demanded which *iſſues out of Land in Ancient Demeſne and Land Guildable*, there Ancient Demeſne ſhall not be pleaded, per Newton; and per Portington, if Aſſiſe is brought where the Lord of Ancient Demeſne is named, there the Ancient Demeſne is no Plea. Br. Privilege, pl. 7. cites 20 H. 6. 37.

13. He who alleges Ancient Demeſne *ſhall ſay that the Land is held of the Manor* &c. which is Ancient Demeſne, and pleadable by Petit Writ &c. Br. Ancient Demeſne, pl. 25. cites 36 H. 6. 18. per Priſot.

14. *Tenant by Receipt* may, upon his Receipt, plead that the Land is Ancient Demeſne where the Tenant has affirmed it to be Frank-fee by his Render or Confeſſion of the Action; Quod Nota, per Opinionem &c. Br. Ancient Demeſne, pl. 38. cites 2 E. 4. 26.

15. If the *Tenant in Præcipe quod reddat ſays, that the Land is Parcel of the Manor of B. which is Ancient Demeſne* &c. the *other ſhall not ſay that the Land is not Ancient Demeſne*, nor deny the Manor to be Ancient Demeſne, *but* he may ſay *that the Land in Demand is not Parcel* &c. *or that the Manor is Frank-fee*; for the Land demanded *ſhall be intended to be of the Nature of the Manor*; per Finch. Br. Ancient Demeſne, pl. 48.

In Præcipe quod reddat the Tenant pleaded that the Land in Demand is Parcel of the Manor of D. which is Ancient Demeſne, and &c. The Plaintiff replied, that it is Frank-fee. This is not good; for he denies the Concluſion; but he ought to plead to the Nature of the Manor, that it is Not Ancient Demeſne, or that the Land in Demand is not Parcel of it. Le. 333. pl. 467. Arg. cites 21 E. 3. 22.

16. In *Præcipe* quod reddat it is a good Plea *to ſay* that the Land is *Ancient Demeſne without traverſing that it is Frank-fee*, becauſe the Writ is only ſuppoſal. Br. Traverſe per &c. pl. 185. cites 5 H. 7. 11. 12.

17. An Abbot ſu'd a Writ of Right Cloſe in Ancient Demeſne, and *made his Proteſtation to ſue in Nature of a Writ of Right at Common Law*; the *Tenant joined the Miſe upon the mere Right*, and after *ſu'd an Accedas ad Curiam* to the Sheriff of W. *to remove the Record*. The Queſtion was, if this was ſufficient Cauſe of Removal? Afterwards a Procedendo was awarded directed to the Bailiffs. D. 111. pl. 47. Hill. 1 & 2 P. & M. Sir Humphry Stafford's Caſe.

18. Writ of Diſceit ſhall *not abate by Death of the Conuſee*, for this Action is but Treſpaſs in its Nature for to puniſh this Diſceit, and no Land is to be recovered, but only the Fine reverſed. 3 Le. 3. pl. 8. 4 & 5 P. & M. the King v. Dewe. Mo. 13, pl. 49. Hill. 4 & 5 P. & M. S. C.

19. In Diſceit for levying a Fine of a Meſſuage, being Ancient Demeſne, an Exception was taken to the Declaration that it was *de Antiquo Dominico Dominæ Reginæ Angliæ*, whereas it ought to have been *de Antiquo Dominico Dominæ Reginæ Coronæ ſuæ* &c. The Opinion of the Court was, that it was good both ways. 3 Le. 117. 118. pl. 166. Mich. 27 Eliz. C. B. Griffith v. Agard.

20. *Defence* was ruled not neceſſary in *Plea of* Ancient Demeſne. 3 Lev. 182. Trin. 36 Car. 2. C. B. North v. Hoyle.

3 Without Defence it may be refuſed, but is made good by Acceptance. 1 Salk. 21*. Paſch. 4 W. & M. in B. R. Ferrer v. Miller.—— Show. 388. Farrers v. Miller, S. C. adjudged for the Defendant. ——3 Lev. 405. Mich 6 W & M. in C. B. Smith v. Frampton, ſuch Plea was pleaded without Defence, and no Notice was taken of the Want thereof.

Comb. 186. Baker v. Winch, S. C. accordingly.— 12 Mod. 13. Parker v. Winch, S. C. accordingly. And by Holt Ch. J. the laying it in the Declaration to be Part of the Manor, ſhews it not impleadable in the Court of the Manor.

21. In *Ejectment* the Defendant *pleaded* in Abatement, *that the Lands were Parcel of the Manor of Bray, which* Manor *was Ancient Demeſne* held of the Crown; but held naught per tot. Cur. For if the Manor be Ancient Demeſne, and the Lands in Queſtion are Part of the Demeſnes, as it muſt be underſtood they are, then they are impleadable at the Common Law, and not in the Lord's Court; but Lands held of the Manor are impleadable in the Manor Court, and there only; and becauſe he did not plead that the Lands were held of the Manor of Bray, Judgment was Quod reſpondeat ouſter. 1 Salk. 56. pl. 1. Mich 3 W. & M. in B. R. Barker v. Wich.

Comb. 183. Heydon v. Pace, S. C. and per Cur. if he had traverſed that they were Parcel of the Manor, it had been naught; for they might be Frank-fee, tho' held of a Manor in Ancient Demeſne; and they held the Plea good, and Judgment for the Defendant.

22. In Ejectment the Defendant pleaded that the Lands are Parcel of ſuch a Manor, which is Ancient Demeſne. The *Plaintiff replies* that the Tenements are pleadable at the Common Law, *abſque hoc* that they are *Parcel de Antiquo Dominico.* Upon a Demurrer the Defendant had Judgment; for per Cur. the Traverſe was ill; for he *ought to have traverſed that the Manor was Ancient Demeſne*, and that ſhall be tried by Domeſday Book; *or elſe* to have traverſed *that thoſe Tenements were held of that Manor.* Show. 271. Trin. 3 W. & M. Hopkins v. Pace.

Ld. Raym. Rep. 177, 179. S. C. and the ſaying that He was Dominus &c. & adhuc eſt, is well enough. But upon this Point it was adjourn'd to be argued again; and after Argument it was adjudged that the Fine be annull'd.———3 Salk. 35. S. C & S. P. accordingly.———S. C. cited Arg. Lutw. 713. and that it was held that Tenant for Years, Tenant for Life &c. are Domini pro Tempore; but if it was neceſſary to ſhew the Eſtate, the Words Ad Exhæredationem are ſufficient.

23. In Writ of *Diſceit* to reverſe a Fine levied in C. B. of Lands in Ancient Demeſne, the Lord need not *ſhew his Eſtate*; for if he was Dominus pro Tempore, it is enough; and if his Eſtate be ſince determin'd, it muſt be ſhewn on the other Side. 1 Salk. 210. pl. 1. Mich. 9 W. 3. C. B. Zouch v. Thompſon.

* See (A. 2) pl. 4.

24. If you *plead that the Manor of D. is Ancient Demeſne*, you ought to *aver it by the Record of Domeſday*; for that is the Trial of it; *But* if you plead *that ſuch a Place is Parcel of a Manor*, which is Ancient Demeſne, then you ought to *conclude to the Country*; for Parcel or not Parcel is triable per Pais, cites 2 E. 3. 15. b. Thomas de Grenham's Caſe. * But it ſeems that the *other Side may traverſe* its being Ancient Demeſne; and ſo was done between * Saunders and Welch, Paſch. 9 Jac. C. B. Rot. 3165. Per Holt Ch. J. And a Reſpondeas Ouſter was awarded. 1 Salk. 57. pl. 2. Hill. 12 W. 3. B. R. Hunt v. Burn.

2 Lutw. 1144. Mich. 2 Jac. 2. S. C. and Judgment for the Plaintiff.

25. In *Replevin* &c. the Defendant made Cognizance &c. and *juſtified* the Taking *for Toll* in H. Market. The Plaintiff *replied that ſhe is Tenant of the Manor of H. which is Ancient Demeſne*, and that the Tenants of Ancient Demeſne Lands are quit of Toll in all Places &c. Upon Demurrer it was objected that the Plaintiff had not well intitled herſelf to this Privilege, becauſe ſhe only ſets forth that ſhe is Tenant of the ſaid Manor &c. whereas ſhe ſhould have ſaid that ſhe is ſeiſed in Fee of ſuch Lands &c. which ſhe held of T. F. as of his Manor of H. which is Ancient Demeſne; but per Cur. it is *not neceſſary for ſuch Tenants to mention what Eſtates they have*; but it is ſufficient to allege that Homines & Tenentes de Antiquo Dominico ought to be diſcharged of Toll &c. Then it was objected that the Privilege was laid too general; for it was to be diſcharged of Toll in all Places &c. when by Law they are not diſcharged of Toll, but only of ſuch Things which ariſe on their own Lands,

Lands, and which are for the Support and Eaſe of their Families. But per Cur. to be quit of Toll in all Places ſhall be intended of ſuch Things in all Places where he is Tenant. 3 Salk. 36. Savery v. Smith.

26. The *Demeſne Lands and the Manor itſelf*, which is Ancient Demeſne, is pleadable at the Common Law; as a Man ought to ſue his Action for the Manor, and for the Lands, which are Parcel of the Manor, at the Common Law and in C. B. *But* if a Man will ſue *for the Lands which are holden of the Manor, which are in the Hands of a free Tenant who holdeth of the Manor*, he ought to ſue for theſe Lands his Writ of Droit-Cloſe, directed unto the Lord of the Manor, and there he ſhall make his Proteſtation to ſue in that Court the ſame Writ, in the Nature of what Writ he will declare. F N. B. 11. (M)

27. In Ejectment the Defendant pleaded *Ancient Demeſne*. It was moved to ſet aſide the Plea, becauſe there was *no Affidavit to verify it*, whereas the Statute for Amendment of the Law ſays, That no dilatory Plea ſhall be allow'd without it. But per Cur. This *is no dilatory, but only a Plea to the Juriſdiction*, and ſo an Affidavit not neceſſary. Barnard. Rep. in B. R. 7. Mich. 13 Geo. 1. Goodtitle v. Rogers.

For more of Ancient Demeſne in General, ſee **Fines**, (H. b. 3) (H. b. 4) (N. b. 4) **Trial**, and other Proper Titles.

Anglice.

1. 4 *Geo.* 2. *cap.* 20. *S.* 1. ALL *Writs, Proceſs, Pleadings, Rules, Indictments, Records, and all Proceedings in any Courts of Juſtice within England, and the Court of Exchequer in Scotland, ſhall be in the Engliſh Tongue.*

It was mov'd to arreſt Judgment for a *Defect in the Award of the Venire*, which was *in Engliſh*, and follow'd the old Latin Form, (12 *and ſo forth*) for Duodecim &c. and ſo on. Upon ſhewing Cauſe the Court were of Opinion that the Venire was well awarded, the Intent of the Parliament being to tranſlate no more into Engliſh than was before in Latin; but being told the ſame Queſtion was depending in the Court of B. R. the Court enlarged the Rule till next Term. Barnes's Notes in C. B. 158, 159. Hill. 6 Geo. 2. Fray v. Smith.

In Action of *Debt upon a Bond*, the *Alias dict'* was *in the Declaration* put *in Latin, as in the Bond.* It was moved in Arreſt of Judgment, upon the late Act of Parliament, that all Proceedings at Law ſhould be in Engliſh, and obtain'd a Rule Niſi. Afterwards on ſhewing Cauſe, the Court were of Opinion that the Alias dict', if ſet out at all, muſt be ſet out in the ſame Language as in the Deed, and would otherwiſe be erroneous, and diſcharged the Rule. Barnes's Notes in C. B. 160. Trin. 6 & 7 Geo. 2. Church v. Jaſon. —— Rep. of Pract. in C. B. 91. S. C. and the Declaration was held good.

For more of Anglice in General, ſee **Abatement, Amendment**, and other Proper Titles.

* Annuity.

* Annuity is a yearly Payment of a *certain Sum* of Money *granted* to another in Fee for Life, or Years, *charging the Perſon only* of the Grantor. Co. Litt. 144. b. (b)

Fol. 226.

(A) What *Things* may *make it.* What not. [In reſpect of the *Time* when payable.]

1. IF a Parſon grants to me 10 l. every Year, that I ſhall be Reſident within his Pariſh, payable &c. an Annuity lies for this; for this is annual at my Will. 7 H. 6. 19. b.

2. So if a Man grants 20 s. to me every Eaſter-Day that you [I] ſtay with him in his Houſe, if he [I] come at any Day he [I] ſhall have Annuity for this, yet at the Grant it was uncertain whether he [I] would ever come there. 8 H. 6. 7.

An *Abbot*, with the Aſſent of his Convent, *granted to a Man and his Heirs to find one of his Monks to ſay Maſs* &c. every Holy-day in ſuch a Chapel, *and that as often as he ſhould fail* therein that *they would forfeit to him and his Heirs* 5 l. It ſeemed to the Court, that in this Caſe Annuity did not lie for the Heir, becauſe it was not annual; and yet perhaps one may have Writ of Annuity for Rent granted every 2d or 3d Year. But Shelly ſaid, that in this Caſe the Heir ſhall have no other Action than Debt. D. 24. pl. 149. Mich. 28 H. 8. Anon.

3. If a Man grants to me a Rent of 20 l. payable at the End of every 20 Years, although this be not annual, yet an Annuity lies for it. 8 H. 6. 6. b.

(A. 2) The Difference betwixt Annuity and Rent-Charge, or other Rents.

For if a Man *holds Land in one County by Caſtle-guard in another County, or to do other Foreign Services in another*, yet this is good, and ſhall be Rent-Service as above; for otherwiſe the Tenant may be doubly charged, as it ſeems, viz. with Annuity, and with Rent-Charge. Ibid.

1. IF a Man *holds* certain *Land by Rent-Service*, and *pays* the Rent *to his Lord continually in another County than where the Land is*, this ſhall change the Nature of the Rent, and therefore where the Plaintiff would have intitled himſelf to it as to Annuity, he was not ſuffer'd. Br. Rent, pl. 26. cites 36 H. 6. 13.

2. A Man *in Replevin* preſcribed, that the Plaintiff and his Anceſtors, and thoſe whoſe Eſtate &c. have had *Common* in his Land where &c. *and that the Plaintiff and his Anceſtors have uſed to pay* 10 *s. Rent per Annum* to him and his Anceſtors *for the ſame Common*, and ſo *avow'd for the* 10 s. and good, notwithſtanding that he *does not preſcribe that he and his Anceſtors &c. have had the Rent*, but that the other has paid it, and all is one, per Cur. Quod Nota. and this is not Rent but Annuity, for he cannot have Aſſiſe; for he *cannot have Rent out of his own Land*; and yet a good Preſcription, per Cur. but he *ought to allege Seiſin*, per Cur. and ſo ſee Preſcription to *diſtrain in his own Land.* Br. Preſcription, pl. 1. cites 26 H. 8. 5.

3. If

3. If a Man would that another ſhould have a Rent-charge iſſuing out of his Land, but would not that his Perſon be charged in any Manner by a Writ of Annuity, then he may limit ſuch a Clauſe in the end of his Deed, provided always that this preſent Writing, nor any thing therein ſpecified, ſhall any way extend to charge my Perſon by a Writ or an Action of Annuity, but only to charge my Lands and Tenements with the yearly Rent aforeſaid &c. then the Land is charged, and the Perſon of the Grantor diſcharged. Co. Litt. S. 220. The Reaſon is, becauſe the Perſon is not expreſsly charged by ſuch a Grant, but by *Operation of Law*. But Proviſo not to charge the Land is repugnant, per Popham Ch. J. Poph. 87. Hill. 37 Eliz. in Caſe of Fulwood v. Ward.

(B) By what *Words* it may be granted.

1. If a Man grants an Annuity to another and his Heirs, and does not ſay for him and his Heirs, this is determinable by the Death of the Grantor. 2 H. 4. 13. Curia. Fitzh. Annuity, pl. 16. cites S. C. ——S. P. and in ſuch Caſe Annuity lies not againſt the Heir of the Grantor, tho' he has Aſſets. Co. Litt. 144. b.

A Man ought to grant an Annuity *for him and his Heirs*, otherwiſe the Heir ſhall not be charged, nor can it continue after his Death. Contrary of the Grant of a Rent out of Land, or a Grant of Rent whereof he is ſeiſed; Note a Diverſity; for this charges the Land, but an Annuity charges the Perſon only. Br. Charge, pl. 54. cites 21 H. 7. 1. per Butler.

Where a Man *grants an Annuity to J. S. and his Heirs*, this ſhall not ſerve but during the Life of the Grantor, and yet there it is Fee-ſimple determinable upon the Life of a Man. Br. Eſtates, pl. 65. cites 21 H. 7. 4.

But if he had granted it *for him and his Heirs to the other and his Heirs*, it is otherwiſe. *But* of *Grant of Rent out of Land to J. S. and his Heirs*, it is good, for the Land is charged, and in the other Caſe the Perſon is charged, which cannot extend to the Heir without expreſs Words. Br. Ibid.

2. So if a Man grants a Rent in Fee, without ſaying for him and his Heirs, his Heirs cannot be charged in an Annuity. D. 18 El. Co Litt. 144. b. (d) S. P. ——D. 344. b. pl. 2. Mich. 17 & 18 Eliz. S. C. ——to Rep. 128. a. cites S. C. accordingly; for the Time of Election to make it an Annuity is paſt by the Death of the Grantor. ——S. C. cited Hob. 58.——Br. Eſtates, pl. 65. cites 21 H. 7. 4. S. P. accordingly.

3. The ſame Law, though he adds further to the Grant, that he obliges himſelf and his Heirs to warrant the Annuity to the Grantee and his Heirs, for this does not inlarge the Grant. 2 H. 4. 13. Curia. Fitzh. Annuity, pl. 16. cites S. C. accordingly. ——Br. Annuity, pl. 13. cites S. C. & S. P. by Hanke, ond the Court agreed to his Opinion; but Brooke ſays, Quære of this Opinion, becauſe it ſeems it is good Law in a Covenant, Annuity, Obligation or Warranty, but not in a Grant of Rent out of Land, ut videtur.——S. P. per Cur. Pl. C. 457. a.—— But if an Abbot with Conſent of the Covent by Deed with their common Seal grants an Annuity to another in Fee, and does not ſay that he grants it for him and his Succeſſors, and the Abbot dies, and a new Succeſſor is elected, he ſhall be charged with the Annuity, becauſe the Abbot with Conſent of the Covent charges the whole Corporation which continues for ever, and for that Reaſon the Annuity ſhall continue.

4. Aſſiſe of 20 s. *Rent*, the Deed was, *I have granted to B. & Hæredibus ſuis Annuum Reditum 20 s. de Molendino meo de C. percipiend' de me & Hæredibus meis in perpetuum*, and it was awarded that it was iſſuing out of the Mill, and is only an Annuity, and therefore the Aſſiſe lies well. Br. Aſſiſe, pl. 247. (246) cites 22 Aſſ. 66.

5. Annuity was granted *Solvend'* at ſuch and ſuch Feaſts *ſi petatur*. It was a Queſtion if it be due without an actual *Demand*. Palm. 320. Mich. 20 Jac. B. R. Sir William Sands v. Lea. 2 Roll Rep. 264. S. C. adjornatur, and Ibid. 267. Sands v. Leake S. C. the Court divided.

6. An Annuity which charges the Grantor, tho' it be *with Clauſe of Diſtreſs*, not being granted for himſelf and his Heirs *till Election made and a Diſtreſs taken*, is merely perſonal, per tot. Cur. Cro. C. 171. pl. 17. Mich. 5 Car. B. R. in Caſe of Bodvill v. Bodvill.

(C) Upon what Grant or *Conveyance* it lies.

Co. Litt. 144. a. S. P.

1. UPON a Rent created by way of Reſervation no Annuity lies. 1 H. 4. 4.

2. [As] if a Man makes a Feoffment in Fee, reſerving a Rent, no Annuity lies for this, becauſe the Reſervation are the Words of the Feoffor, and no Grant of the Feoffee. Co. Lit. 144.

* Fitzh. Annuity, pl. S. cites S. C. but Br. Annuity, pl. 31. is neither S. C. nor S. P.

3. [So] if a Man before Quia emptores had made a Feoffment, reſerving a Rent-Service, no Annuity lay for this Rent-Service. * 33 H. 6. 34. b. admitted. † 36 H. 6. 13. b. 14. admitted. 33 E. 3. Annuity 52.

nor do I find it in Br. Annuity, ſo that it ſeems to be miſprinted in 1 D. 483. (C) pl. 3. (c)

† Fitzh. Annuity, pl. 10. cites S. C. and Br. Rent, pl. 26. cites S. C. but S. P. does not clearly appear there.

4. [But] if a Man before Quia emptores terrarum had infeoffed another, rendering 20 Marks Rent, and the Feoffee by another Deed had obliged himſelf in 20 Marks, to pay yearly to the Feoffor, (as it ſeems to be intended) for certain Lands which he had of his Feoffment; upon this Deed the Feoffor might have an Annuity, for this had no Reference to the Rent reſerved upon the Feoffment, but was a good Grant, though no Feoffment was made. 33 E. 3. Annuity 52. adjudged.

Fitzh. Aid, pl. 7. cites S. C. and S. P ſeems admitted.—

5. If an Annuity be granted by an Abbot, Prior, or Parſon, by the Ordinance of the Ordinary upon a certain Accord, a Writ of Annuity lies for this. 25 E. 3. 39.

S. P if the Parſon had Quid pro quo, tho' the Ordinance made by the Ordinary was without the Conſent of the Patron. F. N. B. 152. (G)———Co. Litt 343. b. 344. a. S. P. accordingly.

F. N. B. 152. (G) S. P. accordingly.

6. So if it be granted by the Ordinary with the Aſſent of the Parſon and Patron. 8 R. 2. Annuity 53.

Fol. 227.

7. If a Man holds of me by a certain Rent-Service, and grants by a Deed to me, reciting that the ſame Land is held of me by the ſame Rent, and for the greater Surety he binds other Lands to my Diſtreſs, that I may diſtrain in other Lands, I cannot have a Writ of Annuity upon this, becauſe the Condition of the Rent is not changed by this Deed. 33 E. 3 Annuity 52. but Quære.

S. P. agreed by all the Juſtices and Barons at Serjeant's Inn

8. If a Rent be granted for Equality of Partition, no Writ of Annuity lies, becauſe it is of the Nature of the Land deſcended. Co. Lit. 144. b.

Poph. 87. Hill. 37 Eliz.—For a Rent granted *for* Allowance of *Dower* or *Recompence of a Title*, an Annuity does not lie, becauſe it is *in Satisfaction of a Thing real*, and therefore ſhall not fall to a Matter perſonal, but always remains of the ſame Nature as the Thing for which it is given. Poph. 87. Hill. 37 Eliz. agreed by all the Juſtices and Barons at Serjeant's Inn

9. Of

9. Of ſuch a *Rent as may be granted without Deed*, a Writ of Annuity does not lie, tho' it be granted by Deed. Co. Litt. 145. in Principio.

10. A Rent-Charge was granted *out of a Rectory by the Parſon*, who afterwards *reſign'd* the Parſonage. A Writ of Annuity lies againſt the Grantor upon the ſame Grant. Poph. 87. Hill. 37 Eliz. in the Caſe of Fulwood v. Ward, cited by Clark, as reported by Bendlows to have been agreed in C. B. and agreed by ſeveral in the principal Caſe to be Law.

(D) Upon what *Title* it lies.

1. A Writ of Annuity does not lie by Preſcription againſt an Heir, becauſe it cannot be known whether he has any Land by Deſcent from the ſame Anceſtor who firſt granted this. Co. Litt. * 202.

* This is miſprinted, and ſhould be 102. a. (c)——F. N. B. 152. (F) S. P. and for the ſame Reaſon.——Br. Annuity, pl. 45 cites F. N. B. 152. S. P. accordingly, and for the ſame Reaſon.——Br. Annuity, pl. 10. cites 49 E. 3. 5. S. P. accordingly; tho' otherwiſe it is of Annuity by Deed, where Aſſets deſcend to the Heir; per Belk.——Br. Deſcent, pl. 53. cites F. N. B. the S. P. accordingly.—— Fitzh. Annuity, pl. 13. cites Trin. 10 E. 4. 10. S. P. by Danby accordingly.——S. P. admitted Arg. Mod. 200. in pl. 32.

2. A *Parſon of a Church* may be charged in Annuity by Preſcription; quod nota. Br. Annuity, pl. 10. cites 49 E. 3. 5.

3. Annuity *may be preſcrib'd in a Corporation which is determin'd*, and that this Annuity was after granted over to another in Fee. Br. Annuity, pl. 40. cites 22 E. 4. 43.

(E) In what Caſes a *Grant of a Rent* is *void* as a Rent, and yet ſhall be *good as an Annuity*.

1. If the Queen grants a Rent of 20 l. to be received of a certain Sum aſſign'd to her in Part of her Dower, de Magna Cuſtuma London, by the Hands of the Collectors of the ſame Cuſtom, and the Queen hath 1000 l. of the Cuſtom aſſigned to her for Part of her Dower, yet becauſe this cannot enure as a Rent, becauſe one Rent cannot iſſue out of another, ſhe may be charged in an Annuity, becauſe the Grant was Generally of 20 l. de Novo, not limited to the Cuſtom, but only the Receipt limited to that, which cannot alter the Grant. 9 H. 6. 12. adjudged.

The Word to perceive out of &c. is only a Limitation *where the Party ſhall receive it.* Br. Grants, pl. 4. cites S. C—— Br. Annuity, pl. 3. cites 9 H. 6. 12. 53. ſays the Difference taken there is, where it is granted by the Name of Parcel of other Rent &c. and where it is granted to perceive of ſuch a Sum &c. For in the one Caſe, if he has no Rent, the Grant is void; but in the other it is a good Grant to charge the Perſon by the Word (perceive.)——Fitzh Annuity, pl. 5. cites S C. accordingly, and ſame Diverſity taken by Cotton and Marten.—— Br. Grants, pl. 4. cites S. C. and ſame Diverſity accordingly.

2. So in this Caſe, if the Queen had not had any thing of the Cuſtoms in Dower. 9 H. 6. 12.

3. So

Fitzh. Annuity, pl. 4. cites S. C. & S. P. accordingly, by the better Opinion, as Fitzherbert intends it.——Br Annuity, pl. 3 cites S. C.

3. So if a Man hath a Rent of 100 l. and grants an Annuity of 10 l. to be received of him who is to pay the Rent to him, he is chargeable in an Annuity. 9 H. 6 53.

Fitzh. Annuity, pl. 4. cites S. C. & S. P. by Newton, who held this to be a new Annuity, and not a Grant of the ſaid Rent.

4. If a Man grants an Annuity of 10 l. out of his Land in D. and he hath but 10 l. Rent there, yet he is chargeable in an Annuity. 9 H. 6. 53.

Br. Annuity, pl. 3. cites S. C. & S. P. accordingly. —Br. Grants, pl. 4 cites S. C. & S. P. accordingly — —Kelw. 161. b. pl. 1. Mich. 3 H. 8. S. P. per Cur. and cited Trin. 9 H. 6 the Opinion of Marten accordingly.

5. If a Man grants a Rent of 20 l. to be received of 40 l. Rent in D. if he hath no Rent there, yet this is a good Annuity. 9 H. 6. 12. b. because this is a new Rent.

Fitzh. Annuity, pl. 4. cites S. C. & S. P. by Cotton.———Br. Annuity, pl. 4. cites S. C. but S. P. does not appear.

6. So if a Man grants a Rent of 20 l. to be received of his Tenants in D. and he hath no Tenants there, this is a good Annuity. 9 H. 6. 12. b. 53. b.

Br. Grants, pl. 4. cites S. C. & S. P. accordingly. ———If a Man by his Deed granteth a Rent-Charge out of the Manor of Dale, (wherein the Grantor hath nothing) with ſuch *Proviſo that it ſhall not charge his Perſon*, albeit the Repugnancy doth not appear in the Deed, yet the Proviſo takes away the whole Effect of the Grant, and therefore is in Judgment of Law repugnant; for upon the Matter it is but a Grant of Annuity, provided that it ſhall not charge his Perſon. But if a Man by his Deed grants a *Rent Charge out of Land*, * *provided that it ſhall not charge the Land*, albeit the Grantee hath a double Remedy, (as has been ſaid) yet the Proviſo is *repugnant*, becauſe the Land is expreſsly charged with the Rent; but the Writ of Annuity is but implied in the Grant, and therefore that may be reſtrain'd without any Repugnancy, and ſufficient Remedy left for the Grantee; for which Cauſe our Author puts his Caſe of Reſtraint of bringing a Writ of Annuity. Co. Litt. 146. a.

* S. P. accordingly by Popham Ch. J. Poph. 87. Hill. 37 Eliz.

7. So if a Man grants a Rent out of his Manor, and he has no Manor, yet this is a good Annuity. 9 H. 6. 13. 53.

Br. Grants, pl. 4. cites S. C. but S P. exactly does not appear.——D. 344. b. Marg. pl. 2. cites like Point, Hill. 42 Eliz. C. B.———Ow. 3. Paſch. 26 Eliz. ſays S. P. was agreed by the Court.——Goldsb. 30. pl. 1. Mich. 29 Eliz. cites S. P. by Anderſon, and agreed to by the Court in Sellenger's Caſe.

N. covenanted with the Wife of the Plaintiff dum Sola by Indenture, reciting that ſhe was ſeiſed in Fee of certain Lands, and that in Conſideration of a Marriage to be had between the Plaintiff and her Son, did *grant* to the Plaintiff a *Rent-Charge* out of thoſe Lands, *to have after the Death of her Son, and covenanted to pay it* &c. The Defendant *pleaded that ſhe had nothing in the Lands at the Time of the Grant, but that a Stranger was ſeiſed thereof*; and upon Demurrer it was adjudged for the Plaintiff, both becauſe the Defendant is eſtopp'd by the Deed, and that the Covenant extends to it as an Annuity. All. 79. Trin. 24 Car. B. R. Newton & Ux' v. Weeks & Ux.

8. So if a Rent be granted to be received out of an Acre of Land in A. and he has not any Acre there, yet this is a good Annuity. 9 H. 6. 12.

9. If a Man grants an Annuity to be received out of a Bag of Money, this is a good Annuity. 9 H. 6. 12. b.

10. So if he grants an Annuity to be received of J. S a Stranger, theſe Words to be received of J. S. are void, and yet it is a good Annuity; for the firſt Words create the Annuity. 9 H. 6. 53.

11. So

11. So if a Man grants an Annuity to be received out of his Coffers, the laſt Words are void, and the Annuity good. 9 H. 6. 53. S. C. cited per Cur. Hutt. 33.

——In ſuch Caſe Annuity lies. F. N. B. 152. (A)

12. If a Man has 20 s. Rent-Service of ſeveral Tenants, and he reciting this Rent grants an Annuity of 10 s. to receive of the Tenants, (*) this is void as a Rent, becauſe none of the Tenants hold by 10 s. but every one by 12 d. and ſo it is not known who ſhall pay it, nor who ſhall attorn, and therefore it is a good Annuity. 9 H. 6. 12. b. Br. Grants, pl. 4. cites * Fol. 228. S. C. & S. P. accordingly, by Godred.

13. If a Man recites that he has 10 l. Rent of one A. and grants an Annuity of 10 s. percipere of the ſaid Rent, if he has no Rent yet it is a good Annuity. 9 H. 6. 13.

14. [But] if a Man recites, that whereas he has 20 s. Rent iſſuing out of the Manor of D. and grants 10 s. Parcel of the ſaid 20 s. if he has no Rent iſſuing out of the ſaid Manor, he is not chargeable in an Annuity, but the Grant is utterly void, for he intended to paſs the Rent he had there. Kell. 3 H. 8. * 1. * This is fol. 161. b. pl. 1.

15. So if the Grantor had had ſuch Rent iſſuing out of the ſaid Manor, the Perſon of the Grantor could never have been charged upon ſuch Grant. Kell. 3 H. 8 1. Kelw. 161. b. pl. 1. Mich. 3 H. 8.

16. But if a Man recites that he has 20 s. Rent iſſuing out of the Manor of D. and grants 10 s. iſſuing out of the ſaid 20 s. the Grantee may, upon this Grant, charge the Perſon of the Grantor by Writ of Annuity. Kell. 3 H. 8. * 1. * See the Note, at pl. 15.

17. So if a Man recites, that whereas he has 10 l. iſſuing out of the Manor of D. and grants 40 s. to another percipere of the ſaid 10 l. when in Truth he has not any ſuch Rent, yet the Grant is good to charge the Perſon of the Grantor, for the Words (Percipere of the ſaid 10 l.) are more than was neceſſary, becauſe the Grant was ſufficient before. Kell. 3 H. 8. * 1. * See the Note at pl. 15.

18. If a Man grants an Annuity to another Solvend' out of the clear Gains of Allom Mines, in a Writ of Annuity it is no Plea for the Defendant to ſay that there were not any clear Gains, for the Grant charges the Perſon, and the reſt is idle. Hobart's Reports, Caſe 317. between *Smith and Boucher*, adjudged. Trin. 17 Jac. B. Hob 248. pl 319. S. C. —Hutt. 33. S. C. adjudged for the Plaintiff.

19. If a Man has 100 l. de Magna Cuſtuma London, and he grants 20 l. of the 100 l. it is void, and if it be not void, yet becauſe the Intent appears to paſs only Part of the 100 l. and not to make a new Grant of 20 l. his Perſon is not chargeable. * 19 H. 6. 12. A. B. agrees. * This is miſprinted, and ſhould be 9 H. 6. a. b.

20. If a Man has a Rent of 20 s. of one Tenant, and he reciting this, grants 10 s. of his Rent, if the Tenant attorns, this is a good Grant of the Rent, but if he does not attorn it is void, but whether he attorns or not, yet the Perſon of the Grantor is not chargeable in an Annuity. 9 H. 6. 13. 53. 9 H. 6 53. if the Tenant attorns. Fitzh. Annuity, pl. 5. cites S. C — Br. Grants, pl. 4 cites, S. C.

21. If a Man recites how he has 20 l. Rent, and grants 10 l. of the ſame Rent, if he has no Rent his Perſon ſhall not be charged, becauſe he intended to paſs what he had as a Rent, and not to make a new Rent. 9 H. 6. 12. 53. Br. Grants, pl. 4 cites S. C. & S. P. accordingly —— Fitzh. Annuity, pl. 5. cites S. C. and S. P. accordingly, by Marten and Cotton.

22. If a Rent-charge is granted to A. for Years, and after Arrearages incur, and A. dies during the Years, the Executors of A. may not have a Writ of Annuity for the Arrearages incurr'd in the Life of the Teſtator, becauſe the Annuity does yet continue. Mich. 22 Baron and Feme (D. a) pl. 5. S. C. but not S. P. —

But if a Man grants a *Rent-charge out of* certain *Lands* to another *for Life with a Proviſo that it ſhall not charge his Perſon*, and the Rent is behind, the *Grantee dieth*; the *Executors of the Grantee ſhall have* an Action of *Debt* againſt the Grantor, and charge his Perſon for the Arrearages in the Life of the Grantee, becauſe the Executors have no other Remedy againſt the Grantor for the Arrearages, for diſtrain they cannot, becauſe the Eſtate in the Rent is determined, and the Proviſo cannot leave the Executors without Remedy. Co. Litt. 146. b——— Pending Writ of Annuity the Term expired, and it was the clear Opinion of the whole Court, that the Plaintiff could not have Judgment, which in this Writ is Quod querens recuperet Annuitatem prædictam, and now there is not any Annuity in being. 2 Le. 51. pl. 68. Trin. 29 Eliz. B. R. Backhouſe v. Spencer. [* Quære if this ſhould not be (may have) leaving out the Word (not) in the Original, becauſe it is ſaid that the Annuity is ſtill continuing]——But when an Annuity determines, tho' it be pending a Writ of Annuity, the Writ fails for ever, becauſe no like Action can be maintained for the Arrearages only, but for the Annuity and Arrears Co. Litt. 285. Jac. B. R. between *Carew and Burgen* upon a Demurrer, per Curiam.

(F) At what *Time* it lies.

S. P. accordingly, if he *makes his Plaint*; but the purchaſing a Writ of Annuity, and Entry of it in Court of Record, or an Aſſiſe, is no Determination of the Election, becauſe a *Stranger may purchaſe a Writ* in the Name of the Grantee, and enter it of Record; but his appearing determines his Election. Co. Litt. 145. (a)(1)

1. If the Grantee of a Rent brings an Aſſiſe for it, he ſhall never after have a Writ of Annuity, becauſe by the bringing of an Aſſiſe he has elected it to be a Rent. 18 E. 3. 7. b.

2. Writ of Annuity does not lie *after the Grant determined by Judgment or otherwiſe*; but Debt. F. N. B. 152. (C) in the new Notes there (a) cites 16 E. 3. Annuity 22. 15 H. 7. 1.

3. If the Annuity *determines pending the Writ*, it abates. F. N. B. 152. (C) in the new Notes there (a) cites 16 E. 3. Annuity 22.

4. When the Rent is extinguiſhed by his *Purchaſe of Part of the Land*, he ſhall never have a Writ of Annuity, becauſe it was by the Grant a Rent-charge, and he hath diſcharged the Land of the Rent-charge by *his own Act*, by Purchaſe of Part; and therefore he cannot by Writ of Annuity diſcharge the Land of the Diſtreſs. Co. Litt 148. a.

As if Tenant for another Man's Life, by his Deed *grants a Rent-charge* to one *for* 21 *Years*, and *Ceſty que Vie dies*, the Rent-charge is determined, and yet the Grantee may have, during the Years, a Writ of Annuity for the Arrearages incurr'd after the Death of Ceſty que Vie, becauſe the Rent-charge did determine by the *Act of God*, and by the *Curſe of Law*, Actus Legis nulli facit Injuriam. Co. Litt. 148. a.

5. *But* if the Rent-charge be determin'd by the *Act of God or the Law*, yet the Grantee may have a Writ of Annuity; for Actus Legis nulli facit Injuriam. Co. Litt. 148. a.

* 2 And. 2. in Caſe of Fulwood v. Ward, S. C. cited, and ibid. 4. denied.——S. C. cited, and denied to be Law, in the S. C. of Fulwood v. Ward. Poph. 86.

6. The like Law is, if the *Land out of which* the Rent-charge is granted be *recover'd by an elder Title*, and thereby the Rent-charge is avoided, yet the Grantee ſhall have a Writ of Annuity, for that the Rent-charge is avoided by the Courſe of Law; and ſo it was holden in Ward's Caſe, againſt an Opinion obiter in * 9 H. 6. 42. a. Co. Litt. 148. a.

7. The Plaintiff declared upon a *Grant* of an Annuity *for* Term of *Years*, and *pending the Action the Term expired*. The Court held clearly that the Plaintiff could not have Judgment; for the Judgment in this Writ is Quod querens recuperet Annuitatem ſuam, whereas now there is no

no Annuity in Being. 2 Le. 51. pl. 68. Trin. 29 Eliz. B. R. Backhouſe v. Spencer.

8. W. *Leſſee for Years, determinable on the Life of P.* by Writing *granted an Annuity* of 10 l. a Year out of the Premiſſes *for 15 Years, with Clauſe of Diſtreſs.* P. died in 3 Years. The Grantee brought Writ of Annuity in C. B. for the Arrearages after his Death, and the Caſe for Difficulty was argued at Serjeant's-Inn before all the Juſtices and Barons, and they all, except Walmſley, Fenner and Owen, agreed that the Plaintiff ought to have Judgment; for the Law gives him an Election at the Beginning to have it a Rent or an Annuity, which ſhall not be taken from him but by his own Act or Folly; and Judgment in C. B. accordingly. Poph. 86. pl. 2. Hill. 37 Eliz. B. R. Fulwood v. Ward. Mo. 301. pl. 450. S. C. adjudged accordingly. —2 And. 1. pl. 1. S. C. adjudged accordingly.—S. C. cited 2 Rep 36. b. ſays that the Act of God, viz. the Death of P. by which the Rent-charge was determin'd, was no Determination of the Annuity.

(F. 2) In what Caſes the Grantee has Election to make it a Rent or Annuity.

1. IF the Grantee brings an *Aſſiſe* for the Rent, and *makes his Plaint*, he ſhall never after bring a Writ of Annuity. Co. Litt. 145.

2. An *Avowry in Court of Record*, which is in Nature of an Action, is a Determination of his Election before any Judgment given. Co. Litt. 145. b.

3. If a Rent-charge be *granted to A. and B.* and their Heirs, and *A. diſtrains* the Beaſts of the Grantor, and he ſues a Replevin, A. *avows for himſelf, and makes Conuſance for B.* A. dies, and B. ſurvives. B. ſhall not have a Writ of Annuity; for in that Caſe the Election and Avowry for the Rent of A. barrs B. of any Election to make it an Annuity, albeit he aſſented not to the Avowry. Co. Litt. 146.

4. The Grantee hath Election to bring a Writ of Annuity, and charge the Perſon only to make it Perſonal, or to diſtrain upon the Land, and to make it Real. Co. Litt. 144. b.

5. Of ſuch a *Rent as may be granted without Deed*, a Writ of Annuity does not lie, though it be granted by Deed. Co. Litt. 145. a. at the Top.

6. If Grantee of a Rent-charge *takes Leaſe* of the Land *for 2 Years*, he ſhall never after the 2 Years ended have Election to make this an Annuity. D. 140. a. pl. 40. Marg. cites Mich. 43 & 44 Eliz. per Walmſley J.

7. *Purchaſe of the Land* by the Grantee of the Rent-charge *before Election made* will diſcharge the Land. D. 140. pl. 40. cites Litt. Where a Grantee *purchaſes Parcel of the Land charged*, he has excluded himſelf of his Election by his own Act; by the Ch. Juſtices and Ch. Baron, and ſeveral other Juſtices and Barons at Serjeant's Inn. Poph. 86. Hill. 37 Eliz. in Caſe of Fulwood v. Ward.

8. *Releaſe of all Annuities before Election* made, will diſcharge the Land alſo. D. 140. pl. 40. Hill. 3 & 4 P. & M.

9. A. grants a Rent-charge to B. which is paid to him, and then B. grants it over to C. and the Tenant of the Land *attorns*; now C. ſhall not have Election to make this an Annuity, but ought to take it as a Rent-charge. Goldsb. 83. pl. 1. Paſch. 30 Eliz. Anon.

10. If a *Termor for 2 Years grants* a Rent-charge *in Fee*, this, as to the Land, is but a Rent-charge for 2 Years, and if he *avows upon it on the Determi-*

Determination of the Term, the Rent is gone; but by way of Annuity it remains for ever, if it be granted for him and his Heirs, and Aſſets deſcend from the Grantor; per Popham Ch. J. Poph. 87. Hill. 37 Eliz. B. R. in Caſe of Fulwood v. Ward.

11. Neither the Preſumption of Law, nor the *expreſs Grant as a Rent*, ſhall take away from the Grantee the Benefit of his Election, where no Default was in him; but that upon his Election he may make it to be otherwiſe, as Ab Initio; per omnes J. And per Popham Ch. J. therefore if a *Rent-charge be granted in Tail*, the Grantee may bring a Writ of Annuity, and thereby prejudice his Iſſue, becauſe then it ſhall not be taken to be an Intail, but as a *Fee-ſimple conditional* Ab Initio. Poph. 87. Hill. 37 Eliz. B. R. Fulwood v. Ward.

See (F. 2)

(F. 3) What ſhall determine Grantee's Power of Election to make it a Rent or Annuity.

1. IF a Man has *Annuity with Clauſe of Diſtreſs*, and *he diſtrains*, yet he may have Writ of Annuity after if he has not avowed in Court of Record. Br. Annuity, pl. 36. cites 10 E. 4. 10. per Choke.

2. If a Man *grants a Rent-charge to a Man and his Heirs*, and dies, and his *Wife brings* a Writ of *Dower* againſt the Heir, and *the Heir, in bar of her Dower, claims the ſame to be an Annuity, and no Rent-charge*, yet the Wife ſhall recover her Dower, for he cannot determine his Election by claim, but by ſuing of a Writ of Annuity, neither can the Heir have, after the Endowment, an Annuity for the two Parts, for that ſhould not be according to the Deed of Grant, for either *the whole muſt be a Rent-charge or* the whole an *Annuity*. Co. Litt. 144. b.

3. This Determination of the Election of the Grantee muſt be *by Action or Suit in Court of Record*, for albeit the Grantee diſtrains, yet he may bring a Writ of Annuity and diſcharge the Land. Co. Litt. 145.

4. If the *Grantee* brings a Writ of Annuity, and at the Return thereof *appears and counts*, this is a Determination of an Election in Court of Record, albeit he proceeds no further. Co. Litt. 145.

5. The *purchaſing of a Writ of Annuity*, and Entry of it in Court of Record, or of an Aſſiſe, is no Determination of the Election, becauſe a Stranger may purchaſe a Writ in the Name of the Grantee, and enter it of Record; but *if the Grantee appear* thereunto &c. then this amounts to a Determination of his Election, as has been ſaid. Co. Litt. 145.

6. Where the *Rent-charge* is *apportioned by Act in Law*, the Writ of Annuity fails; for if the Grantee ſhould bring a Writ of Annuity, he muſt ground it upon the Grant by Deed, and then he muſt bring it for the whole. Co. Litt. 150. a.

Fin. in the Folio Edition, 17. b. cites S. C. and in the Svo. Edition, 68. ſays, that the Grantee had Judgment to recover in the Writ of Annuity,

7. A Man granted a Rent-charge by Deed out of his Lands, without ſaying Pro ſe & Hæredibus ſuis, and died. The Grantee brought Annuity and counted upon the Deed, and the Heir appeared and imparled to the next Term. The Plaintiff diſcontinued his Suit, and diſtrained for the Rent. The Heir pleaded the Matter above. But upon Demurrer the whole Court held the Diſtreſs good and lawful, becauſe the Perſon of the Heir was not bound nor charged by any Word in the Deed, and conſequently no Election remained in the Grantee after the Grantor's Death to make it Annuity or Rent-charge; ſo that tho' the Proceſs in the Writ of Annuity had proceeded to Judgment, (as Littleton ſpeaks)

yet

yet this would not discharge the Land in this Case. D. 344. b. pl. 2. Mich. 17 & 18 Eliz. Anon. and yet shall distrain afterwards,

but this is not exactly agreeable to the Original in D. which is as above. ——— Co. Litt. 145. a. cites Litt. S. 219. where he says, that if the Grantee recovers by Writ of Annuity, then the Land is discharged of the Distress, which Ld Coke observes, is putting the Case very surely upon a Recovery in a Writ of Annuity; but if the Grantee brings Annuity, and at the Return thereof appears and counts, this is a Determination of his Election in Court of Record, albeit he never proceeds any further. —— And per Popham, Poph. 87. S. P. and the Heir shall never be charged, yet if the Grantee had taken it as a Rent-charge the Land had been charged with it in Perpetuity.

One that had nothing granted a Rent-charge, for which he avow'd in Replevin, yet it was agreed that he might bring Annuity, because there was no Election. D. 344. b. Marg. pl. 2. cites Hill. 42. C. B. Anon.

8. If *Feoffee on Condition grants a Rent-charge, and presently breaks the Condition, whereupon the Feoffor re-enters*, the Feoffee shall be charged by Writ of Annuity; for it would be against all Reason that he by his own Act, without any Folly of the Grantee, shall exclude the Grantee of his Election which the Law gives at the Beginning; by the Ch. Justices and Ch. B. and other Justices and Barons. Poph. 86. Hill. 37 Eliz. at Serjeant's Inn, in Case of Fulwood v. Ward.

9. If a *Disseisor grants a Rent-charge to the Disseisee* out of the Land which he had by the Disseisin, if the *Disseisee re-enters before a Writ of Annuity brought*, the Annuity is gone; for this was his own Act. By the Ch. Justices and Ch. B and other Justices and Barons at Serjeant's Inn. Poph. 86, 87. Hill. 37 Eliz. in Case of Fulwood v. Ward.

(F. 4) Charged. How. Jointly or severally.

1. IF the Grant be *Obligamus nos & utrumque nostrum*, the Grantee may have a Writ of Annuity against either of them, but he shall have but one Satisfaction. Co. Litt. 144. b.

2. *Grant by two* of 20 l. per Ann. to A. tho' the Persons are several, yet A. shall have but one Writ of Annuity. Co. Litt. 144. b.

3. If *A.* be *seised of* Lands *in Fee*, and *he and B. grant* a Rent-charge to one in Fee, this Prima facie is the Grant of A. and the Confirmation of B. but yet the Grantee may have a Writ of Annuity *against both*. Co. Litt. 144. b.

4. A. and B. *Jointenants of* Land in Fee, by their Deed *grant a Rent-charge* out of those Lands, *provided that the Grantee shall not charge the Person of A.* in this Case, if the Grantee bring a Writ of Annuity he must charge the Person of B. only. Co. Litt. 146. b.

(F. 5) What shall determine or suspend an Annuity.

1. IN Assise Annuity of 10 Marks was granted *till the Grantee was advanced to a competent Benefice*, and they *were at Issue of the Value of the Benefice tendered and refused*, viz. that it is *not worth* 10 l. &c. and the other e contra where the *Annuity was of* 10 *Marks*; and it was said, that if he had accepted the Benefice it had extinguished the Annuity of What- If A (a Layman) *has the Nomination* to a benefice, *and B. the Presentation*, and B.

grants an Annuity to C a Clerk, until he be advanced to a Benefice *by B.* if afterward the Church become void, and C. *is nominated to B. to be preſented over, and A. does ſo accordingly*, and upon this *B is admitted*, inſtituted, *and inducted*, yet the Annuity ſhall not ceaſe, for that the Grantee was not thereunto preferred by the Grantor, altho' he preſented him. Dod. of Adv. 65, 66. Lect. 12.

whatever Value the Benefice had been; the reaſon ſeems to be becauſe the Acceptance proves that the Grantee took it as competent. Br Annuity, pl. 30. cites 10 Aſſ. 4.

* S P. For *he is not bound to travel*; for a Man may notify his Caſe to him, and he may give his Counſel where he is, without going to the Party. *But* Annuity granted for Life *pro Auxilio & Conſilio habendo*, and the *Defendant ſaid that the Plaintiff is a Phyſician, and that the Defendant was ill, and ſent J. S. to him for his Counſel and Aid, and the Plaintiff would not counſel nor aid him*, Judgment ſi Actio, and the Opinion is, that it is an Extinguiſhment of the Annuity; for a *Phyſician ought to go to the Patient to counſel him*; for the *Patient cannot come to him*. Note a Diverſity. Br. Annuity, pl. 7. cites 41 E. 3. 6. 19.

2. A Man granted Annuity to J. N. *pro Conſilio impenſo & impendendo*. He required Counſel, and *the other refuſed*. The Annuity is extinct; for it is a Condition in Law &c. * But he is *not bound to counſel him but in a Place where he finds* J. N. but J. N. *is not bound to go or ride* to any Place *to give Counſel*; and if he *promiſes him to come to B. to counſel him, and does not come*, yet this is no Bar in Writ of Annuity; for it is a bare Promiſe. Br. Annuity, pl. 18. cites 21 E. 3. 7.——And ſuch another Caſe and Judgment 8 H. 6. 23. Ibid.

3. *But* there it is agreed, that *if the Grantee grants by the ſame Deed that he will go with him to ſuch Place* &c. then, if he does not, he ſhall forfeit the Annuity; per Straunge. *Quære* inde; for *it is a Grant, and not a Condition*; but the Words were *pro qua quidem Conceſſione* & Donatione, he granted to come to the Place to counſel him &c. Br. Annuity, pl. 18. cites 21 E. 3. 7.

4. Annuity *by the Prior* of T. *againſt the Parſon* of D. The *Defendant ſaid that H. was ſeiſed of the Advowſon, and granted it to W. Predeceſſor of the Plaintiff, and after he purchaſed the Church in proprios Uſus*, and held a good Plea. The Reaſon ſeems to be inaſmuch as the Appropriation made Unity of Poſſeſſion, and ſo extinct. Br. Annuity, pl. 14 cites 2 H. 4. 16.

5. If an *Annuity* be granted *pro Homagio & Servitio*, and the *Grantor diſclaims in the Services in Writ of Annuity*, the Annuity ceaſes; per Rickhil J. Br. Extinguiſhment, pl. 37. cites 7 H. 4. 16.

6. If I grant an Annuity to *J. S. to keep my Park*, and after the *Game is kill'd in his Default*, this is an Extinguiſhment of the Annuity. Br. Annuity, pl. 49. cites 5 E. 4. 5.

Br. Double Plea, pl. 100. cites S. C.

7. Annuity granted *ſo long as the Grantee ſhould be Benevolens, Proferens & Amicabilis to the Grantor*; there, if the Grantee labours to put the Grantor out of Service, where he has 4 Marks Fee per Ann. it is a Forfeiture of the Annuity. Br. Annuity, pl. 35. cites 7 E. 4. 16.

8. Where a *Vicarage is charged* with an Annuity, it ſhall not be ſuſpended by the *Entry of him who has the Annuity in the Vicarage*; for the Glebe is not charged, but the Perſon of the Vicar. Br. Grants, pl. 56. cites 21 H. 7. 1.

9. If an Annuity be *granted pro Decimis* &c. if the Grantee be unjuſtly *diſturb'd of the Tithes*, the Annuity ceaſes; and ſo it is if Annuity be granted *pro Conſilio*, and the Grantee *refuſe* to give Counſel, the Annuity ceaſes. Co. Litt. 204. a.

Mo. 522. pl. 689. S. C. but S. P. does not appear.

10. A. granted *Annuity* to be paid at A.'s Houſe *on Requeſt*, at the four uſual Feaſts in the Year. If no Requeſt be made at any of the Feaſts, yet the Annuity is not loſt; for by the Grant it is a Duty, and the Limitation to be paid at the 4 Feaſts is a Limitation of the Payment, and if it were not a Duty the Requeſt is not material; per tot. Cur. Cro. E. 721. pl. 49. Mich. 41 & 42 Eliz. C. B. Thomſon v. Butler.

(F. 6) Where

(F. 6) In what Caſes an Annuity may be granted over.

1. IN Annuity the Plaintiff *counted that J. Biſhop of E. was ſeiſed of the Annuity, and granted it to* 2, and for the Arrearages they counted &c. Per Belk. This is only a Perſonal Action, which cannot be granted over no more than Debt; but per Thorpe, Annuity is inheritable, therefore it may be aſſign'd over. Quære; for it was not admitted. Br. Annuity, pl. 8. cites 41 E. 3. 27.

2. In Debt, where a Man has *Annuity to him and his Heirs*, he may grant it for Term of Life, or otherwiſe; per Aſcue, quod nemo negavit. Quod quære; for *it is not in a manner, but a Choſe en Action.* Br. Annuity, pl. 19. cites 19 H. 6. 42.

3. If a Man has an *Annuity by general Grant or* by *Preſcription, he* may grant it over, tho' it be in a manner a Choſe en Action. Br. Annuity, pl. 37. cites 21 E. 4. 20. Per Catesby J.

4. It was doubted whether he who has Annuity *in Fee* may grant it over; for it is a Choſe en Action. But by others it is Inheritance, and therefore may well be granted over, and this without Attornment; for this charges the Perſon, and yet the Defendant was charged as Parſon of a Church. Br. Annuity, pl. 39. cites 21 E. 4. 83.

5. An Annuity was granted by the Parſon of B. pro Conſilio ante tunc impenſo habend' & recipiend' to the ſaid G. and his Aſſigns. Debt was brought by the Aſſignee of the Grantee. All the Juſtices held the Grant good, and that Debt lies by the Aſſignee. Mo. 5. pl. 18. Trin. 3 E. 6. Baker v. Brooke.

Ibid. ſays, Nota it was pro Conſilio impenſo, and not impendendo —— D. 65. a. pl. 1. S. C. ſays it was pro Conſilio impenſo, and that it was much doubted, and argued at the Bar, and that it was moved that it lay not for the Grantee, becauſe it appears by the Count that the firſt Grantee was ſeiſed thereof in his Demeſne as of Franktenement, by which he made his Election to take it as a Rent ſeck; for it was not granted out of the Rectory of B. And the Reporter ſays Quære bene; becauſe no Judgment is enter'd on the Roll.——Dal. 5. pl. 10. Anon. but is the S. C. tho' he ſtates the Grant to be pro bono Conſilio impoſterum impendendo; but ſays (as likewiſe Mo. 5. 6. does) that the Parties came to an Agreement; but the Court declared that they were agreed that the Grant was good. —— And D. 65. in Marg ſays that Bendloe reports that the Juſtices held the Count good, and that their Opinion was that the Plaintiff ought to recover.

6. Annuity was granted by the Parſon of B. upon a Grant of an Annuity made by him of 40 l. *pro bono Conſilio ſuo impoſterum impenſo* [impendendo] for the Life of the Grantor. The Court agreed that this Annuity might be granted over. Het. 80. 81. Hill. 3 Car. C. B. Gerrard v. Boden.

Annuity granted pro Conſilio impendendo, is not grantable over. Br. Annuity, pl. 37. cites 21 E. 4. 20. per Catesby.——A Man granted a Rent out of certain Lands *pro Conſilio impenſo & impendendo*, To have and to hold to him and his Aſſigns for Term of his Life, payable at four Feaſts in the Year; and upon Default of Payment *upon Demand*, it ſhould be lawful for him to diſtrain. The Grantee granted the Rent over. The Aſſignee, *after one of the Days*, demanded the Rent, and diſtrain'd, and the Diſtreſs adjudged lawful. Co. Litt. 144. a.

(F. 7) What Action muſt be brought for the Annuity or Arrears.

1. IF Rent be granted *out of Land in two Counties*, Aſſiſe does not lie but Writ of Annuity. Br. Rents, pl. 22. cites 17 E. 2.

2. If Annuity be *granted to one for Homage and Services*, and Writ of Annuity is brought, and the *Defendant diſclaims in the Services*, the Annuity ſhall ceaſe imperpetuum, but of the Arrears before the Diſclaimer the Plaintiff ſhall have Writ of Debt, and no Annuity, for the Annuity is extinguiſhed by the Diſclaimer. Br. Annuity. pl. 16. cites 7 H. 4. 16.

3. Where a *Plea goes to all, and to the Extinguiſhment of the Annuity*, *Debt* will lie *of the Arrearages before*, and not Writ of Annuity. Br. Annuity, pl. 20. cites 19 H. 6. 54.

4. If a Man *grants an Annuity*, and *after grants by another Deed, that if it be Arrear he may diſtrain in ſuch Lands*, there he may diſtrain, and yet ſhall not have Aſſiſe, for the Annuity remains ſicut Prius. Br. Aſſiſe, pl. 489. cites 32 H. 6. 27. per Littleton.

Contra now by the Statute of 23 H. 8. 14. Quod Nota ; by Brooke. Ibid.

5. In Annuity the *Sheriff returned Nihil*, and was compelled to amend his Return, for no ſuch Proceſs as Capias did lie in Annuity then. Br. Annuity, pl. 5. cites 33 H. 6. 43.

Br. Deux Plees, pl. 22. cites S. C

6. Tho' Annuity *pro Conſilio* be *determined by Refuſal*, yet Debt lies of the Arrears before, and this Action is Debt, but in Action of Annuity, there the Refuſal goes to all of this Nature of Action ; Nota Difference in Annuity, and e contra in Debt upon Arrears of Annuity. Br. Annuity, pl 28. cites 39 H. 6. 22.

7. If Annuity be *granted for Life of J. N.* and the Grantee brings Writ of Annuity, and *J. N. dies pending the Writ*, the Action is determined, and the Party ſhall have Writ of *Debt of the Arrears*. Br. Annuity, pl. 22. cites 14 H. 7. 31. & 15. H. 7. 1. per Brian.

S. P. and ſo where it is granted *pur auter Vie.* Br. Dette, pl. 203. cites S. C.

8. In Annuity the Plaintiff counted upon a Grant Anno 18 H. 6. for 11 Years, and found for the Plaintiff, and becauſe *it appeared by the Count*, and the Time, *that the Annuity is expired*, ſo that he *ought to have Writ of Debt* for the Arrears, therefore per tot. Cur. he ſhall not have Judgment ; and there it was taken for clear Law, that if the Annuity determines before the Writ purchaſed, or pending the Writ, there the Writ of Annuity is gone ; Quod Nota. Br. Annuity, pl. 6. cites 34 H. 6. 20.

If a Man has Annuity *for Term of Years*, he ſhall have Writ of *Annuity as long as the Annuity continues*, and *after* this is ended he ſhall have *Debt of the Arrears*, per Vaviſor, Davers, and Fineux. Br. Annuity, pl. 32. cites 9 H 7. 16.——Br. Dette, pl. 144. cites 9 H. 7. 17. S. C.——Br. Annuity, pl. 29. cites 39 H. 6. 28. that Annuity lies, and not Debt, ſo long as the Term continues.——S. C. cited by Williams J. Bulſt. 152. Trin. 9 Jac. and held accordingly.

9. Where a Man *grants an Annuity to J. S. during the Life of the Grantor*, and the Annuity is *Arrear*, and the *Grantor dies*, the Grantee himſelf ſhall have Action of Debt of the Arrears of the Annuity, becauſe the Annuity is determined. Contra when the Annuity continues, as it ſeems. Br. Dette, pl. 191. cites Vet. N. B.

And ſo Action of *Debt* lies of the Annuity when the Annuity continues, and it ſhall be *in the Detinet* where Writ of Annuity is in the Debet. Br. Annuity, pl. 46. cites Old Nat. Brev.

10. *Executors* ſhall have Writ of Debt of the Arrearages of Annuity incurr'd in the Time of the Teſtator. Br. Annuity, pl. 46. cites Vet. N. B.

11. An

11. An Annuity was *granted to a Woman for Life, who* afterwards *married, and* Arrears being due, ſhe *died*, ſo that the Annuity was determined. Adjudged that her *Husband might have* an Action of *Debt at Common Law*; for an Annuity is more than a Choſe en Action; for it may be granted over. Ow. 3. Paſch. 26 Eliz. Anon.

(F. 8) Pleadings. Declaration.

1. RENT was *granted to T. Quintin* by his 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.

2. *Annuity againſt the Parſon of E.* the *Plaintiff counted that he and his Predeceſſors*, Time out of Mind *have been ſeiſed* of the ſaid Annuity of 40 s. per Ann. *by the Hands of A. late Vicar of E. and of his Predeceſſors Vicars Time out of Mind, and that King E. 3. when a Vicar died, preſented one J. as Parſon, who was inſtituted and inducted, and all his Predeceſſors after him as Parſon, and alſo this Defendant, and that he has been ſeiſed* of the Annuity *by the Hands of the ſaid Parſons till the Defendant withdrew it*, and the Count awarded good; for he ſhall be taken now *as Parſon*, and not as Vicar, ſo that the Writ ſhall *not* be brought againſt him *as Vicar*; Quod Nota per Judicium; For it is agreed, that tho' there are Vicars and Parſons (as are in divers Churches) and ſeveral Patrons, yet when one is preſented as Parſon he ſhall be taken as Parſon. Br. Annuity, pl. 44. cites 11 H. 6. 18.

3. The Plaintiff may count *by Preſcription* in Writ of Annuity *if it commences before Time of Memory, by Compoſition, Fine, or Patent of the King*. Br. Annuity, pl. 21. (bis) cites 19 H. 6. 74.

4. *Debt* upon Arrears *of Annuity till he was promoted to a competent Benefice*, and *ſhewed that ſuch a Day he took Feme*, and for the Arrears due before, he brought the Action, Choke demanded Judgment of the Count, for *this Act changes the Action of Annuity into Debt*, and therefore ought to ſhew Place, and by the beſt Opinion for this Default the Count is not good. Br. Count, pl. 26. cites 35 H. 6. 50.

5. Annuity brought againſt the Prior of M. in Southwark was Præcipe &c. quod reddat 10 *l. or* 4 *Gowns*, which are Arrear of a certain annual Rent of 5 Marks, or one Gown &c. and the Writ held good notwithſtanding it was in the Disjunctive with (or). Br. Annuity, pl. 33. cites L. 5. E. 4. 6.

6. *Debt upon Arrears of* Annuity, and *counted of a Grant out of the Manor of D.* and *did not ſhew where the Manor is*, and yet well, becauſe the *Action is founded upon the Deed*, and not upon the Land. Br. Count, pl. 92. cites 7 E. 4. 26.

7. In Annuity the *Writ was* 10 *l.* 7 *s.* and *in the Count the* 7 *s. was omitted*. The Plaintiff recovered, and it was reverſed by Error; for it is no Miſpriſion; for the Count is by the Party, and not by the Clerk. Quod nota. Br. Annuity, pl. 24. cites 9 E. 4. 51. Br. Amendment, pl. 49. cites S. C.

8. Annuity of 10 l. granted to him *pro Servitio impenſo & impendendo*, and *did not count that he had continued in his Service*. Per Brian, There is a *Diverſity* where an Annuity is *granted to be an Officer certain*, as Parker or Bailiff, *and* where it is *general pro Servitio* &c. For in the Caſe of Special Service he ſhall allege the Continuance in the Bailiwick and Parkerſhip; Br. Annuity, pl. 38 cites S. C. & S. P. accordingly.

ſhip; for he knows what Service he ſhall do, and in the other Caſe he does not know till the Defendant commands him, and order'd him to anſwer. Note the Diverſity. Br. Count, pl. 72. cites 21 E. 4. 49.

In Annuity *by Preſcription againſt a Parſon Impariſonee*, Per Jenour, if the *Seiſin* be *alleged before the Appropriation*, the Plaintiff ought to *allege the Appropriation*; and e contra where the Seiſin is after the Appropriation, which Fitzherbert affirm'd. Br. Annuity, pl. 2. cites 27 H. 8. 5.

9. Where *a Parſonage* has been *charged with Annuity*, *which is afterwards appropriated* to a Prior, there, in Action againſt the Prior, *mention ſhall be made that he charges him as Parſon for doubt of double Charge*, and the *Defendant may plead this to the Writ*. Br. Annuity, pl. 40. cites 22 E. 4. 43.

As a Man *grants that when J. N. has infeoffed him of* 4 *Acres* of Land, *he ſhall have Annuity of* 10 l. *per Ann.* there he *ought to count that he has infeoff'd him of* 4 *Acres* &c. per all the Juſtices. Ibid.

10. If Annuity be *granted for Life of J. N.* and the Grantee brings Writ of Annuity, and *J. N. dies pending the Writ*, the Action is determined, and the Party ſhall have Writ of Debt of the Arrears, and the Count good, tho' the Plaintiff *did not ſhew the Condition*; for it is *againſt him*; *but where* the Condition *gives Advantage to him*, and makes the Thing to commence, there he ſhall ſhew it. Br. Annuity, pl. 22. cites 14 H. 7. 31. and 15 H. 7. 1.

But where in Debt upon *Bond for Payment* of an Annuity *on Lady-Day, or within* 20 *Days after*, The Plaintiff aſſign'd the Breach in not paying the Annuity at Lady-Day. It was moved in Arreſt that *the Original was brought* 8 Apr. and he alleged the Breach to be at Lady-Day laſt, which was *within the* 20 *Days*, and ſo the Action brought before he had Cauſe of Action; and the Court held it an apparent Fault. Cro. E. 565. pl. 29. Paſch. 39 Eliz. C. B. Blunden's Caſe.

11. A *Grant* was of an Annuity *for* 2 *Years*, *payable at Mich. or* 16 *Days after*. In Debt the Plaintiff *declared that it was in Arrear at Mich. & adhuc in arreco exiſtit.* The Defendant demurr'd, for that it is *not averr'd that it was arrear* 16 *Days after Mich.* Sed non allocatur; for it being alleged that Adhuc a retro exiſtit, which is long after the 16 Days, it is well enough. Cro. E. 268. pl. 3. Hill. 34 Eliz. B. R. Brown v. Pendlebury.

S. C. & S. P. accordingly, that the Concluſion does not make the Count vitious; for the Writ of Annuity and the Count in it, is of Rent as Rent; and the Annuity and the Receipt of the Annuity is mainoral, & quaſi in Demeſne. Adjudged and affirmed in Error. Jenk. 326. pl 46. and ſays that many Precedents are accordingly.

12. A. granted a Rent-charge to B.—B. brought a Writ of Annuity, and *counts* of a Rent-charge granted to him, and concludes, by Force of which *he was ſeiſed in his Demeſne as of Freehold*. Adjudged upon a Writ of Error, and in Affirmance of the Judgment, that this is only a Miſtake of the Law, and does not vitiate the Declaration, which is good, and that this is no Election to have this as a Rent-charge. 2 Bulſt. 148. Mich. 11 Jac. Sprint v. Hicks.

* This ſhould be D. 65. pl. 1. The ſame Objection was taken; and the Reporter ſays Quære bene, becauſe no Judgment is enter'd on the Roll. Brook's Caſe ——— Mo. 5 pl 18. Baker v. Brooke, S. C. but this Point of the Count does not appear. ——— Dal. 5. pl. 10. S. C but S P. of the Count does not appear. ——— Bendl. 34. pl. 55. S. C. & S. P. and all the Court held the Count good, and that the Plaintiff ought to recover; but the Parties had before compromiſed the Matter between themſelves.

† This ſhould be 221. b. pl. 19.

13. In Annuity the Plaintiff declared of a Grant for his Life by Deed, *virtute cujus ſeiſitus fuit in Dominico ſuo ut de libero Tenemento.* It was objected that this proves it a Rent-charge, and no Annuity, and ſo had made it his Election to have it as a Rent-charge; and cited * D. 61. 3 E. 6. and † 220. 5 Eliz. Sed non allocatur; for being an Annuity for Life, tho' no Rent-charge, ſuch Count is good; and tho' Bendloſe took ſuch Exception in 3 E. 6. yet the Court notwithſtanding reſolved for the Plaintiff. Cro. C. 170. pl. 17. Mich. 5 Car. B. R. Bodvell v. Bodvell.

(F. 9) Proceedings and Pleadings.

1. *Annuity by one Parſon againſt another Parſon*, if the *Plaintiff recovers*, and the *Defendant dies*, the Plaintiff ſhall have *Scire Facias againſt the Succeſſor*, and there Riens Arrear is no Plea, nor it is no Plea that the Plaintiff has levied it, but he *may ſay that the Plaintiff has levied it by Fieri Facias*, and the other e contra, and ſo to Iſſue, *but Rien Arrear is no Plea againſt the Record without ſhewing Specialty, tho' the Annuity was by Preſcription*; For the Judgment to recover it is a Record; Quod Nota. Br. Scire Facias, pl. 198. cites 44 E. 3. 18.

And ſee 46 E. 3. 5. that in Scire Facias upon Recovery of an Annuity, Riens Arrear is no Plea.

Payment or Nihil debet is no Plea in Debt upon Arrears of Annuity contrary to the Specialty, *but Levied by Diſtreſs in the Manor of D. in the ſame County charged* to the Diſtreſs in the Deed of Annuity, with this Concluſion, *And ſo Nihil debet*, is a good Plea, but not Levied by Diſtreſs only, becauſe the Manor is in the ſame County. Br. Dette, pl. 114. cites 9 E. 4. 48. 53 ——Br. Annuity, pl. 23. cites 9 E. 4. 53.

2. In Writ of Annuity, if the *Defendant made Default after Appearance*, *Diſtreſs* ſhall iſſue *ad Audiendum Judicium ſuum*; per tot. Cur. Br. Annuity, pl. 11. cites 2 H. 4. 1. but cites 6 R. 2. contra.

Br. Proceſs, pl. 27. cites S. C.

3. In Annuity, *Releaſe of all Actions Ratione Debiti, Compoti ſeu alterius cujuſcunque Contractus* is no Plea, where the Plaintiff *counts by Preſcription*; for it may be before Time of Memory. Br. Annuity, pl. 42. cites 12 R. 2. and Fitzh. Releaſe 29.

Debt upon Arrears of Annuity. The Plaintiff declar'd of Annuity *granted* to him *by Deed for* Term of 10 *Years* &c. The *Defendant pleaded a Releaſe of the Plaintiff of all Actions Perſonal after the Grant of the Annuity, and before the Day of Payment of it*; and it was awarded by the Juſtices, that it is no Bar but for the Arrears due before the Releaſe, and not for Arrears due after the Releaſe; for theſe are not in Action, nor due till the Day of Payment of them. *Contra of Obligation of Day of Payment to come*; for there Action does not lie till all the Days are paſs'd, and yet a Releaſe there is a Bar pro toto; for upon Obligation the Sum is a Duty immediately, but there Day of Payment is appointed to come; but upon Annuity nothing is due till the Day of Payment. Note a Difference. Br. Annuity, pl. 34. cites L. 5 E. 4 40.——And after the ſame Year, Fo. 42. it was awarded that the Plaintiff recover the Arrears due after the Releaſe, for the Cauſe aforeſaid. Ibid.

4. In Annuity the Defendant came *at the Diſtreſs*, and *ſaid that he had been at all Times ready* &c. *and yet is*, and no Plea at the Diſtreſs. Br. Annuity, pl. 12. cites 2 H. 4. 3.

5. Annuity by the Heir of the Grantee againſt the Heir of the Grantor, who *pleaded* Releaſe of all Actions and Exactions Perſonal, and it was doubted if a *Releaſe of Actions Perſonal* be a Bar in Writ of Annuity, becauſe a Man ſhall only recover the Annuity and the Arrearages before the Writ purchaſed, and pending the Writ in Writ of Annuity. Quære &c. But Hank. ſaw the Deed, and *the Annuity was granted out of certain Land* in H. and *was not granted for him and his Heirs*, and ſo none is bound by it but the Grantor himſelf, and not his Heirs for him, *notwithſtanding that he and his Heirs grant the Annuity to the Grantee and his Heirs*; for Warranty cannot amend an Eſtate, and the Court agreed to the Opinion of Hank. by which the Plaintiff ſaid no more of this. But Brooke makes a *Quære* of this Opinion; for it ſeems that this is *good Law in a Covenant, Annuity, Obligation, or Warranty*, but *not in a Grant of Rent out of Land*, as it ſeems. Br. Annuity, pl. 13. cites 2 H. 4. 13.

6. Annuity upon a Grant made *till* he was *promoted to a competent Benefice*, and *declared of Arrears for* 4 *Years*. The Defendant *pleaded Acquittance for* 2 *Years*, and to the reſt *that he preſented him to ſuch a competent Benefice, and he refuſed*. The *Plaintiff ſaid that he at the Time was but of* 22 *Years of Age*, and not of 24 Years, and born *at K. in the County of N.* and

and that the Law of the Church is, that none ſhall take Benefice of Cure before 24 Years of Age, and this was the Vicarage of D. and Benefice with Cure, and of the Acquittance he was diſcharged; for this Plea goes to all, and to the Extinguiſhment of the Annuity, and then Debt will lie of the Arrears before, and not Writ of Annuity. Port. ſaid he was of the Age of 24 at the Time of the Preſentation, priſt. Yelverton ſaid he was but of 22 Years, abſque hoc that he was 24 Years &c. Br. Annuity, pl. 20. cites 19 H. 6. 54.

7. In Annuity the Plaintiff *counted of* 10 *l. per Ann. by Preſcription.* The *Defendant ſaid that the Predeceſſor of the Plaintiff had* 10 *l. per Ann. for a Portion of Tithes in D. for his Life, and died*, and this Plaintiff made Prior, and the Defendant preſented Parſon, *abſque hoc that he and his Predeceſſors, Time out of Mind, have been ſeiſed* of Annuity of 10 l. prout &c. and a good Plea with the Traverſe, and no Plea without the Traverſe. Br. Annuity, pl. 21. (bis) cites 21 H. 6. 2

Br. Traverſe per &c. pl. 382. cites S. C. & S. P. accordingly; but ſays, that it ſeems contra if the Plaintiff had declared upon Grant of Annuity.

8. In Annuity the Plaintiff *declared upon Preſcription*, the *Defendant ſaid that it was granted upon Condition, which is broken of the Part of the Plaintiff*, and no Plea, per Cur. without *traverſing* the Annuity by Preſcription; For *Annuity by Preſcription, and Annuity by Grant upon Condition, cannot be intended one and the ſame Annuity.* Br. Confeſs and Avoid, pl. 63. cites 32 H. 6. 4.

9. In Annuity againſt an Executor, the Plaintiff *counted upon a Grant* of Annuity made *by the Teſtator for Term of Years, which yet continues*; by which *Part was Arrear in the Time of the Teſtator, and Part in the Time of the Defendant Executor*, and *as to the Arrears in the Life of the Teſtator, the Defendant pleaded a Releaſe of the Plaintiff to the Teſtator of all Actions*, and *to the Reſidue Fully adminiſtered*; Quære if the laſt Plea does not go to all; and ſee, that as long as the Annuity continues Writ of Annuity lies, and not Writ of Debt, tho' the Annuity be only for Years. Br. Annuity, pl. 29. cites 39 H. 6. 28.

10. Annuity granted *Quamdiu fuerit Benevolens, Preſerens & Amicabilis to the Grantor*, the *Defendant ſaid, that before any Day of Payment the Defendant was in Service with D. for* 4 *Marks per Ann.* and the *Plaintiff laboured and prayed D. to ouſt him out of Service, by which he was put out* of Service &c. and it is not double, viz. the *labouring*, and the *putting out*, per Cur. For the Labour ſuffices for all; Quod Nota. Br. Double, pl. 100. cites 7 E. 4. 16.

Contra where the Plaintiff counts upon a Deed, for this is Specialty; Quod Nota Differentiam per Cur. Quod Nota bene.

11. In Annuity, *Riens Arrear* is a good Plea in this Action *where the Plaintiff declares upon Preſcription*, for this is only Matter in Fact. Br. Annuity, pl. 31. cites 5 H. 7. 33.

Ibid.——S. P. Br. Annuity, pl. 22. cites 14 H. 7. 31. & 15 H. 7. 1. and *Refuſal* is a good Plea, for by the Refuſal the Annuity is determined, becauſe the Church ought not long to continue void, and therefore he need *not ſay that he is yet ready.*——*Contra upon Feoffment*, for he may infeoff him after; but Quære thereof; for it ſeems that the Refuſal ſuffices, as in Littleton, Tit. Eſtates. Ibid.

In Annuity of 10 l. and the *Plaintiff promiſed* to him, *that if he paid to him yearly at Eaſter* 20 *s. the Annuity ſhould be void*, and *ſaid, that he paid, except at Eaſter laſt, and then leaſed to the Plaintiff the Veſture of an Acre of Land for the* 20 *s.* and a good Plea, per Cur. and it ſeems that the Promiſe was in Writing, and there it is agreed, that for Annuity, tho' Land be thereof charged, yet another Thing in Recompence ſuffices. Br. Annuity, pl. 54. cites 11 H. 7. 20.

12. In *Debt* upon Arrears of Annuity, the *Defendant ſaid*, that he *leaſed ſuch Land to the Grantee in Recompence* of the Annuity, or of the Arrears of the ſaid Annuity, this is no Plea, per Cur. For the Annuity is by *Writing*, which *cannot be diſcharged by Matter in Fact*; Quod Nota. Brooke ſays, Quære if it was Annuity *by Preſcription.* Br. Annuity, pl. 1. cites 19 H. 8. 9.

13. Annuity &c. the Plaintiff *counted of the Grant of R. Prior of C. and his Covent*, by which it was Arrear by 5 Years, the *Defendant ſaid, that it was granted till the Plaintiff was promoted* to a ſufficient Benefice *by the ſaid R.* and *that R. died, and the Defendant is now Prior, and that ſuch a Day he tendered to him a Benefice, pending the Writ, and he refuſed it*, and the Opinion was in a Manner clear, that the Tender, pending the Writ, ſhall abate the Writ of Annuity, and ſhall determine the Annuity, for it ſeems to be upon Condition in Law, and when the Condition is performed, the Annuity is determined, and he may plead this Matter *tender of the Arrears*. Br. Annuity, pl. 22. cites 14 H. 7. 31. and 15 H. 7. 1.

14. If *a Perſon has an Annuity out of the Vicarage*, and *enters into the Vicarage*, this is no Bar in Writ of Annuity; for the Perſon of the Vicar is charged, and not the Poſſeſſion. Br. Annuity, pl. 26. cites 21 H. 7. 1.

15. A Writ of Annuity was brought *upon a Preſcription againſt a Rector of a Pariſh Church*. The Defendant pleaded, that it was overflown with the Sea &c. But the Court were clearly of Opinion for the Plaintiff; for the Church is the Cure of Souls, and the Right of Tythes, and if the material Fabrick of the Church be down, another may, and ought to be built, and Judgment Niſi for the Plaintiff. Mod. 200. pl. 32. Paſch. 27 Car. 2. C. B. Anon.

(F. 10) Pleadings. What is a good Plea without ſhewing Deed.

1. THE Plaintiff in his *Count* ought to ſhew Deed in Debt and Annuity, and there the Writ and Specialty ought to agree, per Finch. Br. Monſtrans, pl. 15. cites 41 E. 3. 23.

2. *Scire Facias* by an Abbot againſt a Parſon upon Arrears of Annuity upon Recovery againſt the Predeceſſor of the Parſon, he *pleaded as to the Arrears recovered againſt his Predeceſſor*,, *that he had levied it of his Predeceſſor*, & non allocatur, becauſe he *did not ſhew Specialty*, by which he *ſaid, that he had levied it of his Predeceſſor by Fieri Facias*, and the other e contra. Br. Annuity, pl. 9. cites 44 E. 3. 18. Br. Arrearages, pl. 4. cites S. C. *Scire Facias upon Record of an Annuity*, the Defendant demanded Oyer of the Deed of Annuity, and could not have it, inaſmuch as *the Action is founded upon the Record*, and not upon the Deed, for be it a Deed or not the Judgment ſhall bind. Br. Monſtrans, pl. 6. cites 3 H. 6. 40.

3. *And to the Arrears incurr'd after the Judgment* he *tendered Averment that he had paid*, and *did not ſhew thereof Acquittance*, by which it was *awarded, that* the Plaintiff *recover as well the Arrears incurr'd pending the Writ as before*, notwithſtanding the Iſſue which pends of the Arrears due before the firſt Judgment againſt the Predeceſſor, and therefore Judgment given of Parcel immediately. Br. Annuity, pl. 9. cites 44 E. 3. 18, Br. Arrearages, pl. 4. cites S. C. —— Br. Execution, pl. 18. cites S. C.

4. *And* it is ſaid, that in Writ of Annuity *upon* * *Preſcription*, or upon *Grant by Deed*, a Man ſhall not plead Riens Arrear without Acquittance; Quod Nota; & Mirum of Preſcription. Br. Annuity, pl. 9. cites 44 E. 3. 18. So upon *Scire Facias*. Br. Arrearages, pl. 4. cites S. C.

* Br. Annuity, pl. 48 cites 37 H. 6. 19. contra, for there he is not charged by Deed.

5. In *Annuity Nil Debet* or *Riens Arrear* is no Plea without ſhewing the Deed, contra if it be *out of Land with Clauſe of Diſtreſs*, to ſay that he Levied by Diſtreſs, this is good without ſhewing the Deed. Br. Monſtrans, pl. 138. cites 9 E. 4. 53.

Payment of part, pending the Writ, is no Plea without Specialty; for it is no Plea in Bar without Acquittance in Annuity by Deed; contra in Avowry for a Rent-charge, per Catesby, for Levied by Diſtreſs is a good Plea there; Quod Nota. Br. Annuity, pl. 51. cites S. C.

6. Annuity by J. B. againſt W. D. upon *Grant by Deed out of the Manor of S with a Clauſe of Diſtreſs*; Suliard demanded Judgment of the Writ, for the *Plaintiff after the Action brought had received* 10 *s. of the Arrears of the ſame Annuity*, and ſo has abated his own Writ; Per Brian, the Plea is not good *without ſhewing Specialty of the Receipt*, no more than in Debt upon Obligation; Per Catesby, peradventure if the Plaintiff would have *diſtrained and made Avowry*, then it may be a good Plea without Specialty. Br. Annuity, pl. 41. cites 22 E. 4. 51.

* S. P. Br. Annuity, pl. 48. cites 37 H. 6. 19.

7. Where he *charges his Perſon* by Writ of Annuity, * *Payment* is no Plea without Specialty. Contra in Avowry. Br. Annuity, pl. 41. cites 22 E. 4. 51.

Fol. 229.

(G) Judgment.

1. IF a Man brings an Annuity, and demands Arrearages, if the Defendant pleads an Acquittance of the Arrearages, the Plaintiff may have Judgment preſently to recover the Annuity. 30 E. 3. 22.

Br. Annuity, pl. 25. cites 39 E. 3. 38. and that the Count was upon a Preſcription, and Judgment accordingly for the Plaintiff, and yet the Arrears ſo found was not Parcel of the Iſſue. Quod nota.

2. In an Annuity, if the Defendant traverſes the Title, if the Title be found for the Plaintiff, but that no Arrearages are behind, but at one Term pending the Writ, yet the Plaintiff ſhall have Judgment to recover the Annuity and Arrears. 39 E. 3. * 38.

* All the Editions of Br. are according to this of Roll; but the Year-book is 39 E. 3. (37. b.)

Tit. Error, (K) pl. 17. S. C. but S. P. does not appear. —Tit. Heir (C) pl. 7. S. C. but S. P. does not appear. —Cro. C. 436. pl. 6. Clotworthy v. Clotworthy, S. P. and ſeems to be S. C. adjudg'd accordingly. ——S. C. cited 2 Vent. 129. as adjudged accordingly.

3. In a Writ of Annuity, if the Plaintiff demands a certain Sum for a Year and a half ended at Michaelmas, before the Action brought, where there is another Quarter paſt between Michaelmas and the Writ purchaſed, ſcilicet, the Feaſt of Chriſtmas, the Annuity being payable quarterly, and upon Non eſt Factum pleaded, this is found for the Plaintiff, in this Caſe the Judgment ought not to be for the ſaid Quarter due at Chriſtmas next before the Original purchaſed, though he ought to recover the Arrears incurr'd pending the Action; for it ſhall be intended that this Quarter being paſt, and not demanded by the Plaintiff, was paid before the Action brought. Hill. 11 Car. B. R. between *Frank and Stukely*, per Curiam, in a Writ of Error; and they gave a peremptory Rule to reverſe the Judgment given in Bank accordingly for Chriſtmas Quarter; but this was after ſtay'd for an Exception to the Writ of Error. Intratur Hill. 10 Car. Rot. 990.

* This ſhould be (37. b) tho' all the Edi-

4. In Annuity the Plaintiff counted *upon Preſcription*, and the *Defendant traverſed it*, and it was *found againſt him*; for that nothing was Arrear but for one Term pending the Writ, by which it was awarded that

that the Plaintiff *recover the Annuity, and the Arrears* found by the Inqueſt, and yet this *was not Parcel of the Iſſue.* Quod nota. Br. Annuity, pl. 25. cites 39 E. 3. * 38. tions of Br. are (38.)

5. In *Annuity* the Plaintiff *recover'd the Annuity and the Arrearages before the Writ brought, and pending the Writ alſo*; quod nota, per Judicium Curiæ. Br. Arrearages, pl. 14. cites 2 H. 4. 3. Note that *in Scire Facias upon a Recovery in Writ of Annuity*, the Plaintiff cannot recover the *Arrearages* and Damages incurr'd *pending the Scire Facias*, but pending the firſt Writ; quod nota, per Judicium. Br. Arrearages, pl. 16 cites 9 H. 5. 7.

A Parſon *recover'd Annuity in the Time of E.* 2. and his *Succeſſor brought Scire Facias in the Time of E.* 4. *to execute this Judgment*, and this is of Arrearages incurr'd Tempore proprio. Br. Arrearages, pl. 18. cites 21 E. 4. 83.

5. In Annuity the Defendant came *at the Diſtreſs*, and *ſaid that he had been at all times ready* &c *and yet is*, and no Plea at the Diſtreſs; by which Rickhill, ex aſſenſu Curiæ, ruled that he recover the *Annuity and the Arrears before the Writ purchaſed, and after* the Writ purchaſed *pending the Suit*, and *Damages to half a Mark*, and the Defendant in Miſericordia. Br. Annuity, pl. 12. cites 2 H. 4. 3.

6. In Annuity a Man ſhall recover *Arrears as well pending the Writ, till Judgment, as before the Writ brought.* Br. Annuity, pl. 16. cites 7 H. 4. 16.

7. In a Writ of Annuity the Parties were at *Iſſue upon a Preſcription*, and the *Jury found for the Plaintiff, but no Damages*; but before Judgment the *Plaintiff releaſed the Damages*, and had Judgment to recover the Annuity. This was aſſign'd for Error; but tho' Damages ſhould have been given, yet the Plaintiff having releaſed them, the Judgment was affirm'd. Roll Rep. 88. pl. 40. Mich. 12 Jac. B. R. Bent v. Marſh. 2 Bulſt. 279. Marſh v. Bentham, S. C. and Judgment affirm'd.—11 Rep. 56. Bentham's Caſe, S. C. and Judgment affirmed.

(H) [*Judgment.*] *How* to be *executed.*

1. IF a Man recovers in an Annuity, he ſhall never after have a new Writ of Annuity for the Arrearages recover'd. 21 E. 3. 22. But where a Recovery was in an Annuity by a Prior Alien, and afterwards all the Temporalties of all Priors Aliens were ſeiſed into the King's Hands, and ſo continued for ſeveral Kings Reigns, and afterwards H. 5. gave this Annuity to the Prior of a Priory newly founded by him It was objected, on a Scire Facias brought by the Prior, that it would not lie for him for Default of Privity. Rede Ch. J. held that the Prior might ſue either a Writ of Annuity or a Scire Facias; and Palmes agreed that he might have Writ of Annuity, but not the Scire Facias. And afterwards they all agreed as to the Scire Facias. Kelw. 168. 170. pl. 12. Mich. 6 H. 8. The Prior of Sheene v. the Prior of Malverin.

2. But within the Year he ſhall have an Elegit or * Fieri Facias to execute them. 21 Ed. 3. 22. 24 Ed. 3. 23. 1 Ed. 3. 3.

3. And after the Year a * Scire Facias. 21 Ed. 3. 22. 24 Ed. 3. 23. 1 Ed. 3. 3. * Br. Scire Facias, pl. 15. cites S. C. & S. P. accordingly, and that in ſuch Caſe he ſhall have Scire Facias from Year to Year ever afterwards to recover the Annuity, becauſe it is always executory. ——Br. Annuity, pl. 17. cites S. C. & S. P. and that it is always executory, becauſe it is annual; per Thirning, & non negatur.

Judgment in Annuity is *always executory*, and ſhall have *Scire Facias after Scire Facias* for all the Arrears which is arrear after the Judgment. Contra it is of Scire Facias upon other Judgment; for the firſt is pro toto. Br. Annuity, pl. 50. cites 8 E. 4. 18.

Annuity lies (tho' the *Annuity continues*) to recover the Annuity and Arrears; but for the future there muſt be a *Scire Facias on the Judgment.* 5 Mod. 144. Mich. 7 W. 3. Davis v. Speed.

4 But

Firth Execution, pl. 89. cites S. C. & S. P. accordingly; and it was

4. But if a Man recovers an Annuity against a Parſon by Nient dedire without the Aid of Patron and Ordinary, and the Parſon dies within the Year, Execution ſhall be ſued againſt the Succeſſor within the Year by Scire Facias, and not by a Fieri Facias. 24 Ed. 3. 23.

ſaid that if the Parſon had had Aid it would be all one.——Br. Annuity, pl. 52. cites S. C. that he ſhall have Scire Facias againſt the Succeſſor, and not againſt the Executor; but ſays it does not appear whether it was of Arrears incurr'd in the Time of the Predeceſſor.

After Judgment in Annuity once had, a *Scire Facias* ſhall iſſue upon

5. If a Man recovers in an Annuity, he ſhall never have a new Writ of Annuity for the Arrearages incurr'd after the Recovery but a Scire Facias, becauſe the Judgment is always executory. 21 Ed. 3. 22. 24 Ed. 3. 23. 30 Ed. 3. 22.

this Judgment only, for the Arrearages incurr'd before; and the Plaintiff ſhall by this Scire Facias recover the *Arrears incurr'd pending the Writ.* Jenk. 51. pl. 98.

But if the Annuity be *determined*, (becauſe the Scire Facias is in the Place of the Writ of Annuity) altho' the Arrears were due before the Scire Facias was brought, yet the Scire Facias does not lie, but *Debt only.* Jenk. 51, 52. pl. 98.

6. So it ſeems that for the Arrearages incurr'd after the Recovery, he ought to have a Scire Facias within the Year, and not a Fieri Facias, becauſe the Defendant may plead any Diſcharge thereof. Contra 30 Ed. 3. 22. Contra 1 Ed. 3. 3.

7. Scire Facias upon Judgment *in Writ of Annuity*; the *Plaintiff prayed the Arrears pending the Writ of Scire Facias*, and could not have it; for the Scire Facias is only to execute the firſt Judgment, and ſhall not vary from the Sum; Quod Nota. Br. Scire Facias, pl. 85. cites 9 H. 5. 12.

8. If there be *Judgment for* an Annuity, and the Annuitant ſells the Annuity afterwards, the *Vendee ſhall have a Sci. Fa.* upon this Judgment, per North K. Vern. 283. in Caſe of Dan v. Allen.

(I) Judgment. Plea in Scire Facias after Judgment.

1. SCIRE Facias of Arrears incurr'd of Annuity at another Time recovered after the Judgment given, the *Defendant pleaded Riens Arrear*, and the Court was in Doubt whether he ſhall have the Plea or not. Br. Annuity, pl. 4. cites 28 H. 6. 8.

S. P. tho' in Caſe of the Heir he is not charged but by Aſſets. Br. Scire Facias, pl. 179. cites 10 E. 4. 10.

2. Where Recovery is of the Annuity, it is no *Plea in Scire Facias* that the Plaintiff has *entered into part of the Land* of the Vicar, or of the Abbot, or of the Heir; for the Perſon is charged, and no Land. Br. Anuuity, pl. 36. cites 10 E. 4. 10.

3. Annuity was recovered *againſt a Parſon*, and after *Tithes was granted to the King*, and the *Arrears of the Annuity were levied to the King for the Tithe of the Plaintiff*, and this is a good Plea in Scire Facias of it. Br. Annuity, pl. 53. cites 21 H. 7. 16.

4. J. S. had an Annuity *granted* him *for Life Pro Exercitio Officii Seneſchalli*, and brought a Writ of Annuity, wherein he *got Judgment*, and *for Arrears due afterwards* he *brought a Scire Facias* upon the Judgment; the Defendant *pleaded, that pending the Writ the Plaintiff was requeſted to hold a Court &c. and refuſed*, without anſwering to the Arrears incurred before the Sci. Fa. brought, and all the Juſtices and Clerks held the Plea good. D. 277. pl. 28. Trin. 23 Eliz. Anon.

(K) Judg-

(K) Judgment. Remedy for Arrears incurr'd after a Judgment.

1. WHERE a *Man has Annuity for Life*, and brings Writ of Annuity, and *recovers and dies*, his *Executors* ſhall not have Scire Facias of the Annuity to recover the Annuity, for this is determined by the Death of the Teſtator, but they may have Sci. Fa. to recover the Arrears recovered by the firſt Judgment in the firſt Action. Br. Annuity, pl. 17. cites 11 H. 4. 34.

Br. Execution, pl. 34. cites S.C. —Br. Scire Facias, pl. 75. cites S.C. —S. C. cited F. N. B. 152.

(C) in the new Notes there (a) accordingly, but that for the Arrears incurr'd after the Judgment the Executor ſhall have a Writ of Debt and not a Sci. Fa.

2. If a *Man has Annuity for Life and* 20 *Years over, and* he *recovers* in Writ of Annuity and dies, his *Executors ſhall not have Scire Facias to recover the Annuity during the Term*, for the firſt Judgment was given of the Frankenement, and not of the Term, therefore they ſhall have *Scire Facias of the Arrears adjudged, and Writ of Annuity of the Annuity itſelf*, by the beſt Opinion. Br. Annuity, pl 17. cites 11 H. 4. 34.

Br. Execution, pl. 34. cites S. C.—Br. Scire Facias, pl. 75. cites S.C. —F. N. B. 152. (C) in the new Notes there (a) cites S. C and that it was held by Hort. and Thirn againſt the Opinion of Hankf. that in ſuch Caſe the Executor ſhall have a Sci. Fa. always during the Term; becauſe they have the Eſtate continuing in them during the Term; but ſays Quære of an Annuity after the Grant determined, and cites 9 H. 6. 16. And if one recovers in an Annuity, and the Annuity is after in Arrear, and then he dies, his Executors ſhall not have a Sci. Fa. but Debt, and cites 11 H. 6. 38.

3. If a Man has an *Annuity by Deed or Preſcription*, and he brings a Writ of Annuity and has Judgment, he ſhall never afterwards have another Writ of Annuity as long as that Judgment ſtands in Force, tho' the Annuity be *of Inheritance*, but ſhall have a Sci. Fa. becauſe the Matter of the Specialty or Preſcription is altered by the Judgment into a Thing of a higher Nature. 6 Rep. 45. a. cites 37 H. 6. 13. b.

After Judgment in Annuity once had, a Sci. Fa. ſhall iſſue upon this Judgment only

for the Arrearages incurred before, and the Plaintiff ſhall, by this Scire Facias, *recover the Arrears incurr'd pending the Writ; but if* the Annuity be *determined*, (becauſe the Scire Facias is in the Place of the Writ of Annuity) altho' the Arrears were due before the Scire Facias was brought, yet the Scire Facias does not lie, but *Debt only*. Je k. 51. pl. 98.

For more of Annuity in general, See **Condition, Debt, Rent,** and other proper Titles.

Appeal.

* (A) Appeal of Murder. Who ſhall have it. The Wife. Not other Feme.

* It being alleged by ſome, and eſpecially by Treby Ch. J. that an Appeal was a revengeful odious Proſecution, and therefore deſerved no Encouragement; on which Occaſion Holt, with great Vehemency and Zeal, laid

1. 9 *H.* 3. *cap.* 34. NO *Man ſhall be taken or impriſoned upon the Appeal of a Woman for the Death of any other than of her Husband.*

ſaid, that he wondered any Engliſhman ſhould brand an Appeal with the Name of an odious Proſecution; that for his Part he looked upon it to be a Noble Proſecution, and a true Badge of Engliſh Liberties, and referred to the Statute of Glouceſter, and the Comment thereupon in 2 Inſt. 12 Mod. 375. Paſch. 12 W. 3. in Caſe of Stout and Fowler.

For this Word Appeal ſee Litt. S 500. and Co. Litt. 287. b.—At the Common Law, before this Statute, a Woman as well as a Man might have had an Appeal of Death of any of her Anceſtors, and therefore the *Son of a Woman* ſhall at this Day have an Appeal, if he be Heir at the Death of the Anceſtor, for the Son is not diſabled, but the Mother only, for the Statute ſays, Propter appellum Fœminæ. 2 Inſt. 68.

Fleta ſays, Fœmina autem de morte Viri ſui *inter Brachia ſua interfecti*, & non aliter poterit Appellare, and therewith agree the Mirror, Britton and Bracton. 2 Inſt. 68.——2 Inſt. 317. 317. S. P cites Bracton and Britton.——St. P. C 58. b. S. P.

By inter Brachia in theſe ancient Authors, is *underſtood* the Wife, which the Dead had lawfully in Poſſeſſion at his Death, for ſhe muſt be his Wife both *of Right and in Poſſeſſion*, for in an Appeal *Unques Accouple* in loyal Matrimony is good Plea. 2 Inſt. 68.——2 Inſt. 317. S. P. and that there muſt be no *Divorce*.——St. P. C 59. a Ne Unque Accouple &c. is a good Plea in Bar——S. P accordingly, Br. Appeal, pl. 17. cites 50 E. 3. 15.——2 Hawk. Pl. C 164. S. 36 ſays, that if the Meaning of (Inter Brachia) be according to Sir Edw. Coke, it ſeems at leaſt to follow, that if the Husband were divorced from the Wife at his Death, tho' by a Voidable Sentence ſhe cannot maintain an Appeal, yet it is generally holden, that a Wife who has eloped from her Husband may have an Appeal of his Death; and Stamford ſeems to underſtand (Inter Brachia) to be, that the Wife ought to have had the Deceaſed in her View, and to have been preſent at his Death, which is moſt certainly not neceſſary at this Day.

The *Judges* are ſo far *bound to take Notice of this Statute*, that if a Woman brings an Appeal of Death of her Father, or of any other beſides her Husband, they ought *Ex Officio* to abate it, tho' the Defendant takes No Exception to it. 2 Hawk. Pl. C. 166. cap 23. S. 42.——Fitzh. Office del Court, pl. 7. cites Paſch. 10 E 4 7.

Co. Litt. 25. b. S. P.

2. If a Man be killed who has no Feme nor Son, and his Daughter, Siſter, or other Couſin, who is a *Feme*, *is* his *Heir*, and he has an Uncle or other *Male Couſin* who is *not Heir*, *but of the Kin*, ſhe ſhall not have Appeal; for the Statute of *Magna Charta*, *cap.* 34. is, that none ſhall be taken by Appeal of a Feme, unleſs of the Death of her Husband, and therefore the Appeal is loſt. Br. Appeal, pl. 68. cites 27 Aſſ. 25.

St. P. C. 59. (C) S. P. accordingly.—2 Inſt. 317. ſays, that there muſt be no Elopement.——2 Hawk. Pl. C. 164. S. 37. cap. 23. ſays, it is ſaid ſhe may have it; for by the Common Law ſhe might have both Dower and Appeal, and that the Stat. W. 2. cap. 34. which takes Dower from her, leaves the Appeal as before.——Co. Litt. 33. b. ſays it is no Bar of the Appeal, and that for the Reaſon here mentioned by Hawkins.

3. A *Feme ſhall have Appeal where ſhe ſhall not have Dower*, as where ſhe *elopes* from her Baron. Br. Appeal, pl. 17. cites 50 E. 3. 15. per Ingleby.

If ſhe has Judgment of Death againſt the Defendant, if after ſhe takes Husband, ſhe *can never have Execution* of Death againſt him. 2 Inſt. 69.—2 Hawk. Pl. C. 164. cap 23. S. 38. S. P. but ſays it ſeems clear, that in ſuch Caſe the Appellee ſhall not be diſcharged without the King's Pardon, and that he does not find it ſettled what ought to be done with the Appellee in this Caſe; but it ſeems certain, that the King cannot proceed againſt him by way of Indictment, becauſe he is attainted already; and therefore it may be probably argued, that the Court may award Execution of him Ex Officio, or at leaſt at the Demand of the King; for otherwiſe he would ſave his Life by reaſon of the Attainder by which he is adjudged to loſe it.

4. If a Feme brings Appeal of the Death of her Baron, and *convicts the Defendant*, and *takes another Baron before Execution*, if the *Defendant gets Charter of Pardon*, this ſhall not be allowed before the Baron and Feme are warned, and the Feme ſhall have Execution notwithſtanding the Coverture, per Skrene; but per Gaſcoign Ch. J. it is not ſo, for the Feme has diſabled herſelf by the taking of the 2d. Baron, and by the Juſtices of B. R. M. 2. M. 1. ſhe ſhall loſe her Appeal by taking of the 2d. Baron; for the Cauſe of Appeal is, that ſhe wants her Baron, therefore when ſhe has another Baron the Cauſe ceaſes, and *Ceſſante Cauſa ceſſet Effectus*, and the ſame it ſeems of the Execution of the Appellee. Br. Appeal, pl. 148. cites 11 H. 4. 48.

5. *If*

5. *If a Man who has no Authority kills the Party adjudged to be hanged*, it is Felony, and the Feme ſhall have Appeal; for it *is no ſuch Corruption of Blood* by the Attainder *between the Party and his Feme as* it is *between the Party and his Heir*; for the Heir ſhall not have Appeal; Quod Nota Diverſitatem by the beſt Opinion, but it was not adjudged. Br. Appeal, pl. 5. cites 35 H. 6. 57, 58. Br. Appeal, pl. 131. cites 2 Aſſ. 3. S. P. —— If the Husband be attainted of Treaſon &c.

and any Perſon kills him, the Wife ſhall have an Appeal. Co. Litt. 33. b. —— 3 Inſt. 215. (a) S. P. for notwithſtanding the Attainder he remains her Husband, and his Body is not forfeited to the King, but till Execution, remains his own.

6. If a Man is *convicted of Felony*, and *adjudged to Death*, and the *Officer kills him with his Sword*, his Feme ſhall have Appeal, and the Attainder of the Baron no Diſability to the Feme. Br. Nonability, pl. 43. cites 35 H. 6. 57, 58. S. P. and ſo if attainted of High Treaſon, yet if he be ſlain, his Heir cannot

Wife ſhall have an Appeal, for notwithſtanding the Attainder he was Vir ſuus, but the have an Appeal, for the Blood is corrupted between them. 2 Inſt. 69.

But no one except the Wife can bring an Appeal of the Death in ſuch Caſe, becauſe in this Caſe, and likewiſe in the Caſe of Treaſon, he can have no Heir. 2 Hawk. Pl. C. 165. cap. 23. S. 40.

7. Appeal *by a Feme groſsly enſeint*, of the Death of her Husband, and the *Defendant was attainted* at the Suit of the Feme, and the *Appearance of the Feme recorded for all the Term.* Br. Appeal, pl. 112. cites 21 E. 4. 72.

8. It is a Queſtion, if a *Feme Sole brings Appeal* as ſhe ought, *Proceſs continues till the Defendant be outlaw'd*, and the *Feme takes Baron*, whether ſhe may *demand Execution.* But per Brian and Huſſey, ſhe may demand Execution. Br. Appeal, pl. 112. cites 21 E. 4. 72. Jenk. 137. pl. 82. S. C. accordingly.

9. Note, if a Feme who has Title of Appeal of the Death of her Husband *takes other Husband*, he and the Feme ſhall not have Appeal; for the Feme ought to have it ſole, and ſo * *the Appeal determined*; and the Reaſon is becauſe the Feme not having a Husband is not ſo well able to live, and therefore when ſhe has another Baron the Appeal is determined. Br. Appeal, pl 109. cites 1 M. 1. * S. P. Br. Appeal, pl. 112. cites 21 E. 4. 72. —— St. P. C. 59. (B) S. P. and by the 2d Marriage

her Appeal is gone notwithſtanding the 2d Baron dies within the Year and Day of the firſt Baron, cites Trin. 20 H. 6. 46 —— 2 Inſt. 68, 69. S. P. accordingly; for ſhe muſt before any Appeal brought continue Fœmina Viri ſui, upon whoſe Death ſhe brings the Appeal. —— 2 Hawk. Pl. C. 164. cap. 23. S. 38. S. P. for being given her only from a Regard to her Widowhood, it cannot but ceaſe when that determines, and being once barr'd it is barr'd for ever.

(B) Appeal of Murder. Who ſhall have it. The Heir.

1. THE *Heir of him who dies outlaw'd* ſhall not have Appeal. Br. Appeal, pl. 116. cites 2 E. 3. Fitzh. Coron. 40. But this ſeems to be Outlawry *of Felony*, which is Corruption of Blood. Ibid. —— S. P. Br. Appeal, pl. 131. cites 2 Aſſ. 3. —— Br. Corone, pl. 67 cites 2 Aſſ. 3. that where A. being outlaw'd of Felony was kill'd by J. S. yet J. S. was arraign'd of it; And Brooke ſaid, but ſee elſewhere that the Heir ſhall not have Appeal by Reaſon of the *Corruption of Blood*,

2. In Appeal, if a Man be kill'd who has no Feme nor Son, and his Daughter, Siſter, or other Coſin, who is a *Feme*, *is* his *Heir*, and he has an Uncle or other *Male Coſin*, who is *not Heir but of the Kin*, ſhe ſhall not have Appeal; for the Statute of *Magna Charta* 34. is that none ſhall be

be taken by Appeal of Feme but of the Death of her Husband, and therefore the Appeal is loſt. Br. Appeal, pl. 68. cites 27 Aſſ. 25.

St. P. C. 59. b. (E) S. P. cites Trin. 20 H. 6. 46. by Fortescue and Newton, tho' ſhe died before any Appeal commenced.——2 Hawk. Pl. C. 164. cap. 23 S. 39. S. P. and cites S. C.

3. The Husband was kill'd, and afterwards the *Wife died within the Year*. The Heir ſhall not have Appeal, becauſe the Appeal was once given to the Wife, ſo that the Action was once out of the Blood, and therefore cannot be given to the Blood again. Keilw. 120. a. pl. 65. Caſus incerti temporis.

Appeal of Death by the Heir, the *Plaintiff died after the Defendant was outlawed in the Appeal*, and by Judgment

4. If a *Man has Action of Appeal* of the Death of a Man *and dies within the Year*, and the *Suit deſcends to ſeveral one after another within the Year*, there the *laſt to whom it deſcends ſhall have the Appeal* notwithſtanding the Death of the others to whom it was firſt given. Per Thirne quod Curia conceſſit. But Gaſcoigne Ch. J. held ſtrongly *contra*. And Brooke ſays it ſeems the Law is with him. Br. Appeal, pl. 30. cites 11 H. 4. 11.

the * *Pardon of the King* granted to the Defendant was *allowed upon the Death returned in a Scire Facias* againſt the Plaintiff *without ſuing other Scire Facias againſt the Heir of the Plaintiff*, for the Appeal is given to the Heir of the deceaſed only, and it is *Action Perſonal*, which dies with the Perſon. But per Grevil, Mordant, and Wood, Scire Facias ſhall iſſue againſt the Heir of the Plaintiff, for the Heir ſhall have Appeal within the Year if he has not been nonſuited, nor releaſed the Appeal, for *within the Year it ſhall deſcend from Heir to Heir if it was to* 20 *Heirs*, for it is a ſpecial Puniſhment given to the Blood, and the Execution ſhall enſue the Original, and therefore when he is outlawed, nothing reſts but to make Execution, and therefore if the *Plaintiff dies before Execution the Heir ſhall have it*, and ſo Scire Facias ſhall iſſue to warn the Heir. But per Conſtable, Keble, and others *e contra*, and that in the time of R. 3. it was adjudged that Scire Facias ſhall not iſſue againſt the Heir, and that it is only a Perſonal Action which dies with the Perſon, and therefore if he to whom it is given dies within the Year, it ſhall not deſcend to the Heir. Br. Appeal, pl. 88. cites 9 H. 7. 5.

* S. P. Br. Appeal, pl. 141. cites 38 H. 6. 13.——Ibid. pl. 144 cites 9 H. 7. 5 S. P.——*And* therefore per Vaviſor, if a Man brings Appeal and is *Nonſuited*, or *dies within a Year or after*, the Heir ſhall not have Appeal, and Conſtable to the ſame Intent ſtrongly. Ibid ——Jenk 182. pl. 70. cites S. C. and S. P. and that the ſuing a Scire Facias againſt the Heir would be in vain; for the Appeal which was once begun dies with the Appellant, and does not deſcend; but that it would be otherwiſe if it had not been begun, for there it deſcends; by the Judges of both Benches.——In Appeal, if the next Heir dies after the Appeal brought, the Appeal is loſt; per Treby Ch. J. Arg. 2 Ld. Raym. Rep. 434. at the Top. Hill. 10 W. 3.

But they agreed that 11 H. 6. 11 H. 4. 11. is that if the *Father has 2 Sons, and is kill'd*, and the *Eldeſt does not take Appeal within the Year*, the *2d Son ſhall have Action*; for he has it *as immediate Heir to the Father*, and not as Heir to the eldeſt Son. But *quære* inde; for he was not immediate Heir, but he need not make mention now of the elder Brother. Br. Appeal, pl. 88. cites 9 H. 7. 5.——St. P. C. 59. b. (K) S. P. cites Trin. 20 H 6 46.

Contra where there is *Grand-father, Father, and Son*, and the *Grand-father is kill'd*, and the *Father dies*, the Son ſhall make mention of the Father; and Vaviſor agreed with Keble and Conſtable, and denied all that Grevill and the others ſaid, and that the Appeal is not anceſtrel, nor can it deſcend; and after Judgment was given by Advice of all the Court, that the Pardon ſhall be allow'd, and the *Defendant went quit without ſuing Scire Facias againſt the Heir*. Quod nota. Br. Appeal, pl. 88. cites 9 H. 7. 5.

* S. P. Br. Appeal, pl. 141. cites 38 H. 6. 13.

If a Man is *outlaw'd in Appeal*, and the *Plaintiff dies*, his * Heir ſhall not have Execution; per Cur. For if the Heir commences the Appeal and counts, and after dies, his Heir ſhall never have Appeal, nor no other; but if the Heir, after the Death of his Anceſtor who is kill'd, dies, and cannot appeal, there *the Heir of the Heir* ſhall have Appeal. Br. Appeal, pl. 156. cites 16 H. 7. 15.

* Br. Appeal, pl. 144. cites 9 H. 7. 5. S P.

If an Appeal be *commenced by an Heir who dies, hanging the Writ*, it ſeems to be agreed by almoſt all the Books, that no other Heir can afterwards proceed in ſuch Appeal, or commence a new one, becauſe it is a *perſonal Action* given to the Heir in reſpect of his immediate Relation to the Perſon killed, at the Time of his Death, and like other perſonal Actions ſhall die with him; but ſome have held, that if the *firſt Heir dies within the Year* and the Day *without commencing an Appeal*, the next Heir may bring one, but this is doubted by others, and the Generality of Books ſeem to favour the contrary Opinion, as more agreeable to the general Tenor of the Law in Relation to Appeal, which in no Caſe, as the Serjeant ſays he knows of, will ſuffer the Right of bringing an Appeal to be *transferred from one to another*, and compares it to the Caſe of a Wife dying within the Year and Day in whom the Right of Appeal is veſted, no Heir ſhall have Appeal; but that it is held by Sir Matt. Hale, [Hale's Pl. C. 182] and ſome others, that if the firſt Heir gets Judgment in Appeal of Death and dies, his Heir may have Execution. But that Stamford [St. P. C. 59. b. (I) cites Trin 16 H. 7. 15] doubts this, and ſeems contrary to many of the old Books, and not eaſily reconcileable with the Reaſon of the Caſes abovementioned. But whether in this Caſe the Court may not award Execution either Ex Officio, or at the Demand of the King, may deſerve to be conſidered. Alſo if a Perſon killed has *no Wife* at his Death,

and

and no Iſſue but Daughters, and all *thoſe Daughters die within the Year* and Day, it may reaſonably be argued, that the Heir Male may have Appeal, becauſe the *Right of bringing* one *never veſted* in any other before; but ſays he does not find this Caſe in any of the Books. 2 Hawk. Pl. C. 165, 166. cap. 23. S. 41.

5. *Feme has Iſſue a Son who is murder'd*, and *has no Heir of the Part of his Father*; the Queſtion was, Whether the *Uncle of the Part of the Mother* ſhall have Appeal or not. Billing Ch. J. Needham and Choke J. ſaid that the Appeal does not lie becauſe he convey'd by Feme, and that by the Statute of *Magna Charta* 34. a Feme ſhall not have Appeal but of the Death of her Baron. But Brian, Neal, Littleton, and the Chief Baron e contra, and that the Uncle ſhall have Appeal of the Death of his Nephew, and yet the Father by whom he made his Conveyance, ſhall not have Appeal of the Death of his Son no more than the Mother of the Son. Billinge ſaid that it is not alike, for the Father is able to have Appeal of the Death of his Anceſtor, contra of a Feme, and therefore here becauſe the Meſne in the Conveyance was diſabled the Appeal does not lie, and ſo adjudg'd H. 20 H. 6 43. tit. Coron. in Fitzh. 9. where *Grandfather*, *Mother and Son* were, and the *Mother died*, *a Man killed the Grandfather*, the *Son ſhall not have Appeal*, becauſe he *conveyed by the Mother* who is a Feme, and never could have had Appeal, quod Nota by award, and there it is ſaid that * *Appeal ſhall not deſcend*, for he upon whom it firſt falls ſhall have it, but if he dies, his Heir ſhall not have it. Br. Appeal, pl. 104. cites 17 E. 4. 1.

S. C cited Co. Litt. 25. b.—If the Appellant be *Heir and Male*, *tho' he derives through Females* he ſhall have the Appeal. Hale's Pl. C. 182. 183. —2 Hawk. 166 cap 23 S. 42. ſays it ſeems to be the better Opinion at this Day, that the Heir Male of the Deceaſed who derives his Blood through a Female may have an Appeal, As the Uncle being Heir on the Part of the Mother, or the Grandſon by a Daughter &c. And yet the Mother in the firſt Caſe, and the Daughter in the 2d could have had no Appeal; for ſince by the Common Law ſuch Mother, and Daughter had not only ſuch a Right to bring ſuch Appeal but alſo to have ſuch Right deriv'd through them to others, it ſeems hard to conſtrue the Statute by depriving them of the former to take from them the other alſo, eſpecially conſidering that an Heir Male, who derives his Blood through Females, ſeems no way leſs worthy to bring an Appeal than if had deriv'd it through Males; and all Statutes made in Abridgment of any Right of the Subject ought to be conſtrued ſtrictly.—* S. P. Br. Appeal, pl. 141. cites 38 H. 6. 13.

6. Appeal was brought by the *Son againſt his Father*, *of the Death of the Mother of the Plaintiff*, and held good, for he is Heir to the Mother, for Appeal lies as well of the Death of a Woman as of the Death of a Man. Br. Appeal, pl. 106. cites 18 E. 4. 1.

St. Pl. C. 60. a (B) cites S. C.—So if the Feme kills the Baron, their Son ſhall have the Appeal *againſt his Mother*, for he is Heir to the Father who is dead. Quod nota. Br. Appeal, pl. 106 cites 18 E. 4. 1.—St. P. C. 59. a (D) S. P.—A *Woman poiſoned her Husband*, which is *Treaſon* by the Statute 31 H. 8. the Heir brought an Appeal of Murder againſt his Mother; but the Reporter ſays that the Opinion of the Juſtices was (ut Aud. vit.) that the Appeal was not maintainable. D. 50. pl. 4. 5. Mich. 33 H. 8 Saccomb's Caſe.—D. 50 a pl. 4 in Marg. ſays the Reaſon ſeems as the Remarker thinks, not becauſe the Treaſon extinguiſhes the Murder [as mentioned in the principal Caſe] but he intends that the King at his Election may indict her of Murder or Treaſon; But that the Reaſon is, that the Life of a Man ſhall be put but once in Jeopardy, and the King being intitled by Matter of a more High Nature, his Remedy ſhall not be obſtructed by the Suit of the Party.——2 Hawk. Pl. C. 165. cap 23. S. 39. ſays if the Petit Treaſon be pardoned by the Parliament, it ſeems that the Heir can bring no Appeal; for he cannot bring it for the Murder only becauſe the Petit Treaſon includes Murder, and more, and that being the greater drowns the leſs, and therefore the Pardon of that ſeems to pardon the Murder alſo.——S. P and the Appeal was held maintainable, and the Woman was burnt. Jo. 425 pl. 10. Hill. 14 Car B R Pigott, v. Pigott.—— Cro. C 531. pl. 10. S C. adjudged accordingly.—S. C. cited by Holt, Ch. J. accordingly, 6 Mod. 217. Trin. 5 Ann. B. R.

7. There were 3 *Brothers*, and the *middle Brother was killed*, the *eldeſt died within the Year*, *and no Appeal brought*, the Queſtion was whether the younger Brother ſhould have an Appeal, it was not reſolved. Dyer 69. pl. 31. Paſch 5 E. 6. Bell v. Crakenthorpe.

Staundf. Pl. C. 59. b. lib. 2. cap 8. ſays that in ſuch Caſe the Appeal being once attach'd in the elder Brother is now gone for ever.

St. P. C. 60. a. (B) S. P. accordingly.

8. If the *Lord kills his Villain* his Son and Heir ſhall have an Appeal. Co. Litt. 139. b.

Hale's Pl. C. 182. S. P. — Every ſuch Appellant muſt be Heir General to the deceaſed by the

9. If there be no Wife of the Perſon killed, then *the next Heir at the Common Law* ſhall have the Appeal, if ſuch Heir be *Male*, but if ſuch Heir be a Female as Daughter, &c. ſhe ſhall not have it, nor in ſuch Caſe ſhall any Heir Male, and therefore the youngeſt Son in Borough-Engliſh ſhall not have the Appeal though he be inheritable to the Land. St. P. C. 59. b. (F) cap. 8.

Courſe of the Common Law, unleſs the Heir General had himſelf a Share in the Guilt in which Caſe the next Heir ſhall have Appeal againſt him. 2 Hawk. Pl. C. 165. cap. 23. S. 40. — St. P. C. 60 a. (B) S. P. cites Fitzh. Corone 459.

2 Hawk. Pl. C. 165 Cap. 23. S. 40. ſays that neither the eldeſt nor youngeſt Son ſhall

10. If the *Eldeſt Son* after Title of Appeal accru'd to him *diſables himſelf*, as by *attainder of Felony* or the like, ſo that by ſuch Diſability he ſhall not have Appeal, yet the 2d Son ſhall not have it. St. P. C. 60. a. (A) cites Fitzh. Corone 235, and 322. and ſays that the Law is the ſame if the Diſability be in the Life of the Anceſtor who is killed &c.

have it, the one by reaſon of the Attainder, nor the other becauſe he cannot be Heir to his Father while he has an elder Brother, who, though he be looked upon as dead in Law to ſome Purpoſes, yet in Truth is alive, and capable of forfeiting all Privileges belonging to the Heir, though not of taking Benefit from any of them, and cites Fitzh Corone 235. but ſays that Fitzh Corone 322. ſeems contrary.

* [This was Hill. 13. H. 4. where the eldeſt Brother was a Monk profeſſed &c. And ſo a Perſon dead in Law.]———Hale's Pl. C. 183. ſays that a Monk ſhall have no Appeal neither of Death or otherwiſe.———St. P. C. 60. a. (D) S. P. accordingly.

11. An *Hermaphrodite*, if the Male Sex be predominant, ſhall have an Appeal of Death as Heir, but if the Female Sex doth exceed the other, no Appeal doth lie for her as Heir. 2 Inſt. 69.

Fitzh. Corone 385. cites Paſch. 15 R. 2.

12. *A. has a Daughter*, his *Heir apparent*, this Daughter *has a Son, ſhe dies in her Father's Life-time*, then *A. is killed*; this Son ſhall have an Appeal of the Death of his Grandfather; for by the Death of his Mother in his Grandfather's Life-time the Son is the immediate Heir to him. By all the Serjeants in England. Jenk. 6. pl. 8.

St. P C. 60. a. (D) S. P.

13. An *Idiot*, or one that is *Mute*, ſhall have no Appeal either of Death or otherwiſe. Hale's Pl. C. 183.

Fitzh. Corone pl. 385. cites Paſch.

14. A Man *above* 70 may Appeal, but no Battail waged. Hale's Pl. C. 183.

15 E. 2. where the Defendant pleaded not Guilty, Priſt to defend by his Body, and flung his Gauntlet into the Court; whereupon it was inſiſted that he was of 70 Years of Age (and ſo ſee that Battail lies againſt a Man of ſuch Age) and the Plaintiff imparl'd &c. Scroop bid him refuſe the Gauntlet then &c. and afterwards the Plaintiff was nonſuited &c.—St. P. C. 60. a. (D) cites S. C. & S. P. accordingly and yet ſuch Age ſhall ouſt the Defendant of Gager of Battail &c.

(C) Appeal of Murder. Who ſhall have it. The Heir an Infant; And Proceedings in ſuch Caſe.

* S. P. Br. Appeal, pl. 116. cites M. 22 E. 3. & Tit Coron. 30. — Raym. 483.

1. IN Appeal, it appear'd by Inſpection, that the Plaintiff was within Age, by which the * *Parol demurr'd*, and he was *arraigned immediately* of the ſame Death, *upon Indictment, and was compell'd to plead to it*, and *after was let to Mainpriſe till the Suit of the Party was determined*; and ſo ſee that *no Jury was ſworn* upon him *immediately*, *but the*

Plea

Plea recorded, quod nota. Br. Appeal, pl. 36. cites † 11 H. 4. 94. and H. 22. E. 3. it was ſaid and [as it ſeems, per Cur.] that before the 21 E. 3. 23. an Infant could not bring an Appeal, and that they find no Precedent of an Appeal brought before that Time, but that now it is frequent. † Br. Appeal, pl. 119 cites S. C. & 32 Aſſ. 8.

2. In Appeal by an Infant within Age, the Defendant pray'd to be diſmiſſed for the Nonage, and the *Juſtices* ſaid that they *would examine* the Matter, *and if they thought that the Appellant is Guilty, he ſhould remain in Ward* till the full Age of the Infant. Br. Appeal, pl. 105. cites 17 E. 4. 2.

3. Note per Cur. that an Infant may have Appeal of Murder, and it ſhall be *by Guardian*, and *not by Attorney*, *and* the Appeal *ſhall not ſtay till his full Age*, as heretofore. Br. Appeal, pl. 2. cites 27 H. 8. 11. Br. Coverture, pl. 2 cites S. C. An Infant of the *Age* 9 *Years* was admitted per Guardianum, to ſue an Appeal for the Murder of his Brother. Mo. 461. pl. 646. Hill. 39 Eliz. Perry's Caſe ——— Lat. 173. Hill. 2 Car. S. P. admitted ——— An Infant may have Appeal, but no Battail waged, and adjudged of late Times that the Parol ſhall not demur. Hale's Pl. C. 183. Sed Quære. ——— 2 Hawk Pl. C. 161. cap. 23 S. 30 ſays that Infancy, old Age, or of the Imbecillity of the Plaintiff, is no good Objection againſt his bringing an Appeal, though Defendants looſes the Benefit of waging Battail, and ſo puts him in a worſe Condition than if the Appeal were brought by one capable of fighting; for ſince the Defendant has proper Means for his Acquittal, by putting himſelf upon a Trial by his Country, and the Imbecillity of the Plaintiff is wholly owing to the Act of God, and no ways leſſens the Injury complained of by him, it is not reaſonable he ſhould ſuffer any Diſadvantage from it. And agreeably hereto it ſeems ſettled of late Times, contrary to the numerous Authorities in the old Books, that the Parol ſhall not demur in an Appeal for the Nonage of the Plaintiff; yet it is certain that an Infant muſt proſecute ſuch Suit by Guardian; But though the Guardian be ſo neceſſary in the Proſecution of ſuch Suit, yet if the Infant comes into Court, and ſays he will relinquiſh it, notwithſtanding which the Guardian will proſecute it, the Court may in Diſcretion diſcharge ſuch Guardian, and aſſign another, it not being reaſonable that an Infant be bound to continue a Suit againſt his Will, which demands nothing but Revenge, and will be chargeable to him.

4. An *Infant by Guardian brought Appeal* of the Death of his Brother againſt the Lady Farmer, and afterwards upon Compoſition made, he *came into Court*, *and diſallowed his Guardian*, after which the Appellee came into Court, and pleaded her Pardon and had it. 2 Roll Rep. 59. Mich. 16 Jac. B. R. Onlie's Caſe. S. C. cited Arg. Ld. Raym. Rep 555 and ibid. 556. denied to be Law by Holt, Ch. J. Paſch. 12 W. 3. in Caſe of the King v. Toler.

5. An Infant cannot proſecute an Appeal by *Prochein Amy*, though he may all other Suits, but he can do it only by Guardian, Per Gould, J. Ld. Raym. Rep. 557. Paſch. 12 W. 3. in Caſe of the King v. Toler.

6. A. an Infant, as Heir to B. ſued an Appeal of Murder againſt T. and C. was admitted as Prochein Amy to A. At the Day of the Return the *Court was moved*, *that the Sheriff might return the Writ*, *who ſaid that the Infant with ſome Relations required him to deliver the Writ back to them*, *which he did*, and that it was uſual ſo to do, for an Infant may diſavow his Guardian or his Suit; but per Holt, Ch. J. both the Writ and Suit are Subject to the Direction of the Guardian, and the Infant can no more diſpoſe of the Writ than he can proſecute it, 'tis true, he may be Nonſuited either before or after Appearance, but then the Appellee muſt be arraigned at the Suit of the King; he may likewiſe diſavow the Suit, and then the Court may diſcharge the Guardian, but it is a Contempt in the Sheriff to deliver the Writ back without any Authority, and he was fined and committed, though the Clerk in Court offered to undertake for the Fine. The Reporter ſays he heard that the Chancery being moved for a new Writ of Appeal, it was denied upon a ſolemn Hearing before Ld. Keeper Wright, the Maſter of the Rolls, Treby 12 Mod. 372. Stout v. Towler, S. C. & S. P. accordingly, and ſays that the *Appellant was not mentioned in the Writ to be an Infant*, but that after the Teſte, and before the Return of the Writ he choſe the deceaſed Mother for

his Guardian before Holt, Ch.

Treby, Ch. J. Powell, J. and Ward, Ch. B. 1 Salk. 176. Paſch. 12 W. 3. B. R. Toler's Caſe.

at his Chambers, and that ſhe was there and then admitted accordingly. And it was inſiſted in behalf of the Sheriff, as reported by Salk, and alſo that the Infant having no Guardian at the Time of the Writ purchaſed it was not well ſued out. But it was reſolved if there *needs no Guardian till the Writ is returnable*, for the uſe of a Guardian is to purſue it when it is before the Court, and not as here to complain of the Officer for not making a Return, and that any Body might ſue out the Writ for the Infant, and that there is no Body in Law whoſe Writ it is, before the Return, but the Infant's.

2 Ld. Raym. Rep. 1288, 1289. S. C. & S. P. and ſee there the Entry at large as peruſed, and approved by Holt Ch. J.

7. B. was *indicted of Murder* at the Old Baily, and *found Guilty*, but *got the Queen's Pardon*. An *Infant lodged an Appeal in Propria Perſona*, before the Juſtices of Goal Delivery the ſame Seſſions, which being removed by Certiorari into B. R. it was moved to admit him by Guardian, but denied as too late, becauſe it *ſhould have been by Guardian at firſt*, and then have mov'd the ſame in B. R. But the Court ſaid that if the Defendant *pleaded this in Abatement*, the Appellant might conſeſs his Plea, and commence a new Appeal by Bill; for a Nonſuit is Peremptory, but an Abatement is not. Afterwards the Appellee being at the Bar, and the Appellant in Court his Counſel would have abated the Writ, and brought an new Appeal by Bill, but the Court refuſed it, for Holt ſaid that this is not like the Caſe of **Watts v. Brains**, in Co. Ent. for there the Writ was void, and the Appellee refuſing to plead the Infancy in Abatement, intending to take advantage thereof after Trial, the Court ſaid they would abate the firſt Appeal Ex Officio, and ordered an *Entry that the Appellant being in Court, and it appearing by Inſpection that he is under Age*, (about 6 or 7 Years old) *Ideo the Court Ex Officio does abate the Appeal*. And Holt Ch. J. ſaid that if the Appellant had not been in Court, there muſt have been a Writ to have brought him in to be inſpected. Then the Appellant brought another Appeal by Bill, and declared againſt him in Cuſtodia, and the Appellee, being arraigned Inſtanter, demurred to the Appeal and pleaded not Guilty. The Court ordered the firſt Appeal to be entered as the firſt Day of that Term, and that the Pleading to the 2d ſhould be entered Inſtanter, that the Demurrer might be firſt determined, and for that End made it a Conſilium to be argued in the next Term. 11 Mod. 216. pl. 4. Paſch. 8. Ann. B. R. Smith, v. Bowen.

(D) Appeal of Mayhem, and how to be tried.

1. APpeal of Mayhem againſt R. W. and others, R. and W. *pleaded not Guilty, without praying that the Mayhem be adjudged by the Court*, and the *Inqueſt prayed that they may ſee* the Party whether he be mayhemed or not, Thorp granted it, but ſaid that *this is not de Rigore juris*, for it is *at the Election of the Party whether he will ſhew it or not*, and ſaid that the Party by his Plea has accepted it to be a Mayhem, and though he recovered Damages now for the Mayhem, he may at another Time recover Damages by Writ of Treſpaſs for the Battery. Br. Appeal pl. 60. cites 22. Aſſ. 82.

2. And ſo ſee that the Appeal *meddles only with the Mayhem*, and *not with the Battery*; and the Judgment was that the Plaintiff recover *Damages*, and that the Defendant ſhall be *taken*; and becauſe ſome pleaded and were attained, and others did not come, and the *Plaintiff ſaid that he would not proceed further againſt them*, it was Awarded that the *Plaintiff*

Plaintiff ſhould be taken, for now it appears that his Appeal is falſe againſt them, quod nota. Br. Appeal, pl. 60. cites 22 Aſſ. 82.

3. Appeal of Mayhem, the Defendant prayed that the Court would ſee the Stroke, and ſee whether he had Mayhem or not. Birton ſaid this they ought not to do, if the Defendant does not put it in Iſſue, and after the Court ſaw the Stroke, and could not judge of it becauſe it was new, and after the *Defendant gave it for Iſſue, and prayed the Court that the Mayhem be examined*, by which *Writ iſſued* to the Sheriff *to make to come ſome of the beſt Phyſicians, and Surgeons in London to inform our Lord the King, and the Court de iis quæ ex parte dicti Domini Regis injungerentur*, and note that the *Defendant ſhall not have other Anſwer*, for if the Surgeons ſay that he is mayhem'd, he ſhall be thereupon attainted. Br. Appeal, pl. 70. cites 28 Aſſ. 5. And Grene Anno 38 E. 3. adjudged the Plea Peremptory, when the Defendant prayed that the Stroke be examined. Ibid.— Br. Peremptory, pl. 33. cites S. C.— No doubt if the Defendant puts it in Iſſue, and prays that it be viewed by the Court, the Court may take a View and then determine the Matter, and if it be doubtful they may award a Writ to the Sheriff to return ſome able Phyſicians, and Surgeons for their better Information. But it ſeems that the Court cannot proceed to ſuch Trial by the View unleſs the Defendant prays it. 2 Hawk. Pl. C. 160. cap. 23. S. 27.

4. Appeal of Mayhem, the Defendant *ſaid that it was no Mayhem*, and prayed that it may be examined by *Juſtices* who *ſaw it, and would not adjudge it* becauſe the Stroke was freſh, but took ſurety of Peace of 4 Mainpernors each in 40 l. to the King, and *gave Day* of Judgment *till the Stroke ſhall be cured*. And ſo ſee that their Judgment is Peremptory. Br. Appeal, pl. 135. cites 41 Aſſ. 27.

5. If the *Defendant prays that the Blow be viewed* to adjudge whether it be Mayhem or not, there if it be adjudged Mayhem by the Court it is Peremptory to the Defendant, but the Law was held contrary by thoſe of Gray's Inn. Br. Appeal, pl. 86. cites 6 H. 7. 1. per Tremail. Br. Appeal, pl. 143 cites S. C. accordingly.— 2 Hawk. Pl. C. 160 cap. 23. S. 27. ſays it ſeems agreed that an Adjudication made upon ſuch View is Peremptory and concluſive to each Party.

6. Appeal of Mayhem, the *Defendant demanded the View of the Mayhem*, which was *aſſigned in the Shoulder of the Plaintiff*, and was *ouſted* of the View *becauſe it is of his own Wrong*. Br. Appeal, pl. 46. cites 21 H. 7. 33.

7. *And* if the Maihem be *adjudged by Inſpection of the Court*, *or* by a *Surgeon*, this is peremptory. Quod nota per Cur. Ibid.

8. *But* if the Juſtices, or thoſe who ſaw it, be *in Doubt whether it be a Maihem or not*, *they may* refuſe the Examination, and *compel the Party to put it to the Country*. Br. Appeal, pl. 47. cites 21 H. 7. 40. It ſeems that they are not bound to try it by their View, but may order a Trial by a Jury, at which, it is ſaid that they may, if they think fit, order that the Jury ſhall have a View of the Wound. 2 Hawk. 160. cap 23. S. 27.

9. A Perſon maim'd ſhall not have Appeal. St. P. C. 60. a. (D) cites Fitzh. Corone 322. but ſays Quære; for a Diſtinction muſt be made where the Plaintiff was *maim'd by the Defendant*, *or by ſome other Perſon*. 2 Hawk. Pl. C. 160. cap. 23. S. 28. ſays it ſeems to be holden that the Defendant in Appeal of Mayhem may in ſome Caſes wage Battail; but the Serjeant ſays he finds no Inſtance in which Battail hath been actually waged in ſuch an Appeal.

10. In an Appeal of Maihem the Defendant *pleaded that* the ſame *Plaintiff had brought Treſpaſs of Battery, and recover'd Damages* in that Action, *and averr'd that the Battery and Treſpaſs is the ſame Mayhem on which the Appeal is brought*. And adjudged upon Argument, that it is a ſufficient Bar. Mo. 268. pl. 419. Mich. 30 & 31 Eliz. Hudſon v. Lee. 4 Rep. 43. a. pl. 7. S. C. reſolved accordingly, tho' it was objected that an Appeal of Maihem was an Action of a higher Nature than an Action of Treſpaſs; for inaſmuch as in Appeal he ſhall

ſhall recover Damages only, and he has already recover'd Damages in the Action of Treſpaſs, it was for that Reaſon reſolved that the Bar was good.—— Le. 318 pl. 447. S. C accordingly.——— 2 Hawk. Pl. C. 159 cap. 23. S 22. cites S. C. accordingly; for it ſhall be intended that the Jury in giving Damages for the Wounding included the Maihem, and no Man ſhall be liable to double Vexation for one and the ſame Thing; but if in ſuch Caſe the Appellee ſhall make it appear by a Special Replication that the Maihem has been occaſion'd ſince the Verdict in the Action of Treſpaſs by ſome ſubſequent Mortification, Dryneſs, or ſhrinking of the Part by reaſon of the Wound, perhaps he may avoid ſuch Plea by ſuch Special Matter; but the Court will not intend it unleſs it be ſpecially ſhewn.——And ſee S. P. Le. 319. in the S. C.

Mo. 457. pl. 628. Kirton v. Hopton, S. C. adjudged accordingly. —Noy 36. S. C. adjudged that the Plea is naught — Ow. 59. S.C.

11. In Appeal of Maihem *againſt ſeveral Defendants, one of them pleaded* that there was *no ſuch Perſon as one of the Appellees*, & quoad the Felony Not Guilty. *Another pleaded Miſnoſmer, and to the Felony Not Guilty.* This was held ill per tot. Cur. For a Plea in Abatement, and alſo Not Guilty, is not good in any Caſe but where the Life is in Jeopardy, and that in Favorem Vitæ; whereas this is only an Action in Nature of Treſpaſs; and the Court awarded that the Pleas in Abatement be outted, and the Pleas of Not Guilty ſhould only ſtand. Cro. E. 495. pl. 14. Mich. 38 & 39 Eliz. B. R. Kirton v. Williams & al'.

and a Diverſity taken between ſuch Pleading in Appeal of Mayhem and that of Murder, that in the laſt Caſe he muſt of Neceſſity plead over to the Murder; or otherwiſe if he will join in Demurrer upon the Plea to the Writ, he thereupon confeſſes the Felony, and ſo muſt plead over Not Guilty; but otherwiſe in Maihem; for tho' the Declaration be for Felony, yet a Maihem is only a Treſpaſs, and all are Principals, and the Defendant's Life not in Queſtion, but ſhall render Damages only, and therefore the Pleading over to the Felony is a Waver of the Plea; and this Diverſity was agreed to by Popham, Fenner, and Gawdy clearly.— Poph. 115. Kirton v. Hoxton, S. C. and held accordingly.

(E) Appeal of Rape. Who ſhall have it. And Pleadings.

1. IF a Man be *outlaw'd of Raviſhment of a Feme, or convicted at the Suit of the Party*, this is not Felony; per Ald. Quære inde; for by the Statute of Weſtm. 2. cap. 34. he ſhall have Judgment of Life and of Member; and it ſeems that the Opinion of Ald. is that no Appeal is here given, but that the *King only ſhall have the Suit.* Br. Corone, pl. 168. cites 13 E. 3.

This Statute gave an Appeal where

2. *In an Appeal of Rape the Husband, Father, or next of the Blood, ſhall have the Suit, and the Defendant ſhall not be received to wage Battle.*

no Appeal lay before, and alſo to other Perſons, ſo as the Woman that never conſented may have her Appeal upon this Statute, and if ſhe conſents afterwards then the Appeal is given, as in this Statute. 2 Inſt. 434.

In Appeal of Rape of his Feme the *Defendant pleaded Ne unques accouple* in lawful Matrimony, *becauſe one was affied to the Feme, and after another married her, and after ſhe came to him who affied her, and he married her, and ſhe after is raviſhed.* The firſt who married her ſhall have the Appeal of Rape; for the firſt Eſpouſals are good till they are divorced by the Pre-contract, and the Opinion here is that Ne unques accouple &c. in this Caſe is no good Plea; for the Statute gives it to the Barons ſi viros habuerint; ſo that *Baron in Poſſeſſion ſhall have it*, where Eſpouſals are not void. Br. Appeal, pl. 32. cites 11 H. 4. 13.

This Statute as to the Husband ſhall be conſtrued ſtrictly, and be intended of a Husband in Poſſeſſion, tho' there be good Cauſe of Divorce; for he is her Husband till a Divorce be had. Contra where the Marriage is void; for there he is not Vir ejus, and therefore in that Caſe Ne unques accouple &c. is no Plea by the beſt Opinion, tho' contra in Appeal of the Death of the Husband, or in Demand of Dower, becauſe they are by the Common Law. Br. Parliament, pl. 89. cites 11 H. 4 14 ——2 Hawk. Pl. C. 173. cap. 23 S. 62. ſays that Ne unques accouple &c. is a good Plea, and ſhall be tried by the Biſhop's Certificate, who, if the Marriage were unlawful by reaſon of a Pre-contract, ought to certify againſt the Appellant.

If

If a Woman be raviſh'd by her next of Kin, and conſents to him, and has neither Husband nor Father, the next of Kin to him ſhall have the Appeal; for he has diſabled himſelf by the Rape, whereby he becomes a Felon. 2 Inſt. 434.———Hale's Hiſt. Pl. C. 632. S. P. cites 28 H. 6. Corone 459.——— 2 Hawk. Pl. C. 173. cap 23. S. 64. S. P.

If there be no Husband, nor Father, then the Appeal is given to the Heir, whether Male or Female. Hale's Pl. C. 186.

3. A *Feme, Priſoner* in the Marſhalſea, *made Suggeſtion that the Servant of the Marſhal had raviſh'd her in Priſon*; and Gaſcoigne commanded the Marſhal to take the Battoon from him, till it was diſcuſs'd if he was guilty or not, and commit him to Priſon in Ward, quouſque &c. And per Cur. becauſe ſhe was Covert de Baron, ſhe cannot bring the Appeal without the Baron; but if the Baron will, they may purſue. And ſee Appeal *by Baron and Feme.* Br. Rape, pl. 1. cites 8 H. 4. 21.

But ibid. cites 1 H. 6. 1. and 11 H. 4. 12. and 10 H. 4. Fitzh. Tit. Corone * 128. [but this is miſprinted, and ſhould be * 228. that it may be brought by the Feme alone.]

4. In Appeal of Rape the *Count was, that the Defendant had raviſh'd his Wife contra Formam Statuti* 6 R. 2. &c. Exception was taken for *not alleging that the Feme did conſent* to the Raviſher; for if ſhe did not conſent, Appeal is not given on this Statute; but it was anſwer'd that this is implied in the Words (contra Formam Statuti.) St. P. C. 81. a. (C) cites Mich. 11 H. 4. 12.

Fitzh. Corone, pl. 86. cites Mich. 11 H. 4. 13. S. C. & S. P. accordingly. ——2 Hawk. Pl. C. 173. cap. 23. S. 63. S. P. accordingly.

5. In Appeal of Rape the Defendant demanded *Judgment of the Writ*, becauſe there is *not Felonice raput* in the Writ, and *as to the Felony Not Guilty.* Thel. Dig. 216. lib. 15. cap. 5. S. 19 cites 1 H. 6. 1.

6. Baron and Feme may join in Appeal of *Rape of the Feme*; for he cannot have it without his Feme; per Cur. Br. Baron and Feme, pl. 34. cites 8 H. 6. 21.

And ſee elſewhere the Baron brought Appeal alone. 1 H. 6. 1 and 4 H. 6. 13. and 10 H. 4. Fitzh. Corone 128.

7. W. brought Appeal of Rape of J. his Wife againſt 2, and the *Writ* was *Ad reſpondendum querenti ſecundum formam Statuti* 6 *R.* 2. *cap.* 6. *Quare Uxorem raput unde eum appellat*; and Exception was taken that the Writ ſhould be Unde eum appellat ſecundum Formam Statuti, and not Ad reſpondendum ſecundum Formam Statuti; for the Statute does not give the Anſwering, but the Anſwering is by the Common Law. And by Hales J. *the Appeal of Rape is given by the Stat. W.* 2. whereupon the Defendant paſs'd over, and Exception was taken to the Writ, becauſe it did *not ſay* that *Felonice raput* &c. & adjornatur. Br. Rape, pl. 4. Wm. Acton's Caſe.

Fitzh. Corone, pl. 228. cites Mich. 10 H. 4 S. P. and the Defendant was order'd to anſwer, and ſo he did, and pleaded Ne unques accouple &c.

——Fitzh. Corone, pl. 1. cites M. 1 H. 6. 1. S. P. of Ad reſpondendum, and the ſame Exception taken; and Haſſ. ſaid that the Statute does not give the Appeal; for that was at the Common Law; but he ſhall anſwer according to the Statute, becauſe the Statute ſays that he ſhall not be received to wage Battail, and ſo the Writ good; whereupon the other Exception was taken, and afterwards pleaded Not Guilty to the Felony; and Fitzherbert thinks the Reaſon was, becauſe the Felony is implied in this Word (Rapuit,) and therefore the Writ good.

8. Tho' by the Stat. W. 1. cap. 13. whereby Rape was turn'd into Treſpaſs, 40 Days are limited for the Suit, yet it being made Felony again by the Stat. W. 2 cap. [34.] and no Time limited for it, it may be *brought in any reaſonable Time.* Hale's Pl. C. 186.

Hale's Hiſt. Pl. C. 633. ſays the Appeal muſt be ſpeedily proſecuted; for it ſeems that a Year and a Day is not allow'd in this Appeal, but ſome ſhort Time, tho' it be not defin'd in Law what Time, but lies much in the Diſcretion of the Court upon the Circumſtances of the Fact, yet the Stat. W. 1. allow'd only 40 Days, and long Delay of Proſecution in ſuch Caſe of Rape, always

always carries a Presumption of a Malicious Prosecution. —— 2 Hawk Pl C. 175. cap 23 S 72. says, it seems that at this Day it may be brought in any reasonable Time, and lies in the Discretion of the Court; that the Stat. Westm. 1. which turn'd this Offence into a Trespass, limited 40 Days; and the Stat. Glouc. cap. 9. which limits Appeals to a Year and a Day, extends only to Appeals of Death; and West. 2. cap. 34. which makes Rape a Felony again, limits no Time for the bringing of it, but leaves it to the Construction of Law, which shall be agreeable to the ancient Rules of Law, in such Points wherein the Statute is silent.

St. P. C. 61. b. at the Bottom, and 62. a. S. P. cites Fitzh. Corone 17. where it is said that she shall not have Appeal of Rape against him; but the King shall punish it by way of Indictment.

9. If the *Lord* had *ravish'd his Nief* or Bond-woman, she might have had an Appeal of Rape against him before the Conquest, as at this Day she may. 2 Inst. 181.

10. In the Appeal of Rape being the Suit of the Party, the King's *Pardon* does not discharge the Party as it does upon an Indictment at the Suit of the King. 2 Inst. 434.

11. In an Appeal of Rape by Virtue of the Statute of Westm 2. cap. 34. several Exceptions were taken, (viz.) that the Appellant had counted, that on such a Day, Year, and Parish, the Appellee *Eam raput & carnaliter cognovit*, without saying *Felonice*, and she did *not aver* it *in Fact that she did not consent either before or after* the Fact done, according to the Statute of W 2. cap. 34. and also because in the Conclusion of the Count it is *not supposed to be Contra Formam Statuti* &c. but no Resolution was made to these Questions, the Queen pardoning the Offender. D. 201. b. pl. 67, 68. Trin. 3 Eliz. Ellen Lamb's Case.

(F) Appeal of Robbery, Larceny &c. Who shall have it. And against whom.

1. A Man may have an Appeal of Robbery *for the King or Queen*, as of a Cup of theirs stolen. St. P. C. 61. a. cap. 9. cites H. 17 E. 3. 13.

But Brooke says it is said, that at this Day it is used to be *De bonis Parochianorum* in Custodia sua existentibus. Br. Appeal, pl. 31. cites 11 H. 4. 11. ——— S. P. and the Churchwardens for the Time being shall have the Appeal of Robbery. Br. Appeal, pl. 45. cites 37 H. 6. 30. 31. ———2 Hawk. Pl. C. 167. cap. 23. S. 44. says it seems agreed, that Churchwardens having Possession of the Goods of the Church may have an Appeal of Larceny against any one who shall steal them; For they have a special kind of Property in them against all Strangers.

2. It is agreed to be a common Use, that *Churchwardens* shall have Appeal of Goods or Ornaments of a Church; Quod Nota; and this *de bonis Ecclesiæ in Custod' sua Existentibus*. Br. Appeal, pl. 31. cites 11 H. 4. 11.

Thel. Dig. 216. lib. 15. cap. 5. S. 18. cites 18 E. 3. the which is reported 11 H. 6. 23. [but it should be 93.] and Mich. 9 H. 4 1. ———Hale's Pl. C. 184. S. P. accordingly. ———2 Hawk. Pl. C. 167. cap. 23. S. 44. says, it is certain that a Villain cannot have Appeal of Larceny against his Lord for any of his Goods taken by his Lord, because the Lord by seising them makes them his own; but it seems clear at this Day, that any Tenant who is not a Villain

3. In Appeal of Robbery, if the Defendant says that the Plaintiff is his *Villein*, this is a good Plea. Br. Nonability, pl. 44. cites 11 H. 4. 93.

lain may have Appeal of Larceny againſt his Lord.———Lat. 127. S. P. accordingly by Doderidge J. to which Jones J. agreed.

4. In Treſpaſs, if *my Servant has my Goods in Poſſeſſion, and be thereof robbed*, he ſhall have thereof Appeal, per Littleton; Quod fuit Conceſſum; for he is *chargeable over* to his Maſter, and the ſame appears there of a Bailiff. Br. Appeal, pl. 91. cites 2 E. 4. 15. St. P C 60. b. (F) S. P. accordingly, cites Fitzh. Corone, pl. 100. [which cites Mich. 45. E. 3. 17 where S. P. ſeems admitted.]—2 Hawk. Pl. C. 167. cap 23. S. 44. S. P. and ſays it ſeems agreed.—— Either Maſter or Servant may have Appeal in ſuch Caſe. Hale's Pl. C. 184.—— S. P. accordingly, 2 Hawk. Pl. C. 167. S. 45. and in ſuch Caſe he that firſt commences the Appeal ſhall prevent the other.

5. Note, per Littleton J. that the Opinion of the Juſtices was, that if a Man *takes my Goods feloniouſly*, and *another takes them from him felonioufly*, I ſhall have Appeal of the 2d. Taking; for by the firſt Taking the Property was never out of me, for a * Felon cannot claim Property, and e contra it is ſaid elſewhere of a Treſpaſſor. Br. Appeal, pl. 100. cites 13 E. 4. 6. * S. P. Br. Appeal, pl. 84 cites 4 H. 7. 5 —— 2 Hawk. Pl. C. 167. cap. 23 S. 44. ſays it is ſaid,

That a Perſon who has been robbed of his Goods, ſtill continues to have ſo far the Poſſeſſion as well as the Property of them, that he may bring an Appeal of Larceny againſt any one who ſhall ſteal them from the Robber.——— Hale's Pl. C. 184. S. P. accordingly.——S. P. 2 Hawk. Pl. C. 167. S. 45. ſays, that ſuch Taker of the Goods claiming no Property in them, but taking them only as a Felon, had in Judgment of Law neither any Property nor Poſſeſſion in them, but the ſame wholly continued in the firſt Perſon; but if the Goods had been taken from him by a Treſpaſſor under Pretence of ſome Title, and ſuch Treſpaſſor had been robbed of them, it ſeems the firſt Perſon could have no Appeal for them.——St. P. C. 61. a. cap. 9. S. P and ſame Diverſity accordingly, cites Mich. 13 E. 4. 3. and Fitzh. Corone 62 ———Br. Appeal, pl. 100. cites 13 E. 4. 6. S. P. and ſame Diverſity.

6. Brooke makes a Quære, if the *Bailee of Goods* who is robbed by a Stranger cannot have Appeal ſpecially De bonis in Cuſtodia ſua exiſtentibus; For he may have Treſpaſs or Replevin De bonis in Cuſtodia ſua exiſtentibus. Br. Corone, pl. 141. cites 5 H. 7. 18. 2 Hawk Pl. C. 167. cap. 23. S. 44. ſays it ſeems agreed, that a Carrier to

whom Goods are delivered to be carried to a certain Place, or in general, any Perſon whatſoever, who is ſo far intruſted with the Goods of another, as, in Judgment of Law, to have the Poſſeſſion, and not the bare Charge of them, may have an Appeal of Larceny againſt any one that ſhall ſteal them, becauſe they have a ſpecial kind of Property in them againſt all Strangers; and it ſeems that they may bring a General Appeal as for their own Goods, or a Special One for the Goods of J S. in their Cuſtody But it ſeems clear, that no one can maintain ſuch Appeal who has the *Bare Charge* of Goods, as a *Butler* or *Cook*, who in my Houſe have the Charge of my Goods, becauſe in ſuch Caſe the whole Poſſeſſion, as well as the abſolute Property in Judgment of Law, always continues in me.

7. If *two are Merchants in Common*, and *one of* them is *robbed* and killed, the other ſhall have Appeal of this Robbery. St. P. C. 61. a. cap. 9. cites Fitzh. Corone, 392. [8 E. 3. Itin. Canc.] Hale's Pl. C. 184. S.P. accordingly. —2 Hawk. Pl C. 167. cap. 23. S. 45. S. P. accordingly.

8. If a Thief ſteals Goods out of the Cuſtody of a *Taylor* which he has of a Cuſtomer, the Taylor ſhall have a General Appeal; per Frowike Ch. J. clearly. Kelw. 70. pl. 7. Mich. 21 H. 7. Anon.

9. An *Executor* may have an Appeal *of Robbery* done *to himſelf*, * but *not* of a Robbery *done to his Teſtator*. St. P. C. 60. b. (F) * S.P. accordingly. Hale's Pl. C. 184 —— 2 Hawk. Pl. C. 167. cap. 23. S. 45. S P accordingly, becauſe when the Larceny was committed, it was no Injury to the Executor, but to the Teſtator only; and therefore the Appeal for it being only a mere Perſonal Action, and veſted wholly in the Teſtator, there is no Doubt but that it dies with him, as all other Actions for mere Torts do.

11. Appeal of Felony lies againſt a *Monk profeſſed* without his Sovereign. St. P. C. 62. a. (A) cap. 11. cites Fitzh. Corone 17. [Trin. 29 H. 6.] and Trin. 6 H. 7. 5.

Hale's Pl. C. 185. S. P. accordingly. ——If Appeal be brought againſt an Abbot and his Commoign, the Commoign ſhall anſwer and plead by himſelf without his Sovereign. Br. Appeal, pl 50. cites 15 E. 4 1.

12. In Appeal of *Robbery againſt two Acceſſories brought in the County of W. where the Robbery was done*, the Plaintiff *ſet forth, that the Principals* named in the Writ, and who were attainted, *did the Robbery in the County of W. and that the Defendants before the Robbery did feloniouſly abet them in London*; It was adjudg'd, that tho' the Plaintiff could have only one Appeal againſt the Principals and Acceſſories, and that this muſt neceſſarily be brought againſt the Principals in the County of W. yet becauſe thoſe of the County of W. and London upon Not Guilty pleaded cannot join, and thoſe of W. cannot inquire of a Thing in London, the Appeal againſt the ſaid Acceſſories ſhall abate. 7 Rep. 2. b. cites D. 38. Mich. 29 H. 8. Gawyn v. Huſſey and Gibbs.

Hale's Pl. C. 184. S. P.

13. An *Infant* ſhall have an Appeal of Robbery. St. P. C. 60. b. cap. 9.

S. P. whether it be Appeal of Robbery, or any other Appeal.

14. Appeal of Felony lies againſt a *Feme Covert* without her Baron. St. Pl. C. 62. a. (A) cap. 11.

15. So it lies againſt an *Infant*; and ſo of all others who may commit Felony. St. Pl. C. 62. a. (A) cap. 11.

Hale's Pl. C 185. and the ſame of an Infant Ibid.———2 Hawk. Pl. C. 168. cap. 23. S. 46. S. P. accordingly, both as to Infant and Feme Covert.

St. P. C. 60. b. cap. 9. S. P. accordingly, cites Fitzh. Corone 357. — Hale's Pl. C. 184. S. P.

16. A *Woman* at this Day may have an Appeal of *Robbery* &c. For ſhe is not reſtrain'd thereof. 2 Inſt. 68.

(G) At what Time Appeal lies.

1. *Stat. Glouc.* 6 E. 1. *cap.* 9. ENacts, That *Appeal ſhall not be abated for Default of freſh Suit, if the Party ſhall ſue within the Year and the Day after the Deed done.*

Theſe *Words* of the Statute *are general*, not making mention of Appeal of Death any more than of other Felony; but on comparing them with the other Words in this Statute a Man will intend them ſpecially, and that they extend only to Appeal of Death, and to no other Appeal; and yet it ſeems that in the Time of E. 3. the Judges intended them generally, viz. that they extended to all Appeals. St. Pl. C. 62. a. (B) cap. 12 cites Fitzh. Corone 184. where he ſays it appears that Appeal of *Robbery* ought to be commenced within the Year and Day after the Fact, and that Britton 45 & 46. is ſo too; but ſays that the Law is not ſo at this Day; for if one being robb'd makes *freſh Suit*, tho' he does not commence his Appeal within 2 or 3 Years after the Robbery, yet it is well enough, as appears Paſch. 7 H. 4. 38.———S. P. accordingly, and the judging of freſh Suit lies in the Diſcretion of the Court. Hale's Pl. C. 185.———2 Hawk. Pl. C. 168. cap. 23. S 48. S. P. accordingly; but ſays that it ſeems that one who has been guilty of a groſs Neglect in purſuing the Offender, may be barr'd of ſuch Appeal as well within the Year and Day as after; for that the Common Law ſeems in all Appeals to have required that the Appellant make freſh Suit; and the Stat. of Glouc. which takes away the Neceſſity of it in Appeals of Death brought within the Year and Day, extends not to other Appeals.

2 The *Suit is freſh enough* if the Diligence of the Party be done, notwithſtanding the Robber *be not taken in a Year after, and* be taken *by another*. Br. Appeal, pl. 23. cites 7 H. 4. 43.

2. Appeal

2. In Appeal of Death, *after Declaration* the *Plaintiff was nonſuited*, and the Defendant was *arraigned upon the Declaration*, and *ſaid that of the ſame Death he was indicted before and arraigned, and pleaded Pardon of the King*, which was *allowed* to him, and went without Day; Judgment &c. *and he ſhew'd the Charter, and it was allow'd again*; quod nota. And ſo ſee that the Plaintiff had Appeal *after the Arraignment at the Suit of the King*, and the Defendant was twice arraign'd. Quod nota. Br. Appeal, pl. 33. cites 11 H. 4. 41.

4. *After the Year and the Day* Appeal *of Death* does not lie; per Hank. And hence it ſeems that other Appeals of *Larceney* lie well. Br. Appeal, pl. 37. cites 12 H. 4. 3.

5. Where the Writ of Appeal of Death of his Anceſtor *was brought within the Year*, and *before the Return the Year was paſs'd, and the King died*, and yet upon Certiorari to bring in the Writ the Plaintiff ſhall have Re-attachment after the Year. Br. Appeal, pl. 98. cites 10 E. 4. 13. 14.

Br. Reattachment, pl. 27. cites S. C. ——— Fitzh. Reattachment, pl. 8. cites S. C. accordingly, and ſays that the Juſtices commanded a Note of the Re-attachment to be made and ſhewn to them, and that the Writ of Appeal was enter'd of Record in Bank before it iſſued to the Sheriff.

Appeal of Death was *abated by Demiſe of the King*, and the *Defendant came and ſhew'd Pardon of the King, and that the Year was paſs'd*, and pray'd the Pardon to be allow'd; and by the Juſtices of both Benches, the Re-attachment ought to have been within the Year after the Death of the King, and becauſe not &c. therefore the Pardon was allow'd, and the Defendant went quit. Br. Appeal, pl. 81. cites 2 H. 7. 10.

In Appeal of Death, (ſince the Statute, 1 E. 6. cap 7.) if the *Writ be delivered to the Sheriff within the Year*, and *before the* Return thereof, or that the *Sheriff has done any Thing, the King dies*, and the *Year expires before the Return-Day*, in this Caſe the Common Law will give Remedy to the Plaintiff, viz. a *Certiorari* returnable in B. R. and thereupon the Plaintiff ſhall have *Re-attachment*, tho' it comes not in by the Return of the Sheriff, but by Certiorari, and this is by reaſon of the Neceſſity of the Matter; for otherwiſe the Plaintiff who lawfully purchaſed his Writ within the Year, without any Default in him, will loſe his Appeal, the Year and Day being now paſt; and therefore, ſince by *Act in Law* the Writ is diſcontinued, the Law will give Means to revive it, that the Party may not be without Remedy. 7 Rep 30. a. b. Trin. 1 Jac. Diſcontinuance of Proceſs &c. by Death of the Queen.

2 Hawk. Pl. C. 163. cap. 23. S 33. ſays, that if an Appeal had been abated by the Demiſe of the King before 1 E. 6. cap. 7. (by which this Miſchief is provided againſt) it ſeems clear that the Appellant might have ſued a Re-attachment againſt the Appellee within the Year and Day after ſuch Demiſe, becauſe he was in no Default, and otherwiſe would have been without Remedy.

6. 3 *H. 7. cap. 1. parag. 16. If the Felons and Acceſſories in Murder be acquitted, or the Principal of the Felony, or any of them, attainted, the Wife or next Heirs to him ſo ſlain may have their Appeal within the Year and Day after the Murder done againſt the ſaid Perſons ſo acquitted, and all their Acceſſaries, or againſt the Acceſſaries of the Principal, or any of them ſo attainted, or againſt the ſaid Principals attainted, and the Benefit of the Clergy not had.*

At Common Law if A. had been *arraign'd for Murder or Robbery*, tho' *within the Year*, yet if Appeal was after brought for the ſame Crime, Auterfoits acquit upon the Indictment had been a good Bar to the Appeal. 2 Hale's Hiſt. Pl. C 249. cites 16 E. 4. 11. a. and therefore the Juſtices *at Common Law* would *rarely arraign* a Priſoner upon an Indictment, eſpecially for *Murder within the Year* after the Death, *in favour of the Appeal*. Ibid. cites 22 E. 4. Corone 44. Unleſs the Appellant had been an Infant, cites 32 H. 6. Corone 278, 279. Or the Evidence had been very pregnant, and cites 21 H 6. 28. b.

7. If a *Stroke* be given *on one Day*, and the *Perſon dies on another Day*, it ſeems the Appeal ſhall be *commenced within the Year after the Stroke given*, becauſe the Death inſuing ſhall have Relation thereto &c. and the Word *(Deed)* in the Statute ſhall be intended the Felony whereon the Appeal is commenced; for if one be Acceſſary a Year after the Homicide or Murder committed, Appeal lies againſt him, and yet it is not within the Year and Day after the Homicide or Murder committed. St. P. C. 63. a. (A) (B).

2 Inſt. 320. cites this Opinion of Staundford; but ſays that the Year and Day ſhall be accounted *from the Death*; for before ſuch Time no Felony was committed, and that thus it has been often reſolved and adjudged, and the Reaſon

ſon grounded upon Relation, which is a Fiction in Law, holds not in this Caſe. And if an Appeal of Murder be brought, and hanging the Suit, and after the Year and Day is run out one becomes Acceſſary to the Appellee, the Plaintiff ſhall have an Appeal againſt him after the Year and Day paſt after the Death; but it muſt be brought within the Year and Day after this new Felony as Acceſſary, becauſe in this Caſe (*after the Deed*) is underſtood after this new Felony done as Acceſſary. ——3 Inſt. 53 S. P. accordingly, if the Stroke be given the 1ſt of January, the Year ſhall end the 1ſt of December. If a *Stroke* be given the *1ſt of Jan.* and the *Party dies the 1ſt of March* following, the Day and Year for bringing the Appeal is to be accounted from the Death, and not from the Stroke, contrary to the Opinion of Stamford's Pl. C. 63. a — Hale's Hiſt. of Pl. C 427. cap. 33. cites Co. Pl. C. 53 and [2 Inſt. 320] upon the Stat. Glouc. cap. 9 and 4 Rep. 42 b. Heydon's Caſe.——2 Hawk Pl. C. 162. cap. 23. S. 33 ſays it has been holden that the Computation ſhall be from the Wound given, and not from the Death, and that this Opinion ſeems ſomewhat favour'd by the Letter of the Statute, viz. That the Party ſhall ſue within the Year and Day after the Deed done; but no Deed is done at the Time of the Death, but at the Time of the Wound; yet the contrary is ſettled to be Law, and is certainly moſt agreeable to the Intent of the Statute; the plain Import whereof ſeems to be, That the Appellant ſhall not be adjudged to have made Default of freſh Suit, unleſs he has been negligent a Year and a Day; but negligent he could not be, as to the bringing an Appeal before the Party was actually dead, becauſe till then no Appeal lay. And agreeable hereto it ſeems alſo to be ſettled, that if a Perſon becomes Acceſſary after the Death by receiving the Offender, an Appeal lies againſt him at any Time within the Year and Day after ſuch Receipt, becauſe till then the Appellant could not poſſibly be guilty of any Negligence as to the bringing an Appeal againſt the Receiver. ——And ibid. S 34. ſays it ſeems that in any of the Caſes abovementioned, the Year and Day are to be computed from the Beginning of the Day on which the Death or Receipt &c. happened, and not from the preciſe Minute or Hour, becauſe regularly the Law makes no Fraction of a Day, and therefore if the Party dies at any Time the 1ſt of January, the Year ſhall end the 1ſt Day of January following

But then there muſt be freſh Suit. St. Pl. C. 62. b. lib. 2. cap. 12.

8. An Appeal of *Robbery* may be brought by the Party robb'd *20 Years after the Offence* committed, and that he ſhall not be bound to bring it within a Year and a Day, as he muſt do in an Appeal of Murder. Agreed by the Juſtices. 4 Le. 16. pl. 58. Trin. 26 Eliz. B. R. Doylie's Caſe.

The Caſe of *other Appeals than of Murder*, As of *Robbery*, *Rape* &c. are not within the Statute 3 H. 7. cap. 1. and

9. An Appeal *of Rape*, *Robbery*, *Felony*, *or Murder* is brought, and *pending this Appeal the Appellee is inditted at the Suit of the King.* The Proſecution upon this Indictment ſhall be ſtay'd until the Appeal is determined; for otherwiſe the King ſhould deſtroy the Suit of the Party; for this Reaſon the King by his Pardon cannot bar an Appeal. Rex, quod eſt Injuſtum, facere non poteſt, by all the Judges of England. Jenk. 160. pl. 4.

therefore Auterfoits Acquit, upon an Indictment within the Year, ſtands as at Common Law a good Bar to an Appeal of Robbery, or any Offence other than Murder or Manſlaughter; and yet the Judges at this Day never forbear to proceed upon an Indictment of Robbery, Rape, or other Offence, though within the Year, becauſe Appeals of Robbery eſpecially are very rare, and of little Uſe, ſince the Statute of 21 H. 8. cap. 11. gives Reſtitution to the Proſecutor as effectually as upon an Appeal. 2 Hale's Hiſt Pl. C. 250.

10. A Perſon *indicted of Murder* was *acquitted*, and afterwards an Appeal was brought, and this by Direction of Holt, Ch. J. before whom the Trial on the Indictment was, the Jury acquitted him *againſt Evidence*, and the Appellee being *found Guilty on the Appeal was hanged.* 11 Mod. 217. pl. 5. Paſch. 8 Ann. and Ibid. 228. pl. 2. Trin. 8 Ann. Young v. Slaughterford.

(H) Before whom it lies. And How.

2 Hawk. Pl. C. 156. cap. 23. S. 5. S. P. but ſays, he ſup-

1. IF the *Juſtices in Eyre* are in a County, and one will commence Appeal in B R. for Matter done in the ſame County where the Juſtices in Eyre are, it ſeems that the Appeal is well commenced, becauſe the King has determined the Power of the Juſtices in Eyre as to this Suit; but

but if the Appeal be commenced before the Juſtices, if he will *bring other Appeal afterwards in B. R.* it will be a good Plea to ſay that He has other Appeal pending, becauſe it is not reaſonable that the Party by his own Act ſhall change the Appeal once well commenced. Kelw. 152. b. pl. 4. 6 E. 1.

poſes it muſt be intended of an Appeal by Bill, becauſe all Writs of Appeals muſt be returnable in B. R

2. Appeal was brought *before the Juſtices at Newgate* of Robbery &c. and ſo note that Appeal lies well before the * *Juſtices of Gaol-Delivery*, and ſo it is often uſed. Quod nota. Br. Appeal, pl. 51. cites 4 Aſſ. 1.

* S. P. Br. Appeal, pl. 123. cites 11 E. 3. 28.

3. Appeal may be taken *before the Sheriff and Coroner by Bill.* Br. Appeal, pl. 56. cites 17 Aſſ. 5.

And Scot J. ſaid that Sheriffs and Coroners *may receive* Appeals, *but* he did *not* ſay that they may *determine* the Appeals. Br. Appeal, pl. 56 cites 17 Aſſ. 5 ——Br. Corone, pl. 82. cites S. C. and S. P.——It ſeems here that the *Coroner* may finiſh Appeals taken before himſelf if the Plaintiff be not nonſuited. Br. Appeal, pl. 62. cites 22 Aſſ. 97.

Upon the Statute Magna Charta cap. 17. Britton and divers have been of Opinion that upon Appeal commenced *before the Sheriff and Coroner*, tho' they might award Proceſs againſt the Appellee till Exigent, yet they cannot award the Exigent nor put him to Anſwer if he appears, but can only award him to Priſon by this Statute, therefore Quære, for Britton and the Book of Aſſiſe which are contrary, wrote long after the making the ſaid Statute. St. P. C. 64. a. (A)—Hale's Pl. C. 171. the Coroner together with the Sheriff hath Power in the County to receive Appeals of Robbery and other Felonies, but then it muſt be of a Felony in the ſame County; and upon this Appeal they may grant Proceſs till Outlawry, but it ſeems they *cannot ſend an Exigent*, becauſe prohibited by Magna Charta cap. 17.——Ibid. 179. Appeals may be proſecuted by Bill before Sheriff and Coroner.——2 Hawk. Pl. C. 51 cap. 9. S. 41. ſays it ſeems probable that before the Statute Mag. Chart. cap. 17 Coroners might try Offenders as well as receive Accuſations againſt them, but it is agreed that ſince the Statute they cannot; and it is agreed that Proceſs may be awarded in the County Court on ſuch Appeals till the Exigent, but it ſeems queſtionable whether ſuch Proceſs may properly be ſaid to be awarded by the Sheriff and Coroner jointly, ſince the Coroner being (as he ſuppoſes) the only Judge, it ſeems moſt proper that the Proceſs be awarded by him only; neither doth it ſeem clear that the abovemention'd Statute reſtrains the Coroner from awarding an Exigent, and outlawing the Appellee thereupon; for ſince, as it is agreed by all, an Offender might become attainted by an Abjuration of a Felony made before a Coroner, why not as well by an Outlawry pronounced by him? And accordingly we find it taken for granted in ſome of the old Books of the beſt Authority, ſince this Statute that Appellees may be outlaw'd for not appearing on Proceſs before the Coroner.——2 Hawk. Pl. C. 156. cap. 23. S. 10. ſays it is certain that an Appeal may be commenced before the Sheriff and Coroner by Bill, and removed from them into B. R. by Certiorari, as is more fully ſhewn. Ibid. cap. 9. S. 39. 40. 41.——Hale's P. C. 179. S. P.

4. *So before the King* * *in B. R.* by Bill, and ſo it was, quod nota, that Sheriff and Coroners may take Appeal by the Statute, *Weſtminſter*, 1. *cap.* 10. *and* by ſome they † *determine it*, *but may award Proceſs till the Exigent*, and ſuch like in Antiqua Lectura in the Time of H. 7. and it ſeems to be Law. Ibid.

† S. P. Br. Appeal. pl. 62. cites a Reading in the Time of the ſame King. * St. P. C. 64. b. (D) S. P.

5. Appeal was *brought before the Juſtices of Goal Delivery in their Circuit* at Windſor, by the Statute which *wills that Juſtices of Goal Delivery have Power to make Proceſs of Felony, and to determine it throughout England, and make Proceſs to the Sheriffs*, quod nota. Br. Appeal, pl. 11. cites 44 E. 3. 44.

Juſtices of Gaol Delivery ſhall not take Appeals unleſs *againſt thoſe Perſons who are in the Gaol before them*, and *not againſt thoſe who are at large*; for their Authority is to deliver the Gaol. Br. Appeal. pl 19. cites 7 H. 4. 27

But it is uſual that *if others are indicted, and taken after their coming* they Arraign them upon Indictments, contra upon Appeal, as appears there. ibid.

If one be in Priſon for Felony in B R. or before Juſtices of Gaol Delivery, and after is *let to Bail*, yet Appeal *by Bill* lies againſt him notwithſtanding this Bailment. St. P C. 64, b. 65. a. cites M. 21 H 7 35. and Mich. 32 H. 6, 4. and Fitzh. Mainpriſe, 12. But that againſt one *let at large by Mainprize*, a Man ſhall not have Appeal, becauſe he is not in Ward. St P C. 65. a. cites Paſch. 9 E. 4 2. and Mich 39 H 6 29.——Hale's Pl. C. 179. S. P accordingly. ——2 Hawk. Pl. C. 155. cap. 23. S 4. S P. accordingly.

Appeal *by Bill* may be commenc'd *before Juſtices of Gaol Delivery*, but then the *Appellee*, at the Time of the Appeal taken againſt him, *muſt be a Priſoner in the ſame Gaol*, whereof the Juſtices are to make

Delivery; *Or one of the Appellees at leaſt* muſt be ſo at the Time of the Appeal taken againſt him, and the others, or otherwiſe the Appeal is not good. St P. C. 64. b. (C) cites 13 H. 4. 12. and Trin. 9. H. 4 2. But an Approver may Appeal others who are not in Priſon but at large, but this is by the Statute De Appellatis.

As if one Subject kills another Subject in a Foreign Kingdom, the Wife of him that is killed may have Appeal here before the Conſtable and Marſhall. St. P. C. 65. a. (B.)——Ibid. ſays that ſome have ſaid upon this Statute that if one be Struck in France, and dies thereof in England, no Appeal lies thereof unleſs the Parties were there in the Service of the King; Quære de eo.

6. 1 *H.* 4. *cap.* 14. *All Appeals of Things done within the Realm, ſhall be tried by the Laws thereof; and of thoſe done out of the Realm, by the Conſtable and Marſhall of England for the Time being.*

Petition was made to the Queen to make a Conſtable and Marſhall, but ſhe would not. Hutt. 3. cites 26 Eliz. Doughty's Caſe.——So in Sir Francis Drake's Caſe, Co. Litt 74. b.——2 Hawk Pl. C. 157. Cap 23. S. 12 S P. accordingly, and ſays they ſhall proceed according to the Civil Law, and give Sentence by Teſtimony of Witneſſes or Combat, and alſo that it ſeems clear, that no ſuch Appeal can be proſecuted before the Marſhal alone without the Conſtable.—— And ibid S. 13. ſays, it has been holden, that if a Man dies in England of a Wound given him in a Foreign Realm, he may be Appealed by the Intent of this Statute, before the Conſtable and Marſhall, for that it is certain, that he cannot be tried by the Common Law; and it cannot be thought the meaning of this Statute in reſtraining the Civil Law, in Caſes within the Conuſance of the Common Law to reſtrain alſo in Caſes which the Common Law had nothing to do with, and which were properly Cogniſable by the Civil Law, and by that only; for the only End of ſuch a Conſtruction would be to cauſe a Failure of Juſtice.

St. P. C. 65. a. (A) ſays it appears Hill. 44 E. 3. 95.

7. Note by all the Juſtices, that *Juſtices of Peace* cannot take Appeal of any Approver, nor of another, for their Commiſſion does not extend ſo far. Br. Appeal, pl. 18. cites 2 H. 4. 19.

that an Appeal may be commenc'd before Juſtices of Peace; becauſe they have Power by their Commiſſion to hear and determine Felonies; but Staundford ſays, Quære tamen——Hale's Pl. C. 179. S P. cites 44. E. 3. Corone 95. Quod Quære.

It ſeem'd to Fitzherbert, in Abridging of the Caſe of 44 E. 3 that *Juſtices of Peace* having Power by the Statute of 34 E 3. which there is calle d (Le novel Statute) might receive an Appeal by Bill, becauſe they had *Power to hear and determine Felonies* at the Suit of the King, and the Book at Large ſpeaketh only of Juſtices of Gaol Delivery. 2 Inſt. 420.——2 Hawk Pl. C. 156. cap. 23. S. 9. ſays that Fitzherbert ſeem'd of ſuch Opinion by Virtue of the the Statute of 34 E. 3 1. which enacts that Juſtices of Peace ſhall here and determine all manner of Felonies, and Treſpaſſes in the ſame County, &c. but that there is much greater Authority for the contrary Opinion; and that the Caſe in the Year Book, in the Abridgment whereof the ſaid Opinion of Fitzherbert is inſinuated is plainly miſtaken, for it makes no mention of Juſtices of Peace but only of Juſtices of Gaol Delivery; to which may be added that the ſaid Statute is expreſs that they ſhall have Power ſo to do at the King's Suit which muſt be either taken to exclude the Suit of the Party or to ſignify little or nothing.

In ſuch Caſe the Wife of the Deceas'd had her Appeal before the Conſtable, and Marſhall. Co. Litt. 74. a. b. and ſays that ſo it was reſolved in Q. Eliz. Time, in Sir Francis Drake's Caſe who had ſtrook off the Head of Down in Partibus Tranſmarinis, that his Brother and Heir might have Appeal, but the Queen would not conſtitute a Conſtable of England, &c. Et ideo dormivit Appellum.

8. A Man is *killed in Scotland*, his Feme may have *Appeal in England*, which proves that Scotland is parcel of the Realm of England, or within their Juriſdiction, as it ſeems. Br. Appeal, pl. 153. cites 13 H. 4.

And per Strange ſuch Appeal brought *before the Coroner by Plaint* is as well as Appeal brought here in Writ, and when it is removed into this Court it is alſo of Record as well as if it had been brought by Writ here at firſt. Ibid.

9. *Appeal may well be attached in full County before the Coroner and Sheriff, but there is no neceſſity that the Sheriff be there preſent, for the Coroner only is Judge of it*, and the Sheriff by the Statute ſhall controul him there; Per Cheyney. J. Br. Appeal, pl. 44. cites 4 H. 6. 15.

Coroners may take Appeal of Death, and *award Proceſs at the Exigent, but* the *Plea ſhall not be determined before him.* Br. Corone, pl. 82. cites an ancient Reading in the Time of H. 7.

St. Pl. C. 64. b. cites S. C. &

10. Appeal by a Feme of the Death of her Husband againſt three. She may commence it *before the Juſtices of Gaol Delivery, where one is,*

and

and convict him, *and after remove* the Appeal *into B. R.* Per Gaſcoigne, *or* might have commenced the Appeal *againſt all in B. R. at firſt*, and have Proceſs againſt them who are not taken. Br. Appeal, pl. 28. cites 9 E. 4. 1. 2. S. P. ſays this Appeal, ought to be removed into B. R. and there Proceſs ſhall be made againſt thoſe that are at large; by Gaſcoigne and Huls.——Hale's Pl. C. 179. S. P. ——2 Hawk. Pl. C. 156. cap 23. S. 7. S. P. ſays it has been reſolved, That if Part of the Accomplices to the ſame Felony are in the Priſon which the Juſtices are to deliver and the others are not in it, the Juſtices ſhall receive an Appeal againſt them all, which, after the Trial of thoſe who are in Priſon, ſhall be removed into B. R. where the others ſhall be proceeded againſt.

11. A Lord, *Peer of the Realm*, ſhall not be tried *by his Peers in Appeal*, contra upon Indictment. Br. Appeal, pl. 97. cites 10 E. 4. 6. Br. Corone 152. cites S. C.

12. It was doubted by what Warrant *Juſtices at the Aſſiſes* hold Pleas of Appeals of *Robbery*, and it ſeem'd to all here [in C. B] that it is by Virtue of the Commiſſion of Gaol Delivery, but of Appeal of Murder the Statute 2 or 3 H. 7. gives them Power by expreſs Words. D. 99. a. pl. 62. Paſch. 1 Mar. Anon. 12 Rep. 32. Trin 5 Jac. in the Caſe of Commiſſions S. C. cited per Cur. and ſaid that Juſtices of Aſſiſe held Plea in Appeal of *Murder* by the Stat. W. 2. and 3 H. 7. and of Robbery by Commiſſion of Gaol Delivery.——2 Hawk. Pl. C. 30. cap. 7. S. 9 cites S. C. and ſays it ſeems that the meaning of this Report of Dyer ought not to be intended that Juſtices of Aſſiſe have no Juriſdiction as to an Appeal of Robbery without an expreſs Commiſſion of Gaol Delivery; for ſince they have Power as ſuch by the Statute De Finibus to deliver Gaols of all Manner of Priſoners after the Form of Gaol Deliveries, it ſeems they may delever ſuch Gaols of Perſons proceeded againſt by way of Appeal commenc'd before them as well as thoſe proceeded againſt by way of Indictment. And that Dyer ought to be underſtood that Juſtices of Aſſiſe may hold Plea of Appeals of Robbery by the Commiſſion of Gaol Delivery given them implicitly by the Statute De Finibus, in reſpect whereof they ſeem to have all the Power of Juſtices of Gaol Delivery whether given by Common Law or Statute, as fully appears by what follows in that Report of Appeal of Murder given by the Statute 2, or 3. H. 7.

13 Appeal lies either *by Writ Original or* by *Bill*. The Original Writ iſſues out of Chancery. 2 Inſt. 420. St. P. C. 64. a. (A) S. P. ——Hale's Pl. C. 179 S P. and ſays that Appeals by Bill may be proſecuted againſt any that is in Cuſtodia Mariſchalli or let to Bail.——2 Hawk. Pl C. 155 cap. 23 S. 1, 2. S P. but ſays the original Writ is returnable only in B. R.

14. It ſeems clearly to follow from the Purport of the Statute of Weſtm. 2. cap. 29. that Bills of Appeal may be commenced and determined before *Juſtices ſpecially aſſign'd* in ſpecial Caſes, and for certain Cauſes to hear and determine them. 2 Hawk. Pl. C. 156. cap. 23. S. 6.

(I) In what County to be brought or Tried.

1. APpeal by a Feme of the Death of her Husband *againſt two*, of her Husband kill'd at Reading in the County of Berks *by the one, that the other received him at D. in the County of S.* 20 *Miles from Reading*; and there it was agreed clearly by Tank and Knivet J. that the Principal cannot be in one County, and the Acceſſory in another County, but that it ſhall be void againſt the Acceſſory, unleſs it be where a *Vill extends into diverſe Counties*, as where a Man is *Struck in one County, and dies in another County*, there Appeal lies in the County where he died, and ſhall found the Appeal upon the one Writ, and the other upon his Caſe, by which the Acceſſory went quit, quod nota. But Brook ſays ſee now the Statute thereof, 2 *E.* 6. *cap.* * 34. Br. Appeal, pl. 80. cites 45 Aſſ. 9. * It ſhould be cap. 24.

2. Appeal

Fr. Corone, pl. 79. cites S. C. & S. P. accordingly.

2. In Appeal, if a Man be *robbed in London*, and the *Felon brings the Things taken into Middlesex*, Appeal may be well brought in Middlesex, and in whatever County or Place the Felony be done, *yet* upon Appeal *in B. R.* the Things taken shall be brought into Court, and he who has Franchise to have it, as London &c. shall have Allowance there. Br. Appeal, pl. 23. cites 7 H. 4. 43.

3. Appeal was bronght *in another County than where the Felony was done*, and therefore it was abated by Award, 5 R. 2. But it seems, that where the *Goods* are *taken in one County, and carried into another County*, it is Felony in each County. Br. Appeal, pl. 35 cites 11 H. 4. 93.

But Br. Appeal, pl. 7. cites 43 E. 3. 17, 18, 19. that the Appeal shall be brought in the County where he died.

4. Note, that it was said by Babb. in Trespass, that if a Man *strikes* another *in one County*, by which he *dies in another* County, the Heir may bring Appeal in the one County or the other. Br. Appeal, pl. 3. cites 9 H. 6. 63.

Br. Corone, pl. 140. cites S. C. accordingly, but it was said that the Indictment shall be taken in the one County only. ——— Br. Appeal, pl. 85. cites S. C. & S. P. tho' in Appeal he may count in both Counties, by all the Justices in the Exchequer Chamber. ——— Br. Appeal, pl. 83. cites 3 H. 7. 12. S. P. acordingly as to the Visne; for all is one and the same Felony. ——— Br. Appeal, pl. 149. cites 10 E. 3. S. P. ——— S. P. Br. Visne, pl. 78. cites 7 H. 7. 12. ——— Jenk. 175. pl. 48 cites S. C & S. P. accordingly.

5. *Appeal*, and *counted that he struck the Deceased in the County of W. of which he died in the County of S.* the Delendant pleaded Not Guilty, and it was tried by both Counties by Advice of all the Justices in the Exchequer Chamber. Br. Visne, pl. 80. cites 4 H. 7. 18.

If a Stroke be in one County and the Death in another, the Appeal of the Murder may be brought in either County, and yet the Defendant did nothing in that County where the Party died but the Death, which ensued upon the Stroke, made the Felony. 7 Rep. 2. a in Bulwer's Case cites 18 E. 3. 32. 9 H. 6. 63. 45 Ass. pl. 9. 43 E. 3. 3 H. 7. 12. a. 14 H. 7. 18. 6 H. 7. 10. 11 H. 4. 93 ——2 Hale's Hist. P.C. 163. cites S. C. accordingly.

A Man was wounded in the County of E. and died in the County of C. and the Heir brought an Appeal in the County of C. where he died; upon Not guilty pleaded, the Court were of Opinion that the Visne should come out of each County. D. 46. pl. 8. Mich. 31 H. 8. Anon.

Fitzh. Corone, pl. 60. cites S. C. & S. P. and says, that it was tried by both Counties, by the Advice of all the Justices in the Exchequer Chamber. ——— Br. Appeal, pl. 85. cites S. C. & S. P. accordingly, by all the Justices.

6. *And in Appeal the Defendant said, that the Deceased assaulted him in another County, and the Defendant fled as long as he could* to save his Life, *and at last he struck him, of which he died in the other County where he is indicted*, this shall be tried by both Counties; Per Townsend, quod omnes negaverunt. Br. Visne, pl. 80. cites 4 H. 7. 18.

Br. Corone, pl. 139 S. C. & S. P. for this affirms Property in Case of Felony, but not in Trespass.

7. Appeal may be *in any County where the Felon carries the Goods*; For a Felon claims no Property; contra of a Trespassor, for there the Action does not lie but in the same County where the first Taking was; For a Trespassor claims Property; and per Frowike, the same Law of Indictment as of Appeal, which Brooke says is Law. Br. Appeal, pl. 84. cites 4 H. 7. 5.

——— Fitzh. Corone, pl. 62. cites S. C. & S. P. accordingly, by Huffey and Fairfax.

St. P. C. 63. b. (E) (F) S. P. accordingly. —— 2 Hawk. Pl. C. 168. cap. 23. S. 47. S. P.

8. If a Man commits a *Robbery in one County, and carries the Goods into diverse Counties*, the Party robbed may have Appeal of Felony in which of the Counties he will, but no Appeal of Robbery but only in the County where the Robbery was committed; for it is Felony in all the Counties where the Goods are carried; (For Felony does not devest Property) but it is no Robbery (which ought to be done to the Person of a Man) but only in the County where the Robbery was done. 7 Rep. 2. a. in Bulwer's Case, cites 4 H. 7. 5. b. 29 H. 8. 39, 40. Dyer 11. H. 4. 93. 3 E. 3. Tit. Ass. 446.

9. If

9. If one *takes me in the County of A. and* carries me into the County of B. and *robs or kills me in the County of B.* he ſhall be appeal'd for this in the County of B. only, for he was guilty of a Treſpaſs only in the County of A. St. P. C. 63. (F) 2 Hawk. Pl. C. 168. S. 47. cites S. C.

10. Where a *Feme was taken in the County of E. and raviſhed in the County of H.* the Appeal was brought in the County of H. and well, and tried there only. Br. Appeal, pl. 83. cites 3 H. 7. 12. Hale's Pl. C. 186 accordingly.—— St. P C. 63. b (E) S. P. accordingly.——2 Hawk. Pl. C. 174. cap. 23. S 71. ſays, there is no doubt but this, like all other Appeals, is a local Action, and conſequently ought to be brought in the County where the Felony was done.

11. A Man was *arraigned upon Indictment taken before the Coroner of London*, for that he *ſtruck J. N. at D. in the County of Middleſex, and of which he died at London within the Year*, and he was diſcharged per Cur. *But Appeal* may be ſuffered in this Caſe if both Counties can join, for the one County cannot find the Striking in the other, Quære inde in Appeal, but this is aided by the Joinder; but Brooke ſays, ſee Now the new *Statute thereof in the Time of E.* 6. Br. Corone, pl. 142. cites 6 H. 7. 10. A Man was *ſtruck in Middleſex, and died thereof in London*; the iſſue was tried by thoſe of Middleſex only, but it was ſaid that the Reaſon thereof was, becauſe London and Middleſex cannot join. D. 46. pl. 8 Mich. 31 H. 8. obiter.——D 40 b pl. 71. S. P. accordingly.

In an Appeal *of Murder*, where the *Fact* is *committed in Eſſex* and the *Acceſſary before the Fact is in another County*, the Appeal ſhall be brought where the Fact is committed, and the Trial ſhall be by both Counties where they can join; but where they could not join, the Trial of the Acceſſary failed at the Common Law; but now *by the Statute of* 2 *E.* 6 *cap.* 24. *the Appeal ſhall be brought where the Murder was committed againſt the Principal and Acceſſary*, altho' their Crimes were committed in ſeveral Counties. In an Appeal of Robbery or *other Felony*, where the Counties cannot join, the Appeal againſt the Acceſſory fails; for the ſaid Statute does not extend to it. Jenk 77. pl. 49.

12. If one *menaces* me *in one County to bring* 20 *l. to him in another County*, and becauſe of the Menace I carry it thither to him accordingly, Quære where the Appeal of this Robbery ſhall be brought. St. P. C. 63. b. (F) 2 Hawk. Pl. C. 168 cap. 23. S. 47. ſays, that if one brings my Goods into the County of B by reaſon of a Menace in the County of A. it may be queſtioned which is the proper County for the bringing the Appeal.

13. *By* 2 *&* 3 *E.* 6. *cap.* 24. *an Appeal of Death may be commenced, taken, and ſued in the County where the Party ſtricken or poiſoned ſhall die, as well againſt the Principal as Acceſſory, in whatſoever County ſuch Acceſſory be guilty thereof; and the Juſtices before whom ſuch Appeal is proſecuted within the Year and Day after the Offence commenced, ſhall proceed againſt every ſuch Acceſſory in the County where ſuch Appeal is ſo taken, in like Manner as if the Offence of ſuch Acceſſory had been committed in the ſame County, as well concerning Trial by Jurors, upon the Offenders Plea of Not-Guilty as otherwiſe.* At Common Law, if a Man had received a mortal Wound in one County, and died in another, the Wife or next of Kin had their Election to bring their Appeal in either County, but the Trial muſt be by a Jury of both Counties; but that Miſchief is remedied by this Statute, which provides, that not only an Appeal ſhall be brought in the County where the Party died, but that it ſhall be proſecuted, which muſt be to the End of the Suit. 3 Mod. 121, 122. Hill 2 & 3 Jac 2 B R. per Cur. in Caſe of Banſon v. Offley. ——3 Inſt. 48, 49. S. P. accordingly ——St. P. C. 63. a. b. (D) cap 13. S. P. accordingly. ——2 Hawk. Pl. C. 163. cap 23. S. 34. Serjeant Hawkins ſays, he takes it for granted, that ſuch an Appeal in the County where the Party died, may, ſince the making this Statute, be tried by a Jury of ſuch County, without the Joinder of any other.

14. The Husband was *killed at M. in Montgomeryſhire*, the Wife brought an *Appeal in Shropſhire*, and upon Trial there had a Verdict, and the Defendant found Guilty. It was moved in Arreſt of Judgment, Jo. 255. pl. 8 Sentley v. Price, S. C. adjudged per

tot Cur. accordingly, after divers Arguments.

that the Appeal ought to have been brought in Montgomeryſhire where the Fact was done, and reſolved that the Writ ſhould abate; For it is againſt a fundamental Rule of Law, that a Trial for Murder by Appeal or otherwiſe ſhould be out of the County where it is committed. And at the End of the Report is a Note, that the Statute 26 H. 8 cap. 6. allows that Indictments may be in *Counties next adjoining*, but there is *no Mention therein of Appeals*; and for this Reaſon Certioraries have been granted to remove Indictments out of the Grand Seſſions, but never Writs of Appeal. Cro. C. 247. pl. 8. Hill. 7 Car. B. R. Soutley v. Price.

2 Show. 510. pl. 472 S. C. adjornatur, as to this Point. —— 3 Salk. 38. Bauſon v. Offley, S. C. and the Court mentioned this Statute. —— Comb. 45. S. C. but S. P. does not appear, but ſays the Court inclined to give Judgment on another Objection there mention'd, but that it was adjourn'd on other Exceptions [which ſeems to intend the Objection here.]

15. In an Appeal of Murder the Appellant declared, that the Defendant did aſſault her Husband, and *wounded him in Huntingdonſhire*, of which Wound he *died in Cambridgeſhire*. It was objected, that the Trial was by a Jury of Cambridgeſhire when it ought to be of both Counties; but the Court held the Trial good, and this by the Statute 2 & 3 *Ed.* 6. *cap.* 24. which enacts, that *where an Indictment is found by a Jury of the County where the Death happens, it ſhall be as effectual in the Law, as if the Stroke had been in the ſame County* where the Party died; adjornatur. 3 Mod. 121. Hill. 2 & 3 Jac. 2. B. R. Banſon v. Offley.

(K) One or ſeveral. In what Caſes there ſhall be one or ſeveral Appeals.

Hale's Pl. C. 184. ſays, that if a Man be robbed at ſeveral Times, he muſt put all into one Appeal. [But Quære if not miſprinted.]

1. IF *one robs* me of *two Things at one Time*, I cannot have ſeveral Appeals, and put Parcel of the Thing taken in one Appeal, and Parcel in another, but I muſt bring one Appeal of all or of Parcel. St. P. C. 65. b. (D) cites Mich. 45 E. 3. Corone 100.

2. Feme brought *Appeal* before the Juſtices, the Mayor and Recorder of London, at Newgate, *againſt one who was acquitted at her Suit*, and *this Defendant and 7 others were indicted of the Murder of the ſame Baron*, and *ſhe would have other Appeal againſt the others*, and was not ſuffered; for by the Juſtices, if ſhe brings Appeal againſt one, be he acquitted by Nonſuit after Appearance, or by other Acquittal, ſhe ſhall not have other Appeal againſt any others, by which they were arraigned at the Suit of the King and acquitted. Br. Appeal, pl. 14. cites 47 E. 3. 16.

Br Reſtitution, pl. 4. cites S. C.

3. *Appeal of Larceny* againſt J. H. who *pleaded Not Guilty*, and after *another appealed him of other Larceny*, and he was *found Guilty at the Suit of the firſt Plaintiff*, *and that the Plaintiff made freſh Suit*, and the Court inquired *Ex Officio by the ſame Inqueſt*, whether he was guilty of the Larceny in the 2d. Appeal which ſaid that he was, and that the 2d. Appellor made freſh Suit, and the one Appellor and the other *had their Goods*, with which the Appellee was taken with the Mainour, and the Appellee was hang'd. Br. Appeal, pl. 21. cites 7 H. 4. 31.

4. One Man may be appeal'd *as Principal and Acceſſary* in one and the ſame Appeal. St. Pl. C. 65. b. (D) cites Mich. 7 H. 4. 23. by Gaſcoigne.

5. In

5. In Appeal of *Rape of his Feme*, the Defendant ſaid that he has other Appeal pending of the ſame Rape. Per Tirwit, He may make divers Rapes at divers times; but Quære of 2 Appeals; for the Defendant cannot die but once. Br. Appeal, pl. 32. cites 11 H. 4. 13.

6. A Feme brought Appeal, and the Defendant ſaid that *at another Time the Feme brought Appeal againſt others of the ſame Death* before Juſtices of Gaol-Delivery in the County of N. *who at her Suit were attainted and hanged*, and pray'd Allowance, and to the Felony Not guilty; and by Award the *Plaintiff took nothing* by her Writ, *by reaſon that ſhe had Judgment againſt others in other Appeal*, for ſhe *ought to have joined all in one Appeal*, and ſhall *not have ſeveral Appeals of Death. And* if they were *in divers Gaols* or Counties, or if *one* is *taken and the others not*, yet the Appeal ſhall be againſt all. Br. Appeal, pl. 28. cites 9 E. 4. 1. 2.

S. C. cited St. P. C. 65. b. (C) & S P. accordingly; but ſays that by the Ancient Law a Man might have had divers Appeals, viz. one againſt the Principal and another againſt the Acceſſory, as appears by Britton and Bracton, and alſo by Hill. 28 E. 3. 90. [Fitzh. Corone 138. cites S. C.] where a Feme ſued an Appeal of the Death of her Baron againſt the Principal and Aiders, and another Appeal againſt the Receivers, and the two Appeals were maintain'd &c. but ſays that the Law has ſince been changed, and that now there ſhall be but one Appeal, which ſhall comprehend the Principals and Acceſſories, unleſs in ſpecial Caſes. As if one in one County procures a Perſon to rob or kill another in another County; ſo where one receives a Felon after the Year and Day, and my Appeal commenced, I may have other Appeal againſt this Acceſſory, and cites 26 Aſſ. 52 — S P. accordingly Hale's P. C. 188 — In Appeal againſt A. B and C. if A. only appears the Court muſt be againſt all, by the better Opinion. Hale's P. C. 188. — 2 Hawk. P. C. 183. S. 93. cites the Caſes in Brooke and Staundford, and ſays that the Principal Caſe of 9 H. 4. 1. which ſeems the Chief Foundation of thoſe Opinions, ſeems to be only that where an Appellant has had Judgment and Execution in one Appeal, he ſhall not afterwards have another againſt Perſons not named in the firſt; and ſays that all the Precedents of Counts, wherein ſome Defendants have not appear'd, tho' they mention the Perſons abſent and ſhew How they were Guilty, yet they all expreſs that the Appellant but inter appellat thoſe only that appear, and would in like manner appeal thoſe abſent if they were preſent; and ſo ſeems clearly implied that another Declaration ſhall be againſt them when they appear, and that this Declaration is as againſt thoſe only that appear. — 4 Rep. 47. b in pl. 12. S. C. cited accordingly.

7. A Man may have divers Appeals *of Maihem* againſt thoſe who gave him *divers Maihems in one and the ſame Affray*; for it is divers Maihems. But *contra of Death*; for a Man has not but one Death. Br. Appeal, pl. 28. cites 9 E. 4. 1. 2.

8. The Wife brought one *Appeal* of Murder of her Husband *againſt ſeveral*, and *after ſhe brought 7 ſeveral Appeals againſt ſeveral Perſons of the ſame Murder, as Principals.* It was reſolved per tot. Cur. That all the Appeals except the firſt ought to abate; for clearly all the Principals and Acceſſaries before the Murder, and all Acceſſaries after, and before the Writ purchaſed againſt whom the Plaintiff would bring Appeal, ought to be named in one Writ, and not in divers. 4 Rep. 47. pl. 12. Hill. 45 Eliz. B. R. Waite's Caſe.

One Appeal ſhall be brought *againſt all the Principals and Acceſſaries, and the Acceſſaries of the Acceſſaries*; for there is only one Appeal to be brought, and if any one be omitted, he cannot be ſued by another Appeal; but the Omiſſion of any of them does not vitiate the Appeal, as to thoſe againſt whom it is brought. Pœnæ ſunt reſtringendæ. Reſolved by the Counſel. Jenk. 29. pl. 56. — Jenkins ſays he underſtands the Caſe of Acceſſaries of Acceſſaries to be before the Fact; for ſuch may have Acceſſaries; for they are quaſi Actors in the Fact; but as for Acceſſaries after the Fact, they cannot have Acceſſaries Jenk 29 pl. 56.

9. *Two Perſons* were *indicted* for Murder at the Seſſions at Exeter. The *one* was *convicted* and attainted, *the other acquitted*, and againſt him the Widow brought her Appeal, and he removed himſelf hither by *Habeas Corpus*; and the Plaintiff moved to have an Habeas Corpus to remove the Body of the other who was attainted, which was denied, and it was ſaid that ſhe might arraign her Appeal againſt the other alone. Skin. 634. Hill. 7 W. 3. B. R. Reynolds and Kening, al' Kenige.

(L) False Appeal. Punish'd How.

By the Words (*shall nevertheless make a grievous Fine to the King*) the

1. 13 E. 1. cap. 12. ENacts, That *if the Appellee of Felony acquits himself in due manner &c. the Justices before whom &c. shall punish the Appellor by a Year's Imprisonment, and render* * *Damages, and also make a grievous Fine to the King.*

Plaintiff shall make Fine to the King; but *this is* to be intended *where he is to render Damages also to the Defendant*; for in such Case, where he shall not render Damages by this Statute, he shall not be fined, but amerced only. St. P. C. 170 a. (C) cites Pasch. 9 H. 5. 1. where the *Appeal abated for Misnosmer*, and the Plaintiff was only amerced And cites Fitzh. Corone 219. 41 Ass. [8] where the Appellant after Declaration was *nonsuited*, and the Court immediately awarded Process against the Appellant to make Fine; and there agreed that if the Defendant be *acquitted afterwards at the Suit of the King*, whereby he recovers Damages against the Appellant, yet the Appellant shall *not make a New Fine*, because he made one before. But suppose the Defendant be found guilty of the Felony at the King's Suit, it seems the Plaintiff has no Remedy to re-have the Fine paid; for it seems by the Common Law, that the Plaintiff in Appeal shall be fined for his Nonsuit, and this is the Reason why they awarded the Fine here to be paid immediately. St. P. C. 170. b. (C)——2 Hawk. Pl. C. 204. cap. 23. S. 154 says there is no Doubt but that by the express Words of this Statute, where-ever the Appellant or his Abettors are by the Purport thereof to render Damages to an Appellee, they are also to be fined to the King, and imprisoned for a Year. Also it seems clear from the general Purport of the Books, that an Appellant appearing to have brought an ill-grounded Appeal, whether of Felony or Maihem, shall be fined in many Cases wherein he is not liable to render Damages by the Statute abovementioned; as where he is Nonsuit, either against all or Part of the Appellees only, whether after, or as some have holden, before Appearance, or where the Writ abates thro' the Default of the Appellant in wilfully suing by a wrong Name or a vitious Writ &c. and even a Feme Covert suing an Appeal known by her to be groundless, as for the Death of a Husband whom she knows to be alive, shall be fined. But it is certain that where a Writ abates by the Act of God, or for any other Cause no way imputable to the Appellant, he shall neither be fined nor amerced. Also it is certain that an Infant in no Case is to be fined for a false Appeal; but some have holden that he may be amerced, which is contradicted by others, who say that an Infant in no Case can be amerced.

* As to Damages, see Postea.

Br. Imprisonment, pl. 29. cites S. C.

2. In Appeal *against* 2, the Appeal *against the one was found false*, by which the Appellor was awarded to Prison. Br. Appeal, pl. 49. cites 1 Ass. 9.

3. Because some pleaded and were attainted, and others came not, *the Plaintiff said that he would not proceed against them*, and it was awarded that the *Plaintiff should be taken*; for now it appears that his Appeal is false against those. Quod nota. Br. Appeal, pl. 60. cites 22 Ass. 82.

Br. Imprisonment, pl. 106. cites S. C.——Br. Fine for Contempts, pl. 11. cites S. C.

4. Appeal by a Feme of the Death of her Husband, and *at the Day the Baron was brought in*, and she examined, and confess'd that he was her Baron; and for her false Appeal she was *committed to Prison to make Fine*, and the Baron at large. Br. Appeal, pl. 25. cites 8 H. 4. 18.

5. Appeal *of Maihem, that the Defendant beat him upon the Head, by which he lost his Hearing*, and the Defendant pray'd that the Maihem be examined, by which the Justices examined him openly, and perceived that he could well hear, and therefore he shall make Fine for his false Appeal; *but* because the *Writ supposed it in the Time of R. 2. against the Peace of the said King*, and the *Declaration was in the Time of the King now*, therefore he went without Fine. Br. Appeal, pl. 26. cites 8 H. 4. 21.

6. In Appeal the Plaintiff *confess'd the Appeal to be false.* He shall be imprison'd and make Fine; but contra of a Nonsuit; and the Fine was 100 s. Br. Appeal, pl. 151. cites 13 H. 4.

7. A Felon *confess'd the Felony, and appeal'd another, who* was taken, and *pleaded Not guilty*, and when the Jury appear'd *the Approver confess'd his Appeal to be false*, by which they proceeded no further upon the Approver of the Approver, but *gave Judgment that the Approver should be hanged*,

hanged, and they were in Doubt if by this Confeſſion the *Appellee* ſhall go quit; and at laſt per tot. Cur. he *was arraign'd De Novo at the Suit of the King*; and ſo ſee that the firſt Aſſiſe was upon the Appeal of the Approver; and when he confeſſes his Appeal falſe, it is as a Nonſuit in another Appeal, in which Caſe the Party ſhall be arraign'd at the Suit of the King, and ſo ſee that the Approvement ſerves for Indictment. Br. Corone, pl. 3. cites 3 H. 6. 50.

(M) Determined by Judgment in another Proſecution. *Or by having, or* praying *his Clergy.*

1. APpeal *againſt* 3, *one as Principal, and the* 2 *others as Acceſſaries of Rape* brought by a Feme, and the *Principal did not come, but the* 2 *others came and were indicted thereof, and alſo of Burglary, and of Goods carried away feloniouſly*; and Kirton pray'd that the 2 ſhould anſwer to the other Felonies, tho' they did not anſwer to the Rape, till the Principal be attainted; & non allocatur; for by Attainder at the Suit of the King, the Suit of the Party may be loſt. Br. Appeal, pl. 9. cites 44 E. 3. 38. By the *Attainder of one Felony, he is excuſed for all Felonies before*, as it ſeems; for he *cannot have but one Judgment of Death*; and ſee that Life *ſhall not be twice in Jeopardy*, viz. once at the Suit of the King, and once at the Suit of the Party. Br. Appeal, pl. 9. cites 44 E. 3. 38. ——Br. Corone, pl. 11. cites S. C. & P. But Brooke ſays, ſee elſewhere that *if he be acquitted of one Felony, he may be arraigned of another Felony done before*; but Judgment of Death can be but once; for he cannot die twice.

2. Where 2 *Appeals* are *againſt one and the ſame Man*, and he is *convicted at the Suit of the one* firſt, he cannot be convicted at the Suit of the other, and therefore they were reſtored upon Inquiry of the freſh Suit, and of the Property &c. And ſo ſee that a Man ſhall not have but one Judgment of Death; and in Appeal, if the Defendant has his Clergy, the Plaintiff ſhall have Reſtitution. Br. Appeal, pl. 11. cites 44 E. 3. 44. Br. Corone, pl. 13. cites S. C.

3. If a Man be *convicted of one Felony and adjudged to be hanged*, by this *all Appeals of any other Felony done before it are determined*; For a Man can die but once, and one Judgment of Death ſerves for all Felonies before; and yet, becauſe the *King pardoned the Execution* Gaſcoigne awarded the Felon to anſwer to the Appeal of a Felony done before, which was againſt the Opinion of Huls, for Appeal once determined cannot revive, therefore Quære; for it is hard to prove the Appeal to revive. Br. Appeal, pl. 10. cites 6 H. 4. 6. Fitzh. Corone, pl. 227. S. C.

4. In Appeal the Defendant pleaded Not Guilty, and *two other Appeals were brought* againſt him, and he was *found Guilty in all*, and *three Judgments given ſeverally* that he ſhould ſuffer Death, and theſe *entered ſeverally upon each Appeal*, and *every Inqueſt found* that the Parties made freſh Suit, by which they were reſtored to the Goods in the Appeal, and Writ awarded to the ſeveral Bailiffs. Br. Appeal, pl. 93. cites 4 E. 4. 11.

5 In an Appeal of Murder for the Death of his Brother H. the Defendant *pleaded, that he was Auterfois indicted for the Death of* the ſaid H. which he ſet forth, *upon which he was arraign'd, and confeſſed the ſame, and prayed his Clergy*, upon which the Court adviſed, and pleaded over to the Felony and Murder Not Guilty, and upon a Demurrer to this Plea the Court conſidered the Statute 3 H. 7. cap. 1. by which it is enacted, 2 Le. 160. pl. 195 21 Eliz. B. R. Borough v. Holcroft, S. C. argued. —— S. C. cited 4 Rep.

45 b. 46. a. as reſolved. ——3 Inſt. 131. cap. 57. S. C. adjudged that this Caſe was out

enacted, *that if the Perſon indicted ſhall be arraigned within a Year &c. and acquitted or attainted, yet the Party may have an Appeal*, but in this Caſe the Defendant was *neither acquitted or attainted*, ſo that the Statute does not extend to it, and the Opinion of the Court was, that an Appeal would not lie. And. 68. pl. 142. Paſch. 20 Eliz. Burgh's Caſe.

of the Statute, and being penal concerning the Life of a Man, and made in Reſtraint of the Common Law, was not to be taken by Equity, but is Caſus Omiſſus, and left to the Common Law.——S. C. cited per Coke, Arg. as holden, that where the Party is convicted at the Suit of the Queen, Appeal does not afterwards lie.——After Clergy prayed, tho' the Court will adviſe upon it, and it be not actually allowed, it is a good Bar to an Appeal. 2 Hale's Hiſt. P.C. 251. cites S. C.———See Kelyng's Rep. 107. Mich. 8 W. 3 Armſtrong v. Liſle, S. P. accordingly.———2 Hawk P1 C. 377. cap. 36. S. 12. ſays, it ſeems to have been long ſettled, that not only he who has been admitted to his Clergy on a Conviction of Manſlaughter upon an Indictment of Murder, but alſo that he who being called to Judgment on ſuch a Conviction has prayed his Clergy, but has not been actually admitted to it, may bar any ſubſequent Appeal for the ſame Death as he might by the Common Law; And as to the Objection to the ſeeming Abſurdity, that if the Law be ſo, he that has his Clergy on a Conviction of Manſlaughter will be in a better Caſe than if he had been wholly acquitted, it may be anſwered, that this does not depend on any Reaſoning from the Nature of the Thing, but from the Statute of 3 H. 7. cap. 1. which expreſsly takes away the Plea of Autrefoits acquit in this Caſe, but by ſuffering even Perſons attainted on an Indictment of Death, who have been admitted to their Clergy, to plead ſuch Admiſſion in Bar of an Appeal, plainly ſeems to have intended to leave the Benefit of the Clergy as it ſtood before.

4 Rep. 43. b. pl. 9. Bibithe's Caſe, alias, Goff v. Bibithe S. C. reſolved; and ſays, that the Law is the ſame if the Principal on his Arraignment *confeſſes the Felony*, and before Judgment obtains a Pardon, or has his Clergy allowed, the Acceſſory is thereby diſcharged.

6. One *indicted of Murder* was *found guilty of Manſlaughter*. Afterwards an *Appeal was brought againſt him, and* alſo againſt *others as Acceſſories after the Fact*. It was moved, that the *Principal after Conviction had his Clergy*, and was never attainted, and therefore the Acceſſories to be diſcharged; and per tot. Cur. if the Principal had his Clergy or Pardon *before his Judgment*, tho' it were after Conviction, the Acceſſory ſhall be diſcharged; but if he prays his Clergy after he has had his Judgment, as well he may, or if he be pardoned, yet the Acceſſory ſhall be arraigned. And after Coke Attorney General agreed the Difference taken to be good, and thereupon they were diſcharged. Cro. E. 540, 541. pl. 4. Hill. 39 Eliz. B. R. Goff v. Byby & al.

Comb. 89. S. C. argued, and ſays, that all the Juſtices, except Street J. (becauſe it was adjourned it ſeems into the Exchequer Chamber propter Difficultatem) were of Opinion that the Plea was ill; for otherwiſe the Statute [3 H. 7. cap. 1.] would be of no Uſe.———2 Show. 507. pl. 469. S. C. juſt mentioned.———Carth. 16. S. C. ſays, that the Defendant alſo pleaded that he demanded the Book, and was always ready to read when it ſhould be required of him, & hoc &c. ſed adjornatur.——S C. cited 4 Mod. 100. as to the Opinion of the Judges; but as to that ſays Quære tamen; for that the Law ſeems to be otherwiſe.———Carth. 17, 18. Mich. 3 Jac. 2 B. R. Penroſe v Welch and Power S. P. only the Defendant omitted Pleading that he demanded the Book to perform his Clergy, but pleaded that they were Clerks, and then, and ſtill are ready to read; The Caſe was argued, but nothing ſaid by the Court.

7. In Appeal of Murder, the Defendant *pleaded, that he was indicted, and convicted of Manſlaughter, and not of Murder*, pront patet per Recordum, *and that he was Clericus & paratus fuit legere* ut Clericus, *if the Court would have admitted him*, and that he is the ſame Perſon &c. The Appellant demurr'd. The Truth was, that after the Conviction, and before the Sentence, an Appeal was brought, ſo that the Defendant had not an Opportunity to pray his Book. This Caſe was argued in Hill. 3 Jac. 2. in B. R. and afterwards in Trin. 4 Jac. 2. and the Ch. J. delivered the Opinion of all the Judges (except Street J.) who were aſſembled at Serjeant's Inn for that Purpoſe, that this was no good Plea, and that the Court ought not to ask the Priſoner what he had to ſay, and ſo to let him into the Benefit of his Clergy. 3 Mod. 156. Goring v. Deering. But the Reporter adds tamen Quære; for it is otherwiſe reſolved.

8. The

8. The Words of the Statute of 3 H. 7. cap. 1. are general, viz. in an Appeal brought, or to be brought, and therefore extend to all Appeals, whether antecedent, concurrent, or subsequent, and so it is if Clergy was *not had by Default of the Court.* 1 Salk. 63. pl. 3. Hill. 8 W. 3. B. R. Armstrong v. Lisle.

7. Where a Person has *had his Clergy*, he shall *have Time to plead*, but it must be *Quasi Instanter*, and as of this Day, and no Imparlance entered. 12 Mod. 416. Mich. 12 W. 3. Wilmot v. Tyler.

10. *At Common Law*, if a Man was *indicted and attainted of any Felony or acquitted* upon this Indictment, an Appeal did not lie, for it would be in vain, for an attainted Person is dead in Law; but because the King might pardon such Attainder at this Day in Case of the killing of a Man, be the Offender attainted or acquitted before, if he has not had his Clergy, he is liable to an Appeal by the Statute of 3 H 7. cap. 1. but all other Felonies remain at Common Law. Jenk. 160. pl. 4.

11. In an Appeal at Bar, the Appellee was *found guilty of Manslaughter only*, whereupon he prayed the Benefit of his Clergy; and the Court being of Opinion, that the Statute that gives the Clergy extends to Appeals, and that the *Burning in the Hand*, being no Part of their Judgment, the Queen could *pardon* it, according to Biggin's Case, 5 Rep. 50. thereupon the Appellee was *immediately discharged without Bail*, being pardoned by the late *Act of Grace.* 11 Mod. 254. pl. 7. Mich. 8 Ann. B. R. Smith v. Bowen.

(N) Process and Proceedings.

1. APpeal of Rape, the Defendant pleaded Not Guilty, and was *let to Mainprise* to attend the Inquest, *and after came not*, and *Capias, alias & Pluries* issued, and was returned, and he came not. Scott awarded *Exigent*, and said, that if he appeared pending the Exigent, he should try to remove the Inquest; for he *is without Day by the Exigent*, and he *cannot take the Inquest by Default*, in as much as it was in Case of *Felony*. Br. Appeal, pl. 54. cites 16 Ass. 13. Br. Process, pl. 148 cites S. C. and says, that if the Exigent be returned served, then it seems clearly that he is attainted.

2. Br. Appeal, pl. 55. cites 17 Ass. 1. that it was said, that before this Time there were *no Mainpernors* taken in Appeal, *but Pledges of the Battail.*

3. Note if a Man would sue Appeal of *Felony*, *Robbery*, *or Larceny*, he must *come in full County within the Year and Day after the Fact*, *and find sufficient Pledges to prosecute*, *and immediately make the Coroner enter the Appeal in his Roll*, *and be sent to the Bailiff*, *that he have the Body of the Appellee at the next County*, and if the Bailiff testifies in two Counties, that *Non est Inventus*, then *the Appellee shall be demanded from County to County till he be outlawed*, and if the *Plaintiff makes Default at any County*, then *the Exigent shall cease till the Eyre of the Justices in this County*, *and the Plaintiff shall lose his Appeal for ever.* Br. Appeal, pl. 62. cites 22 Ass. 97.

4. *Infant* within the Age of 18 Years sued Appeal of the Death of his Father *against J. N. who was thereof indicted*, and *by his Nonage the Appeal was abated*, and the Infant amerced, and the Amercement pardoned because within Age, and not awarded to Prison, and the Defendant arraigned at the Suit of the King, and pleaded to the Country, and was not let to Mainprise, and the *Infant prayed Venire Facias for the King*, *and could not have it*, *because within the Year of the Death*, in which Case the Law may intend that another may have the Suit yet within the Year; but

Knivet

Knivet ſaid, that he *ſhall deliver the Writ to the Sheriff, but no Inqueſt ſhall be taken within the Year*; Quære if it be intended that another who is Heir within the Year, and of full Age, may have the Appeal, as where the Infant Heir dies, and the Uncle is Heir by his Death whether he ſhall have the Appeal after the Infant has brought Appeal, and his Appeal abated by Infancy? or if an elder Son be found? Br. Appeal, pl. 75. cites 41 Aſſ. 14.

And it was agreed, that *Exigent ſhall not iſſue* againſt the Acceſſories *till the Principal is attainted* by Verdict or Outlawry, where the Court may be appriſed who are Principals and who Acceſſories. Br. Appeal, pl. 7. cites 43 E. 3. 17, 18, 19.

5. Appeal *by a Feme againſt three* of the Death of her Husband, and *Proceſs continued till Exigent* iſſued, and *at the Exigent two rendered themſelves* in the County, and the *third made Default, and was outlawed*, and the *Feme counted againſt the two as Receivers of the third in the County of Dorſet after that the third had killed her Baron in the County of Kent*, and therefore the two prayed to go quit, & non allocatur till they had pleaded, by which they pleaded Not Guilty, and after were let to Mainprize, and after the Court awarded that the Defendant ſhould go quit for the Cauſe aforeſaid. Br. Appeal, pl. 7. cites 43 E. 3. 17, 18, 19.

6. Appeal by a Feme of the Death of her Husband *againſt three generally, one is outlawed*, the *others render themſelves at the Exigent*, and the *Plaintiff counts againſt thoſe 2 as Acceſſories*, and yet the Exigent well awarded, becauſe *it does not appear in the Appeal who was Principal and who Acceſſory*, and e contra if this had appear'd; for then Exigent ſhall not iſſue againſt the Acceſſory, till the Principal be outlaw'd. Per Knivet J. Br. Appeal, pl. 79 cites 44 Aſſ. 16.

S. P. Br. Appeal, pl. 140. cites 48 Aſſ. 3.

7. Appeal of Death before the Sheriff and the Coroner in the County of H. and Writ and came to them to remove the Appeal into B. R. who ſent it accordingly, and becauſe *the Appelor was without Day in the Appeal before the Sheriff and Coroner, Scire Facias iſſued to maintain his Appeal*, and the Sheriff *return'd Nihil*, by which iſſued *Sicut alias*, and the Sheriff return'd *Nihil*, by which the Defendant pray'd to go quit, and could not, but *other Sicut Alias awarded*, and the Defendant let to Mainpriſe &c. for it may be that the Plaintiff has been warned in another County. Br. Appeal, pl. 15. cites 48 E. 3. 21.

8. In *Appeal* the Sheriff had not return'd any Pledges de Proſequendo, but becauſe the *Defendant had appear'd in Court* he was put to anſwer, and the Plaintiff found Pledges in the Court. Thel. Dig. 218. lib. 16. cap. 1. S. 8. cites Mich. 11 H. 4. 7.

9. The *Writ* to remove an Appeal was *directed to the Sheriff*, which *ought to have been to the Coroner*, and therefore that which comes here by ſuch Writ ſhall not be ſaid of Record here. Br. Appeal, pl. 44. cites 4 H. 6. 15.

10. The Defendant *pleaded Charter of Pardon*, which was allowed, and he diſmiſſed, and the Mention of the Pardon was *enter'd upon the Declaration and not upon the Indictment whereas Ceſſet Proceſſus ought to have been made upon the Indictment alſo*, by which *Proceſs of Outlawry iſſued upon the Indictment*, and the Defendant outlaw'd and taken by Capias, and demanded what he had to ſay, Why he ſhould not be put to Death? and *he caſt in Writ of Error*, and ſhew'd the Allowance of the Charter in Avoidance of the Outlawry, & ei allocatur, and *Surety* was demanded of him, and Scire Facias againſt the Lords mediate and immediate, and there it was furniſed that he had not Land nor Tenement, and the Attorney of the King confeſſed it, and therefore becauſe he had been *twice vexed for one and the ſame Felony*, therefore *he paid his Fees*, viz. only 2 *Dozen of Gloves*, and was diſmiſſed. Br. Appeal, pl. 92. cites 4 E. 4. 10.

11. The

11. The *Appellant ſhall be ſworn that his Appeal is true*, and therefore Donee of Goods to other Uſe ſhall not be compelled to maintain Appeal, for he ſhall not be compelled to ſwear. Br. Appeal, pl. 95. cites 7 E. 4. 27.

12. Appeal *againſt four, all ſhall be named together in the Proceſs till* it comes to the *Exigent*, and then the *Plaintiff ſhall aſſign who are Principals, and who Acceſſaries*, and Exigent ſhall iſſue againſt the Principals, and Proceſs ſhall be continued by Capias againſt the Acceſſary, for the Acceſſary ought not to be attainted by Proceſs jointly with the Principal. Br. Aſſiſe, pl. 107. cites 20 E. 4. 7.

13. If *Appeal be without Day by Demiſe of the King*, there if the *King pardons the Defendant*, and the *Plaintiff does not bring his Re-attachment within the Year* to revive the Appeal, the Pardon ſhall be allowed. Br. Charters de Pardon, pl. 69. cites 2 H. 7. 10.

14. An Appeal was brought for the Death of a Man; pending the Appeal, *the Plea is diſcontinued by the King's Death*; a *Re-attachment ought to be ſued within a Year* after the King's Demiſe; the Appellant does not ſue it; the *King pardons the Appellee*; this Pardon ſhall be allowed without awarding a *Scire Facias* againſt the Appellant; for it appears on Record, that the Appeal is extinct; and it would be in vain in this Caſe to award a Scire Facias. By the Juſtices of both Benches. Lex nil facit fruſtra. This Caſe is remedied at this Day by the Stat. 1 *E.* 6. *cap.* 7. *the Appeal continues notwithſtanding the King's Demiſe*. Jenk. 169. pl. 29 cites 6 H. 7. Fitzh. Re-attachment 13.

15. In an *Appeal* of Murder *directed to the Wardens of the Cinque Ports*, the *Writ was returned in B. R.* and filed, and the Defendant brought to the Bar, and becauſe the *Proceedings were void by reaſon that the Writ ſhould have been directed to the Sheriff of Kent*, the Appellee was committed to the Marſhalſea, and a *Bill was filed againſt him* of Appeal of the Murder *as in Cuſtodia Mareſchalli*, and afterwards he was executed thereupon. Cited per Cur. 2 Ld. Raym. Rep. 1290. Trin. 8 Ann. as Cro. E. 694. [pl. 5. Mich. 41 Eliz. B. R. and] 778. [pl. 12. Mich. 42 & 43 Eliz. B. R.] Watts v. Brains.

S. C. cited Yelv. 13. ——Noy. 171 S. C. but S. P. does not appear. —— Comyns's Rep. 259. cites Cro. E. 6 [but is miſprinted, and ſhould be as in the principal Caſe] Watts v. Brains.

16. When a *Proceſs is return'd* in Appeal *another ought to iſſue inſtantly* without any mean Day betwixt, for then there is a Ceſſation of the Proſecution, and abſolutely diſcontinued. Reſolved. Cro. J. 283. 284. pl. 4. Trin. 9 Jac. B. R. Bradley v. Banks.

Bulſt. 143. S. C. & S. P. held accordingly. —— Yelv. 205. S. C. & S. P. held accordingly, and ſays that ſo is Stamford and all the Precedents in B. R. —— The Caſe was a Writ of Appeal was returnable Quinden. Mich. which was 16 Oct. whereas it ſhould be returned A Die Sancti Mich. in 15 Dies, which was 16 Oct. and the Capias bore Teſte the 23d Oct whereas it ſhould have been atteſted from the firſt Writ return'd, viz. 16 Oct. and returnable Octabis Hillarii, all which was enter'd on the Roll, and ſo 7 *Days omitted between the Return of the Writ of Appeal and the awarding the Capias*, and this was objected to be a manifeſt Diſcontinuance. And tho' this was ſaid by the other Side not to be material, it being all in one Term (which is but as one Day in Law) and that the Appearance of the Party aided this Diſcontinuance, yet all the Court reſolved that it is a Diſcontinuance. Cro. J. 283. pl. 4. Trin 9 Jac. B. R. Bradley v. Banks. —— Yelv. 204. S. C. adjudged for the Defendant per tot. Cur. and agreed that no Appearance by the Defendant in Appeal will aid any Diſcontinuance of Suit. —— Bulſt. 141. S. C and S. P. accordingly, and the Writ of Appeal was quaſh'd and the Defendant diſcharged.

17. All *Writs* of Appeal muſt be *returnable in B. R.* 2 Hawk. Pl. C. 156 cap. 23. S. 5.

18. An Appeal of Murder *de Morte Viri* was carried down to be tried at Niſi Prius in Yorkſhire, where *both Parties appear'd, but the Appellant did not put in the Record* to try the Iſſue. It was moved that the Appeal being not tried, it was either a *Nonſuit or a Diſcontinuance* But Holt Ch. J. was of Opinion that it was neither; but ordered the Appellant

pellant to pay Coſts for not going on to Trial. 12 Mod. 65. Mich. 6 W. & M. Sutton v. Sparrow.

2 Salk. 589. pl. 1. S. C. & S. P. held accordingly that this Return was good.——4 Mod. 290. 293. S. C. the Court held the Words, viz. Attachiari feci prout mihi præcipitur, a full Anſwer to the Writ.——— Comb. 293. S. C. & S. P. and Holt Ch J. at firſt thought it ill unleſs cured by by the Defendant's Appearance ; but afterwards it was reſolved to be well enough.——Carth. 331. 333 S. C. & S P and the Return held good, becauſe it is ſaid to be done Virtute Brevis, which, by the Concluſion Paratum habeo, amounts to Attachiavi. But per Holt Ch. J. it would have been ill if the Words (Virtute Brevis) had been omitted ——Ld. Raym Rep. 20 S. C. & S P and the Return adjudged good, becauſe it was Virtute Brevis prædicti prout mihi præcipitur. ——Skin. 552. S. C. & S. P. and the Court held it all one.

19. The Return of a Writ of Appeal was *Attackiari feci*, whereas it ſhould be *Attachiavi*, and this was held a full Anſwer to the Writ. 4 Mod. 290. Trin. 6. W. & M. in B. R. Wilſon v. Law.

But if the *Return of the Writ is naught* this will *not* be *help'd by the Defendant's Appearance* ; for Appearance helps only when the Party comes in and pleads to Iſſue, but not when he comes in and challenges the Proceſs upon the Account of its Defect. Per Eyre J. 1 Salk 59. pl. 2. Trin. 6 W. & M. in B. R. in Caſe of Wilſon v, Laws. — S. P. by Eyre J. accordingly. Ld. Raym. Rep. 21.—— S. P. held accordingly per Cur. Carth. 334. in S. C.

Skin. 670. pl. 6. S. C. and per Holt Ch. J the Appellee ought, after the Appeal returned upon the Certiorari, to ſue a Sci. Fa. againſt the Appellant ad Proſequendum ; for the Appellant has no Day in Court —— 1 Salk. 62. S. C. & S. P. and a Scire Facias being taken out returnable at a common Day, and no Return being made by the Sheriff, the Priſoner moved again for his Diſcharge ; but the Court told him that he muſt take a New Day and procure a Return, unleſs he can get the Appellant to appear Gratis, as he may if he pleaſes.

20. The Defendant was *indicted* at Carliſle *of Murder, and found Guilty of Manſlaughter*. The Brother of the Deceaſed immediately exhibited his Bill of Appeal, and the Appellee was *arraign'd upon the Appeal forthwith*, and being put to Anſwer he *refuſed to plead*, and nothing more was done then. Afterwards a *Certiorari* to remove the Indictment, and *a Hab. Corp.* to remove the Perſon into B. R. *was granted* tho' oppoſed by the Appellant, *and he was brought to the Bar in Cuſtodia* and the Returns filed, *and* he was *committed to the Marſhal*. The Court held that the Appellant is not demandable at this Time, becauſe by the Certiorari he had *no Day in Court*. And therefore in ſuch Caſes the only Courſe is, for the Priſoner to ſue out a Writ of *Scire Facias againſt the Appellant*, reciting the whole Matter, and ſo *to warn him to appear at a Day certain to proſecute his Appeal* in this Court ; and then if the Appellant ſhould make Default on that Day, the Court upon Demand might nonſuit him, but not otherwiſe. Sed per Cur. the Appellant *may come in Gratis* if he will, and proſecute his Appeal without a Scire Facias. Carth. 395. Hill. 8 W. 3. B. R. Liſle's Caſe. [Alias, Armſtrong v. Liſle.]

21. A *Civil Cauſe is always arraign'd on the Plea Side, unleſs it comes in by Attachment*. Per Cur. And Mr. Aſton ſaid that Appeal, whether by Writ or Bill was always *arraign'd in Engliſh on the Plea Side, unleſs it came by Certiorari* ; for then it was ruled on the Crown Side ; and accordingly it was ruled in this Caſe, but not to make a Precedent. 1 Salk. 62. Hill. 8 W. 3. B. R. in Caſe of Armſtrong v. Liſle.

1 Salk. 60. S. C. & S P. and per Cur. this is the King's Record, in which the Appellant cannot aſſign Errors ; for he is a Stranger, and perhaps the Priſoner has releaſed theſe Errors to the King, and the Appellant has no Warrant of Attorney, and ought not to ſpeak or be heard in the Cauſe.———Comb 411 S. C. & S. P. and Holt Ch. J. ſaid that none but the King or the Priſoner can aſſign Error in the Conviction.

22. The *Conviction* being *return'd by Certiorari*, the *Appellant would have taken Exception to it* ; but Holt Ch. J would not allow it, and ſaid that they are Strangers to this Record, and they have not any Privity or Authority to take Exceptions. Skin. 670. 671. pl. 9. Mich. 8 W. 3. B. R. in Caſe of Armſtrong v. Liſle.

23. On the *Day on which an Appeal was returnable*, it was moved that the Appellant ſhould be demanded. Per Cur. There is no Writ return'd, ſo no Appeal pending ; and the Sheriff has all this Day, the Court ſitting,

ting, to make a Return; but it was agreed *if* the Writ were *returned*, they might come and have the Appellant demanded, and if he did not come, they ſhould be diſcharged; and a Motion for Appellant *that the Sheriff ſhould return his Writ* was denied, there being no *Affidavit that it was delivered to the Sheriff*. 12 Mod. 349. Paſch. 12 W. 3. Stout v. Marſon & Cowper.

24. An Appeal was brought *by an Infant*, and the *Sheriff delivers it up to him*, who cancels it. Adjudged a *Contempt*, *and* the Sheriff *fined*. 12 Mod. 372. Stout v. Towler.

25. Note in Appeal, the *Year* having *expired*, the Appellant *could not have a new Writ of courſe*, and for this they petition'd the Lord-Keeper for a new Writ, who aſſembled Treby Ch. J. of the Common Pleas, Sir John Trevor Maſter of the Rolls, and Juſtice Powell to adviſe of it; who all agreed it was *diſcretionary* to grant one or no; but agreed it was not proper to do it. 12 Mod. 375. Paſch. 12 W. 3. in Caſe of Stout v. Towler.

26. Where a Man is bail'd upon an Appeal of Murder *to appear from Day to Day*, if he *makes Default* it ſhall be recorded, and Proceſs ſhall go againſt his Bail, and a Capias againſt himſelf; and if he does not make Default, but comes in Diſcharge of his Bail, he ſhall be committed as at firſt; per Holt Ch. J. 12 Mod. 428. in Caſe of More v. Wats.

27. In Writ of Appeal there ought to be 15 *Days between Teſte and Return*. Admitted. 1 Salk. 63. pl. 4. Paſch. 13 W. 3. B. R. Wilmot v. Tyler.

28. The original Writ of Appeal ought to be return'd *Non eſt inventus before* a *Capias* awarded; per Cur. 12 Mod. 554. Trin. 13 W. 3. Anon.

29. After Acquittal on an Indictment for Murder an Appeal was brought, and the Judge of Aſſiſe gave the Appellee Time to the next Aſſiſe; but in the mean time the *Appellant brought an Habeas Corpus and Certiorari to remove the Body &c. and the Record into C. B.* and afterwards at a Judge's Chamber the Parties agreed, and the *Appellee* being bailed, he appear'd upon his Recognizance, and *produced a Releaſe* from the Appellant, and moved that he might be diſcharged, and Counſel appear'd for the Appellant to conſent. But per Holt Ch. J. *the Habeas Corpus and Certiorari muſt be return'd*, and then the Court will be poſſeſs'd of the Record, *and the Appellee muſt be arraign'd, and then he may plead the Releaſe*; *or if the Appellant* is not ready at the Return &c. to arraign the Appeal, or *does not appear*, *he may have a Scire Facias* againſt him to compel him to it; *and if he does come in* at the Return thereof, *he ſhall be nonſuit*, *and yet* the Appellee is not thereby diſcharged; for here being a Record againſt him in Court, he *muſt be arraign'd at the Suit of the Queen*, and then he may plead Auterfoits Acquit &c. 3 Salk. 39. Culliford's Caſe.

1 Salk. 382. The Queen v Culliford, Mich. 3 Ann. B. R. the S. C. but S. P. does not appear.—— 6 Mod. 219. S. C. & S. P. accordingly.

30. There muſt be 4 *Bail* in an Appeal of Murder; Per Cur. 11 Mod. 218. Paſch. 8 Ann. B. R. in Caſe of Young v. Slaughterford.

31. In Appeal the *Defendant was brought up on the Return of the Writ*, *whereof Notice had been given* to the Appellant, *and that the Court would be moved to bail him*. The Plaintiff not appearing, the Court was moved either to diſcharge or bail him; but it was then denied, becauſe they would conſider if there were not 4 Days of Grace in this as well as in other Actions for the Party to appear in; and then being brought up again, Lee J. ſaid that it appear'd by 4 Mod. 99. that the Parties have 4 Days to appear in, and thereupon was remanded till the laſt Day of the Term, when the Appellant not being ready to count againſt him, he was diſcharged. Barnard. Rep. in B. R. 423. Hill. 4 Geo. 2. Tucker v. Mackerſton.

(O) Writ abated in what Caſes. And the Effect thereof.

At the Common Law theſe Exceptions were allow'd to the Plaintiff in Appeal of Death, *that the Plaintiff was not preſent* at the mortal Wound given, or Felony done. 2 Inſt 317

1. 6 E. 1. cap. 9. PRovides *that no Appeal ſhall be abated ſo ſoon as have been heretofore.*

If the Writ of Appeal doth *comprehend the Special Matter*, viz. That the Husband or Anceſtor was ſlain *ſe defendendo, or by Miſadventure*, the Writ of his own ſhewing ſhall abate; for an Appeal lies not of ſuch a Killing, becauſe the End of the Appeal of Death is, that the Appellee may have Judgment of Death, viz. Death for Death. 2 Inſt. 317.

This Clauſe, if taken by itſelf generally and literally, as ſome have taken it, extends to all Appeals, as of Death, Robbery, Rape, Felony, Maihem &c. but the Words themſelves ſhew that this Act is only extended to the Appeal of the Death of Man; and therefore Appeals of *Robbery, Rape, and other Felony and Maihem, are not within this Act*; for the Miſchief was, as has been ſaid, in the Caſe of the Death of Man. 2 Inſt. 317.

Br. Impriſonment, pl. 9. cites S. C.

2. In Appeal *againſt Baron and Feme and another*, the *Baron died pending the Writ*, and Proceſs was pray'd againſt the Feme and the 3d Perſon, becauſe the Writ is not abated by the Death of the Baron. Candiſh ſaid, that the Feme upon this Writ ſhall not be compell'd to anſwer, and you may *have new Writ* upon ſuch Cauſe without being impriſoned; for it is not abated by your Default. Br. Appeal, pl. 16. cites 50 E. 3. 1.

3. In Appeal of Felony brought *againſt a Feme Covert* without her Baron, ſhe ſhall be named by her Name of Baptiſm, and *Feme of ſuch a one.* Thel. Dig. 50. lib. 6 cap. 2. S. 6 cites 1 H. 4 5.

4. In Appeal of *Maihem* the *Writ was contra Pacem Regis R.* and the *Declaration was contra Pacem Regis nunc H.* 4. by which the Defendant went quit without Fine. Br. Variance, pl. 107. cites 8 H 4. 21.

5. A Feme ſued Appeal *by Name of Cicely*, where *her Name was Joan*; and after the Defendant had imparl'd, ſhe came and ſaid that her Name was Joan, and it was examined if Covin &c. and it was found that No Covin, by which ſhe went without making Fine. Quære if ſhe ſhall have new Appeal by Name of Joan. Br. Appeal, pl. 38. cites 9 H. 5. 1.

6. *Appeal by Feme of the Death of her Father.* The Court ſhall abate it ex Officio. Br. Office del &c. pl. 29. cites 10 E. 4. 7.

If an Appellant brings a new Appeal *pending a former Writ or Bill of Appeal*, whereon he hath appear'd,

7. *Appeal of Death* was taken *in London*, and after Iſſue of Not guilty, and Proceſs made againſt the Jury which remained for Default &c. the *Plaintiff diſcontinued* his Suit, and becauſe *the Indictment was in B. R.* he brought Appeal there; and by the Reporter the laſt Appeal ſhall abate, becauſe the firſt Appeal in L. put his Life in Jeopardy once. Br. Appeal, pl. 103. cites 16 E. 4. 11.

the Defendant may plead ſuch former Appeal in Abatement of the ſecond, unleſs the firſt were by Bill before the Sheriff and Coroners, which is of ſo little Regard that it ſhall not be pleaded in Abatement of a ſecond before it is removed into the King's Bench by Certiorari, nor even then till it appear, by the Plaintiff's appearing upon it &c. to have been removed by him, and not by a Stranger. 2 Hawk Pl. C. Abr. 173. S 76.——2 Hawk. Pl. C. 190. cap. 23. S. 124.

If one of the Defendants who doth not appear be either *miſnamed or* were *dead before the Writ purchaſed*,

8. If the Defendant in Appeal pleads *Miſnoſmer of his Sur-name*, the Appellant may aver that *Known by the one Name and the other.* 2 Hale's Hiſt. P. C. 238. cap. 30. cites 1 H. 7. 29. a.

9. *But* if Miſnoſmer be pleaded *of the Chriſtian Name*, the Appellant muſt take Iſſue, and cannot plead that Conus by the one Name or the other. Ibid. cites S. C. and 21 E. 3. 47. b.

it is a good Plea for any of the Defendants who appear, that there was *not at the* Time of

of the *Purchaſe of the Writ, nor* hath been *ſince, any ſuch Perſon in Rerum Natura* as ſuch Defendant &c. whereon if Iſſue be joined and found for the Pleader, the Writ ſhall be abated as to all the Defendants. *But* it is no good Plea that there is *no ſuch Perſon as A. B. of C. Yeoman* &c. becauſe it implies a *Negative pregnant. Neither* can a Man plead *Miſnoſmer of any* one *but himſelf.* 2 Hawk. Pl. C. Abr. 173. pl. 77. ——2 Hawk. Pl. C. 191. cap. 23. S. 125. S. C.

10. In an Appeal of Murder againſt W. O. of B. &c. Yeoman, and M. O. of B. &c. Spinſter, alias dict' M. O. Spinſter, W. O. did not come, but M. O. before the Return of the Exigent appear'd, and *pleaded to the Writ that ſhe was a Gentlewoman, and not a Spinſter*; (for in Truth ſhe was the Daughter of Sir Edw. Gorge, and W. O. her Husband was likewiſe a Gentleman) and pleaded over to the Felony Not guilty. The Plaintiff replied, that ſhe had *appear'd and brought a Superſedeas* to the Exigent *by the ſaid Name*, and demanded Judgment if now ſhe ſhould be admitted to plead this Miſnoſmer to the Appeal; and thereupon the Defendant demurr'd; but afterwards, upon ſeeing the Opinion of the Court, ſhe waived it, and pleaded Not guilty, and then the Parties agreed. D. 88. a. pl. 107. Trin. 7 E. 6. Allington v. Oldcaſtel. See 2 Hawk. Pl. C. 185 cap. 23. S 102.

11. Appeal of Murder *againſt* 4 by original Writ. They *all appear'd* at the Bar at the Return of the Writ. The *Plaintiff would have declared againſt them as in Cuſtodia Mareſchalli*; but the Court ruled that he could not, unleſs there be a Record Quod committitur Mareſchallo, or that they put in Bail; and the Writ being faulty for *want of Addition of one of the Defendants*, he would not declare againſt them; whereupon he was demanded and nonſuited, and the Defendants diſcharged. And if he had declared, and the Writ had been abated, it would have been peremptory to him. Cro. E. 605. pl. 1. Paſch. 40 Eliz. B. R. Holland v. Four others. S. C. cited 2 Ld. Raym. Rep. 1290.

12. A Writ of Appeal was *quaſh'd for Defect*, and it was thereupon *moved that the Defendant might be arraign'd upon the Count*, tho' the Writ was abated; *but* per Cur. he *cannot*, becauſe the Count is founded on the Writ which is abated; and cited 4 H. 6. 14. and 18 E. 3. 35. and upon View of Precedents, he was afterwards diſcharged. Sty. 7. Mich. 22 Car. Moor v. Savage.

13. A Feme brought Appeal of the Death of her Husband, but becauſe it did not *appear that ſhe was a Wife* to the Party ſlain *at the Time of the Murder*, and alſo for another Exception, the Writ was abated. Sty. 7. Mich. 22 Car. More v. Savage.

14. Appeal for the Murder of her Husband *againſt W. W. late of the Pariſh of St. James Weſtminſter*, in Com. Midd. The Defendant in pro-Perſona venit, and craved Oyer of the Writ and Return; and then per J. S. Attornatum ſuum, pleads in Abatement that there is a Pariſh named St. James within the Liberty of Weſtminſter, but *no Pariſh named St. James's Weſtminſter* only. The Plaintiff demurr'd, and the Cauſe was adjourn'd till next Term, when the Defendant had Judgment, becauſe the Plaintiff by his Demurrer had confeſs'd the Matter pleaded in Abatement, viz. That there was No ſuch Pariſh, which is a good Plea; but it being pleaded per Attornatum, it ought not to have been received, and tho' it is received it is void, and by Conſequence was diſcontinued by that Adjournment. 1 Salk. 59. pl. 1. Mich. 1 W. & M. in B. R. Orbet v. Ward. Show. 47. Orbell v. Ward, S. C. and held a Diſcontinuance, there being no Plea at all; for a Plea by Attorney ought not to be received, and ſo the Suit is diſcontinued, or elſe per Attornatum ſuum is Surpluſage, and then it is well enough, and ſo a good Plea, and ſo Quicunque Via data, it is againſt the Plaintiff, and adjudged for the Defendant. ——Comb. 139. S. C. Holt Ch. J. ſaid the Plaintiff ſhould have refuſed the Plea, and have taken Judgment by Nihil dicit; but that here is no Plea at all, and ſo a Diſcontinuance, and Judgment for the Defendant ——Carth. 54 S. C. And per Cur. this is a Diſcontinuance; for in this Caſe the Defendant could not make an Attorney, and ſo this is a Plea by a Stranger, and in Effect no Plea.

14 If an Appeal *abates* for a falſe Return, the Party may ſue a new Appeal, and it is not like to a Nonſuit; per Holt Ch. J. Cumb. 294. Mich. 6 W. & M in B. R. Wilſon v. Lawes.

12 Mod. 416. S. C. but S. P. does not appear. —Ibid 448. S. C. The Defendant pleaded with a Proteſtando, that he ought not to anſwer the Writ for want of ſufficient Number of Days between the Teſte and Return, pro Placito dicit, and ſets forth an Indictment at the Old Baily, and Conviction of Manſlaughter, and had his Clergy allow'd, and was burnt in the Hand After Argument at Bar, Holt Ch. J. at another Day deliver'd the Opinion of the Court, wherein they all agreed that final Judgment ought to be given; for tho' clearly the Writ is bad for want of 15 Days between the Teſte and Return, yet ſince he appear'd and pleaded in Chief he has loſt that Advantage; and Judgment for the Defendant upon the Plea in Bar. ——— 2 Hawk Pl C. 185. pl 101 ſays that the later Authorities ſeem to incline that it ought to be abated, becauſe the Writ is the Foundation of the whole Proceeding; but that it has been reſolved to be cured by the Party's coming in and pleading in Chief; and that it has likewiſe been adjudged that where the Original is right, all Defects in the Meſne Proceſs are ſolved by the Party's Appearance.

15. In Appeal of Murder by Writ, there were *but* 11 *Days between the Teſte and Return.* The *Defendant pleaded a Conviction of Manſlaughter, and Clergy allow'd*, and after would have taken Advantage of the Want of 15 Days. The Court held that this is *cured by his appearing and pleading in Chief*; for the Reaſon of the 15 Days between the Teſte and Return of Originals is, that the Defendant may have ſufficient Time to come into Court, computing 20 Miles to a Day's Journey, according to which Computation, if the Defendants are in England, they have Time enough to come hither; and if he would take Advantage of this Defect he muſt plead ſpecially, as in an Aſſiſe, Not attach'd by 15 Days. And final Judgment was given. 1 Salk. 63. pl 4. Paſch. 13 W. 3. B. R. Wilmot v. Tiler.

4 Mod. 99. Loder v. Snowden, Paſch. 4 W. & M. in B R. ſeems to be S. C. notwithſtanding the Difference of Time. And there being a *Defect of Pledges*, and that being returned by the Sheriff, the Appellant came into Court and pray'd that he might find Sureties; that Quarto Die poſt the Appellant appear'd per Attornatum, and then the Defendant was arraign'd; whereupon the Defendant pray'd to be diſcharged, becauſe Appellant cannot appear by Attorney, and ſo it was no Appearance, and conſequently is a Diſcontinuance of the Suit upon Record. The Court took Time to conſider, and then the Appellee was brought to the Bar again, when the Appellant was there in Perſon, and Sureties taken; but the Filing the Warrant of Attorney was rejected. Per Cur. The Defendant upon the Arraignment ſhould have pray'd that the Plaintiff be demanded, and then, if he had not appear'd in Perſon, he ſhould be nonſuited. He was not arraigned again, but the Secondary read the Record. The Defendant pray'd Oyer of the Writ and Return, and after reading he moved that it might be enter'd, as it was; and that Continuances from time to time might be enter'd, in regard he was going into the King's Service, which was granted. Then he pleaded a Conviction of Manſlaughter, which was inſiſted on to be a good Plea in bar to an Appeal of Murder &c. and had his Clergy &c and pray'd that his Plea might be allow'd. It was read by the Secondary. ——12 Mod. 21. Paſch. 4 W. & M. the S. C.

16. In Appeal of Murder a *Warrant of Attorney* was offer'd for the Appellant, but diſallow'd, becauſe he muſt *count* in propria Perſona. Then the Appeal was arraign'd in French, and deliver'd in the Roll in Latin, and it *was per Attornatum ſuum; but the Appellant was preſent in Court.* The Court held that if he had not been preſent, he might have been demanded and nonſuited; but it had not been peremptory, becauſe it is only a Nonſuit before Appearance; and the Court allow'd the Words Per Attornatum to be ſtruck out of the Roll, becauſe it made the Count agreeable to the Truth, and the Parchment is no Record in Court till filed. 1 Salk. 64. pl. 5 Paſch. 4 Ann. B. R. Loder's Caſe.

S. C. & S. P. cited accordingly, Comyns's Rep. 260. Paſch. 3 Geo. 1 B R.

17. Where a *Writ of Appeal* is *abated in B. R.* the Appellant may file a *Bill of Appeal* againſt him, as *in Cuſtodia Mareſchalli* &c. and ſo it was done, and the Appellee arraign'd immediately upon it. And Holt Ch. J. relied on the Caſe of Watts v. Brains, Cro. E. 694. 778. 2 Ld. Raym. Rep 1290. Trin. 8 Ann. B. R. Smith v. Bowen.

in Caſe of Reeves v. Trindle, in which Caſe, becauſe there was a Miſpriſion in the Writ of Appeal, wherein no Addition of State, Degree, or Myſtery was given to the Defendant, it was pray'd that the Writ and Proceedings thereon might be quaſh'd; and that the Defendant, who was before committed to the Marſhalſea, might now be charged by Bill, as in Cuſtodia Mareſchalli. And the Court quaſh'd all the

the Proceedings on the Writ, and the Appellant (being an Infant) was admitted by Guardian to profecute his Appeal againſt the Appellee in Cuſtodia Mareſchalli.

(P) Arraignment after Former Arraignment. And Pleadings.

1. IN Appeal of Death, *after Declaration* the *Plaintiff was nonſuited*, and the Defendant was *arraign'd upon the Declaration*, and *ſaid that of the ſame Death*, before this Time, *he was indicted and arraign'd, and pleaded Pardon of the King*, which was *allow'd* to him, and went without Day; Judgment &c. *and he ſhew'd the Charter, and it was allow'd again.* Quod nota; and ſo ſee the Plaintiff had Appeal *after the Arraignment at the Suit of the King*, and the Defendant was twice arraign'd. Quod nota. Br. Appeal, pl. 33. cites 11 H. 4. 41.

2. If a Man be kill'd, and the *youngeſt Son brings Appeal*, and the *Party is acquitted*, he ſhall be *arraign'd a-new at the Suit of the eldeſt Son*, and ſo Life ſhall be twice in Jeopardy. Br. Appeal, pl. 41. cites 21 H. 6. 28. Per Aſcue. Br. Corone, pl. 48. cites S. C. —— 2 Hale's Hiſt. Pl. C. 249. cites S. C. that Auterfoits Acquit is no Plea, becauſe not brought by the right Party.

3. *So* where he is *acquitted in Appeal brought by the Heir* he ſhall be *arraigned again at the Suit of the Feme.* Br. Appeal, pl. 41. cites 21 H. 6. 28. per Aſcue. Br. Corone, pl. 48. cites S. C.

4. In all Caſes where an Appeal is *commenced below and* afterwards *removed*, it is neceſſary that the Priſoner be *arraigned De Novo upon the ſame Bill* or Appeal, and *not to exhibit a new Bill* againſt him here *in Cuſtodia Mareſchalli* &c. Per Cur. Carth. 394. Hill. 8 W. 3. B. R. Liſle's Caſe, [alias, Armſtrong v. Liſle.] 1 Salk. 61. S. C. & S. P. but the Appellant is not to make a new Count; for the Arraignment is no Commencer but a Revivor thereof like a Re-ſummons.

(Q) In what Caſes the Appellee may afterwards be arraign'd at the Suit of the King.

1. THE Plaintiff in *Appeal brought as Heir* was barr'd becauſe he *was not next Heir to the deceaſed*, and the other arraign'd at the Suit of the King. Br. Appeal, pl. 53. cites 15 E. 2. *So* if the Plaintiff had been a *Baſtard.* Ibid. —*Contra* if he had been an *Infant.* But during his Nonage the Appeal ſhall ceaſe; and ſo ſee that an Infant ſhall have Appeal. Ibid.

2. In Appeal of Robbery, if the Plaintiff be *nonſuited before Appearance*, and *no Mainour found*, the Defendant cannot be arraign'd upon the Appeal for the King, by which the *Juſtices wrote to the Sheriff for the Indictment.* Br. Appeal, pl. 130. cites 1 Aſſ. 5. In Appeal the Plaintiff is *nonſuited before Appearance*, and there is *no Indictment*, and therefore the Defendant went quit; for in this Caſe there is no Declaration nor Indictment upon which he may be arraign'd. Br. Appeal, pl. 67. cites 27 Aſſ. 7.

But

But if the *Plaintiff* be *nonsuit after Appearance* the Defendant ought to be arraign'd at the Suit of the King, tho' he had been acquitted upon the Inoictment, and ought to have been put to plead Autertoirs Acquit ; Per Holt Ch. J. Ld. Raym. Rep. 556. Paſch. 12 W. 3. in Caſe of the King v. Toler.

3. A Man *kill'd a Man* who is *outlaw'd of Felony*, there none may have Appeal as Heir ; for the Outlawry is Corruption of Blood, but he ſhall be arraign'd at the Suit of the King. Br. Appeal, pl. 131. cites 2 Aſſ. 3.

4. In Appeal *of Robbery*, *Excommunication* was pleaded in the Plaintiff, by which the Defendant was let to Mainpriſe from Day to Day ; for by Excommunication the Suit of the Party is not loſt, nor can the King by this have Suit, and ſo ſee that where the Party would have Appeal, the Suit of the King ſhall not take it away. Br. Appeal, pl. 50. cites 3 Aſſ. 12.

Thel. Dig. 94. lib. 10. cap. 6. S. 4. cites 13 Aſſ. 11. Hill 13 E. 3. Corone 121. S P accordingly.

5. In Appeal, the *Writ was abated* becauſe *Habeas was wanting in the Original*, and the Defendant went to Priſon, but was not arraign'd at the Suit of the King, becauſe the *Court has no Warrant when the Writ is vitious*. Br. Appeal, pl. 53. cites 13 Aſſ. 11. and 16 E. 3. accordingly.

——Br. Corone, pl. 78. cites S. C. but ſays that Scott arraign'd him for the King at Newgate. —— S. C cited Bulſt. 142. and ſays that an Appeal varies from all other Proceedings, for there ſhall be *no Amendment* of a Writ of Appeal ; and ſays Note, that in that Caſe the Defendant was not arraign'd at the Suit of the King, altho' the Court was well appriſed of the Year and Day ; the Reaſon of this there given, was that the Court had no Warrant ſo to do when the Writ was vitious ; and the Court would not ſuffer the Writ for to be amended ; and the Reaſon of this is, becauſe an Appeal is the violent purſuing of a Subject unto Death, and therefore the ſame is to be taken ſtrictly, and that in all Reſpects in Favorem Vitæ.

2 Hawk. Pl. C. 213 214. cap. 25. S. 11. S. P. and ſays that he ſhall not be arraign'd at the Suit of the King upon the Appeal, but ſhall be wholly diſcharged of it.

S P. tho' the *Plaintiff ſaid that at the Time* of the Outlawry *he was impriſon'd*, by which he ſaid that he *had Writ of Error now ſealing thereof*, & non allocatur.

6. In Appeal, the *Defendant pleaded Outlawry in the Appellor in Treſpaſs*, and for that Reaſon the Defendant went quit without arraigning at the Suit of the King, and Note, that this Appellor ſeems to be Approver, who is arraign'd and appeal'd others ; for the Plaintiff in Writ of Appeal is called Appellant. Br. Appeal, pl. 57. cites 17 Aſſ. 26.

For *after the Outlawry reverſed*, *or Pardon* obtain'd, the Plaintiff *may have other Appeal*. Br. Appeal, pl. 118 cites Fitzh. Utlage 47. ——Ibid. 146. cites 18 E. 3. and Fitzh. Utlawry 47.

7. If a *Man* be *kill'd* who *has no Feme nor Son*, and *his Daughter*, *Siſter*, *or other Couſin*, *who is a Feme is his Heir*, and he *has an Uncle or other Male Couſin who is not Heir* but of the Kin, ſhe ſhall not have Appeal, and therefore the Appeal is loſt, and upon ſuch Appeal the Defendant ſhall not be arraign'd at the Suit of the King upon the Declaration ; for the Appeal never was good, and yet Damages were not given to the Defendant, becauſe it may be that he ſhall be thereof indicted and convicted at the Suit of the King. Br. Appeal, pl. 68. cites 27 Aſſ. 25.

8. In Appeal by *Infant*, and upon Inſpection of Age the *Parol demurr'd*, by which the Defendant was arraign'd at the Suit of the King upon Indictment, and was compell'd to plead, by which he pleaded Not Guilty, and thereupon was let to Mainpriſe till the Suit of the Party be determined. Br. Appeal, pl. 119. cites 32 Aſſ. 8. and T. 11 H. 4. 94. at the End.

9. It is ſaid, that if a Man be indicted and be *arraign'd of the Indictment pending the Appeal*, the Inqueſt ſhall not be taken till the Suit of the Party be paſſed by Nonſuit &c. For if he be once acquitted he ſhall not put his Life in Jeopardy again for this Offence ; quod nota bene. Br. Appeal, pl. 12. cites 45 E. 3. 25 and 21 E. 3. 24. accordingly.

10. Two

10. Two are indicted of the Death of a Husband, the Feme brought Appeal againſt the *one* who *is acquitted by Nonſuit after Appearance of the other*, ſhe ſhall not have Appeal againſt the other, nor ſhall any other, by which he was arraign'd at the Suit of the King, and ſo ſee a Stranger has Advantage of the Record, which is uncommon. Br. Appeal, pl. 139. cites 47 Aſſ. 7.

11. In Appeal of Robbery, the *Defendant is convicted* and the *Plaintiff pardon'd the Execution*, and *the King reciting the Attainder pardon'd the Execution alſo*, and becauſe *no Felony was expreſsly pardon'd it was diſallow'd*; and ſo it ſeems that by the *Releaſe of the Party* the Defendant is not excuſed againſt the King without Pardon of the King; For where the Plaintiff ceaſes his Appeal, *yet he ſhall be arraign'd upon the Declaration for the King*. Br. Appeal, pl. 27. cites 8 H. 4. 22.

12. The Plaintiff ſhall have Appeal *after the Arraignment at the Suit of the King*, and the Defendant was twice arraign'd; quod nota. Br. Appeal, pl 33. cites 11 H. 4. 41.

13. If a Man be *arraigned of Felony and acquitted without Original*, he ſhall be newly araigned at the Suit of the King. Br. Corone, pl. 35. cites 9 H. 5. 2. Br. Appeal, pl. 39. cites S. C. accordingly upon an ill Original.——*But* where he is arraigned *upon good Original*, As good Appeal, or good Indictment, and is acquitted, and the *Meſne Proceſs or Return is ill*, there he ſhall not be at another Time arraigned at the Suit of the King. Br. Corone, pl. 35. cites S. C. & S. P. accordingly.

15. Where the Plaintiff is *nonſuited* in Appeal *after Declaration*, the Defendant ſhall be arraigned upon the Declaration for the King. Br. Appeal, pl. 44. cites 4 H. 6. 15. S. P. Br Corone, pl. 29. cites 11 H. 4. 41. and Defendant pleaded *Autrefoits arraigned of this Death upon an Indictment, and* Charter of *Pardon*, and had thereof Allowance; and the Court agreed, that he might plead the firſt Record and Judgment of Diſcharge, and vouch the Record thereof; but if he pleads the Pardon, he ought to ſhew it as it is ſaid, and ſo he did, and pleaded it, and it was allow'd tho' there was *Variance in the Name and Day*; but what the Variance was does not appear.

15. *Contra after the Writ abated*, as by Miſnoſmer of the Vill, the Defendant ſhall not be arraigned upon the Declaration for the King, for where the Writ is abated, the Declaration depending upon it is determined, and cannot remain; contra upon Nonſuit, per Strange. Br. Appeal, pl. 44. cites 4 H. 6. 15.

16. *But* the Defendant may *ſay that the Plaintiff has an elder Brother alive, or* that *the Deceaſed has a Feme alive*, and if &c. to the Felony Not Guilty, but he cannot do ſo *where he is arraigned upon Indictment at the Suit of the King*, and upon theſe Caſes upon Appeal ſo miſtaken, if he be acquitted, he ſhall never be arraigned again at the Suit of the King, but contra at the Suit of the Party, becauſe he might have aided himſelf by Plea before, and therefore volenti non fit Injuria. Br. Appeal, pl. 41. cites 21 H. 6. 28. per Newton. See 2 Hawk. Pl. C 196. cap 23. S. 135.

17. If a *Feme brings Appeal of the Death of her Father* which is againſt the Statute, and *he is acquitted*, yet he ſhall be arraigned again at the Suit of the King, per Aſcue. Br. Appeal, pl. 41. cites 21 H. 6. 28. *So* if the *Son brings Appeal of the Death of his Father who was outlawed*, and the Defendant is acquitted, yet he ſhall be arraigned again at the Suit of the King, which Newton agreed; for it appears in the one Caſe in the Declaration, and in the other by the Record of the Outlawry; Quod Nota. Ibid.

18. If the Appeal be *not good*, and the *Plaintiff be nonſuited*, the Defendant ſhall not be arraigned upon it at the Suit of the King, if it appears. Br. Appeal, pl. 5. cites 35 H. 6. 57, 58. per Markham. Tho' the Appellants be *nonſuited*, yet the *King ſhall proceed* upon it; and if the Appellee be acquitted before, he muſt plead it, for we cannot take Notice of it. 12 Mod. 374, 375 Paſch 12 W. 3. in Caſe of Stout v. Towler.

19. A Man was indicted of *Murder*, and after was appeal'd upon the ſame Indictment, and for *Variance between the Indictment and the Appeal* the Plaintiff was nonſuited after Declaration, by which he was arraigned for the King upon the Declaration, and not upon the Indictment. Br. Corone, pl. 195. cites 4 E. 4. 10.

Contra of Appeal commenced before the Juſtices of Niſi Prius, there upon Nonſuit they may arraign him upon the Declaration. Ibid.

19. If in *Appeal* brought *in B. R.* they are at Iſſue, and *Niſi Prius is granted*, and at the Day the Plaintiff is *nonſuited*, they ſhall not arraign the Defendant for the King upon the Declaration as they ſhall do in B. R. for their Power is only to take their Verdict and record it. Br. Appeal, pl. 113. cites 22 E. 4. 19. per Fairfax J.

21. *Where the Party will not proſecute the Suit*, the Defendant *ſhall be arraigned upon the Declaration for the King.* Br. Charter de Pardon, pl. 13.

4 Rep. 39. b. 40. a. pl. 1. Vaux v. Brooke, S. C. where an Exception was taken to the Count, and reſolv'd, that *if the Count had been ſufficient*, then by his being convicted at the Suit of the Party he ſhould not be Auterfoits impeached at the Suit of the King, but it was reſolved that the Count was inſufficient by reaſon of the Word (Burgaliter) for (Burglariter) and thereupon he was diſcharged——2 Hale's Hiſt. Pl. C. 251 cites S. C.

22. Appeal *of Burglary* againſt B. who was *found Guilty*, and *before Judgment* given the *Appellant died*,; It was moved, that Judgment might be given for the Queen upon that Verdict, or at leaſt that the Declaration in the Appeal ſhould be inſtead of an Indictment, and that the Appellee be thereupon arraigned at the Suit of the Queen. Wray held, that if the Appellant died before Verdict, the Defendant ſhould be arraigned at the King's Suit; but if his Life be once in Jeopardy by Verdict, he conceived that it ſhall not be again drawn into Danger; and ſome were of Opinion, that the Defendant ſhould be arraigned at the Queen's Suit upon the whole Record, and plead Auterfoits acquit, and that they ſaid was the ſureſt Way. 2 Le. 83. pl. 111. Hill. 28 & 29 Eliz. B. R. Brooke's Caſe.

23. In an Appeal upon the *Death of her Husband againſt ſeveral* Defendants, who *pleaded ſeveral Pleas*, *and ſeveral Iſſues* being *joined*, the *Plaintiff was nonſuit as to one* of them; The whole Court held this to be a Nonſuit againſt them all, and therefore as to the Suit of the Party it was ruled that he be diſcharged, but held, that the others who were not tried upon this Appeal, ſhall be arraigned upon the Declaration at the Queen's Suit. Cro. E. 460. pl. 6. Hill. 38 Eliz. B. R. Curtis v. Saville.

(R) Againſt Acceſſories.

1. APpeal *lies againſt* the Principal and Acceſſory, and the *Receivers of the Acceſſory*, per Shard, and by Aſſent of all the Counſel the Suit lies well; Quod Nota Acceſſory of Acceſſory. Br. Corone, pl. 104. cites 26 Aſſ. 52.

In Appeal of Maihem againſt ſeveral, the *Plaintiff counted againſt one as*

2. In Appeal of Maihem, he counted that he *maihem'd him felonioufly*, *as a Felon to our Lord the King*, and yet this is no Felony of Death, the ſame Law elſewhere of Petit Larceny, and there it is ſaid, that in Appeal of Maihem the Plaintiff may *chooſe to make each Principal*, *or he who ſtruck him Principal*, *and the others Acceſſories*, and it was adjudged before Knivet [Trin.] 42. and there it was ſaid, that in *the ancient Law* each

each ſhall be appealed as Principal, but now he may chooſe; Quod Nota. Brooke ſays it ſeems the ancient Law was the beſt; for it is only Treſpaſs in Effect. Br. Appeal, pl. 72. cites 40 Aſſ. 9. *Principal, and againſt others as Acceſſories*; the Defendant demanded Judgment, becauſe all ought to be named as Principals, and per Cur. he may elect, ſo that the one Count and the other is well enough, by which the Defendant was put over. Br. Appeal, pl. 76. cites 41 Aſſ. 16.

3. Appeal by a Feme of the Death of her Husband *againſt 5*, viz. 2 *as Principals*, and 3 *as Acceſſories*, becauſe they *procured the two to kill the Baron*, and that the two *were thereof arraigned* coram Rege, *and they confeſſed and died in Priſon*, and *ſo were compelled to ſay*, for *otherwiſe the Acceſſories ſhall not be put to anſwer if the Principals are not attainted*; and it is ſaid there, that the Principals were attainted at their own Confeſſion, and therefore it ſeems that the Judgment was given upon the Confeſſion, but it does not expreſsly appear in the Book whether Judgment was given or not. Br. Appeal, pl. 19. cites 7 H. 4. 27. And after, becauſe the *Principals were arraigned and attainted upon the Indictment at the Suit of the King*, and not at the Suit of the Party, therefore the Inqueſt was ſpared, and the *Acceſſories were not tried at the Suit of the Party till the Principals were convicted at the Suit of the Party*. Br. Appeal, pl. 19. cites 7 H. 4. 27.

4. Appeal *of the Death* of a Man lies not againſt any as Acceſſories before the Fact where the *Principal* upon Trial was *found Not Guilty of the Murder but of Manſlaughter* only. Mo. 461. pl. 645. Hill. 39 Eliz. Gooſe's Caſe. 4 Rep. 43. b. pl. Bibithe's Caſe, alias, Goff v. Byby S. C. reſolved accordingly per tot Cur. becauſe there can be no Acceſſory before the Fact in Manſlaughter, becauſe that muſt be on a ſudden Affray; for if it be premeditated it is Murder. Cro. E. 540. in pl. 9. Goff v. Byby & al' S. P. accordingly.

5. *But* as to the *Acceſſories after the Fact*, they ſhall anſwer as Acceſſories to the Manſlaughter. Mo. 461. pl. 645. Hill. 39 Eliz. Gooſe's Caſe. Cro. E. 540. pl. 4 Hill. 39 Eliz. B. R. Goff v. Byby, ſeems to be S C held accordingly, 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.

6. In Caſe of a Principal and Acceſſary in *Murder*, the *Principal is attainted upon an Indictment at the Suit of the King, and outlaw'd* thereupon. This Attainder will not ſerve in an Appeal to arraign the Acceſſary, but the Principal *ought to be attainted* upon an Appeal before the Acceſſary ſhall be arraign'd upon an Appeal. Jenk. 75. pl. 42.

(S) Declaration. Of Declarations in General.

1. NOTE, that none ſhall be bound to anſwer to the Appeal, unleſs the Plaintiff *ſhews the Name of the Perſon kill'd*; but to Indictment de Morte Ignoti, a Man ſhall be compell'd to anſwer. Br. Appeal, pl. 61. cites 22 Aſſ 94.

2. Where a Man is *ſtruck in one County, and dies in another*, the Appellant *ſhall found his Appeal upon the one Act, and the other* upon his Caſe. Br. Appeal, pl. 7. cites 43 E. 3. 17. 18. 19.

3. Appeal

St. P. C. 81. a. (A) S. P. cites 45 E. 3 21. and Fitzh. Corone 201.

3. Appeal *by an Infant of the Death of his Couſin*, and it was challenged, becauſe he *did not ſhew How Couſin*; and it was held that he ought to ſhew it. Br. Appeal, pl. 12. cites 45 E. 3. 25.

——2 Hawk Pl. C. 166. cap. 23. S. 43. S. P. and cites S C.——Hale's Pl. C. 187. S. P. ——See Bulſt. 71. &c. Mich. 8 Jac. Egerton v. Morgan.

St. P. C. 78. a. (C) cap. 20 S. P. cites 45 E 3 21. [but it is 45 E. 3. 25. a. pl. 36.]

4. By which the Plaintiff counted of Treaſon, that the Defendant kill'd his Couſin traiterouſly, in his going with 20 Men of Arms to aid the King; per Cur. *in common* Writ of *Appeal* he ſhall *not* count *of Treaſon*. Br. Appeal, pl. 12. cites 45 E. 3. 25.

4 Rep. 47. b. pl. 12.

5. Appeal by a Feme of the Death of her Husband *againſt* 3, *the one as Acceſſary and* 2 *as Principals*, and the *Acceſſary appear'd*, *and* the *others not*, and the *declared againſt the* 2 *as Principals*, *and againſt him who appear'd as Acceſſary*; for it is agreed that if *Appeal be againſt* 20, and *one appears only*, yet the *Plaintiff ought to declare againſt all* &c. Br. Appeal, pl. 28. cites 9 H. 4. 1. 2.

Holt's Rep. 356 S. C. Holt Ch. J. held it amendable by the Common Law.

6. Exception was taken, that the Appeal was *Murdum* inſtead of *Murdrum*, and *Georius* inſtead of *Georgius*; but upon Examination of the Bill that was filed, it was right. It was moved to amend it, but objected that none of the Statutes of Amendments extend to Appeals. But Holt Ch. J. thought there needed no Amendment; but if there does, it may be amended; but as to the Miſtake of (Georius) for (Georgius,) that is in the freſh Suit, which ſince the Statute of Glouceſter need not be ſet forth; for if an Appeal be proſecuted within a Year and a Day, it is ſufficient; and the Court order'd the Roll to be amended. 11 Mod. 231. Trin. 8 Ann. Smith v. Bowen.

(T) Declaration. By the Statute of Glouceſter.

By this Act the Count of the Appellant muſt comprehend theſe ſeven

1. *Stat. of Glouc.* 6 E. 1. *cap.* 9. ENacts, That *if the Appellor declares the Deed, the Year, the Day, the Hour, the Time of the King, and the Town where the Deed was done, and with what Weapon, the Appeal ſhall ſtand in Effect &c.*

Things, 1ſt, The Fact. 2dly, The Year. 3dly, The Day. 4thly, The Hour. 5thly, The Time of the King. 6thly, The Town where the Fact was done. And laſtly, with what Weapon. 2 Inſt. 318.—2 Hawk. Pl. C. 179. cap. 23. S. 86. ſays that no Omiſſion of any of theſe Circumſtances, where the Law requires them to be expreſsly ſet forth, can be aided by the Conviction of the Defendant.

2. By the Word *(Deed)* muſt be ſet forth, firſt, *whether* it was *by Wound or without* Wound; *if by Wound*, 4 Things are neceſſary to be rehearſed in the ſetting out of the Fact, beſides the Circumſtances mentioned in the Act, viz. 1ſt, *In what Part of the Body* the Wound was. 2dly, *Of what Length and Depth* the Wound was, where the Wound is of ſuch a Quality, ſo as it may appear to the Court that the Wound was mortal; but if his Arm were cut off, or the like, there the Length or Depth cannot be ſhew'd. 3dly, *That the Party died of that Wound.* And laſtly, that it may appear that he died of that Wound *within the Year and Day* after the giving the Wound; *if without Wound*, either by Weapon or without; if by Weapon, *as by a Blow or Bruiſing, or by putting up a hot Iron in the Fundament*, or the like, then as many of *the Circumſtances* before-mentioned in the Declaration of the Fact as do agree therewith; and the reſt of the Circumſtances required by the Act are to be

be ſet forth, *if without Weapon*, or by *Poiſoning*, *Drowning*, *Suffocating*, *Strangling*, or the like, *the Manner* of the Fact muſt be ſet forth, and ſo many of the Circumſtances required by the Act as agree therewith, namely all the Circumſtances, ſaving with what Weapon the Felony was done, becauſe no Weapon was uſed in committing of this Felony; but notwithſtanding this Act extends to all Homicides, tho' they were not done with any Weapon. 2 Inſt. 318.

3. Appeal *againſt* 3, and *counted that the one ſtruck the Baron of the Feme Plaintiff in ſuch a Place of his Body, of which he died, and if he had not died of it, another ſtruck him in ſuch a Place, ſo that he had died* if &c. *and that the 3d ſtruck him in ſuch another Member, ſo that if he had not died of the firſt Blow, he had died of this*; and the Defendants made Defence, and pleaded Not guilty. Br. Appeal, pl. 8. cites 44 E. 3. 38. Fitzh. Corone, pl. 97. cites S. C.—St. P. C. 80. b. (C) cites S. C. [but is miſprinted 44 E. 3. 33. inſtead of 44 E. 3. 38.]

and ſays that the Statute of Glouceſter, cap. 9. wills that he ſhall declare the Fact, and that the Count in Appeal ſhall differ according to the Difference of the Fact; for the *Fact muſt neceſſarily be declared as it was done, or elſe as the Law expounds it to be done*, and therefore if two are preſent at the Death of a Man, and the *one did not ſtrike* him, *but commanded the other to do it*, and he thereupon kills him; in this Caſe, in an Appeal againſt them, the Plaintiff ſhall count that each of them ſtruck him mortally, and cites Mich. 21 E. 4. 84. and Fitzh. Corone, Hill. 4 H. 7. * 60.

* The Caſe in Fitzh. Corone is at pl. 60. and cites Hill. 4 H. 7. 18.——Br. Appeal, pl. 85. cites 4 H. 7. 18. S. P. accordingly, ſays that the Words of the Count being that *each ſtruck him mortally*, are only Words of Form; for the Blow of him who ſtruck is the Blow of him who commanded, if he was preſent.

So in Appeal of *Rape againſt* 2, where the *one was preſent and aletted the other* to raviſh &c. the Count ſhall be that Both raviſh'd; for in Law it was the Ravishment of both. St. P. C. 80. b. 81. a. cites Mich. 11 H. 4. 12. and Fitzh. Corone 86 & 228.——Br. Appeal, pl. 32. cites 11 H. 4. 13. S. P. accordingly.

S. P. Br. Appeal, pl. 132. cites 40 Aſſ. 25. and ſays Nota, that thoſe that are preſent at the Force, and are Aiders, tho' they do not ſtrike, are Principals.

4. In Writ of Appeal of Rape the Plaintiff counted *that where ſhe was in Peace of God and our Lord the King, ſuch a Day, Year, and Place, there came the Defendant felontouſly, as a Felon to our Lord the King, his Crown and Dignity, & ipſam rapuit & Carnaliter Cognovit, by which ſhe purſued from Vill to Vill, and from County to County, till he was taken at her Suit, and* that *A. and B. were there inforcing and aiding of the ſame Felony* &c. and if the Defendant would deny it, ſhe is ready to prove as the Court ſhall award, as a Feme ought &c. Br. Appeal, pl. 13. cites 47 E. 3. 14. Appeal of *Rape of his Feme*, the Writ was *Felonice rapuit*, and not quod *Carnaliter Cognovit*, and y t well. Br Appeal, pl. 32. cites 11 H. 4. 13.

——St. P. C. 81. a. (C) S. P. and cites S. C.——Hale's P. C. 187. S. P. accordingly.——2 Hawk. Pl. C. 177. S. 79. S. P. accordingly.

5. Writ of Appeal *of Rape of his Feme*, and the *Writ was Ad reſpondendum to the Plaintiff, ſecundum Formam Statuti of* 8 R. 2. *quare Uxorem ſuam rapuit, unde eos appellat.* Strange demanded Judgment of the Writ; for no Appeal of Rape was given to the Baron alone but by this Statute; and the Writ ought to be *Unde eos appellat ſecundum formam Statuti*, and not Ad reſpondendum ſecundum formam Statuti; for the Anſwer was at Common Law, and the Appeal is given by the Statute. Per Hall Serj. The Statute does not give Appeal by expreſs Words; for Appeal of Rape was given before by the Statute of W. 2. cap. 34. but ſee the Statute that the King ſhall have the Suit, and ſo becauſe the Statute aforeſaid gives no Appeal, he cannot ſay as Strange ſaid, but he ſhall anſwer according to the Statute; for the Statute is Quod ad Duellum Vadiandum non recipiatur, and ſo the Writ good. Br Appeal, pl. 48. cites 1 H. 6. 1.

6. Yet Strange demanded Judgment of the Writ; for it is not *Felonice raput*, and to the Felony Not guilty, and the other e contra. Quære, becauſe he anſwer'd to the Felony. Ibid.

Ibid. pl 143. cites S. C. and ſo it ſeems to be Felony, as Petit Larceny; but not Felony of Death.

7. In Appeal of Maihem the Plaintiff counted *Quod defendens ipſum Mahemavit Felonice.* Quod nota. Br. Appeal, pl. 80. cites 6 H. 7. 1.

Holt's Rep. 356. pl. 15. S. C. Holt held that the (et) couples all, and they are not laid as diſtinct Acts.

8. In Appeal of Murder an Exception was, that it does *not ſay that the Aſſault was Vi & Armis*, but ſays only *venit Vi & Armis & Inſultum fecit.* But Holt ſaid that the Vi & Armis ſhall extend to all, and not only to the Venit; and that this is not like the Caſe of Battery or Treſpaſs; for there there is a Fine due to the King. 11 Mod. 231. Trin. 8 Ann. B. R. Smith v. Bowen.

9. Another Exception was that the Bill *ſet forth that the Appellee, the ſaid W. S. the deceaſed did ſtrike and give him one mortal Wound, of which the ſaid W. S. did languiſh till ſuch a Day and then died*, and ſo the ſaid J. B. as a Felon, and of his Malice aforethought, murder'd the ſaid W. S. in E. aforeſaid. So that it does not appear that the Perſon died, for that it is not ſufficient to ſay Obiit, without repeating the Nominative Caſe. But per Powel J. the Nominative Caſe goes to the Whole of Neceſſity. Holt's Rep. 355. 356. Mich. 8 Ann. Smith v. Bowen.

See pl. (16)

10. By the Word *(Year)* is meant the Year of the Reign of the King. 2 Inſt. 318.

* 2 Hawk. Pl. C. 180. cap. 23. S. 83. ſays it ſeems moſt proper to allege it in ſuch Manner.

11. The Word *(Day)* here is *taken for the natural Day*, comprehending both the Solar Day and the Night alſo, containing 24 Hours, and therefore if it be done in the Night it is ſaid, * *In nocte ejuſdem diei.* 2 Inſt 318.

Hale's Pl. C. 207 S. P.— 2 Hawk. Pl. C. 181. cap. 23. S. 88. calls it a Repugnancy to allege the Killing on the 10th of

12. If a Man be feloniouſly ſtrucken the 10th of December, whereof he died the 10th of January, he cannot allege the Killing the 10th of December when the Stroke was, but he may allege the Killing to be the Day that he died; but the ſureſt Concluſion is, And ſo he killed him in Manner and Form aforeſaid; for tho' to ſome Purpoſe the Death hath Relation to the Blow, yet this Relation being a Fiction in Law, maketh not the Felony to be then committed. 2 Inſt 318.

of December, and that ſuch Concluſion makes the whole naught: becauſe the Party could not be ſaid to have been murder'd till he was dead, and that in Truth and Propriety of Speech (which muſt be obſerved in legal Proceedings) it is not a Felony but a Treſpaſs only till the Death; but if in ſuch Concluſion it had been alleged that the Defendant in ſuch Manner felonioully kill'd the Party on the 10th of January aforeſaid it had been ſufficient, but that it is ſaid the better way to conclude Generally, That the Defendant in ſuch Manner feloniouſly plunder'd the Party.

At the Seſſions of the Peace holden for the County of Norfolk, one Syer was *indicted of Burglary, Auguſti* 31 *Eliz.* and upon Not Guilty pleaded, it fell out in *Evidence that the Burglary was done* 1 *die Septembris in eodem Anno*, ſo as primo Auguſti there was no Burglary done, and thereupon he was Not Guilty, and afterwards he was indicted again 1 Septembris &c. And it was reſolved by Wray Periam, Juſtices of Aſſiſe, and by the greateſt Part of the Judges, that he *ought not to be tried again, for he might have been found Guilty upon the firſt Indictment*, for the *Day is not material*; but it is neceſſary for the Jury in that Caſe to ſet down the Day, and ſo in Caſe of Appeal. 2 Inſt. 318. 319. cites Paſch. 32 Eliz. Syer's Caſe.

13. And altho' the Day be alleged, yet if the Jury *find him guilty at another Day* the Verdict is good, but then in the Verdict it is good to *ſet down on what Day it was done* in Reſpect of the Relation of the Felony; and the ſame Law is in Caſe of an Indictment. 2 Inſt. 318.

2 Hawk. Pl. C. 181. cap. 23 S. 88. at the End, ſays it is certain that a Miſtake of the Day will not be material upon Evidence.

There are divers Diverſities between the alleging of the Hour, and

14. As to the Word *(Hour)* the Statute of Glouceſter makes it material; for in the Day are ſeveral Hours, and if he that is killed was, at the Hour ſuppoſed at a Place 20 Miles diſtant from where the Felony was done, How can he be the principal Actor of this Felony? And yet it may be true that he was there the ſame Day, tho' not the ſame Hour;

but

but as Bracton ſaid, it ſeems the Plaintiff is not neceſſarily compelled to expreſs the Hour in the Declaration by the Common Law, and a Man may now declare in this Manner notwithſtanding the Statute of Glouceſter, ſince the Statute does not prohibit it, it being in the Affirmative. St. P. C. 80. b. (B)

the Day or Year. 1ſt. in the Count upon the Appeal one may ſay, *Circa horam* 10 *ante Meridiem* &c. &c. or, *Inter horam decimam & undecimam ante Meridiem*; but the like cannot be done either of Day, Year, or Part of the Body; as the Fact cannot be alleged to be done *Circa* 10 *diem Decembris* &c. or *Inter decimum & 11 diem Decembris*, or *Circa Annum ſextum Domini Regis nunc*, or *Inter ſextum & ſeptimum diĉti Domini Regis nunc*, or allege the Wound to be given Circa or Circiter Pectus; And the Reaſon of this Diverſity is, that it is more difficult to allege the true Hour, than the true Day or Year; and yet the Plaintiff in the Appeal is *not bound to prove in Evidence* neither *the preciſe Hour*, *nor* the very *Day* he *alleged in his Count*; another Diverſity is between the Appeal and the Indictment, for in the Indictment the Hour need not be alleged. 2 Inſt 318.

2 Hawk Pl. C. 180. cap. 23. S. 88. ſays, There can be no Doubt but every Count muſt allege the Day on which the Fact was done; but it is ſaid not to be ſufficient to allege it done *About ſuch a Day*, or *Between ſuch a Day and ſuch a Day*, or *on the Feaſt of ſuch a Saint*, *without an Addition*, if there be another of the ſame Name, As *on St. John's Day*, *without adding Baptiſt or Evangeliſt*; or on *an Impoſſible Day*, *as the 31ſt of June*. Alſo an Appeal of Death muſt *not only ſhew the Day of the Hurt*, *but but alſo of the Death*, that it may appear that the Party died within the Year and Day after the Hurt. And it is ſaid not to be ſufficient to allege that the Defendant aſſaulted the Party at a certain Day, and feloniouſly ſtruck him, without expreſsly alleging, that he ſtruck him *Ad tunc & ibidem*, and yet both Sentences being join'd with the Copulative, it is the moſt natural Import of the whole that the Stroke and Aſſault were both at the ſame Time &c.

2 Hawk Pl. C. 180. cap. 23. S. 87. ſays, that it is obſervable that all the Precedents of ſuch Counts (excepting only one) in Appeals of Larceny in Raſtal's Entries, which ſeems to be the only Book of Authority in which any ſuch Counts are to be found; and alſo all the Precedents in Coke and Raſtal of ſuch *Counts in Appeal of Mailem* take Notice of the Hour, *as well as thoſe in Appeals of Death*, and therefore certainly it is not ſafe wholly to omit it, yet it has been holden that ſuch an Omiſſion is not fatal, even in Appeal of Death, becauſe the Common Law did not require the Mention of the Hour, and the Statute abovemention'd is in the Affirmative; yet if the Hour as well as Day be ſet forth in the Allegation of the Offence of the Principal, it is ſaid to be fatal to mention the Day only in the Allegation of the Offence of the Acceſſory. But it ſeems that there is no Neceſſity in any Caſe preciſely to allege that the Fact was done ſuch an Hour, but that it is ſufficient to ſay, That it was done about ſuch an Hour, as appears from every one of the Precedents in Coke and Raſtal, in which the Hour is mention'd, and alſo from other good Authorities; yet we find the contrary Opinion holden by 3 Judges againſt 2 in * Bulſtrode's Reports. But it ſeems certain that a Miſtake of the Hour will not be material upon Evidence.

* Bulſt. 82 Mich. 8 Jac in Caſe of Egerton v. Morgan.

15 In Appeal of Murder Exception was taken to the Bill, becauſe it was laid to be done *Poſt Meridiem circa Horam decimam ejuſdem Diei*, whereas if it was done in the Night it ought, by the Statute of Glocester cap. 9. to be alleged to be done *in Nocte ejuſdem Diei*, tho' it be in July, when it is not dark at 10. But Holt Ch. J. held it well enough in Murder, tho' in an Indictment for Burglary it would be ill without (in Nocte) becauſe it is not Burglary, unleſs it be in the Night. 11 Mod. 230. 231. pl. 3. Trin. 8 Ann. B. R. Smith v. Bowen.

16. As to *(the Time of the King)* the Year being already named, it might ſeem that the Time of the King, which is the Year of the Reign of the King is needleſs, but it is here again added to the End that *not only the Year ſhall be alleged wherein the Blow &c. was given*, *but alſo the Year when the Death enſued thereupon*, to the End that it may appear that he died of the Blow &c. within the Year and Day; and whenſoever the Year of the King ought to be alleged, it draweth with it Time and Place, that is, the Day and Time, when and where the Death enſued. 2 Inſt. 319.

2 Hawk. Pl. C. 181. cap. 23. S. 90. ſays there is no Doubt but every Count in Appeal muſt expreſsly ſet forth in what Year the Fact was done, and that in Appeal of Death it is certainly neceſſary to ſet forth not only the Year in which the Stroke was given, but alſo that in which the Death happen'd, that it may appear that the Death happen'd within the Year and Day after the Stroke; but that it ſeems clear from all the Precedents, that it is ſufficient to ſhew in what Year of the King's Reign the Fact was done, and the Death happen'd, without ſhewing the Year of the Lord; and that it hath been adjudged that it is ſufficient to allege the Fact in ſuch a Year of ſuch a King, without ſaying that it was in ſuch a Year of his Reign, becauſe it is clearly implied.

17. As

If the *Act* be *done in a Vill* it ſhall be *expreſſed in a Vill*, but *if* it be done *in a Pariſh or Foreſt*, as Sherwood, which is, *out of any Vill*, there *it ſhall be named in a Pariſh*, *or* in ſuch a *Place*. Quod nota. Br. Appeal, pl. 19. cites 7 H. 4. 2.

17. As to the Words *(the Town)* this muſt be *underſtood*, *if the Murder* or Homicide *were done in a Town*, *but if* it were done *in a Place known out of any Town*, then may it be alleged in that Place known in ſuch a County. And ſo *in a City* it may be *alleged in a Pariſh* &c. becauſe ſuch a Pariſh is in Lieu of a Town. But *in the Country* if a *Pariſh contain'd divers Towns*, the Murder or Homicide cannot be alleged in ſuch a Pariſh, for that the Statute requireth that the Fact be alleged in a Town. 2 Inſt. 312.

2 Hawk. Pl. C. 182. cap. 23. S. 92. ſays that it ſeems not only neceſſary in Appeal of Death to allege ſome Place where the Fact was committed, but alſo that ſuch Allegation be in proper *Place*; and that if the Truth will bear it it is ſafeſt to lay it in a Town, as the Statute of Glouceſter directs, but if done out of a Town, you may lay it in any other Place whence a Vifne may come. If a Fact *done in a Vill within a Pariſh which contains divers Vills* be in the Count in an Appeal alleged Generally in the Pariſh, or a Fact done *in a City which contains divers Pariſhes* be in the Count in an Appeal *alleged Generally* in the City, it ſeems the Defendant may plead ſuch Matter in Abatement, for otherwiſe he could take no Advantage of the Inſufficiency of the Allegation, becauſe the Place named as it ſtands on the Record, muſt, till the contrary be ſhewn, be intended to contain no more than one Town or Pariſh.

St. P. C. 80. b. (B) S. P. and it is not good to ſay *at the Place aforeſaid*; for in ſuch Caſe a Man does not know which of the Places aforeſaid it refers to; and cites Paſch. 21 E. 4. 30. [but it ſeems miſprinted, and that it ſhould be 21 E. 4. 25. b. pl 41. where the S. P. is, but I do not obſerve S. P. at 30.]

18. Appeal of Murder *againſt ſeveral of ſeveral Vills* that they at D. murder'd the Baron of the Feme Plaintiff, and becauſe he ſhew'd what each did ſeverally there, and becauſe they were ſeveral Vills, therefore was compell'd to *ſhew the Name of the Vill at every Time when the Murder is alleged*, by Reaſon that there were ſeveral Vills rehearſed ſupra; Quod nota; And the Defendant was let to Mainprize. *Br.* Appeal, pl. 110. cites 21 E. 4. 25.

4 Rep. 42. b. pl. 6. S. C. accordingly.

19 In Appeal of Death where the *Stroke was given at A.* and the *Death happen'd at B.* the *Declaration muſt be of murdering* the deceaſed *at B.* For it is no Felony till his Death, which was at *B.* and thence the Venire ſhall come. But if the Stroke had been alleged at A. and the Death at B. and then the Declaration had ſaid, *Et ſic Murdravit Modo & Forma prædicta*, it had been good. And tho' the Precedents as to the alleging the Place of the Murder are where the Stroke was, yet they paſſed Sub Silentio, and were not well examined and not to be regarded, and adjudged that the Appeal did abate. Cro. E. 196. pl. 13. Mich. 32 & 33 Eliz. B. R. Hume v. Ogle.

Holt's Rep. 356 S. C. ſays that it was laid that the deceaſed was in the Peace of God in Eaſt-Smithfield, and there are 2 or 3 Places named, and then it is ſaid that In Loco prædicto he did not give the Blow the Year Day and Hour aforeſaid, and objected that if there was one particular Place, then (in Loco prædicto) would refer to that, but when there are ſeveral, then (Loco prædicto) is uncertain; And Holt held it well enough, for the Reaſon mention'd in 11 Mod.

20. Another Exception was that *No Place is ſet forth where the Stroke was given*; for it is ſaid *Die & Loco prædict. Inſultum fecit*, and ſays that is mention'd before where the Pledges lived, and afterwards where Venit Vi & Armis, ſo that prædict' may refer to the Place before-mention'd, viz. where the Pledges lived; and ſo no Venue laid to the Aſſault; But Holt held the *(prædict')* good, becauſe the Place mention'd where the Pledges live is no Part of the Appeal. 11 Mod. 231. Trin. 8 Ann. B. R. Smith v. Bowen.

And albeit this Statute requireth that it be alleged in the Count

21. As to the Words *(with what Weapon the Wound was given)* albeit one certain Weapon muſt be alleged in the Count, yet upon the Evidence, if it be *proved* that the Wound was given *with any other Weapon*, the Offender ſhall be found Guilty; as if it be *alleged* in the Indictment that the Wound was given *with a Dagger*, and it is *proved* in Evidence that

that it was given *with a Sword, Rapier, Hook, Hatchet,* Bill, or any like Weapon with which a Wound may be made; for it were unreaſonable to drive the Plaintiff in the Appeal to prove the ſelf-ſame Particular Weapons, whereof many Times he cannot have Notice; but upon ſuch a Count, or an Indictment in Evidence it cannot be proved, that the Party was poiſoned, or drowned, or burnt, ſuffocated or ſtrangled, or the like, where no Weapon was ſued; for that Evidence doth maintain the Count in the Appeal or Indictment, becauſe it is Murder or Homicide of another Kind, and not under the ſame Claſſis that is alleged in the Count or Indictment, and thereof the Plaintiff by ſuch as view'd the Body may have Notice. 2 Inſt. 319.

of the Appeal with what Weapon he was killed, is to be *underſtood* in Caſe *where he is killed with a Weapon*, for albeit (as hath been ſaid) there was no Weapon at all, and in Caſe of *poiſoning, drowning* &c. yet doth the Appeal lie for ſuch Homicide; and Weapon is in this Act mention'd for Example 2 Inſt. 319.

22 Appellant counted that the Defendant in Parochia of St. Giles in the Fields &c. on ſuch a Day circa Horam primam &c. did aſſault &c. and in & ſuper ſuperiorem Partem of his Belly near his Breaſt, and the middle Part of his Body percuſſit, pupugit & inforavit, Dans ei vulnus mortale &c. The Defendant craved Oyer of the Writ and Return, and then demurr'd in Abatement, and pleaded over to the Felony; the Court ruled * *circa Horam primam* is certain enough, for the Law will not tie a Man up to an exact Minute; that *in & ſuper ſuperiorem Partem* &c. could not be more certain; and that *percuſſit, pupugit & inforavit, dans ei mortale vulnus* was better and more certain than if it had been *(& dedit;)* and that the Fact is well alleged *in Parochia* tho' the Stat. of Glouceſter requires that a Vill ſhould be ſet forth, for it ſhall be intended a Vill, and tho' there may be more Vills than one in the Pariſh, yet that ſhall never be ſuppoſed, but muſt be ſhewn by the other Side. 1 Salk. 59. 60. pl. 2. Trin. 6 W. & M. in B. R. Wilſon v. Laws.

This and the following Plea relate to more than one ſingle Point of thoſe before-mention'd in this Letter. 4 Mod. 290. S. C. and S. Points reſolved accordingly.—Comb. 293. S. C. and the Demurrer was over-ruled. ——Carth. 331 S C. reſo'ved accordingly.——Skin. 443. pl 2. S C. adjornatur Ibid 549. pl. 11. the Court over-ruled all theſe Exceptions. And ibid 551. pl 2. S. C and Judgment given accordingly.———Ld Raym Rep. 20 S. C. adjudged accordingly.

* As to the Circa Horam primam, the Court ſaid that tho' in Egerton and Morgan's Caſe [Bulſt. 77. So. &c.] three Judges were of a contrary Opinion, [viz. that it was not good;] yet even there, Coke and Williams held that it was certain enough, and the Reaſons of thoſe two Judges ſeem to be better warranted than the Opinions of the other three, and that ſo have the Precedents been ever ſince that Time.

00. In Appeal of Murder, the Appellee being found Guilty, it was moved in Arreſt of Judgment, 1ſt. That *two Places* are *mentioned* in the Appeal, viz. *That he was commorant at Shalford, and that the Fact was done at Compton*; Afterwards it ſays, that *Die, Anno, Hora, & Loco præd' eandem Jane Young percuſſit.* 2dly, There is *no Venue* laid to the Aſſault, for it is ſaid, that the Deceaſed being at Compton &c. *Venit præd' Chriſtop'* Slaughterford Felonice, voluntarie & ex Malitia ſua præcogitata *ut Felo* dictæ Dominæ Reginæ nunc, ac contra Pacem &c. Die & Hora præd' apud C. præd' &c. Vi & Armis &c. ac in & ſuper eandem J. Y. in Pace Dei & dictæ Dominæ Reginæ ut prefertur exiſten' Felonice, Voluntarie & ex Malitia ſua præcogitata inſultum fecit, ſo that the Venue is only laid to the Venit Vi & Armis, for the (ac) ſeparates the Sentence; and if an Aſſault be neceſſary, it is neceſſary to lay a Venue, for it is traverſable, and that it ſhould have been *tunc & eadem inſultum fecit.* At firſt Holt Ch. J. Powis and Gould Juſtices were clear that neither Exception was good, but Powel doubted, and the Matter being put off to the next Day, Holt was of Opinion, that neither Exception was material; As to the firſt, when one Place is the Man's Addition, and the other the Fact, certainly Die, Hora & Loco præd' ſhall refer to the Place of the

Fact, and it is as well as if it had been *(eodem,)* for the Place of the Fact is the fame before the Præd'. As to the other Exception it is not material, for the Aſſault is not neceſſary, for Percuſſit is a ſufficient Aſſault; as to **Long's** Caſe, where Percuſſit was omitted, that was ſhewing the Conſequence without the Cauſe; *Percuſſit implies an Aſſault*, but if it did not, here it is ſaid, *Venit Vi & Armis to Compton, ac inſultum fecit &c. ac eum quodam Baculo &c. percuſſit, dans eidem J. T. unum mortale Vulnus, de quo quidem vulnere inſtanter obiit*, ſo that if the Aſſault was neceſſary in the Venue here it would be ſufficiently ſet forth. Powel ſaid, as to the firſt Exception the Precedents are Die, Hora & Loco præd', but in an Appeal there needs no Addition, for it is not within the Statutes of Additions; and it being ſaid, *apud Compton inſtanter obiit, ties down the Stroke to the Place of the Death.* As to the 2d he ſaid, that *dedit mortale Vulnus* would be bad, but in this Caſe there cannot be a Stroke without an Aſſault. The old Precedents are Inſidiando & Ex inſultu, but upon the Petition of the Clergy, becauſe it took away the Benefit of the Clergy in H. 6th's time, it was left out, and afterwards it was only Ex inſultu. In **Burgh and Pelcroft's Caſe** there is no Aſſault laid, and indeed where there is percuſſit, as in this Caſe, there needs none. Powis and Gould the ſame. 11 Mod. 229, 230. pl. 2. Trin. 8 Ann. B. R. Young v. Slaughterford.

(U) Of Pleading in Abatement, and then over to the Felony &c.

Thel. Dig. 216. lib. 15. cap. 5 S. 18. cites S. C. & S. P. accordingly.

1. IN Appeal by a Feme of the Death of her Husband, the Defendant ſaid, that *at another Time the Feme brought Appeal againſt others of the ſame Death* before Juſtices of Gaol Delivery in the County of N. *who at her Suit were attainted and hanged*, and prayed Allowance, and to the Felony Not Guilty, and ſo ſee that he *ought to plead over to the Felony.* Br. Appeal, pl 28. cites 9 H. 4. 1. 2.

S. C. & S. P. cited accordingly.

2. The *Defendant pleaded Villeinage in the Plaintiff, and* was compelled to plead *over to the Felony.* Br. Appeal, pl. 28. cites 18 E. 3.

Thel Dig. 216 lib. 15 cap. 5 S. C. and ſays that the ſame is reported Trin. 11 H. 4. 23. [but it ſeems it ſhould be 93.] and Mich 9 H. 4. 1. ——— Brooke makes a Quære if it is a good Plea in Appeal of Murder that the *Plaintiff* is the *Defendant's Villein.* Br. Nonability, pl. 44.

Thel. Dig. 215. lib. 15. cap. 3. S. 18. cites S. C. & S. P. accordingly.

3. Alice T. ſued Appeal againſt W. S. and R. in B. R. of the Death of J. T. Baron of the Plaintiff, and *declared againſt W. as Principal, and againſt R. as Acceſſory in the County of W.* Cotton for W. made Defence, and *ſaid, that at another Time the ſame Plaintiff attached the Appellee of the ſame Death againſt W. before A. B. Coroner in the County of W. in full County ſuch a Day and Year, which was removed* out of the County *into B. R. by Writ directed to the Sheriff, and upon this Proceſs continued here till ſuch a Day, within which time this Appeal was purchaſed*, and ſo this Appeal purchaſed pending the other &c. and where W. is named of D. in the County of W. there is *no ſuch Vill, Hamlet, nor Place known* by ſuch Name, and prayed Allowance, and as *to the Felony Not Guilty*, and *for R. he ſaid*, that *where he was named of W. he was of C. in the County of M. the Day of the Writ purchaſed, and not at W.* and prayed Allowance, and as to the Felony Not Guilty; Per Hals. J. he ſhall not have thoſe 2 *Pleas to the Writ*, viz. *that the Appeal is purchaſed pending another*, which is Matter in Law and triable by the Juſtices, *and* alſo *that there*

is

is no such Vill &c. which is triable by the Country, but he may plead *Misnomer of himself, and also that there is no such Vill* &c. *and* such like which are triable by the Country if he will aver *such Matters*; and after the Misnomer of the Vill was confessed, by which it was awarded that the Plaintiff shall take nothing by her Writ, and that she shall be taken; Quod Nota. Br. Appeal, pl. 44 cites 4 H. 6. 15.

4. In Appeal of the Death of T. his Brother, the Defendant *said, that B. took to Feme C.* at B. in the County of S. &c. *and had Issue J. the eldest Son, and T. who is dead the 2d. Son, and this Plaintiff the youngest Son and T. is dead, living J.* and prayed Allowance, *and to the Felony Not Guilty*; Per Markham, he need not plead to the Felony, but *where it is confessed that he had Title of Appeal at one Time*, As where a Release is pleaded, but shall *not* plead over &c *where he alleges Matter which proves that the Party never had Title to the Appeal* as here, * *and where he pleads Bastardy, or Ne unques Accouple* &c. which Yelverton agreed, and that where he pleads to the Felony, he confesses the Plaintiff to be such Person as may have the Appeal, and the other Matter proves the contrary; but by the Serjeants he may plead over to the Felony in Favour of Life to have it inquired, if the first Matter be not found for him, by which he had the Plea by the Manner after; Quod Nota. Br. Appeal, pl. 94. cites 7 E. 4. 15.

* S. P. by some, because if it be certified against him he shall be hang'd, which Brian and Catesby denied, saying that the Felony *shall be inquired after the Certificate of the Bishop* &c. Br Appeal, pl. 101. cites 14 E. 4 7.

5. In all Cases of pleading *Misnomer* he must plead over to the Felony. 2 Hale's Hist. P. C. 238. cap. 30. cites D. 88. a. b. and 21 E. 4. 71. a. b.

6. Appeal of Death in B. R. Vavisor said, where the Plaintiff has declared that the Defendant killed the Deceased the first Day of May 21 E. 4. we say that he *died* the 10th Day, Anno 18 E. 4. which is 2 *Years before the Appeal sued*, and it found that it be not, then to the Felony Not Guilty, and the Plea good, by all the Justices, in Favour of Life. Br. Appeal, pl. 115. cites 22 E. 4 39.

Thel. Dig. lib 15. cap. 5. S. 20. cites 22 E. 4 38 S. P. accordingly, and held good.

7. *And* after the Defendant pleaded, *that where it is supposed that he died the* 21 *E.* 4. *he died* 18 *E.* 4. and this &c. Huffey said, it is *best to plead that* the Deceased *died Anno* 18 *E.* 4. &c. before the Appeal, *and plead over to the Felony*, and then if the Jury find the Time they shall not inquire any further, and if e contra, then they shall inquire of the Felony, and we are all agreed that if he pleads the first Plea only, and it is found against him, he shall plead to the Felony after, and so 2 *Inquests* where one may make an End of all, and the Opinion of the Court was, that the Plea was good, without *Traverse that he was alive within the Year and Day.* Br. Appeal, pl. 115. cites 22 E. 4. 39.

8. *But after* the Defendant of his own free Will *alleged the Death Anno* 18 &c. *absque hoc* that he was alive within the Year and Day before the Teste of the Appeal, Prist. &c. and the other e contra, *and to the Felony Not Guilty*, and the other e contra. Br. Appeal, pl. 115. cites 22 E. 4. 39.

9. *And* per Huffey, he shall plead *Bastardy*, and if &c. *Not Guilty*, and in Appeal by a Feme, *Ne unques Accouple* in lawful Matrimony, and if &c. Not Guilty, *contra* of a *Release*, for there he has in a Manner confessed the Felony. Br. Appeal, pl. 115. cites 22 E. 4. 39.

Thel. Dig. 216. lib 15. cap 5. S. 20. cites S. C. and 7 E. 4. 15. S. P. by Huffey.

10. In Appeal by the Brother and Heir &c. the Defendant said, *that the Plaintiff had an elder Brother*, &c. and *as to the Felony Not Guilty*, and held good. Thel. Dig. 216. lib. 15. cap. 5. S. 20. cites Mich. 7 E. 4. 15.

11. In Appeal of Death, the Defendant *pleaded a former Conviction of Manslaughter* before Justices at York for the same Fact, *and had his Clergy, and that no Judgment was given* upon the Premisses, and took all the material Averments &c. and *as to the Felony and Murder* aforesaid pleaded *Not Guilty*. It was mov'd, that the Plea was not good, because after pleading the Conviction upon the Indictment he pleaded to the Felony and Murder aforesaid Not Guilty, which is no Answer to the

Bulst. 141. S. C. the Appeal was quash'd, and the Defendant discharged. — Cro. J. 283. pl. 4. S. C. and the Ob

jection was, that he ſhou'd have defended Feloniam & Homicidium, and concluded to them, and not Feloniam & Murdrum, ſed non allocatur, and the Defendant was diſcharged.

the Declaration which ſuppoſes the Fact to be Homicide only, and not Mueder. But reſolved that the Plea is good, becauſe Ex Neceſſitate Juris the Defendant need not plead to the Country at all where he has pleaded a good ſpecial Plea to the Country before; For this Plea to the Country added to the other Plea is only in Favorem Vitæ, and the Defendant may hazard his Life upon the firſt Plea, if he will, and here the pleading the Conviction and Clergy allowed is a good Bar; That the Word *(Murdrum) in the Plea is Idle, and* the Word (Feloniam) is the principal Word, and refers the Plea to the Felony ſuppoſed in the Declaration. Beſide, the Word (Murdrum) here *muſt be taken for Homicide*; For tho' the Indictment or Appeal ſays the Defendant murdravit, yet *if there be no Malitia præcogitata it is only Manſlaughter*, and the Word (Murdravit) of itſelf is equally applicable to Manſlaughter as well as Murder. Yelv. 204. Paſch. 9 Jac. B. R. Bradley v. Banks.

1 Salk. 59. pl. 1. Orbet v. Ward, S. C. but S. P. does not appear. ——Comb. 139. S. C. and Holt Ch. J. ſaid, that the Plaintiff ought to have moved that the Defendant might have pleaded over, but that that is a diſtinct Plea, and does not vitiate the Plea in Abatement, and if the Plea over be neceſſary, the Plaintiff ſhould have taken Judgment for want of it; and Dolben J. agreed, but he was of Opinion, that if the Defendant pleads over to the Felony at the ſame time that his Plea in Abatement is over-ruled, it is ſufficient, and that ſo it was reſolved in Parliament 10 Years ago. Adjudged for the Defendant.——Carth. 54. S. C. and it was admitted, that it was uſual to plead over to the Felony in ſuch Caſes, but ſaid, that it was not neceſſary that for the Default thereof the other Plea ſhould be ill; for it is but reaſonable that the Defendant in this Caſe, whoſe Life is concerned, ſhould have the ſame Privileges that all other Defendants have in civil Actions; and cited Br. Appeal pl. 66 and Co. Ent. Tit Appeal.——3 Mod. 266, 267. S. C. and per Cur. if the Plea is in Abatement, and the Party does not anſwer to the Murder, yet that does not ouſt him of his Plea, but the Appellant ought to have prayed Judgment, and it is a Queſtion whether he ought to plead over to the Felony or not, for the Precedents are both ways. There is no Judgment entered.

12. In Appeal of Murder, the Defendant pleaded in Abatement of the Writ that there was *No ſuch Pariſh* known by ſuch Name as that of which he is named. The Appellant demurr'd, becauſe this Plea being in Abatement the Defendant ought to have pleaded over to the Felony. But the Court held it well enough; For that it ir good either way, and that the Precedents are both ways, and Judgment for the Defendant. Show. 47. Trin. 1 W. & M. Orbell v. Ward.

For more of this ſee 2 Hale's Hiſt. Pl. C. 255. cap. 33. and 2 Hawk. Pl. C. 196. cap. 23. S. 135. with his Obſervations on the ſeveral Pleas pleaded in Abatement.

(W) Pleadings. What is a good Plea in Bar.

Br. Nonability, pl. 22. cites S. C. and H. 17. accordingly.

1. APpeal at Newgate, the *Defendant ſaid, that the Plaintiff is extra Legem*, and ought not to be anſwered; for he *has abjured the Realm*, and this is found in the Roll of the Coroner, by which he was hanged, and the Defendant went quit. Br. Appeal, pl. 52. cites 11 Aſſ. 27.

2. In Appeal *of the Death of his Brother*, the *Plaintiff was diſabled by Outlawry*, by which *he brought Writ of Error to reverſe the Outlawry*, becauſe he was in Priſon at the Time of the Outlawry, and notwithſtanding this, the *Defendant went quit* without being arreſted at the Suit of the King, and no Miſchief, for when he has *ſued his Charter of Pardon, or reverſed his Outlawry, he may have a new Writ*, but *contra after Nonſuit after Appearance*; Quære of the new Writ after the Year, and ſo ſee that the Diſability by Outlawry in Appeal is not peremptory; Contra of Nonſuit after Appearance. Br. Peremptory, pl. 80. cites 18 E. 3. and Fitzh. Utlawry 47.

3. Appeal

3. Appeal by a Feme of the Death of her Husband, the *Defendant ſaid, that at the Time of the Death the Baron was outlawed of Felony*; Judgment &c. Per Shard, a Man cannot kill a Man outlawed of Felony no more than another Man, by which he pleaded Not Guilty; but Lud. ſaid, that H. of C. was for ſuch Cauſe excuſed of the Death of the Baron of Woodhull. Br. Appeal, pl. 69. cites 27 Aſſ. 41.

4. In Appeal *by Feme of the Death of her Husband*, the *Defendant ſaid* that *Ne unques accouple* in lawful Matrimony. This ſhall be *tried by Certificate of the Biſhop*, and is not * peremptory againſt the Defendant; for the Biſhop certify'd that *Lawfully accoupled* &c. and the *Defendant pleaded Not guilty*. Quod nota. Br. Peremptory, pl. 32. cites † 27 Aſſ. 3.

* S. P Br. Peremptory, pl. 67. cites S. C. and ſays that he cannot plead over at the firſt; and Brooke ſays the Reaſon ſeems to be, becauſe *it demands two Trials*. ——— S. P. accordingly, and for the ſame Reaſon; but he may plead Not guilty afterwards, and this in Favour of Life, as it ſeems. Br Appeal, pl. 17. cites 50 E. 3. 15 ——— Thel. Dig. 216. lib. 15 cap. 5 S. 20. cites Mich. 7 E. 4. 15. where it is ſaid that Ne unques accouple may be pleaded, without pleading to the Felony; but Huſſey ſaid that in this Caſe the Defendant may plead over to the Felony.

In an Appeal of Murder by the Wife, the Appellee pleaded *Ne unques accouple* in lawful Matrimony, and if found &c. then *Not guilty to the Felony*. The Plaintiff replied *lawfully accoupled* &c. *but* did not reply *that he was guilty of the Felony*. It was moved that this was a *Diſcontinuance*; but per Cur. when a Plea is pleaded which is triable at Common Law, and concludes over to the Felony, there the Plaintiff ought to reply, and conclude over to the Felony; but where he pleads a Plea, triable otherwiſe than by the Common Law, it is otherwiſe. Cro. E. 223. 224. pl. 6. Paſch. 33 Eliz. B. R. Withington v. Dalaber. ——— 3 Le. 268. pl. 360 Witherington v. Delabar, S. C. held accordingly.

† S. P Br. Appeal, pl. 66. cites S. C. and Ibid. pl. 101. cites 14 E. 4. 7. S P. and by ſome he ſhall not plead over to the Felony, becauſe if it be certified againſt him, he ſhall be hanged But Brian and Catesby denied it, and ſaid the Felony ſhall be inquired after the Certificate of the Biſhop &c.

5. The *praying of the Defendant that the Stroke in Appeal of Maihem be examined* is peremptory, *if* it be *found againſt him* upon the Examination. Br. Peremptory, pl. 33. cites 28 Aſſ. 5.

S. P. per Tremail J. Br. Peremptory, pl. 41. cites 6 H. 7 1. But Brooke ſays the Contrary was held in Gray's-Inn.

6. In Appeal of Maihem *againſt A. as Principal, and D. as Acceſſary*, it is a good *Plea that at another Time he brought ſuch Appeal againſt them, and named D. Principal, and A. Acceſſary*, contrary to this Writ, and after was *nonſuited* after Appearance, Judgment if &c. by which Kniver awarded that he take nothing &c. and that he be taken &c. Br. Appeal, pl. 71. cites 40 Aſſ. 1.

S. P. Br Appeal, pl. 154. But Brooke ſays Quod mirum; for in Maihem there is no Acceſſary.

7. In Appeal by a Feme of the Death of her Husband, the Defendant *ſaid that the Baron was alive at D. in the County of C.* and the other e contra; and Day was given to bring in the Proofs. Quære of Trials by Proofs at this Day. Br. Appeal, pl. 133. cites 41 Aſſ. 5.

8. In Appeal of Maihem the *Defendant pleaded* that De *ſon Aſſault demeſne, and in Defence of the Defendant*, and the Defendant ſaid that De ſon tort demeſne without ſuch Cauſe, priſt; and the others e contra. Br. De ſon tort &c. pl. 47. cites 41 Aſſ. 21.

9. In Appeal by Feme of the Death of her Baron, the *Defendant ſaid that the Baron is yet alive*, and the Feme e contra; by which they were *awarded to bring in their Proofs*, and becauſe the Proofs were faulty, therefore to avoid Perils the Defendant pleaded Not guilty. Quære if it be peremptory, if the Proofs are adjudged againſt the Defendant. Br. Peremptory, pl. 36. cites 43 Aſſ. 26.

10 It ſeems that *an Acquittal or Attainder* of the ſame Death had been a good Bar in the Appeal. Br. Appeal, pl. 33. cites 11 H. 4. 41.

11. *Contra of Charter of Pardon* allow'd, as it ſeems here. Ibid.

12. If a Man be arraign'd upon an Indictment he ſhall not plead *Miſnoſmer*, but plead Not guilty, and *give in Evidence that he is not the ſame Perſon*; but if he be the ſame Perſon, then no matter for the Miſnoſmer.

But *contra in Appeal*; for there Miſnoſmer is a good Plea, and if he be outlaw'd upon Miſnoſmer, it ſeems to be Error. Br. Corone, pl. 201. cites 1 H. 5. 5.

13. Brooke ſays, it ſeems that he ſhall *not plead over to the Felony, but where the Plea to the Writ is triable per Pais.* Br. Appeal, pl. 48. cites 1 H. 6. 1.

14. In *Appeal of Death* by Writ in B. R. the Defendant *pleaded* in Abatement of it, *that the Plaintiff had brought Appeal before the Coroner and Sheriff in the County* of the ſame Death, *which was removed by Writ directed to the Sheriff in this Court, and Proceſs continued here till* ſuch a Day, *within which Time his Appeal was purchaſed*, Judgment &c. And becauſe it was *removed by Writ to the Sheriff, where it ſhould be to the Coroner*, for he is Judge &c. therefore it was taken that that which was removed here was not of Record here, and ſo no Plea, by which the Defendant pais'd over. Quod nota, that it is no Plea that the Plaintiff has *2 Writs pending in one and the ſame Court*, as here; for it is falſe if the Removing be void, and it may be that the Writ before the Coroner is diſcontinued. Br. Brief, pl. 209. cites 4 H. 6. 15.

15. In Appeal the Defendant ſaid that the Plaintiff purchaſed *other Appeal before, returnable ſuch a Day*; Judgment of the 2d Writ of Appeal; and no Plea, per Cur. if he *did not appear to the firſt Appeal*; for it may be that a Stranger has enter'd it, and here the firſt Writ was deliver'd of Record &c. yet Cur. held ut ſupra. Quod nota. Br. Appeal, pl. 87. cites 7 H. 7. 6.

16. If the *King pardons or releaſes* the Appeal, it is no Bar to the Plaintiff in the Appeal. Br. Appeal, pl. 41. cites 21 H. 6. 28.

Br. Corone, pl. 57. cites S. C. —— Br. Treſpaſs, pl. 197. cites S. C. —— Br. Battaile, pl. 15. cites

17. In Appeal by the Heir of the Death of his Anceſtor, it is a good Plea, per 3 Juſtices, *that the Defendant join'd Battail with the Anceſtor before the Conſtable and Marſhal, becauſe the Anceſtor call'd the Defendant Traytor, and he vanquiſh'd him to Death*, Judgment &c. and this Matter ſhall be certified. Br. Appeal, pl. 129. cites 37 H. 6. 19. 20.

S. C. but not exactly S. P.

Fitzh. Corone, pl. 28. cites S. C. —St. P. C. 60. b. (E) S. P. and cites S. C. —S. C. cited 2 Hawk Pl. C. 165. cap. 23. S. 40.

18. A. brought Appeal of the Death of T. his Brother. The *Defendant ſaid that* the ſame *T. at the Time of his Death, and after the Day of the Writ purchaſed, had an elder Brother J.* to whom the Appeal is given, and not to the Plaintiff. Per Markham Ch. J. he *ought to commence his Plea to the Blood, viz. from the Father of him who is dead*; for *it may be that J. and T were Brothers of the Half-blood*, to which Laten and others agreed. Br. Appeal, pl. 94. cites 7 E. 15.

Br. Appeal, pl. 50. cites 3 Aſſ. 12.

19. In Appeal the Defendant pleaded *Excommunication in the Plaintiff*, by which the Defendant went without Day till the Plaintiff was abſolved. And ſo ſee that this ſhall not abate the Writ. Br. Appeal, pl. 142. cites 13 E. 4. 8.

By the Stat. 3 H. 7. cap. 1. *Auterfoits acquit, or Attaint upon an Indictment* of Murder or Manſlaughter, is no Bar of an Appeal for the ſame Death; *but* Auterfoits convict of Murder or Manſlaughter, and *Clergy had* upon an Indictment, is a good Bar to an Appeal, notwithſtanding this Statute; for indeed the Statute itſelf has this Exception, viz. "The Benefit of the Clergy not being had." 2 Hale's Hiſt. P. C. 250. cites 4 Rep. 45. b. Wiggy's Caſe; and this though an Appeal were depending, whereunto the Priſoner had not pleaded at the Time of his Acquittal, cites 4 Rep. 45. b. Holcroft's Caſe.

20. In Appeal of Death it is a good Plea, *that at another Time the Defendant was indicted, arraign'd, and acquitted of the ſame Cauſe*, Judgment ſi Actio, quod Curia conceſſit; for Life ſhall not be twice in Jeopardy for one and the ſame Cauſe; per Brian Ch. J. Br. Appeal, pl. 102. cites 16 E. 4. 11. But Brooke ſays that it is contra at this Day by the *Stat. 3 H. 7. cap. 1.* Ibid.

Auterfoits convict, or acquit on an Indictment, was a Bar *at Common Law* to an Appeal, becauſe no Man's Life ſhould be endanger'd twice for the ſame Offence; and the Judges proceeding firſt on the Appeal was meerly diſcretionary, the very Preamble of 3 *H.* 7. ſaying it was only a Uſage among them ſo to do, which Statute *obliges* the Judges *to proceed within the Year and Day to hear and determine the Indictment*, and not to ſtay on the Account of an Appeal, without ſaying (to be brought) or (already brought,) or whether of both. But where the Defendant was indicted of Murder, and convicted of Manſlaughter, he ſhall anſwer to an Appeal the *ſame Seſſions*. If he pleads *Not guilty*, the Judges may proceed and *try him de Novo*, and hang him on the Appeal. If he pleads Auterfoits convict, it is no Bar; if he *will not anſwer over*, his ſtanding *mute* muſt be recorded, and Judgment given accordingly, *either* to be *hang'd by Nil dicit*, *or* the *Peine fort & dure*. But if the Appellant is not ready, and cannot go on with his Appeal, the Appeal will be gone; per Holt Ch. J. 12 Mod. 157. Mich. 9 W. 3. L'Iſle v. Armſtrong.

If a Man be *convicted of Manſlaughter*, and *no Judgment of Death* given, *Auterfoits convict* will not be a good Bar of an Appeal; but *Conviction and Benefit of Clergy is*; per Holt Ch. J. 12 Mod. 642. Hill. 13 W. 3. in Caſe of Colt v Swift.

21. In Appeal againſt ſeveral, as J. W. and J S. late of F. in the County of N. Yeoman, and others, the ſaid J. W ſaid *that there is not any J. S. late of F. in the County of N. Yeoman, in Rerum Natura the Day of the Writ purchaſed* &c. and to the Felony Not guilty. Per Sterkey, the Vill and Myſtery is only Addition by the Statute, and no Parcel of his Name, and therefore he ſhall traverſe the Name, that it was ſufficient by the Common Law, viz. that no ſuch J. S. and *ſhall not expreſs the Vill, County, nor Addition.* And ſee M. 35 H. 6. 5. that it is only Addition, and none of his Name, and therefore, as here, it is Pregnancy clearly, as it ſeems. Br. Appeal, pl. 111. cites 21 E. 4. 71. Br. Additions, pl. 58. cites S. C.

22. *And* in Appeal againſt ſeveral, *the one ſhall not plead a Releaſe* of all Appeals, nor of all Executions &c. *made to his Companion*; for in Appeal each ſhall ſuffer Death. Contra of ſuch Releaſe in other Actions Perſonal. Br. Appeal, pl. 111. cites 21 E. 4. 71. S. P. Br. Appeal, pl. 120. cites 2 R. 3. 9. For it ſhall not ſerve but for him only to whom it was made; per Cur.——S. P. Jenk 165. in pl. 18. For they have ſeveral Judgments and Executions——Jenk. 137. at the End of pl 18. ſays a Releaſe to one Appellee [of Murder] will not ſerve the other, as it will in a Treſpaſs. Treſpaſs may be ſatisfied by a Recompence paid by one, but no Recompence ſerves for a Life loſt.

23. In Appeal of Robbery it is no Plea, *that at another Time the Plaintiff brought Treſpaſs of the ſame Goods taken againſt the Defendant*, and the Plaintiff *was barr'd*; for the Appeal is of a more high Nature than Treſpaſs, as a Man who is barr'd in Aſſiſe may have Writ of Right. Br. Appeal, pl. 121. cites 2 R. 3. 14.

24. Where the Principal *pleads a Foreign Iſſue* to the Felony, *as Auterfoits arraign'd* &c. the Acceſſary ſhall not be put to anſwer; and if it be *found againſt the Principal, this is not peremptory to the Acceſſary.* Br. Peremptory, pl. 43. cites 9 H. 7. 19.

25. Note by the Juſtices of both Benches, a Man ſhall not have Plea in Appeal *that the Deceaſed aſſaulted him, and he kill'd him in his Defence*; *but* ſhall plead *Not guilty*, and *ſhall give this Matter in Evidence*, and the Jury is bound to take Notice of it, nor ſhall he have it for Plea with a *Traverſe* of the Murder; for the Matter of the Plea is no Murder, nor can Murder be juſtified; and when the Matter of Plea is not good, there a Traverſe is not good. Br. Appeal, pl. 122. cites 37 H. 8. *But* in Appeal of *Maihem* it is a good Plea, *that it was De ſon Aſſault Demeſne*, and in the Defence of the Defendant. Br. Appeal, pl. 99 cites 12 E. 4. 6.——*So* Ibid pl. 134. cites 41 Aſſ 21.——*And* the Plaintiff *counted in one Ward* in London, and the *Defendant juſtified* ut ſupra *in another Ward*, and *did not traverſe the firſt Ward*, and well; for he cannot be maim'd in two Places. But e contra, per Kniver, in Treſpaſs; for ſeveral Treſpaſſes may be done in one Day Ibid.

26. In an Appeal of *Robbery*, *Rape*, *Arſon*, *Felony*, or *Larceny*, a *Releaſe of Actions Perſonal* is no Plea; for it is of an higher Nature, in which the 2 Hawk. Pl. C. 196 cap. 23. S. 133.

says it seems clear that whatsoever the Nature of the Releaſe may be, it ſhall not

the Appellee ſhall have Judgment; but a Releaſe *of all * Actions Criminal, Mortal, or concerning Pleas of the Crown*; or 2dly, a Releaſe *of all Actions generally*; 3dly, a Releaſe *of all Appeals*; and 4thly, a Releaſe *of all Demands*, are good Bars in all thoſe kind of Appeals. Litt. S. 501. and Co. Litt. 288. a.

wholly diſcharge the Appeal, unleſs it were made before it was commenced; for if it be ſubſequent to the Appeal, it ſhall only diſcharge it as to the Suit of the Plaintiff; and after Judgment given for ſuch Diſcharge, he ſhall be arraign'd at the King's Suit.

* This is a good Bar in an Appeal of Death. Co Litt. 287. b. at the End.

See (A)

27. *Coverture of the Feme*, after the Murder of her former Baron by J. S. is a Bar to her having an Appeal. D. 296. pl. 20. Mich. 12 & 13 Eliz. Stanley's Caſe.

28. B. was *indicted for the Murder* of Wheatherhead, and being arraign'd upon it, he *pleaded that A. the Wife* of Weatherhead *brought an Appeal againſt him for this Murder, and he was* arraign'd upon it, and pleaded Not guilty, and tried, and *found* by the Jury that he was *Not guilty of Murder, but that he was Guilty of Manſlaughter*; *and* thereupon he *pray'd his Clergy and had it*, and demands Judgment if he ſhall again be put to anſwer this Felony, and thereupon it was demurr'd; and now this Term it was adjudged a good Plea, and thereupon he was openly in Court diſcharged, but no ſpecial Reaſon was given of the Judgment. Quære; for the finding him guilty of Manſlaughter in the Appeal was more than needed, as it appear'd in Caſe of **Broth and Wiggs**, and then the Allowance of Clergy is to no Purpoſe &c. Cro. E. 296. pl. 2. Paſch. 35 Eliz. Barley's Caſe.

29. C. was *indicted of Murder*, and *found Guilty of Manſlaughter.* In Appeal brought againſt him the Defendant *pleaded the Queen's Pardon*, and pray'd Allowance of it, and a Precedent was ſhewn Paſch. 8 Eliz. Rot. 33. **Musgrave's** Caſe, where the Defendant pleaded the Queen's Pardon in this very Caſe, and it was allow'd; altho' in the 9 Eliz. Dy. 261. there was a Quære thereof. But Popham ſaid it was a ſtrong Precedent; for it is hard the Queen ſhould pardon that which is the Suit of the Party; and there is no Queſtion if it had been an *Appeal of Homicide*, as it well might, *the Queen could not have pardon'd it*; whereto Coke the Queen's Attorney, of Counſel with the Defendant, *agreed*; *for it is meerly the Suit of the Party*; *but here the Suit of the Party is an Appeal of Murder, and that wherein he is found guilty is not for the Party, but for the Queen.* Cro. E. 465. pl. 13. Hill. 38 Eliz. B. R. in Caſe of Penryn v. Corber.

Cro. E. 778. pl. 12. Mich. 42 & 43 Eliz. B. R. the S. C. and the Defendant was adjudged to be hanged.

30. The Defendant in Appeal of Murder pleaded in Abatement of the Writ, *that the Plaintiff had* a Writ of *Appeal pending againſt him*, and pleaded in hæc Verba. But by the Opinion of the Court he was compell'd to plead over to the Felony; for ſo are all the Precedents of the Court, and upon this Plea it was demurr'd in Law. Cro. E. 694. pl. 5. Mich. 41 Eliz. B. R. Watts v. Brayns.

31. An *Attainder at the King's Suit at Common Law* did *not bar an Appeal, if it was brought before the Attainder*; but if brought after the Attainder it was otherwiſe. But now by the *Stat. H. 7. cap. 1. neither* an *Attainder nor Acquittal at the Suit of the King bars an Appeal for Murder, if Clergy be not had.* Other Felonies remain at the Common Law. At this Day an *Appeal ſuſpends the Proceedings for Murder at the Suit of the King, till the Appeal is determined.* Jenk. 75. pl. 42.

32. The *Releaſe of the Appellant after Judgment*, being ſhewn to the Court, ſhall ſtay Execution till this Releaſe be confeſs'd or prov'd, or diſprov'd, and the Appellant ſhall be warn'd upon it by Scire Facias. Jenk. 137. pl. 82.

33. In

33. In an Appeal of Murder the Defendant *pleaded a Conviction of Manſlaughter* at the Gaol-Delivery *at the Old Baily, and that he was allow'd his Clergy*, but did not ſhew by what Authority the Court was held; and now it was moved to amend it, it being before Iſſue joined or Demurrer. But the Court doubted, becauſe the Appellant cannot amend, and ſo no Reaſon why the Appellee ſhould. In this Caſe, if he amends, he makes a new Rule; whereas in other Caſes the Amendments are all in Paper, and no Statute extends to Amendments * in Appeal, and it is not warranted by the Courſe of the Court. 4 Mod. 158. Mich. 4 W. & M. in B. R. Hoile v. Pitt. 3 Salk. 38. S. C. accordingly.

* But ſee (S) pl. 6. Smith v. Bowen.

34. *Conviction of Manſlaughter with Clergy had* is a good Bar to an Appeal antecedent, concurrent, or ſubſequent, and *ſo* it is *if Clergy was not had by the Default of the Court*; for it has been adjudged, that the praying of Clergy is having of Clergy within the Statute; For by praying it thhe Priſoner has done all he could, and the Delay of the Court ought not to prejudice him. 1 Salk. 63. Hill. 8 W. 3. B. R. in Caſe of Armſtrong v. Liſle. Comb. 410. S. C. Holt Ch J. ſaid he did not underſtand the Reaſon why Clergy ſhould be delay'd to charge a Man with an Appeal; and ſaid it was argued in the Caſe of Goring v. Deering, but that it is fit to be argued again. And at another Day he ſaid, that the Court ought to allow the Priſoner his Clergy, and the Statute 3 H. 7 1. requires a Determination —— Skin 600. S. C. ſays, that Holt Ch. J. inclined ſtrongly that the Court ought not to refuſe to allow Clergy to one convicted of Manſlaughter, but in regard of ſome Reſolutions contra it was fit to be argued; that he had argued it both ways, but never was ſatisfied in his Judgment with the Reſolutions given that they may reſpite Clergy; for by this Means they put it in the Power of the Judges to hang a Man.——12 Mod. 157. S. C. and per Holt Ch J. neither an Acquittal nor an Attainder upon an Indictment ſhall be a Bar to an Appeal, as it was at Common Law, but only the *having Clergy*, which has been extended ſo far, that if a Man *prays his Clergy, and the Court does not give it him*, he having done what lies in his Power, the Delay of the Court ſhall not prejudice him; Now in this Caſe there is no Prayer made to have his Clergy; but how comes that to paſs? Why? the Party was never asked; and if the *Court will not proceed to Judgment*, and call him down to Judgment, he has no Opportunity to ask his Clergy, and therefore he thought it a good Plea in Bar, of which Opinion were the other 3 Juſtices, and ſo the Appellee was diſcharged.

35. The Defendant in Appeal of Murder pleaded in Abatement, *that the Vill in which he was commorant was Shauſord, abſque hoc that it was Shalford*; It was objected, that this Plea was not to be *received without an Affidavit ſince the Act for Amendment of the Law*, it being a dilatory Plea, and the Court at firſt inclined accordingly, criminal Caſes not being excepted out of the Act, (the Exception of Appeals in the Act relating only to the preceding Clauſe;) but afterwards the Court thought it might be read without an Affidavit, becauſe tho' this Plea be for the moſt Part dilatory, yet in this Caſe it is not, becauſe the Appellee muſt plead over, and Iſſue be joined 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.

(X) Pleadings. Plea in Bar. Waved. In what Caſes.

1. APpeal of Death of the Husband by the Feme, the Defendant *ſaid, that the Baron is alive* &c. and the other e contra, by which Day was given to bring in the Proofs, who came, and there was *Default in both their Proofs*, by which the Defendant for the Danger pleaded Not Guilty; and hence it ſeems that the firſt Iſſue found ſhall be peremptory, and that he may wave it before Trial in Favour of Life. Br. Appeal, pl. 137. cites 43 Aſſ. 26.

2. In Appeal of Murder the Defendant pleaded Not Guilty, and *Iſſue was joined thereupon.* Afterwards the Defendant waved it, and *demurred upon the Declaration.* And the Court held clearly that ſo he might; For if the Declaration be not good, it is in vain to proceed to Trial; yet it was clearly held, that it is *not peremptory to the Defendant*, for if it be adjudged againſt him it is only a *Reſpondeas Ouſter.* Cro. E. 196. pl. 13. Mich. 32 & 33 Eliz B. R. Hume v Ogle.

(Y) Pleadings. Replication.

Ibid Brooke ſays, that ſo it ſeems that the Plaintiff by ſuch Allegation may put every Defendant from his Law in Appeal of Robbery, [as this Caſe was, as appears in the Year-Book]

1. IF *in Appeal the Defendant pleads Not Guilty, Priſt by his Body, and tenders Battle*, the *Plaintiff ſays that he was taken with the Mainour*, Judgment *if againſt ſuch Matter he ſhall be received to wage Battle*, the Mainour is not traverſable, per Huſſey and Fairfax J. & non negatur. Br. Traverſe, per &c. pl. 273. cites 22 E. 4. 19.

2. Appeal againſt J. and A. viz. *againſt J. as Principal, and* againſt *A. as Acceſſory*, and *J. came and ſaid, that at another Time &c. he was arraigned of the ſame Felony and attainted, and ſhewed the Record* in certain, Judgment if he ſhall be at another Time put to anſwer, and the *Plaintiff ſaid, that this Appeal is of another Thing than is compriſed within this Record*, and ſo to iſſue, and A. was not put to anſwer; for the Acceſſory ſhall not be put to anſwer till the Principal be put to anſwer, and the Principal ſhall not be compelled to anſwer twice to one and the ſame Felony; for Life ſhall not be twice in Jeopardy for one and the ſame Felony, and if the Principal be found Guilty here, this is not peremptory to the Acceſſory, but it ſhall be inquired whether he be Guilty or not. Br. Appeal, pl. 89. cites 9 H. 7. 19.

(Z) Diſcontinuance or Nonſuit &c. The Effect thereof.

Appeal of Maihem, *Nonſuit after Appearance* is peremptory, contra it ſeems of Nonſuit before Appearance. Br. Appeal, pl 138. cites 43 Aſſ. 39.——If Plaintiff in Appeal of Maihem is Nonſuit after Appearance it is peremptory, for the Writ ſays *Felonice Mahemavit*, and therefore the Nonſuit is peremptory Co Litt. 139 a.——*But* after *Nonſuit in Treſpaſs of Battery* Appeal of *Maihem lies* of it, but he ſhall *not* have *Treſpaſs after Nonſuit in Appeal of Maihem* of the ſame Battery; Note a Diverſity. Br. Appeal, pl. 138. cites 43 Aſſ. 39.

1. IN Appeal *of Mayhem* the Plaintiff was *nonſuited*, and took another Appeal, in which he altered in the Principals and Acceſſories, and it was awarded that he ſhall take nothing by his Writ, but Capiatur. Br. Peremptory, pl. 85. cites 40 Aſſ. 1.

Nonſuit in Appeal *after Appearance*

2. Two are indicted of the Death of the Husband, the Feme brought Appeal againſt the *one*, who *is acquitted by Nonſuit after Appearance or otherwiſe*

otherwise, ſhe ſhall not have Appeal againſt the other, nor no other. Br. Appeal, pl. 139. cites 47 Aſſ. 7.

is peremptory, and ſhall not have

other Appeal; Per Hull. Br. Appeal, pl. 28 cites 9 H. 4. 1. 2.——Br. Peremptory, pl. 80 cites 18 E. 3. and Fitzh Avowry 47 ———2 Hawk. Pl. C. 193, 194. cap. 23. S. 129. ſays it ſeems to be certain, that a Nonſuit on a Bill of Appeal, whether commenced in the Court of B. R. or before Juſtices of Gaol Delivery, or before the Sheriff and Coroners, or a Nonſuit after Declaration on a Writ of Appeal, is a Bar of all other Appeals of the ſame kind; becauſe no ſuch Bill or Declaration ſhall be received till the Appellant have firſt appeared in proper Perſon; and it ſeems agreed by all the Books, that a Nonſuit after ſuch an Appearance is peremptory. Alſo it is holden generally in ſome Books, that a Nonſuit after Appearance is a peremptory Bar to the Appellant, without adding that he muſt alſo have declared; from whence, and alſo from the general Reaſon of the Thing, it may be reaſonably argued, that if it any way appear on Record that the Appellant who was nonſuited in a former Appeal did actually appear and proſecute ſuch Appeal, as by praying of Proceſs on it &c. he ſhall be barr'd in any other Appeal of the ſame Kind. But it ſeems, that the bare taking out of a Writ of Appeal, and cauſing it to be delivered of Record to the Sheriff, and a Nonſuit upon it, is no Bar of a 2d. Appeal, becauſe it does not appear of Record, but that it might be done by a Stranger; and notwithſtanding ſome Books ſeem to hold generally, that any Nonſuit in Appeal is peremptory, yet it ſeems to be in a great Meaſure ſettled at this Day, that ſuch Nonſuit ought to be after Appearance in proper Perſon of Record.

3. A Man was found guilty upon an Indictment for the Murder of J. S. and immediately his Wife brought an Appeal, to which the Defendant *pleaded*, that after the Death of her firſt Husband ſhe had married another at E. but did not ſhew his Name, which was *a foreign Plea*. The Plaintiff replied, and ſo the Matter depended a Year, and more. The Priſoner and all the Proceedings were removed into B. R. by Certiorari, and the Court demanding of him what he could ſay why Judgment ſhould not be given againſt him upon his former Conviction, he pleaded all the Matter above, and that the Appeal was ſtill depending; but it being brought in another County than where the Indictment was laid, and there being *no Continuances* of the Appeal *enter'd after the ſaid foreign Plea pleaded, which was more than a Year paſt*, and ſo the Record certified, the Queſtion was, What ſhould be done? And afterwards the *Feme was Nonſuited*, and ſo the Court gave Judgment upon the Indictment that the Defendant be hanged. D. 296. pl. 20. Mich. 12 & 13 Eliz. Stanley's Caſe.

S. C. cited Kelyng's Rep. 92. in Caſe of Armſtrong v Liſle, and ſays it is ſo very ſtrange that it cannot amount to the leaſt Authority, and adds a Nota, that it is left with a Quære, and ſo no judicial Determination ſaving that the Man

was hanged; That the Court gave no Opinion concerning the Sufficiency of the Plea, nor does it appear how the Plaintiff became Nonſuit, for there was not any Opportunity for it, therefore it was irregular; for *the Plea was diſcontinued by the Certiorari*; for all Removals of Cauſes upon Certioraries determine the Plea, therefore that Caſe is no Authority, but only an Hiſtory of what was done, for the Man was well condemned and executed upon the Conviction, and thoſe Scruples then made were very unneceſſary.

4. In Appeal of Murder, the Defendant *pleaded that another Time he was acquitted of the Murder, but found Guilty of Manſlaughter*; and now the great Queſtion was, Whether the Plaintiff in Appeal might be Nonſuited? And adjudged that he might not, and this by Reaſon of the Precedents alleged by the Clerk of the Crown. Mo. 407. pl. 546. Trin. 37 Eliz. Perin v. Corbet.

Cro E. 464 pl. 13 Hill. 38 Eliz. B. R. Penryn v. Corbet, S. C. the Reaſon why the Plaintiff

would have been nonſuited was, becauſe the *Defendant had compounded with him*, and the Court doubted if it might be allowed, it being after a general Verdict, altho' it were in another Term, and that it was then prayed that a *Retraxit* might be entered thereof, and thereof the Court likewiſe doubted whether it might be, but they would adviſe.

5. An *Infant brought an Appeal* of Murder *by his Guardian*; at the Day in Court it was *pray'd that the Guardian be not demanded becauſe he is ſick*, and that the Court would give 1 or 2 Days further for his Appearance; but per Cur. this cannot be in Appeal; for the Court cannot make Laws, and thereupon the Plaintiff being demanded, and not appearing

S. C. cited per Cur. 12 Mod. 3-4. Patch. 12 W. 3. in Caſe of Stout v.

Towler,— S. C. cited by Holt Ch J. but miſprinted (as 178) in S. C. Ld. Raym. Rep. 556.

pearing, [the Defendant was diſcharged.] Lat. 173. Hill. 2 Car. Anon.

2 R. 3. 9 a in pl. 18. cites S P. as held 11 R 2. —— In an Appeal of Murder, the Defendant is outlawed and has a Charter of Pardon, the Appellee ſhall have a *Scire Facias* againſt the Appellant without ſhewing any Releaſe, for the Appellant ſhall not have Execution if he does not pray it in Perſon; by Attorney will not ſerve; upon this Scire Facias the Appellant being ſummoned makes Default, which Default is recorded, the Appellee ſhall have his Pardon allowed, and ſhall be diſcharged, and the Appellant cannot pray Execution at another Time; by the Judges of both Benches. Jenk. 165. pl. 18. cites 2 R. 3. 38.

6. Where an Appeal is brought *againſt* 2, and *one of them has a* Charter of *Pardon*, and he *ſues a Sci. Fa. againſt the Appellant who is ſummoned and makes Default*, which is recorded, this ſhall diſcharge him that has the Pardon, but not the other. Jenk. 165. pl. 18.

7. The Wife brought an Appeal of Murder of her Husband againſt the Earl of S. and others, and it was agreed in this Caſe, that a *Nonſuit of the Appellant after Appearance in proper Perſon*, is peremptory, but not ſo before Appearance in proper Perſon; But Kelynge Serjeant inſiſted, that there was no Difference, becauſe the Appearance of the Appellant is never enter'd on Record, for he ought always to be ready in propria Perſona, and is demandable every Day, and ſhall be nonſuited upon Non-appearance, and therefore pray'd that the Lady Grey might be demanded, but the Court, by reaſon of the peremptorineſs thereof, would adviſe. Sid. 32. pl. 11. Hill. 13 & 14 Car. 2, B. R. Lady Grey v. Ld. Southeske & al.

2 Hawk. Pl. C. 194. cap. 23. S. 130. ſays he cannot find it any where adjudged that the Diſcontinuance of one Appeal was a Bar of another; but ſuppoſing the Law to be ſo, yet ſurely it is to be of ſuch a Diſcontinuance only as happens after the Appearance of the Appellant.

8. An Appeal *before Appearance was diſcontinued*, and the next Term the Defendant being in Court pray'd to be diſcharged, the Appeal being diſcontinued; but the *Court gave a Day to bring in the Roll*, when it was pray'd that they might *proceed* againſt him *in Cuſtod. Mareſchalli by Bill*, which was allow'd, and the Appeal was arraign'd; and the Court order'd a Roll to be made, and a Copy of it to be deliver'd, and gave the Defendant Day to plead. Skin. 634. pl. 3. Hill. 7 W. 3. B. R. Reynolds v. Kening.

12 Mod. 20. Lowder v. Screwdens, S. C.

9. If the Plaintiff be not preſent, he may be demanded and *nonſuited*; but ſuch Nonſuit is *not peremptory*, becauſe before Appearance. 1 Salk. 64. Paſch. 4 Ann. B. R. Loder's Caſe.

10. An Appeal was brought *by the Wife* for the *Murder* of her Huſband, and upon a Demurrer, Exception was that there was a *Diſcontinuance*; for in the Exigent the Words *De morte viri ſui unde eum appellat*, *were omitted*, and therefore it did not appear that this Exigent was ſued out in this Action. It was anſwer'd, that this was an Exigent ſued out between the ſame Parties that the Capias was, and that there is no Variance between the Capias and the Exigent, tho' there is ſomething more contain'd in the Capias than what is in the Exigent; and upon Prayer of Oyer of meſne Proceſs in this Action, this Exigent was recited, and thereby admitted to be the Exigent in this Suit. It was argued that this *Diſcontinuance*, if it was one, was *aided by Appearance*; and that the Difference taken, that Appearance and Pleading-over does aid a Diſcontinuance, but not Appearance and Demurrer, was not Law. Adjornatur. 10 Mod. 86. Paſch. 11 Ann. B. R. Widdrington v. Charlton.

11. If

11. If Appeal be brought againſt diverſe, a *Retraxit as to one* is no Bar for the others. Hale's Pl. C. 190.

If the Appellant be barr'd by a Retraxit as to one, yet he may continue his Suit againſt the reſt, becauſe he is to have a ſeveral Execution againſt every one of them; yet in an Appeal againſt divers, whether they plead the ſame or ſeveral Iſſues, it has been adjudged that a Nonſuit againſt one, at the Trial of any one of the Iſſues, is a Nonſuit to all; of which this ſeems to be the beſt Reaſon, that ſuch a Nonſuit operates in Nature as a Releaſe of the Whole; but whether the Diſcontinuance of an Appeal, as to one Appellee, ſhall have the like Conſtruction as to all, may deſerve to be conſider'd. 2 Hawk. Pl. C. 196. cap. 23 S. 134.

(A. a) In what Caſes an Attorney may be made.

1. APpeal *by a Feme, groſly enſeint*, of the Death of her Husband, and the *Defendant was attainted* at the Suit of the Feme, and the *Appearance of the Feme recorded for all the Term*; and yet by the beſt Opinion ſhe *cannot pray the Judgment and Execution by her Counſel*, but in proper Perſon, by which *one of the Judges rid to her to Iſlington, to ſee* whether ſhe was alive, and *if ſhe would pray Execution*, and ſhe pray'd it, by which Judgment was given that he ſhould be hang'd; for this Action ſhall be ſued in proper Perſon, and likewiſe Judgment ſhall be demanded in proper Perſon; and after the Judgment the Execution cannot be pray'd by Attorney, but in Perſon; and Appeal of Maihem ſhall be in Perſon, and ſo ſee that *all Appeals* ſhall be *in Perſon*, and *not by Attorney*. Br. Appeal, pl. 112. cites 21 E. 4. 72. 73. Br. Attorney, pl. 78. cites S.C.—Jenk. 137. pl. 81. S.C. & S. P. accordingly.

2. 3 *H. 7. cap.* 1. parag. 9. Enacts, That *the Appellant in any Appeal of Murder, or Death of a Man, where Battail, by the Courſe of the Common Law lies not, may make their Attornies, and appear in the ſame in the ſaid Appeals, after they are commenced, to the End of the Suit and Execution of the ſame.*

3. In an *Appeal of Maihem* the Plaintiff appear'd by Attorney, and declared againſt the Defendant. The Defendant pray'd that the Plaintiff might be demanded; for that he could not appear by Attorney, and if the Plaintiff appear'd not, that he might be nonſuited; againſt which the Counſel of the Plaintiff objected, that the Plaintiff in an Appeal of Maihem might appear by Attorney; for that *it might be that he was ſo wounded as he could not appear*, and for Authority cited the Book in 21 H. 7. But it was anſwer'd, and reſolved per tot. Cur. That the Plaintiff could not appear by Attorney; for the Defendant may demand Oyer of the Maihem &c. which ſhall be peremptory to him, being a Trial of the Maihem, which is a Trial which the Law gives him; and albeit it may be hard and difficult in ſome particular Caſe, in reſpect of the Grievouſneſs of the Maihem, for the Plaintiff to appear in Perſon; as it was in 16 H. 5. where the Maihem was heinous, the Legs of the Plaintiff being broke over a Threſhold, yet that muſt not change the Law, nor take from the Defendant his juſt Defence and Trial; for ſo, upon the like Surmiſe, the Defendant might be barr'd thereof in all Caſes. And Wray Ch. J. ſaid that the Record of **Tawortty's Caſe** had been ſeen, and that it was againſt the Report, and thereupon the Plaintiff was call'd, and by the Rule of the Court was nonſuit; and Ld. Coke ſays he was of Counſel in this Caſe, which he has the rather reported more at large, for that no Man ſhould be deceived by the ſaid Report, 21 H. 7. 2 Inſt. 313. cites Mich. 25 & 26 Eliz. B. R. Hudſon v. Marwood.

4. In *Appeal of Murder* brought *by the Widow* againſt the Defendant, and another who did not appear, upon the Return of the Writ the Appellee appear'd, and it was moved to admit the Appellant to proſecute by —It being Skin. 48 pl. 1. S.C. accordingly.

proved that Appellant in Murder might be call'd in, and ſo ſhe was; but

by Attorney, and a Warrant of Attorney under her Hand and Seal was produced, and acknowledged by her in Perſon, (for otherwiſe it muſt have been proved by Witneſſes) and ſhe was admitted accordingly, and the Warrant filed. 2 Jo. 210. Trin. 34 Car. 2. B. R. Warren v. Verdon.

her Attorney appearing for her, it was held ſufficient, the Appeal being brought by a Woman. 12 Mod. 65. Mich. 6 W. & M. Sutton v. Sparrow.

1 Salk. 62 S. C and per Cur. every Appeal *muſt be commenced in Perſon, but may be proſecuted by Attorney, unleſs where Wager of Battail lies; and in ſuch Caſe he muſt commence* in Perſon, *and proſecute in Perſon alſo*

5. L. being *indicted of Murder* was *convicted of Manſlaughter*, and *pray'd his Clergy by a Friend, not being in Court himſelf*; and after at the ſame Aſſiſes *an Appeal was lodg'd* by the Brother and Heir of the Party ſlain, and the *Conviction and Appeal were removed by Certiorari*, and the Party by Habeas Corpus; and at the Return of the Certiorari it was *moved by the Appellant that he might file a Letter of Attorney*, in which Caſe the Court would not make any Rule, but ſaid that they might file it at their Peril; yet inſinuated that they could not file a Letter of Attorney by the Stat. of Hen. 7 till after Appearance; and they admitted clearly that in Maihem they could not make an Attorney; and the Court ſaid that if he filed a Letter of Attorney, and the Law required an Appearance in Perſon, the Appeal would be diſcontinued. Skin. 670. pl. 9. Mich. 8 W. 3. B. R. Armſtrong v. Liſle.

But where there is no Wager of Battail it may be proſecuted by Attorney, for which there muſt be a Special Warrant of Attorney filed; and if the Plaintiff appears by Attorney, where he ought not &c. this is a Diſcontinuance.———Comb 411. S. C The Court doubted whether he might be admitted to appear &c. by Attorney, becauſe it muſt appear to them that the Indictment was for the ſame Offence, where Battail lies not by the Stat. H. 7.

6. The Appellee after his Acquittal may *ſue for the Damages* by Attorney. 2 Hawk. Pl. C. 203. cap. 23. S. 149.

(B. a) Pledges or Bail. In what Caſes they may or muſt be found.

1. THE Defendant *was not let to Bail in* Appeal of *Maihem*, no more than in Appeal of Murder or Robbery, *becauſe the Maihem was heinous*; for the Thighs were broke upon a Threſhold. Br. Appeal, pl. 86. cites 6 H. 7. 1.

2 Show. 159. pl. 144. Walkin v. Osborne, S. C. It was urged that Pledges might be put in any Time before Judgment; and held that in Appeals Pledges ought to be found before any Anſwer by the Appellee

2. In an Appeal of *Felony* againſt the Defendant then in Gaol in the County where the Appeal was brought, the Plaintiff declared, and the *Appellee* imparl'd, and afterwards *was bail'd*. Afterwards the *Record was removed* by Certiorari *into B. R.* where the *Parties appear'd in Perſon*, and upon Oyer of the Record of Appeal the *Defendant imparl'd to another* Day, *and then demurr'd* to the Bill of Appeal, *becauſe the Plaintiff non invenit plegios ad Proſequendum* Appellum, and pleaded over to the Felony Not guilty. The Appellant join'd in Demurrer, and reſolved that *Pledges might be found at any Time before Judgment*, and thereupon the Plaintiff found Pledges, and Iſſue was taken upon Not guilty. 2 Jo. 154. Paſch. 33 Car. 2. B. R. Blenkarne v. Osborn.

3. Ap-

3. Appellee of Murder pray'd to be admitted to Bail, which the Court ſaid they could do *on Iſſue join'd, Demurrer, or Curia adviſare vult*, if he could find 4 *ſufficient Bail* who would be *bound Body for Body*; but thoſe he offered not being approved of, he was remanded to the Marſhalſea. 11 Mod. 216. 217. Paſch. 8 Ann. Smith v. Bowen.

(C. a) Verdict. What the Jury muſt or may find.

1. APpeal of Murder of the Death of his Brother. The Defendant pleaded Not guilty, and found Not guilty; and per Cur. becauſe the *Defendant* was *indicted before the Coroner*, therefore *they ought to find who kill'd the Man*. Br. Appeal, pl. 42. cites 14 H. 7. 2.

Contra if he had been indicted *before the Sheriff or Juſtices of the Peace*. Br. Appeal, pl. 42. cites 14 H. 7. 2.

2. Where the Jury acquit the Defendant upon *Indictment before the Coroner*, they ought to *find who kill'd the Man*, and there they may ſay that the ſame Defendant killed him Se Defendendo. Br. Appeal, pl. 122. cites 37 H. 8.

But upon Indictment *before other Juſtices*, it ſuffices to ſay *Not guilty only*, without more. Ibid.

3. Appeal of *Murder*; the Defendant pleaded Not guilty, and being arraign'd by a ſubſtantial Jury of Middleſex, the *Evidence was pregnant that he was guilty of Manſlaughter*, but for the Murder was doubtful; the Jury *found* he was *not guilty of Murder*, and *being demanded if he was guilty of Manſlaughter, they anſwer'd they had nothing to do to enquire of it*; And upon this the Court being in Doubt ſent Fenner J. to C. B to know their Opinion, who conceived, that by the Law the Jury are not compellable to enquire of the Manſlaughter, and thereupon they gave their Verdict as before, and the Priſoner was diſcharged. Cro. E. 276. pl. 5. Paſch. 34 Eliz. Wroth v. Wiggs.

4 Rep. 45. b. S. C. but I do not obſerve S. P— Hale's Hiſt. P. C. 449. 450. cap. 36. cites S. C. & S. P ruled accordingly [but the Editor in a Remark ſays "Or rather taken for granted,"] and ſays that tho' upon an Indictment of Murder, if the Party appears to be Guilty of Manſlaughter the Jury ought not to acquit him Generally, but find him Guilty of Manſlaughter; yet in an Appeal of Murder, tho' they may, if they pleaſe, find him Guilty of Manſlaughter, if the Fact be ſuch, yet they may find Generally that he is Not Guilty, becauſe it is the Suit of the Party, and he ſhould lay his Caſe according to the Truth. And with this agrees Hill. 38 Eliz. B. R. Penryn and Corbet's Caſe, and Blount's Caſe; but ſays it was held Paſch 2 Car. 1. in Baſſagt's Caſe, that they may not in ſuch Caſe find a General Verdict of Not Guilty, but muſt find him Guilty of Manſlaughter, becauſe included in Murder as well in Caſe of an Appeal as in Caſe of an Indictment. And ſo it ſeems the Law is.

(D. a) Judgment of Damages, in what Caſes by the Statute of Weſtminſter 2. cap. 12.

1. *Weſtm. 2. 13 E. 1. cap. 12* FOraſmuch as many through Malice intending to grieve others, do procure falſe Appeals to be made of Homicides and other Felonies, Appellers having nothing to ſatisfy the King for their falſe Appeal, nor to the Parties appealed for their Damages,

2. Damages

By the Words hereof it appeareth, that *before this Statute* the *Defendant being duly acquitted, ſhould recover his Damages*, but that is to be underſtood *in a Writ of Conſpiracy*, wherein he ſhould recover Damages for Satisfaction in Regard of the Infamy, Impriſonment, and Vexation done to him, and further that the *Parties convicted ſhould be fined* to the King, *and impriſoned*, which Ld. Coke ſays he had read to have began in this Sort *before the Reign of H. 1. They which plotted* or compaſſed *the Death of a Man under Pretext of Law by bringing of falſe Appeals*, or preferring untrue Indictments againſt the Innocent of Felony, who being duly acquitted, both the Appellant and his Abettors *were to ſuffer Death. But King H.* 1. by Authority of Parliament did mitigate the Severity of this ancient Law (leſt Men ſhould be deterr'd and afraid to accuſe) and *did ordain that if the Delinquents were convicted at the Suit of the Party, they ſhould make Satisfaction, and be fined and impriſon'd*; *But if* they were convicted by Judgment *at the Suit of the King*, (whom they pretended to intitle to the Forfeiture) then *ſhould loſe the Freedom of the Law*; they ſhould *be* ſo *infamous* as never to be any Witneſs, or to be of any Jury; that they ſhould *never come* in or *near the King's Court, but make their Attornies*, that *they, their Wives, and their Children ſhould be caſt out of their Houſes, and their Houſes proſtrated, their Trees eradicated* and ſubverted, their *Meadows plowed up and waſted*, every Thing to be deſtroyed which nouriſhed or comforted them in Reſpect of the Villainy and Shame done to the Delinquent, all againſt Nature and Order, for that the Delinquent ſought the Blood of the Innocent under Pretext and Colour of Law; and this in latter Books is *called, a Villainous Judgment*; all which in Caſe of Conſpiracy, remain a conſtant Law to this Day. But this Act doth give the Party a ſpeedier Remedy for his Satisfaction than he had before, as hereafter ſhall appear. 2 Inſt. 384.

2. *Damages* in Appeal of Felony are *always on the Part of the Defendant*, to be recover'd by him upon his Acquittal, and ſuch Recovery is *given* to him *by the Common Law*, as appears Mich. 48 E. 3. 20. and by the Recital of this Statute of W. 2. cap 12. for Common Law and Common Reaſon wills, that when one has ſuſtain'd a Trial whereby his Lands, Goods, Life, and good Fame, have been in Jeopardy undeſervedly, or without other Foundation than the malitious Accuſation of another, and he is found Verus & Fidelis Homo, and duly acquitted of that whereof he is appeal'd, he ſhould have Amends againſt his falſe Accuſer; and if his Accuſer be not ſufficient, then againſt ſuch as procured or abetted the Proſecution; But becauſe the Damages to be recover'd againſt the Procurers or Abetters were *to be recover'd by Original Writ*, viz. *of Conſpiracy and not otherwiſe*, which was not ſo ſpeedy Redreſs as the great Malice or Badneſs of the Offence required, *this Statute was made to make it more ſpeedy.* St. P. C. 167. b. cap. 11.

* Br Damages, pl. 106. cites S. C. & S. P. accordingly. — S. P. accordingly, nor ſhall he have Conſpiracy, and in ſuch Caſe the Jury ſhall not inquire of the Abettors. Br. Appeal 4. cites 33 H. 6 1. 2 ſays it was granted there per Cur. Arg. ——— S. P. Br. Appeal, pl. 147. cites 34 H. 6 by Billing and tot. Cur. and ſays the Reaſon is becauſe he is indicted. ——— S. P. but where he is *indicted as Principal, and appealed as Acceſſory, or e contra*, there the Defendant ſhall have Damages. *Contra where the Indictment and Appeal agree*; for Indictment is ſufficient Cauſe to bring the Appeal; quod nota. Br. Appeal, pl. 6. cites 40 E. 3. 42 — S. P ibid. pl. 73. cites 40 Aſſ. 18. where the *Indictment is before* the Appeal, but *contra if after the Appeal.* ——— S. P. ibid. pl. 58. cites 22 Aſſ. 39. ——— 2 Inſt. 380. S. P. that it ſhall not be underſtood to be commenced per Malitiam, becauſe the Plaintiff had a *Foundation to build upon*, viz. an Indictment by the Oath of 12 or more men, ſo as it ſhall be preſumed that the Plaintiff was moved to his Appeal by the Indictment, & non per Malitiam; for in thoſe Days (as yet it ought to be) Indictments taken in the Abſence of the Party were form'd upon plain and direct Proof, and not upon Probabilities or Inferences. *But if the Indictment be inſufficient*, then it is in Judgment of Law as no Indictment, and then the Appeal may notwithſtanding be commenced per Malitiam, & ſic in ſimilibus, *or* if it be *a good Indictment*, and *found after the Appeal commenced*, yet may the Appeal be commenced per Malitiam.

3. By the Words *(thro' Malice)* if the Defendant be to recover Damages, it muſt be for that the Appeal is founded more on Malice than good Matter, and therefore if the Defendant was *indicted of the Felony*, whereof the Appeal is ſued *before the Suit of the Appeal*, tho' the Defendant be after acquitted thereof, yet he ſhall never recover Damages; for it ſhall be intended that the Indictment and not Malice induced him to bring the Appeal. St. P. C. 168. b. (B) cites Fitzh. Corone 178. * 22 Aſſ. [39] and Mich. 40 E. 3. 28.

Soon after the making of this Statute, the *Wife and her 2d Huſband brought an Appeal for the Death of her former Huſband*, whereas it would not lie by Reaſon of her Marriage, ſo that the bringing the Appeal was rather Folly than Falſity, and therefore Ex Gratia Curiæ ſhe was ordered to Priſon for 15 Days, and then to make a Fine to the King. 2 Inſt. 584. cites Mich. 34 E. 1.

4. Contra

4. Contra if he be *not indicted till after the Appeal commenced*, or if there be such *Variance between the Appeal and Indictment* that the Acquittal of him on the one is not an Acquittal of him upon the other, As if he be indicted as Principal and appealed as Accessory, or e contra. But if the Variance be *not in a Matter of Substance* it is otherwise. St. P. C. 168. b. (B) cites Mich. 14 H. 7. 2. For such Variance shall not prejudice so far, but that the Acquittal upon the one shall be an Acquittal also upon the other.

In Appeal the Defendant is acquitted, and pray'd that it be inquired of the Abetters, and he was *indicted of the same Felony before the Appeal*, but there was a *Variance between the Indictment and the Appeal*, and yet because he was indicted, and *therefore it appeared that the Appeal was not sued for Malice*, it was not inquired; for the Plaintiff cannot recover Damages, Br. Appeal, pl. 43. cites 14 H. 7. 2. ——Br. Damages, pl. 80. cites S. C

5. Appeal of Robbery, the *Defendant was acquitted*, and *said that the Plaintiff is not sufficient to render Damages*, and *prayed that it be inquired of the Abettors*. Row said this ought not to be, and shewed a Paper by which the Defendant was indicted of the same Felony. But because it was only Paper, and did not contain what Day and Year, the Indictment was taken, nor before whom &c. therefore the *Jury was charged to inquire what Damages the Defendant had, and* then *whether the Plaintiff be sufficient* to render them, and *if not, then to inquire who were the Abettors*; quod nota. Br. Appeal, pl. 1. cites 26 H. 8. 3. 4.

If the Appeal be *founded upon a good Indictment* and the Defendant is acquitted, it shall not be inquired of the Abetters; for the Indictment is sufficient Cause to sue the Appeal. And e contra upon insufficient Indictment. Br. Appeal, pl. 108. cites 20 E. 4. 6.

6. If the *Heir abets his Mother* to bring the Appeal, he is out of the Danger of this Statute tho' within the Words of it. Per Mountague Ch. J. Pl. C. 88. b. Hill. 6 & 7 E. 6.

The Heir *or other Near of Kin may abet* the Wife Plaintiff in the Appeal, Et sic adjudicatur quod Pater, Mater, Frater &c. non sunt in Casu hujus Statuti ratione Propinquitatis Sanguinis, & ad eos pertinet prædictam Mortem ulcisci, Hoyland's Case, and cannot be said to be Per Maitiam 2 Inst. 384.——2 Hawk. Pl. C. 199 cap 23. S. 138. says that some seem to have gone so far as to hold, that the Heir who abets his Mother in bringing an Appeal for the Death of his Father, can be in no Case within the Statute by Reason of such Abetment; because Nature and Duty oblige him in such a Case to abet his Mother. But this Reasoning, strictly examined, seems to prove no more than this, That in such a Case the Heir shall Prima Facie be intended to have abetted the Apellant rather out of Duty than Malice, and that therefore he shall not be taken to be within the Purview of the Statute, without very strong Evidence of his Malice. But surely it cannot be denied that in some Cases it may be notorious, that an Heir abets such an Appeal, not out of Duty but Malice; as where he himself, without the least probable Ground of Suspicion, is the first Promoter of the Prosecution; or where he causes it to be carried on by violent or unfair Methods, not for the Sake of Justice but Oppression, in which Case it seems harsh to say, That he is not as well within the Meaning as Letter of the Statute.

7. Note that tho' by the Letter this Word *(Malice) is referr'd only to the Abetters* and Procurers, yet the Books before cited understand it to *extend as well to the Appellant as to them*. St. P. C. 168. b. (C)

2 Inst. 384. says that Malitia refers only to the Procurors and Abettors, by the expres Words of this Act. ——In the several Places of this Statute the Malice is expresly referr'd to the Procurors and Abettors only, and in no Part to the Appellant. Some hold, That wherever an Appellee is acquitted of an Appeal of Felony, he shall recover Damages by this Statute against the Appellant, except only where he hath been *indicted of the same Felony before*. And it must be confessed that in the Reports and Entries relating to this Matter, Damages seem generally of Course to have been awarded against the Appellant on the Acquittal of the Appellee in all other Cases, without any finding that the Appeal was malicious. Yet others hold, That the Appellant is no more within the Intent of the Statute than his Abettors, unless his Appeal were grounded on Malice. And if it be consider'd that where the Appellant is to render Damages by this Statute, he is also by the express Words of it to have *a Year's Imprisonment, and to be grievously ransomed to the King*, surely it cannot be imagined that the Makers of the Statute intended in any Case to expose him to so severe a Punishment for a legal Prosecution, which he has reasonable Evidence to induce him to commence, tho' it may not be sufficient to induce a Jury to convict the Defendant. Neither do I see any Reason why the bringing an Appeal against one, who before hath been indicted, by a sufficient Indictment of the very same Crime, which is agreed not to be within the Meaning of the Statute, should be

the only excepted Case; especially considering that any other Case, wherein the Appellant plainly appears to proceed *on a probable Ground of Suspicion*, is within the Reason given in many Books for the Favour shewn to the Appellant, where the Appellee has been indicted before, which is this, that the Appellant had *Cause and Evidence to pursue* the Appeal, and it appears to the Court that it was *not merely caused on Malice*. And this is also one of the Reasons given in the Books, why the Appellant is not to render Damages by the Intent of the Statute, where the Appellee in Appeal of Murder is found guilty of Homicide, *se Defendendo* only. And as to the general Expressions of the Books abovemention'd, in which Damages seem of Course to be awarded against the Appellant, without any Inquiry whether his Appeal were malicious or not, it may be answer'd, That the Books speak as generally in Relation to the Recovery of the Damages against the Abettors; and yet it seems plain from the whole Purport of the Statute, that they are not within the Purview of it, unless their Abetment were founded on Malice. 2 Hawk. Pl. C. 198. cap. 23. S. 138.

It is ordain'd that when any being appealed of Felony surmised upon him, doth acquit himself in the King's Court in due Manner, either at the Suit of the Appellor, or of our Lord the King, the Justices before whom the Appeal shall be heard and determined, shall punish the Appellor by a Year's Imprisonment.

And the Appellors shall nevertheless restore to the Parties appealed their Damage, according to the Discretion of the Justices, having Respect to the Imprisonment or Arrestment that the Party appealed hath sustained by Reason of such Appeals, and to the Infamy that they have incurr'd by the Imprisonment or otherwise, and shall nevertheless make a grievous Fine unto the King.

2 Inst 384. S. P. accordingly as to the Words (*Homicides and other Felonies.*)

9. This Word (*Felony*) is not only intended of such Offences as were Felonies at the Time of making this Statute, but also of all other Offences made Felonies since. St. P. C. 168. b. (D) cites Fitzh. Corone 381. Hill. 12 E. 2. and 275. Hill. 22 E. 3.

Before this Statute *Rape* was not Felony, but is made Felony by Stat. Westm. 2. cap. 34 and yet if the Defendant in Appeal of Rape be acquitted, the Abettors shall be inquired if the Plaintiff is not sufficient to render Damages, which seems strange, because the Statute which says ("procure false "Appeals to be made of Homicides and other Felonies &c.") seems to be intended of Felonies then before, and not of Felonies made by the same Statute [Westm 2. cap. 34] per Staundford J. Pl. C. 124. b. Trin. 2 Mar. but says it is taken as he has said; but says, that he had not seen the like Construction of the Words in any other Case, and especially where it is penal. —— 2 Hawk Pl. C. 199. cap. 23. S. 139. S. P. and says it has been adjudged.

This Statute extends both to *Acquittals in Deed*, and to Acquittals *in Law*. Acquittals *in Deeds, as* either by *Verdict* or by *Battail*, and in that Case when the *Plaintiff yields himself creant, or vanquished* in the Field, the Judgment shall be that the Appellee shall go quit, and that he shall recover his Damages against the Appellor, *but if* the Plaintiff had been slain, then no Judgment can be given against a dead Person. Acquittals *in Law, as* if 2 be appealed of Felony, the one as Principal, and the other as Accessory, and both of them plead Not Guilty &c. and the *Jury does acquit the Principal*, in this Case by Law the Accessory is acquitted, and shall recover Damages by this Act against the Appellant &c. or may have his

10. The Words (*acquit himself in due Manner*) may be understood as well where the Defendant acquits himself by *Battail* as by the Country. St. P. C. 168. b. (E) cites Fitzh. Corone, 98. Pasch. 41 E. 3. but this Acquittal by Battail is intended thus, viz. where the Appellant being *in the Field confesses his Appeal false*; For this is a kind of Vanquishing, and is not to be intended of his being *killed in the Field*; for there by his Death the Damages are gone and lost for ever without Recovery.

11. There is an *Acquittal in Law* as well as an Acquittal *in Fact*; For if *two are appeal'd*, the *one as Principal*, and the *other as Accessory*, and the *Principal is acquitted*, the Accessory shall recover his Damages against the Appellant if the Inquest that tried the Principal were likewise charged upon the Accessory, notwithstanding they give no Verdict as to the Accessory; For he shall have Writ of Conspiracy by the Common Law; For he put his Life in Jeopardy by a Mesne. St. P. C. 168. b (F) 169. a. cites Hill. 33. H. 6. 2.

12. But where the *Principal is acquitted the Accessory not having appeared*, but Process is pending against him, it will be otherwise. St. P. C. 169. a. cites Fitzh. Corone 222. 48 Ass. [but that Plea cites 41 Ass. 24.] For in this Case he must be expressly acquitted by Verdict, or otherwise he shall neither recover Damages by this Statute, nor shall have Writ of Conspiracy by the Common Law.

his Writ of Conſpiracy at the Common Law. But if the Principal be acquitted by Verdict, *Proceſs depending againſt the Acceſſory*, the Acceſſory ſhall not recover Damages within this Statute, becauſe no Jury can be returned to aſſeſs them. 2 Inſt. 385.

If *one* be *appealed as Acceſſory to two Principals, and one of the Principals is acquitted*, the Acceſſory ſhall recover no Damages until the other Principal be acquitted. 2 Inſt. 385.——D. 120. pl. 10. Mich. 2 & 3 P. & M. and 131. pl. 72. Paſch. 2 & 3 P. & M. Read v. Rochford & al. S. C.——2 Hawk. Pl. C. 200. cap. 23. S. 140. S. P. and ſays it ſeems clear, becauſe it does not appear by any thing but that he might be Acceſſory to the other.—2 Hawk. Pl. C. 199, 200. cap. 23. S. 140. ſays, if 2 are appealed, the one as Principal and the other as Acceſſory, and the Jury being charged on the Acceſſory as well as the Principal, do acquit the Principal; it ſeems to be agreed, that the Acceſſory ſhall recover Damages by the Intent of the Statute, without any expreſs Verdict concerning him, becauſe he is impliedly acquitted by the Acquittal of the Principal; for it is impoſſible that there ſhould be an Acceſſory where there is no Principal. And this Reaſon ſeems to hold as ſtrongly for the Damages, where the Acceſſory does not appear on the Trial or Acquittal of the Principal, becauſe in ſuch Caſe the Acquittal of the Principal is as much an Acquittal of the Acceſſory as where he does appear; but it is holden by Sir Edw. Coke, that ſuch an Acceſſory ſhall not recover Damages, becauſe no Jury can be returned to aſſeſs them; and Sir William Staundford ſeems to be of Opinion, that ſuch an Acceſſory ſhall not recover, unleſs he be expreſsly acquitted by Verdict after the Acquittal of the Principal; yet whether the Juſtices themſelves may not, in a Caſe of this Nature, if they think proper, aſſeſs the Damages without any Jury, or elſe aſſeſs them by an Inqueſt of Office, may deſerve to be conſidered; alſo it ſeems to be to little Purpoſe to require an Actual Acquittal of a Perſon, where it appears by the Acquittal of another, that he could not be guilty.

13. If the *Defendant bars the Plaintiff of his Appeal*, he ſhall not recover Damages unleſs it be ſuch Bar as acquits him of the Felony, for the whole Streſs of the Statute is upon thoſe Words (acquit himſelf in due Manner;) And therefore if he *pleads that the Appellant is a Baſtard, or has an elder Brother*, or *Ne unques Accouple &c.* or the like, and thereby bars the Plaintiff, yet he ſhall not recover Damages, for he may be afterwards indicted of the ſame Felony and attainted, notwithſtanding by thoſe Pleas he is diſcharged as well againſt the King as againſt the Party. St. P. C. 169. a. (A) For ſuch Pleas as do not try the Defendant's Innocence as to the Felony, intitle him no more to Damages than if he had pleaded in Abatement ſuch Plea as had abated the Appeal, for tho' ſuch Plea diſcharges the Appeal both againſt the King and the Party, yet it does not diſcharge him of the Felony.

In Appeal of Death by one as Couſin, but did not ſhew how Couſin, and therefore the Writ abated, but Damages were not given to the Defendant, becauſe *it may be that he ſhall be* thereof indicted and *convicted at the Suit of the King.* Br. Appeal, pl. 68. cites 27 Aſſ. 25.—— Fitzh. Corone, pl. 201. cites S. C. & S. P. by Shard.

14. *So* where the Plaintiff is barred *by a Demurrer* in Law. St. P. C. 169. a. cites Fitzh. Corone 12. Mich. 21 H. 6.

If the Defendant *pleads* that there is *a nearer Heir*, and Iſſue thereupon taken, and found for the Defendant, *he is diſcharged of the Actor, but* is *not* acquitted *of the Felony* within the Purview of this Statute; *ſo* it is if the Defendant be diſcharged *by Clergy*, he is not acquitted within the Purview of this Statute. 2 Inſt. 385.

If the Defendant *wages Battle*, and the *Plaintiff demurs* upon it, and it is *adjudged againſt the Plaintiff*, the Defendant is diſcharged of the Appeal, but he is not acquitted until he be acquitted of the Fact at the Suit of the King. 2 Inſt. 385.——2 Hawk. Pl. C. 199. cap. 23. S. 140. ſays it ſeems to have been generally agreed, that no Acquittal is within the Intention of the Statute unleſs it be had on an Appeal, either at the Suit of the Party, or of the King after a Nonſuit of the Party, and be of ſuch a Nature as finally to Bar all other Proſecutions for the ſame Felony, whether at the Suit of the ſame or any other Party, and therefore it ſeems clear, that no Damages ſhall be recovered on the Abatement of an Appeal, nor on the bare Nonſuit of the Appellant, nor where the Appellant is barr'd either by a Demurrer, or by a Plea, ſhewing that he is not intitled to the Appeal, nor on any Acquittal on an inſufficient Original, becauſe in all theſe Caſes the Appellee is liable to another Proſecution for the ſame Felony.

15. *So* where it is found by Verdict that the Defendant killed him *ſe defendendo*, or *by Miſadventure*; For this is no Acquittal of the Felony, becauſe in ſuch Caſe the Defendant muſt purchaſe a Pardon. St. P. C. 169. a. cites Fitzh. Conſpiracy 14. 22 Aſſ. [77.]

In Appeal, it is found that the Defendant killed a Man *ſe defendendo*, it *ſhall not* be inquired of the Abettors, *for he did the Act*; Quod Nota; *Contra where it is acquitted that he did not do the Act*; Note a Diverſity; Per Hill. Br. Appeal, pl. 59. cites 22 Aſſ. 77.——This ſhall not be ſaid to be per Malitiam, becauſe he had a juſt Cauſe; for Quod quiſque ob tutelam Corporis ſui fecerit, Jure id feciſſe videtur; & ſic de ſimilibus. 2 Inſt. 384.

The

The Wife of G. brought an Appeal *of Murder againſt S. and 5 of his Servants as Principals, by being preſent aiding and abetting S.* to commit the Murder, and *S. appeared*, againſt whom the *Plaintiff declared with a Simul cum* of his 5 Servants, and *S pleaded Not Guilty*, and *Proceſs was continued againſt the other* 5. and by Verdict it was *found that S. killed C. in his own Defence*, whereupon *he was acquitted*, and had his Pardon of Grace; and it was reſolved by all the Judges of England, that *this Acquittal* of him *was, in Law, an Acquittal of the other* 5 that were charged as Principals by being preſent, aiding and abetting, and S. could not upon this Statute recover Damages for the Cauſe before remembered. 2 Inſt. 385. cites a MS. of Dier, Paſch. 15 Eliz. B. R. Copleſton v Stowell.——2 Hawk Pl. C 199. cap. 23. S. 140. ſays, that if a Perſon appealed of Murder be found guilty of Homicide by Miſadventure or Se defendendo, which will be a Bar of any other Proſecution for the ſame Killing, yet it has been reſolved that he ſhall not recover Damages, not only becauſe it appears that the Appeal was not groundleſs, but alſo becauſe the Appellee is not totally acquitted.

16. *So* where the Defendant upon his Arraignment *betakes himſelf to his Clergy, and the Court takes an Inqueſt of Office to inquire if he be Guilty or not, and they find him Not Guilty*, yet he ſhall not recover Damages by this Acquittal. St. P. C. 169. a. cites Fitzh. Corone 386. Paſch. 17 E. 2. For by taking himſelf to his Clergy he rather confeſſes the Felony by Implication than otherwiſe; *but if he waved his Clergy, and put himſelf upon the Inqueſt, and they had acquitted him*, it would be otherwiſe.

S P. as to the King's Pardon, and ſo if the Principal *dies before he is attaint*, in this Caſe

17. *So if the Defendant has the Plaintiff's Releaſe, and alſo the King's Pardon, and waves them, and pleads Not Guilty*, and puts himſelf on the Country, *and is acquitted*, he ſhall recover Damages, and yet he has done a Thing of Record whereby he confeſſes the Felony by Implication; Quære; For it was a Pardon by Act of Parliament, doubtleſs he could not wave it. St. P. C. 169. b. (A) cites Hill. 11 H. 4. 39.

Writ of Conſpiracy does not lie for the Acceſſory, becauſe for any thing yet done it ſtands indifferently whether the Conſpiracy was falſe or true. St. P. C. 173. a. cites Hill. 33 H. 6. 2.——2 Hawk. Pl. C. 200. cap. 23. S. 140. at the End, cites S. C. accordingly, becauſe it does not appear but that he might have been guilty.

* Br. Appeal, pl 39. cites S. C. accordingly, for the Original is good, tho' the meſne Proceſs or Return are ill; Quod Nota. Whenſoever any is acquitted by Verdict, and

18. By the Words (*in due Manner*) it is not a ſufficient Acquittal if it be *erroneouſly without due Proceſs*. St. P. C. 169. b. (A) cites Paſch. * 9 H. 5. 2. where the Defendant came *by Exigent* on which the Sheriff had *returned Cepi Corpus*, whereas he ought to have returned *Exigi feci*, and the *Defendant appeared on the Exigent, and without taking Advantage of the Proceſs pleaded Not Guilty* to the Appeal, *and ſo found*, and yet he could not have Judgment to recover Damages for the Reaſon above; but Staundford ſays Quære; for you will find the contrary in Fitzh. Corone 444. Paſch. 19 E. 3. 5. that Error in the Proceſs is not material if none be in the Writ, Declaration, or Pleading, for the Appellee is arraigned upon the Original and not upon the Meſne Proceſs.

yet his *Life was never in Jeopardy* either by reaſon of the erroneous Proceſs or Original, or otherwiſe, tho' this be within the Letter of the Law, yet it is out of the Meaning, and therefore the Defendant in that Caſe ſhall recover no Damages. 2 Inſt. 385, 386.——2 Hawk. Pl. C. 200. cap. 23. S. 141. ſays, it ſeems at this Day, that if a Defendant appearing upon erroneous Proceſs to a good Appeal be acquitted, he ſhall recover Damages by the Intent of the ſaid Clauſe, becauſe ſuch an Acquittal is a good Bar of any other Proſecution for the ſame Felony, and the Life of the Appellee was put in Danger by the Appeal. But there were formerly ſome Opinions, that the Appellee in ſuch a Caſe ſhould not recover Damages, becauſe his Life was not in Danger at the Time of the Trial, for that he might have taken Advantage of the Error in the Proceſs; but granting it to be a good Rule, that the Defendant ſhall not recover Damages where his Life is not in Danger at the Time of the Trial, which yet I find not confirmed by any Authority, beſides the Year-Book of 9 H. 5. 2. it may be anſwered, that in the Caſe the Queſtion the Defendant's Life is in Danger at the Time of the Trial, becauſe the Error in the Proceſs is ſalved by his Appearance.

If the Plaintiff in an Appeal be *nonſuit*, and the *Defen-*

19. By the Words *(at the Suit of the Appellant, or of our Lord the King)* this Suit of the King is *intended upon the Appeal*, when the Defendant is arraigned thereupon, *after that the Appellant has declared upon his Appeal, and is nonſuited*; for if the Defendant was acquitted at the Suit of the King,

King, upon an Indictment of the ſame Felony, yet he ſhould not recover Damages. St. P. C. 169. b. (B)

dant is arraign'd at the Suit of the King and acquitted, he ſhall recover his Damages by this Act; for the Words are (Vel ad ſectam Appellantis vel Domini Regis;) but this Suit of the King muſt be intended *upon the Appeal after Nonſuit*; for an Acquittal upon an Indictment is not within this Statute. For Debito modo Acquietatus, ſee 9 H. 5. 2. that the Defendant being acquitted by Verdict, yet if his Life was never in Jeopardy either in the Original or Proceſs, tho' it be in Default of the Plaintiff himſelf, yet is he not Debito modo Acquietatus within the Statute. 2 Inſt. 385.——2 Hawk. Pl. C. 199 cap. 23. S. 140. ſays it is clear that the Appellee is intitled to his Damages, where he is acquitted on an Appeal at the Suit of the King, after a Nonſuit of the Plaintiff, or where he vanquiſhes the Appellant in a Trial by Battle.

20. And the Manner how he ſhall *recover Damages on Acquittal at the King's Suit*, *varies* ſomething *from* his Recovery of them *when acquitted at the Suit of the Party*; for in the firſt Caſe he ſhall not have Recovery of them, tho' he be acquitted, till he ſues a *Scire Facias* againſt the Plaintiff *to bring him again into Court*, he *being out of Court before by his Nonſuit*; but in the 2d Caſe he ſhall have his Judgment without ſuing other Proceſs St. P. C. 169. b. (C) cites Fitzh. Damages 77. Hill. 40 E. 3. where the Caſe was, that the Appellant *took Baron after the Nonſuit*, and yet the Scire Facias awarded againſt the Feme alone.

2 Hawk. Pl. C. 200. S. 143 ſays that wherever any Perſon is ſo far acquitted on an Appeal carried on at the Suit of the Party,

as to be intitled to his Damages, he ſhall have Judgment for them without any Proceſs to bring in the Party to anſwer to the Damages, becauſe he is ſtill in Court; but where he is ſo acquitted on an Appeal carried on at the Suit of the King after a Nonſuit of the Party, he ſhall not recover Damages without a Scire Facias to bring in the Party, becauſe he was out of Court by the Nonſuit.

21. By the Words *(the Juſtices before whom the Appeal ſhall be heard and determined, ſhall puniſh the Appellor &c.)* cannot be underſtood Juſtices *of Niſi Prius*; and yet by 14 H. 6. cap. 1. they are impower'd to give Judgment in Treaſon and Felony tried before them, and this as well where the Defendant is acquitted as where he is attainted; but yet they are not the Juſtices intended by this Statute, inaſmuch as the whole Plea of the Appeal was not heard before them, but Parcel only, viz. the Trial only. St. P. C 169. b. (D) 170 a. cites Mich. 10 E. 4. 14.

St. P. C. 156. b. (D) S. P. accordingly, and cites S. C —— If the Defendant in an Appeal be *tried before Juſtices of Niſi Prius*,

albeit they have but Delegatam Poteſtatem, yet *ſhall they inquire of the Inſufficiency of the Plaintiff, and of the Abettors*; and the Words of this Act are, Quod Juſtic' coram quibus auditum fuerit Appellum & terminatum; *but* that great Over-ruler Experientia hath ruled and over-ruled it by Precedents, that they *cannot give Judgment for the Damages*. 2 Inſt. 386.

If Appeal be commenced before *Juſtices of Niſi Prius*, there upon Nonſuit they may arraign the Defendant upon the Declaration, and inquire of the Damages, and give Judgment thereupon, and for Inſufficiency of the Plaintiff may inquire of the Abettors Quod nota for Law, & non negatur. Br. Appeal, pl. 113. cites 22 E. 4. 19.——2 Hawk. Pl. C. 201. cap. 23. S. 141 (bis) S. P. and ſaid to have been held accordingly, and that for the Reaſon given in Staundford; and ſays that the Stat. 14 H. 6. has been conſtrued to intend only to enable Juſtices of Niſi Prius to give the principal Judgment, and not to transfer to them from the Court of B. R. a Power in Collateral Matters; Yet Juſtices of Niſi Prius have, by Uſage not now to be diſputed, gain'd a Power to aſſeſs the Damages, and to inquire of the Sufficiency of the Plaintiff to anſwer them, and alſo of the Abettors But ſays he does not find that they have ever given Judgment for the Damages; yet there is no Doubt but that if ſuch Juſtices be alſo Juſtices of Aſſiſe, and as ſuch have an Appeal commenced before them, they may as Juſtices of Aſſiſe, upon the Acquittal of the Appellee, not only inquire of the Damages &c. but alſo give Judgment, both by the Letter and Meaning of the Statute.

22. The Statute wills that there ſhall be Conſideration of the Damages, *(having Reſpect to the Impriſonment &c)* and therefore if the *Appeal is againſt ſeveral, and all are acquitted*, the *Damages ſhall be tax'd ſeverally*, viz. againſt each; for perhaps one has more Cauſe to recover Damages than the other; As if one was appeal'd as Principal, and the other as Acceſſary only, that the one is a Gentleman, or of other Eſtate, and the other not. St. P. C. 170 a. (A) Hill. 8 H. 5. and Fitzh. Damages, Hill. 40 E. 3. 77.

2 Hawk. Pl. C. 201. cap. 23. S. (143) bis, ſays that if there are ſeveral Appellees, and all of them acquitted, the Damages ought to be

ſeverally aſſeſſed as to every one of them, and this doubtleſs both to the Letter and Meaning of the Statute,

Statute, which provides that in the giving the Damages, Reſpect ſhall be had to the Impriſonment and Infamy, and other Damage ſuſtained of the Appeal; and theſe being ſeveral, and receiving different Aggravations from the different Circumſtances of the Perſon's particular Caſe, it cannot but be reaſonable that the Damages be aſſeſſed ſeverally alſo.

23. But yet this Recovery of Damages muſt be intended in one that has Ability to recover them; for if Appeal be *ſued againſt a Monk or Feme Covert only*, without the Sovereign of the Houſe or the Baron, as it ought, (unleſs the Sovereign with his Monk or the Baron with his Feme commit Felony) the Monk or Feme ſhall not recover Damages, though they are acquitted. St. P. C. 170. a. (B) cites Fitzh. Corone 276. Hill. 22 E. 3.

'Tho' this Branch be general, yet every Appellee ſhall not upon his Acquittal

24. But if the Appeal be brought *againſt the Baron and Feme* together, and they are acquitted, then Damages ſhall be recover'd and *tax'd ſeverally*, viz. the Baron alone ſhall recover for his Impriſonment, and the Baron and Feme jointly for the Impriſonment of the Feme. St. P. C. 170. a. (B) cites Fitzh. Judgment * 108. Paſch. 12 R. 2.

recover Damages; for if a *Monk* be appeal'd, or a *Feme Covert* be appeal'd alone without her Husband, and acquitted, they cannot recover any Damages by this Act, in reſpect of their Diſability; for the general Words of this Act does not enable any to recover Damages that thereunto was diſabled by Law. But if an Appeal be brought againſt the *Husband and Wife*, and they be acquitted, Damages ſhall be given to the Husband alone for his Damage, and to the Husband and Wife for the Damage of the Wife. And where *ſeveral Perſons be acquitted*, the *Damages muſt be ſeveral*; for the Words of the Statute are Habito reſpectu ad Perſonam. But then it may be demanded, what Remedy hath the Monk or Feme Covert being ſolely appealed? The Anſwer is, that they have no Remedy by this Statute but the Abbot and Monk, and the Husband and Wife may have a *Writ of Conſpiracy* at the Common Law.

2 Hawk Pl.C. 202. cap. 23. S. 144. ſays it has been holden that a Monk or Feme Covert, being appeal'd without the Abbot or Husband, cannot have a Judgment for the Damages on their Acquittal, becauſe they are diſabled by the Law to recover any Damages without the Abbot or Husband; and the general Words of a Statute ſhall not be conſtrued to enable Perſons in a Point wherein the Common Law has diſabled them; but the Authority of this Opinion, as to a Wife, is queſtion'd by Hobart; neither do any of thoſe who ſeem to give it greater Weight, bring any other Proof of it than a Note in Fitzherbert's Abridgments, of a Reſolution to ſuch Purpoſe in the Time of Ed. 3. as to the Caſe of a Monk, and an Aſſertion that the Law is the ſame in the Caſe of a Wife; againſt which it may be plauſibly argued that ſince the Impriſonment and Infamy ſuſtain'd by a Feme Covert, in a malicious Appeal againſt her, are far from being leſs grievous in reſpect of her Coverture, and are a good Ground on a Writ of Conſpiracy at the Common Law brought by the Husband and Wife; and ſince the Wife may take any thing to the Benefit of her Husband, and it appears to the Court that the Appellant by his own Act, without any Default either in the Husband or Wife, gives them a good Title to the Damages; and ſince no expreſs Judgment can be given for the Husband, not being a Party to the Record, and it is moſt for his Advantage as well as his Wife's, that a preſent Judgment be given; it may perhaps be thought no unreaſonable Conſtruction of the Statute, that in this particular Caſe Judgment ſhould be given for the Wife to recover the Damages, which as much enure for the Benefit of herſelf and her Husband as an expreſs Judgment for them both on a Writ of Conſpiracy. However, it is certain that if the Husband and Wife are both of them appeal'd and acquitted, they ſhall have a joint Judgment for the Damage done to the Wife, for which the Wife alone ſhall ſue Execution if the Husband die without ſuing of it, and the Husband alone ſhall have Judgment for the Damage done to himſelf.

* This is miſprinted, it being neither the ſame Year nor the S. P. there; and tho' the two following Pleas are 12 R. 2. yet S. P. is in neither.

25. *Parag.* 3. *And if peradventure ſuch Appellor be not able to recompence the Damages, it ſhall be inquired by whoſe Abetment or Malice the Appeal was commenced, if the Party appeal'd deſire it.*

It is a certain Concluſion upon theſe Words of the Statute, that

26. By theſe Words it is implied, that if Damages are not to be recover'd againſt the Appellant, they never ſhall inquire of the Abettors; and there are ſeveral Caſes where Damages ſhall not be recover'd. St. P. C. 170. b. (D)

where Damages ſhall not be recover'd againſt the Plaintiff, there *none ſhall be recover'd againſt the Abettors*; alſo *where the Plaintiff is ſufficient, and ſo found* by the Jury, the *Abettors ſhall not be inquired of*. 2 Inſt. 386.

27. And

27. And as to the Words *(not able to recompence the Damages)* they intend *all the Damages*; for if the Appellant be ſufficient to render Part, and not all, then it ſhall be inquir'd of the Abettors, and they ſhall render them. St. Pl. C. 170. b. (E) cites Paſch. 8 E. 4. 3. and Hill. 8 H. 8. 5. and Fitzh. Corone 219. [41 Aſſ. 8.]

Appeal by a Feme of the Death of her Huſband in B. R. and *after Appearance* the *Feme was nonſuited*, and it was awarded that ſhe be *taken to make Fine*, and ſhe came by Capias and made Fine, and after the Appellee was acquitted, and it was inquired of the Damages, and of the Abettors, and found 2 Abettors, and *Damages tax'd to* 100*l.* and the *Appellor was not ſufficient but of* 100*s.* and it was awarded that the Defendant *recover the Damages tax'd to* 100*l. againſt the Feme, and that he ſue againſt the Abettors if he will*; but Judgment was *not that the Feme ſhall be taken, becauſe ſhe had made Fine before.* Br. Appeal, pl. 74 cites 41 Aſſ. 8.——Fitzh. Corone, pl. 219. cites S. C. and both Br. and Fitzh. are only Tranſlations of the Year-Book.

A Man was acquitted in Appeal, and pray'd his Damages againſt the Plaintiff, and that if he be not ſufficient, that it be inquired of the Abettors, and it was found that the Plaintiff is not ſufficient, and that A and B are Abettors, there *Judgment ſhall not be in Part againſt the Plaintiff, and in Part againſt Abettors, but all againſt the Abettors, if the Plaintiff be not ſufficient*; but in Aſſiſe the Judgment ſhall be againſt all the meſne Occupiers, where the Diſſeiſor is not ſufficient; and the *Abettors may ſay* that *they did not abet after the Verdict*; for it is only Inqueſt of Office againſt them. But *Quære whether they may ſay that the Plaintiff is ſufficient*, and it ſeems that they cannot; for by this they confeſs that they are Abettors. Br. Appeal, pl. 96. cites 8 E. 4. 3.

It is reſolved that he muſt recover either all againſt the Plaintiff, or all againſt the Abettors, and not by Parcels; ſo as if the Plaintiff be not ſufficient for the Whole, the Defendant ſhall recover the Whole againſt the Abettors; for prædicta Damna & omnia Damna are all one. 2 Inſt. 386.——2 Hawk P. C. 202. cap. 23. S. 145. ſays it has been holden that the Abettors are in no Caſe liable to render Damages where the Appellant himſelf is not liable, tho' never ſo ſufficient; and this is confirm'd by Experience, and the manifeſt Purport of the Statute, which by directing that the Abettors be inquired of, where the Appellant appears inſufficient to anſwer the Damages, plainly intimates that they are to be inquired of in ſuch Caſes only wherein the Appellant muſt have anſwer'd them, if he had been able; and agreeably hereto it ſeems to be ſettled, that a Releaſe of Damages to the Appellant will diſcharge the Abettors if they can produce it.

28. The Statute is, that they ſhall inquire of the Abettors *(if the Party appeal'd deſires it)* ſo that it ſeems the Court ex Officio ought not to inquire, unleſs at the Defendant's Deſire; but if they have inquired thereof *at the Deſire of one of the Defendants*, and they found that there were no Abettors, and afterwards the other Defendant being acquitted, prays an Inquiry of the Abettors, yet it ſhall not be inquired, becauſe it appear'd to the Court by the Verdict of the other Inqueſt that there were none, and therefore in ſuch Caſe nothing more now ſhall be inquired unleſs Damages, as appears Fitzh. Corone 222. * 48 Aſſ. [but there it is 41 Aſſ. 24.] But Staundford ſays Quære; for he ſays this Award ſeems not Law, becauſe it is againſt the expreſs Words of the ſaid Statute, and againſt Reaſon, that the Verdict of an Inqueſt ſhould bind me who am not privy to it, and againſt which I have no Remedy, it being only an Inqueſt of Office; for tho' it is commonly inquired of Abettors by the ſame Jury that acquits the Defendants, yet their Inquiry therein is of Office only; for if they find Abettors, the Abettors, when they come, may traverſe all that they have found; As if they find the Appellant not ſufficient, or that ſuch and ſuch were Abettors, thoſe that are ſuppoſed Abettors may ſay by Proteſtation, not confeſſing the Felony, pro Placito that the Appellant is ſufficient, or that they did not abet. St. P. C. 170. b. (F) 171. a. (A) cites † 8 E. 4. 3. For the Words of the Statute are, "If he be lawfully convicted of ſuch a malitious Abetment;" which proves alſo that he ſhall have Anſwer to what was found by the Inquiry.

* Br. Appeal, pl. 77. cites 41 Aſſ. 24. and the Caſe was, viz. Appeal of the Death of the Baron by a Feme, *againſt one as Principal, and others as of Force and Aid*, and the Plaintiff was *nonſuited after Appearance*, and after the *Principal was acquitted at the Suit of the King*, and it was *inquired of Damages and Abettors by the ſame Inqueſt*, which found Damages, but no Abettors; and *after the Acceſſaries came, and were arraigned and acquitted*, and pray'd that it be *inquired by the ſame Inqueſt of the Damages and Abettors*, and it was *denied of the Abettors*, becauſe at another Time it was found that there were no Abettors; per Ingleby. But they *inquired of the Damages*, and *ſeverally what Damages each Perſon by himſelf ſuſtain'd.* Quod nota.

2 Hawk. P. C. 203. cap. 23. S. 147. S. P. and cites S. C. but ſays that this Caſe, if thoroughly examin'd, ſeems repugnant to itſelf; for the Jury were permitted on the 2d Acquittal to tax the Damages, which yet are ſaid to have been tax'd before; but to what Purpoſe ſhould this be done, unleſs it were firſt found

found that the Appellant was ſufficient, or elſe that there were Abettors, which could not but controul the firſt Finding? as alſo the 2d Taxation of the Damages muſt do, unleſs it were wholly the ſame with the firſt. † Br. Appeal; pl. 96. cites S. C. accordingly.

This *Inſufficiency of the Plaintiff* in the Appeal *muſt be found by the Jury*, and cannot come in by the Averment of the Party, and ſo it is in other like Caſes. 2 Inſt. 386.——2 Hawk. Pl. C. 202. cap. 23. S. 140. ſays it has been holden, that unleſs the Appellant be found by the Jury to be inſufficient, the Abettors ſhall not be inquired of; and yet the Statute doth not expreſsly direct that the Jury ſhall inquire of the Sufficiency of the Appellant. But it being the general Method of the Law in other Caſes of the like Nature, to make an Inquiry by a Jury, it is certainly a reaſonable Conſtruction of the general Words of the Statute that ſuch Inquiry may be made in the preſent Caſe. Yet whether the Juſtices themſelves may not, if they think fit, make ſuch Inquiry without a Jury, it being but an Inquiry of Office, may deſerve to be conſider'd for the Reaſons in 52 & 142. Sect. of this Chapter. However, there can be no Doubt but that the Inſufficiency of the Appellant muſt appear by one or the other of theſe Inquiries, before the Abettors can be inquired of.

This Writ is given *in Lieu of* the Writ of *Conſpiracy at the Common Law*, the *Abettors, coming in upon this Proceſs, may traverſe the Abetment*, becauſe they were Eſtrangers to the Verdict; and if the Defendant, that ſued forth the Diſtreſs, be *nonſuit*, yet may he have a new Writ, and it *is not peremptory* to him. 2 Inſt. 386

The Abettors may traverſe the Jury's finding the Appellant to be inſufficient, or that they abetted &c. For it is hard that a Man ſhould be concluded by any Matter whatſoever, found to his Prejudice in an Action, to which he is no way privy. 2 Hawk. Pl. C. 203. cap. 23. S. 147.

Albeit the *Jury find neither the Time nor the Place where* the Abetment was, yet if they find the Abettors it is ſufficient; for when the Plaintiff appears, the Defendant may ſhew Time and Place in good Time. 2 Inſt. 386.——2 Hawk Pl. C. 203. cap 23. S. 152. S P and that by ſuch Shewing he ſupplies the Omiſſion of the Jury in not finding any Time or Place on their Inquiry of the Abetment &c.

29. And note that it is a good Anſwer for the *Abettor* to *ſhew* Matter, which proves *that the Defendant ought not to have his Damages againſt the Appellant, Or that the Defendant was not lawfully acquitted, but erroneouſly*, as appears in Fitzh. Corone 386. Paſch. 17 E. 2. But if the Abettors will take *Exception to the Inquiſition* found, for that it is *not found at what Day, Year, or Place the Abetment was made*, ſuch Exception ſhall not be good; for by finding the Abetment they have ſatisfied the Statute, which is, "That it be inquired by whoſe Abetment," and this they have found; wherefore as to the Year, Day, and Place the Defendant in the Appeal ought to adjuſt it to the Inquiſition, and ſo ſupply what is wanting. St. P. C. 171. a. (A) cites Fitzh. Corone 45. Mich. 22 E. 4.

Br. Appeal, pl. 77. cites S. C. & S. P. admitted.—Fitzh. Corone, pl. 222. cites S. C. & S. P. accordingly.

30. In Appeal where the *Defendant is acquitted*, it ſhall be inquired of the Damages *ſeverally, as to the Damage every Perſon* by himſelf *ſuſtain'd* by the Appeal. Quod nota. Br. Damages, pl. 114. cites 41 Aſſ. 24.

Abettors were found (upon the Acquittal of the Defendant) by Name, *Et quod procuraverunt*, inſtigaverunt & abettaverunt prædictum querentem ad capiendum & proſequendum appellum prædictum in forma prædicta, and *ſaid not* (*per Malitiam*,) and yet allow'd of. But nota, the ſurer Way is to purſue the Words (falſo & per Malitiam,) according to this Act. 2 Inſt. 386.

31. *Parag.* 4. *And if it be found by the Inqueſt that any Man is Abettor thro' Malice, at the Suit of the Party appeal'd, he ſhall be diſtrain'd by a Judicial Writ to come before the Juſtices.*

2 Inſt. 387. cites S. C. but ſays it ſeems that the Proceſs given by the Statute is Diſtreſs Infinite.——2 Hawk Pl. C. 203. cap. 23. S. 151. ſays it has

32. By theſe Words the *Proceſs* againſt them ſeems to be a *Diſtreſs in Infinitum*; and yet in Fitzh. Corone 102. Hill. 46 E. 3. the Court awarded firſt a *Ven. Fac.* and afterwards a Diſtreſs; but Staundford ſays that this is contrary to all other Books which he had read; for they all mention a Diſtreſs for the firſt Proceſs, and this Proceſs is always purſued by the Perſon acquitted, who for his Speed may purſue it, tho' the Appellant is not in Court; As where the Appellant was nonſuited in Appeal, and the Defendant arraign'd at the Suit of the King and acquitted, and his Damages tax'd, and the Abettors found, here the Defendant ſhall have Proceſs againſt the Abettors immediately, though the Judgment of Damages

Damages ſhall be ſuſpended till Scire Facias be ſued out and returned againſt the Appellant. St. P. C. 171. a. (B) b. cites Fitzh. Damages 77. Hill. 40 E. 3.

been holden that if the Appellee chooſe rather to proceed for the Recovery of his Damages by Judicial Proceſs than by Original, it is ſafeſt for him to make uſe of a Diſtreſs, which is given by the expreſs Words of this Statute, yet there is a Note of an old Caſe wherein a Venire Facias was firſt awarded; but it is queſtionable whether this be juſtified by the Statute or not.

33. Note that the *Defendant* who is acquitted in the Appeal *may be nonſuited in the Proceſs againſt the Abettors, and commence De novo* if he will; for this Nonſuit is not peremptory to him. St. P. C. 171. b. (C) cites Fitzh. Corone 386. 17 E. 2.

2 Hawk. Pl. C. 203. S. 153. ſays it has been holden that whether the Nonſuit be in the original Writ or Proceſs by the Appellee againſt the Abettors, and whether before or after Appearance it is no Bar of a 2d, or after Proceſs.

34. An Original *Writ* was brought *for Abetment*, and *counted* againſt the Abettors *of greater Damages than were aſſeſs'd in the Appeal*, and allow'd for good; for of thoſe Damages tax'd in the Appeal an Attaint lies not, becauſe the Inquiry as to them is only of Office, and the Defendant in Appeal cannot compel the Juſtices to increaſe them, and ſo it is reaſonable that he aid himſelf by ſuch Action. St. P. C. 171. b. (D)

2 Inſt. 387. S. P.—— 2 Hawk. Pl. C. 203. cap. 23. S. 150. ſays it has been holden that though the Statute expreſsly gives only Judicial Proceſs for the Recovery of the Damages againſt the Abettors, yet the Appellee may, if he think fit, take an Original Writ of Abetment grounded on the Statute, and therein count to greater Damages than were found by the Jury; which, in reſpect of ſuch Finding, being but in Nature of an Inqueſt of Office, ſhall not conclude the Appellee.

35. And note that ſuch Remedy as is given by this Statute to the Defendant in Appeal of Felony, if he be acquitted, is likewiſe given to him who is *falſely indicted for proſecuting in Court Chriſtian Matter belonging to the Temporal Juriſdiction*, after his Acquittal thereof. St. P. C. 171. b. (E) and ſays this Remedy is given by Stat. 1 R. cap. 13.

36. In Appeal the Defendant was acquitted, and Damages tax'd for him. Theſe Damages ſhall not be *increaſed* contrary to the Taxation of the Jury. Br. Appeal, pl. 136. cites 42 Aſſ. 19.

If the Jury give too ſmall Damages, it is but an Inqueſt of Office, and the Plaintiff may have an Original Writ of Abetment, and inquire of greater Damages. 2 Inſt. 387.——2 Hawk. Pl. C. 201. cap. 23. S. (142) bis, ſays if a Jury gives too ſmall Damages to the Appellee, the Court may increaſe them; from which it ſeems to follow, that if a Jury give too large Damages the Court may abridge them. And ſurely no leſs can be implied by the Statute's ordering that the Damages ſhall be given according to the Diſcretion of the Juſtices, Reſpect being had to the Impriſonment &c. and this Conſtruction alſo ſeems agreeable to the Rules of Law in other Caſes, by which the Court is ſaid to have a general diſcretionary Power, except in ſome Special Caſes, as Local Treſpaſſes &c. either to increaſe or abridge the Damages found by an Inqueſt of Office; and where a Jury which hath acquitted an Appellee inquires afterwards of the Damages, it ſeems in reſpect of ſuch Inquiry to be no more than an Inqueſt of Office, tho' it were returned to try the Cauſe.

(E. a) Execution. How anciently.

1. THE Ancient Law was, that when a Man had Judgment to be hang'd in an Appeal of Death, the *Wife and all the Blood* of the Party ſlain ſhould *draw the Defendant to Execution.* 3 Inſt. 131. cites

This ſhould be 11 H. 4. 12. a.—Pl. C. 3 6 b 11 Bromley

cites S. C. & S. P. by Trew it and Gaſcoigne; and ſays that all of the Blood of the Perſon murder'd drew the Felon *by a long Cord* to the Execution, and that this Uſage was founded upon the Loſs which all of the Blood had by the Murder of one of themſelves, and for their Revenge, and the Love which they had to the Perſon kill'd.

11 H. 4. 11. and that Gaſcoigne ſaid then, that ſo it was in his Days.

For more of Appeal in General, ſee Acceſſory, Addition, Murder Mute, Rapes, Utlawry, and other Proper Titles.

Appendant [or Appurtenant.]

Appendants are ever *by Preſcription*, but *Appurtenances* may be *created at this Day*; As if a Man at this Day grants to a Man and his Heirs Common in ſuch a Moor for his Beaſts Levant or Couchant upon his Manor; or if he grants to another Common of Eſtovers or Turbary in Fee-ſimple, to be burnt or ſpent within his Manor, by theſe Grants the Commons are appurtenant to the Manor, and ſhall paſs by the Grant thereof. Co. Litt. 121. b.——Vent. 407. S. P. by Hale Ch. J. * Fitzh. Quare Impedit, pl. 151. cites S. C.

(A) What Thing may be Appendant [*to what.*]

1. An Advowſon of a Priory may be appendant to a Caſtle. * 18 Ed. 3. 15. b.

Advowſon *is appendant* to the principal Part of the Manor, viz. *to the Demeſnes*, and cannot be appendant to the Services; per Dyer. 2 Le. 222. pl. 281. Paſch. 16 Eliz. C. B. in Caſe of Bawell v Lucas.——S. P. accordingly, and the Reaſon is, that a Man cannot preſcribe in Profit appendant to a Thing that is not the principal Thing, and which is of perpetual Continuance. Savil. 105. pl. 182. Trin. 30 Eliz in Caſe of Long v. Heming.——4 Le 216 in pl. 349. S. P. Arg —— D. 70. pl. 41. S. P. admitted accordingly ——Yet if one grant all the Demeſnes of the Manor *Cum pertinentiis*, it ſeems the Advowſon ſhall not *paſs* with the Demeſnes but remains in Groſs, becauſe the Manor is extinct by this Separation, and the Advowſon ſhall not paſs unleſs expreſsly named, and then there ought to be a Deed to carry it. But Quære. Savil 104. in Caſe of Long v. Biſhop of Glouceſter and Hemings.—— An Advowſon is properly appendant to the Demeſnes, and not to the Services; per Cur. Cro. E. 210 pl. 6 Mich 32 & 33 Eliz. B. R. in Caſe of Long v. Hemings.

In Law the Advowſon is appendant to all the Manor, but moſt properly to the Demeſnes, out of which at the Commencement it was derived; per tot. Cur. Le. 208. pl. 139. Mich. 32 & 33 Eliz. C. B. in S. C.

2. An Advowſon which is ſaid to be appendant to a Manor, is, in Rei veritate, appendant to the Demeſnes of the Manor, which is of perpetual Subſiſtance and Continuance, and not to the Rents or Services, which are ſubject to Extinguiſhment or Deſtruction. Co. Litt. 122.

3. If an Advowſon be appendant to the Manor of D of which Manor the Manor of S. is held, and after the Manor of S. is made Parcel of the Manor of D. by way of Eſcheat, the Advowſon is only appendant to the Manor of D. Co. Litt. 122.

4. Aſſiſe *of Bread and Beer*, *Pillory*, *and Tumbrell*, are appendant to *the View of Frank-Pledge*, where a Man has it by Grant of the King, and if he *does not uſe Pillory and Tumbrell*, he ſhall loſe his Franchiſe. Br. Quo Warranto, pl. 8. cites It. Canc. 6 E. 2.

5. A

5. A *Foreſt* may be appendant *to an Honour*, As to the Honour of Pickering, of which the King was ſeiſed. Jenk. 29. pl. 55. cites 26 Aſſ. 9.

6. *Bona & Catalla Felonum* cannot by any Uſage or Length of Time be appendant or appurtenant to a Manor; Per tot. Cur. 9 Rep. 27. b. Mich. 33 & 34 Eliz. in Caſe of the Abbot of Strata Marcella. Mo. 297. pl. 443. S. P. in the Caſe of the Queen v. Vaughan, and ſeems to be S. C.——Cro. E. 293. pl. 7. Hill. 35 Eliz. B. R. S. P. admitted.

7. Common Appendant *belongs to Arable* Land, not to Paſture Land. Brownl. 35.

(B) What Things ſhall be ſaid appendant, and to what Things, and what not.

The greater Part of the Caſes under this Letter are to the ſame Point as thoſe under the Letter (A) *and therefore might better have been placed under that Head.*

1. 33 H. 6. 4. b. By 2 Serjeants, when Advowſon or other Things which may be appurtenant Time out of Mind &c. paſſed with the Manor, by theſe Words Cum pertinentiis, this makes the Appendancy. Br. Incidents &c. pl. 2. cites S. C. and that Littleton and Wangford laid it down for Law, that Hundred or Leet may be appendant to a Manor well enough, and that if it has been uſed to paſs by Feoffment of the Manor Cum pertinentiis &c. Time out of Mind, it is appendant; quod nota, quia nemo negavit.

2. One Thing incorporeal cannot be appendant to another Thing incorporeal. Com. 170. Bracton lib. 2. fol. 53. * Co. 4 Cr. 36. b. ‡ Lit. 121. b. * 4 Rep. 36. b. 37. a. Mich 26 & 27 Eliz. B. R. Tyrringham's Caſe.

3. [Nor] One corporeal Thing cannot be appendant to another corporeal Thing. Com. 170. Co. 4. Cr. 36. b. Co. Litt. 121. b.

4. But a Thing incorporeal may be appendant to a Thing corporeal. Com. 170. Bracton lib. 2. fol. 53. Co. Litt. 121. b. ‡ Co. Litt. 121. b. S. P. for the Thing appendant or appurtenant *muſt agree in Nature and Quality* with the Thing to which it is appendant or appurtenant.——Pl. C. 168. a. b. Hill v. Grange.

5. A Leet may be appendant to a Manor. * 33 H. 6. 46. per Lit. 13 H. 4. 9. b. * Br. Incidents, pl. 2. cites S. C.

A Man may preſcribe in a Leet appendant to his *Manor* or appendant to his *Houſe*, but *not to a Church or a Chappel*. Br. Incidents, pl. 29. cites Fitzh. tit. Leet.——Co. Litt. 121. b. S. P. for the one is Temporal and the other Eccleſiaſtical.

A *Leet* may be appendant *to a Hundred*. Br. Incidents, pl. 18. cites 12 H. 7. 16.——Mo. 426. pl. 595. Hill. 30 Eliz. B. R. the S. P. admitted, Norris v. Barret.——S. P. by Jones J. and admitted per Cur. Mar. 75. pl. 115. Mich. 15 Car.

6. A Hundred may be appendant to a Manor or appurtenant. * 33 H. 6. 4. b. per Lit. Contra † 13 H. 4. 9. b. * Br. Incidents &c. pl. 2. cites S. C. † Br. Jointenants, pl. 2. cites S. C. & S. P. admitted.——Fitzh. Releaſe, pl. 9. cites S. C.

It was admitted, that a *Hundred* may be Parcel *of a Manor*, and it ſeems that it may be appendant &c. Court Baron, pl. 15. cites 27 H. 6. 2.

7. A Rent-charge may be appendant to a Manor. 1 H. 4. 3.

8. Land

Land cannot be appurtenant to an Office *without a Prescription*, and it

8. Land may be appurtenant to an Office, as to the Office of Forterſhip and Warden of the Fleet &c. becauſe thoſe which have had the Office have had the Land. 1 H. 7. 16. Com. 169. D. 6 E. 6. 71. 43.

ſhall not be underſtood that Land belongs to an Office, unleſs it be *ſpecially ſhewn* by pleading the Preſcription. Jenk 170. pl. 33.

Land is appertaining to the Office of the Fleet and the Rolls, but that is to the Office which is in another Nature than the Land is. Godb. 352, pl. 447. per Doderidge J.

Land, or any other Annual Profit Real, may be incident and appendant *to an Office*, and by Grant of the Office the Land ſhall paſs, As to the Office of Warden of the Fleet &c. But then the Offices are Offices of Inheritance. D. 71. a. pl. 43. Trin. 6 E. 6. in the Caſe of Withers v. Iſham.——As to Offices in Fee whereto Lands may appertain, they are of perpetual Subſiſtence either being in Eſſe, or in that they are grantable over. Co. Litt. 122. a.

The Office of Exigenter is in the Gift of the Chief Juſtice de Banco.

9. One Office may be appurtenant to another, as the Cuſtos brevium gives one of the Prothonotaries de Banco, Com. 169. and ſo of the Chief Juſtice de Banco.

See D. 175. a. pl. 25. Mich. 1 & 2 Eliz. Scroggs v. Coleſhill.

Meadow cannot be appurtenant *to Land nor to a Houſe.*

10. But Land cannot be appendant to Land, becauſe both are Things corporeal. Com. 169, 170. per Curiam.

Br. Incidents, pl. 16. cites 3 E. 2. in Fitzh. Tit. Brev. 783.

Meadow cannot be appurtenant *to Land.* Thel. Dig. 70. lib. 8. cap. 21. S. 3 cites Mich. 3 E. 2. Brief 783. but that contra it is ſaid 3 E. 3 Ir. North. Barre 298. by Scroope.——Pl. C. 170. b S. P. accordingly. Mich. 4 Mar. 1 in Caſe of Hill v Grange.

But Meadow may be appurtenant *to an Oxgange* of Land. Thel. Dig. 70. lib. 8. cap. 21. S. 3. cites 2 E. 3. 57.

An Advowſon in Middleſex may be appendant *to a Manor in Cornwall.*

11. An Advowſon in one County may be appendant to a Manor in another County. 33 H. 6. 4. b. per Lit.

Br. pl. 31. cites Fitzh. Tit. Quare Imp. 100 M. 34 E 3.

Fol. 231.

12. A Vicarage may be appendant to a Parſonage. Dubitatur. 17 Ed. 3. 76.

D. 350 b. pl. 11. Paſch. 18 Eliz. S. P. admitted.

13. If a Parſon appropriate creates a Vicarage &c. lawfully, the Vicarage of common Right ſhall be appendant to the Parſonage. Contra 17 Ed. 3. 51.

——Bendl. 252. pl. 270. S. C. and the Pleadings, Blagrave v. Pierce.——S. C cited, and S. P. admitted, 10 Rep. 65. b. —— Ld. Raym. Rep. 200. Paſch. 9 W. 3. in Caſe of Reynoldſon v. Blake Treby Ch. J. cited the Caſe of 17 E. 3. 51. and ſaid, that heretofore it was doubted, whether the Advowſon was appendant to the Rectory, and that it was long before a Vicar obtained the Repute of a Corporation, but it is now ſettled that it may be appendant to the Rectory.

Tho' the *Advowſon of the Vicarage* uſually appertains *to the Parſonage*, yet it is not of Neceſſity,

14. [So] a Vicarage may be appendant to a Manor, tho' of common Right it belongs to the Parſonage, for it might be granted over by the Parſon Time out of Mind, and ſo become appendant to the Manor, or it might be by Compoſition. By Reports, Mich. 13. the *King and Sacker.* Mich. 14 Jac. B. adjudged. The Dean and Chapter of Exeter and Cornish's Caſe.

but it may be appertaining *to a Manor.* Cro. J. 386. pl. 16 the King v. Biſhop of N. and Saker.—— Roll Rep. 237. in pl. 7. S. C. Coke Ch. J. ſaid, that a Vicarage maybe appendant to a Manor, and that he had ſeen one ſo, tho' 5 R. 2 Quare Impedit [Fitzh. pl 165] is adjudged contra. —— S. P. accordingly; As if the Rectory was before the Appropriation appendant to the Manor, the Advowſon of the Vicarage upon the Appropriation may well be reſerved to the Patron, and it ſhall be appendant in the ſame Manner as the Rectory was; and tho' the Deed of the Appropriation be not extant, yet the Uſage in the PreſentationTime out of Mind is ſufficient Evidence of the Appendancy. Mo. 894. pl. 1258. Mich. 16 Jac. C. B. Sherley v. Underhill.

15. One

15. One Advowſon cannot be appendant to another Advowſon. Contra 24 Ed. 3. Quare Impedit 13 per Curiam.

16. Land may be appurtenant or Parcel of a Hundred, for a Man may convey his Manor except a ſmall Parcel of Land, which in Continuance may be reputed Parcel of the Hundred. Mich. 17 Jac. B. ſaid by Hobart to be reſolved in Camera Scaccarii.

17 An Advowſon may be appendant to a Tenement. 32 Edw. 1. 89. admitted.

18. An Advowſon may be appendant to one Acre. 18 Ed. 3. 52. 39 Ed. 3. 36. b. 19 Ed. 3. Quare Impedit 155 D. 28 H. 8. 24. 153. to 6 Acres.

19 If an Advowſon be appendant to a Manor, and one Acre is granted with the Advowſon, it is clear that after the Grantee has preſented, the Advowſon is appendant to this Acre. 44 Ed. 3. 16. admit. * 17 Ed. 3. 3. b. 5. adjudged. 18 b. 21. b. * Fitzh. Darrein Preſentment, pl. 9 cites S. C. —— S. P. by Windham J. Arg. cites 43 E. 3. 12. but takes no Notice of the Grantee's having preſented. Cro. E. 39. Paſch. 27 Eliz. C. B in pl. 1.

20. So it ſeems it is appendant before any Preſentation. Dubitatur 43 Ed 3. 25. b. * 17 E. 3. 3. 5. 18 b. 24. b. they did not rely upon the Preſentation. *Fitzh. Darrein Preſentment, pl. 9. cites S. C.

21. But this Feoffment of the Acre with the Advowſon ought to be by Deed to make the Advowſon appendant. 17 Ed. 3. 4. b. 18 b. Fitzh. Darrein Preſentment, pl. 9. cites S. C.

22. If a Baron is ſeiſed in the Right of his Feme of a Manor, to which the Advowſon is appendant, and grants one Acre with the Advowſon, the Advowſon ſhall be appendant to this Acre. * 17 E. 3. 5. 18. b. Adjudged 21. b. tho' the Husband had not the abſolute Right, but † 23 Aſſ. 8. this is reverſed in a Writ of Error. * Fitzh. Darrein Preſentment, pl. 9. cites S. C. † Br. Error, pl. 131. cites S. C. ——See Tit. Preſentation (3. d. 22.) pl. 1. S. C.

23. So if the Husband hath alien'd all the Manor by Acres to ſeveral Perſons having one Acre, the Advowſon ſhall be appendant to this. 17 Ed. 3. 22. b.

24. If Leſſee for Life of a Manor, to which an Advowſon is appendant, aliens one Acre with the Advowſon appendant, the Advowſon is appendant to the Acre for this. 18 Ed. 3. 44. Curia.

25. If Coparceners of a Manor to which an Advowſon is appendant, make Partition of the Manor and not of the Advowſon, the Advowſon continues appendant to the Manor. 17 Ed. 3. 39. Curia. S. P. accordingly, Arg. Het. 14. in Caſe of Hurrup and Tuck v. Dalby.——S. P by Powell J. the Advowſon at each Turn continues appendant; but if they make * expreſs Mention of the Advowſon upon the Partition it becomes in Groſs; But if the one dies without Iſſue, ſo that the Demeſnes deſcend to her that has the Services, or Vice Verſa, the Manor is revived, and the Advowſon becomes appendant again becauſe it was by Act in Law, ſo that the Diverſity is where the Severance is by *Act in Law*, and where by *Act of the Party*. Ld. Raym. Rep. 198. Paſch. 9 W. 3. C. B in Caſe of Reynoldſon v. Blake.

* If an *expreſs Exception* be made of the Advowſon, then the Advowſon remains in Coparcenary and in Groſs, and ſo the Books are reconciled. Co. Litt 122. a.

So it is if they make *Compoſition to preſent againſt Common Right*, yet it remains appendant. Co. Litt. 122. a.

26. If the Baron, ſeiſed in Right of the Feme of a Manor to which an Advowſon is appendant, aliens one Acre with the Advowſon appendant, and after aliens the Reſidue of the Manor to another, and dies, if the Wife recovers in a Cui in Vita the Acre with the Appurtenances, ſhe ſhall recover the Advowſon as appendant. 17 Ed. 3. 22. b. 19. b.

Fitzh. Dr-ten Preſent-ment, pl. 9. cites S. C.

27. If a Feme be endow'd of the 3d Part of a Manor with the Appurtenances, the 3d Part of the Advowſon ſhall be appendant to it alſo. 6 Ed. 3. 44. Quare Impedit 40.

Fol. 232.

Br. Error, pl. 121. cites S. C ——

28. If the Feme be endow'd of the 3d Part of a Manor, with the Advowſon appendant, and after another Baron and Feme purchaſe all the Manor and preſent twice, and after aliens one Acre with the Advowſon appendant, the 3d Part of the Advowſon does not paſs as appendant to the Acre, becauſe the Baron had but a Reverſion in this 3d Part at the Time of the Grant. 23 Aſſ. 8. Adjudged.

Br. Preſentation, pl. 38. cites S. C.——See Tit. Preſentation, (B. d. 22) pl. 1. S. C.

This does not properly belong to this Diviſion.

29. If a Man ſeiſed of a Manor to which an Advowſon is appendant, grants the 3d Part of the Manor with the Appurtenances, without making mention of the Advowſon, nothing of the Advowſon paſſes. 6 Ed. 3. 44. Per Parn. and Stoner. Title Quare Impedit, 40.

Br. Action ſur le Statute, pl. 48. cites Itin. Not. tempore E. 2.

30. A Man may preſcribe that He and all thoſe whoſe Eſtate &c. in the *Manor* of D. have had there a *Park* Time out of Mind, and is appendant &c. and is good &c. Br. Incidents, pl. 39. cites Itin. Not. 3 E. 3.

31. *Treaſure trove* cannot be appendant *to a Leet*, nor can it paſs by the Word (Leet.) Br. Incidents, pl. 38. cites Itin. Cant. 6 E. 3.

Hob. 161. S. C. cited by Hobart Ch. J. as the Abbeſs of Sion's Caſe.

33. An *Advowſon in Poſſeſſion* cannot be appendant *to the Reverſion of a Manor expectant on an Eſtate for Life*; but *otherwiſe* it is of an Eſtate *for Years*. 5 Rep. 11. b. Mich. 39 & 40 Eliz. C. B. in Ive's Caſe, per Cur. cites 38 H. 6. 33. b.

Common of *Piſchary* may be appendant to *a Houſe and* 8 Acres of *Land*, viz. to fiſh from ſuch a Place to ſuch a Place. Br. Treſpaſs, pl. 306. cites 4 E. 4. 29.——Br. Preſcription, pl. 66. cites S. C.

32. A *Piſchary* may be appendant *to a Houſe and Land.* Br. Incidents, pl. 19. cites 4 E. 4. 29.

34. Note that where *four Manors* with Advowſon appendant to one of them *deſcend to four Daughters, who make Partition of all except the Advowſon*, and every one has a Manor, and the Advowſon remains to them in common, this is a Severance of the Advowſon in the Law, and it is not now appendant for any Part; but if three of the Daughters die without Iſſue, and the fourth is their Heir, now the Advowſon is appendant as before. Br. Incidents, pl. 14. cites 2 H. 7. 4.

35. A Man may make *Deed of Gift of Advowſon, or Villein regardant, to be appendant or regardant to what Parcel of the Land he will*; As where two Manors are given in Tail by one Deed, the Donee may diſcover [diſcontinue] the one Manor, and give the Deed with it; per Keble; but Fairfax and Huſſey contra. But a Man may give Part of the Manor to which &c. with the Advowſon or Villein to J. S. and thoſe make it appendant to thoſe Parcels. Br. Incidents, pl. 15. cites 4 H. 7. 10.

Br. Incidents &c. pl. 16. cites Fitzh Brief, 783. 3 E 2.

36. *Waif and Eſtray* is not Parcel of a Leet, nor incident to it, but it *may be appendant to a Leet*, Note a Diverſity. Br. Eſtray. pl. 15. cites 8 H. 7. 1.

S. P. accordingly ——Mo. 29-. pl. 443 Paſch. 32 Eliz. B. R. the S. P. admitted in Caſe of the Queen v. Vaughan.———9 Rep. 27. Mich. 33 & 34 Eliz. S. P. accordingly, in the Caſe of the Abbot of Strata Marcella.

Pl. C. 170. b. S. C. and all the Juſtices (ex-

37. A *Leaſe* was made *of a Meſſuage in D. with all Lands to the ſaid Meſſuage belonging* Habend' &c. It ſeem'd to Stamford J. that Lands might be pertaining to a Meſſuage but not parcel; but Saunders, Brown, and

and Ld. Brooke, e contra, in as much as they are of one and the ſame Nature; but yet by the Words above, the Lands paſs by the Intention of the Parties and the open Conuſance of the Uſe and Occupation of the Land and Houſe together. D. 130. b. pl. 69. 70. Paſch. 2 & 3 P. & M. Hill v. Grange.

cept Browne) agreed that the Term (pertaining to the Meſſuage) ſhall be taken in the Effect and Senſe of Uſually occupied with the Meſſuage, or Lying to the Meſſuage.——S C. cited And 77.

38. *Things compounded* may have divers things appurtenant to them, or to be parcel of them, As *Manor* may contain *Land, Meadows, Paſture, Wood, and Rent* &c. and all the Things are contained in the groſs Name. Arg. Pl. C. 168. b. Hill 3 P. & M. Hill v. Grange.

39. *Eſtovers* may well enough pertain to a Houſe. Pl. C. 170. b. Mich. 4 Mar. 1. in Caſe of Hill v. Grange.

Common of Turbary or Eſtovers cannot be appendant or appurtenant *to Land*, but to an Houſe to be ſpent there; for there muſt be an Agreement in Nature and Quality. Co. Litt. 121. b.

40. A *Seat in a Church* cannot be claimed by Preſcription as appendant *to Land* but to an Houſe; for the Seat belongs to the Houſe in Reſpect of the Inhabitancy; and therefore if the Houſe be Part of the Manor, he may claim the Seat as appendant to the Houſe. Co. Litt. 121. b. 122. a.

41. Nothing can be *properly* appendant or appurtenant to any Thing, unleſs the principal and *ſuperior Thing* be of *perpetual Subſiſtance* and Continuance, as Advowſon that is ſaid appendant to a Manor is in Rei Veritate appendant to the Demeſnes of the Manor, which are of perpetual Subſiſtence and Continuance, and not to Rents or Services, which are ſubject to Extinguiſhment and Deſtruction. Co. Litt. 122. b.

42. Land ſhall paſs as pertaining to a Houſe if it has been *occupied with it by* the Space of * 10 *or* 12 *Years*, for by that Time it has gain'd the Name of Parcel, or Belonging, and ſhall paſs with the Houſe by that Name in a *Will or Leaſe* &c. Per Anderſon Ch. J. Cro E. 16. pl. 7. Paſch. 25 Eliz. in Caſe of Higham v. Baker.

Le. 34. pl. 42 Higham v Harewood S. C. the Words of the Will being, viz. I will that my Houſe with all the Appurtenances be ſold by my Executors. It was reſolved by Wray, Clench, and Gawdy, that by a Sale by the Executors the Lands do paſs; for by Wray theſe Words (with all the Appurtenances) are emphatical Words to inforce the Deviſe, and that does extend to all the Lands, eſpecially it being found that the Teſtator gave the Scrivener his Inſtructions accordingly.

* In 2 *Years* Land may in Reputation be appurtenant to a Houſe, if by Uſage thereof with the Houſe the *Profits thereof are ſpent in Hoſpitality*; and a ſmall Time will ſuffice if there are *Circumſtances* which inforce the Reputation; Per Lea Ch. J and not denied; and this notwithſtanding 6 Rep. 64. was cited that 5 or 6 Years are not ſufficient. But the Court inclined *that no certain Time can be defined*; for the Circumſtances make the vulgar Reputation of Appurtenancy. But Lea Ch. J. held that if one be ſeiſed of a Houſe to which Lands are appurtenant, and the Houſe and Lands are ſevered by Alienation, this *Appurtenancy* which was *gain'd by Uſe is loſt by Severance*. Palm 376. Trin 21 Jac. B. R. in Caſe of Loftes v. Barker.——2 Roll Rep. 347. S. C. & S. P. by Ley Ch. J.

43. In Ejectment a *Deviſe* was *of a Houſe with the Appurtenances*; the Deviſee claimed Land in the Field. Popham doubted whether it ſhould paſs, but Fenner held that it might well paſs, and that upon a Demurrer in 28 Eliz. it was held accordingly. But afterwards the Defendant to make it clear that the Land did not paſs, ſhewed that *the Houſe was Copyhold and the Land Freehold*; whereupon the whole Court conceived that it could not be ſaid Appurtenant, tho' it had been enjoy'd with it; and the Plaintiff had been nonſuited. Cro. E. 704. pl. 24. Mich. 41 & 42 Eliz. Yate v. Clincard.

44. *Tithes* cannot be appendant to a *Manor*. Arg. Sty. 279. cites 42 Eliz. Sherwood v. Winſton.

Cro E 203. pl. 7. Sherwood v Winchcomb, Hill. 35 Eliz. B. R. held per tot. Cur. that one cannot preſcribe for Tithes as Parcel of a Manor.

Tythes cannot be appurtenant to, but are Parcel of, the *Rectory*. Arg. and ſeems to be admitted. Mo. 223. pl. 362. Hill. 28 Eliz. B. R. in Carew's Caſe.——By Manwood Ch. B. Tythes are Parcel of the Rectory. Le. 282. pl. 380. S. C.——See Grants (A. a. 2) pl 10. Bone v. the Biſhop of Norwich.

A Way may well enough pertain to a Meſſuage.

45. A *Way* cannot be appendant or appurtenant *to a Houſe*; for it is an Eaſement only and not an Intereſt. Yelv. 159. Trin. 7 Jac. B. R. Godley v. Frith.

Pl. C. 170. b. Mich. 4 Mar. 1. in Caſe of Hill v. Grange.

2 Roll Rep. 347 Lofts v. Baker, S. C and Haughton J. held that Lands will paſs by the Name of the Houſe, if they have been uſually enjoy'd and occupied with a Houſe, ſo that they have thereby gain'd the Reputation of being appurtenant. [But it ſeems that this is meant of a Deviſe in ſuch manner, according to the principal Caſe.]

46. In Strictneſs of Law *Land* cannot be ſaid to be appurtenant *to Houſe or Land*, but in vulgar Reputation it may be ſaid Belonging, and in ſuch Caſe, in Caſe of Grant the Land will not paſs as appertaining to Land; Per Ley Ch. J. and cites 4 Rep. Terringham's Caſe. But in Caſe of a Will (it ſeems) it may. Godb. 353. pl. 447. Trin. 21 Jac. Knight's Caſe.

Land cannot be appertaining to a Houſe Pl. C. 85. b. in Caſe of Straunge v. Croker, and 168. in Caſe of Hill v. Grange, and ibid. 170. b. 2 Show. 438. pl. 402 S. P. Arg. and cites the Caſe of Hill v. Grange.

Land may be ſaid to be appertaining to an *Houſe* as well in the King's Caſe as in the Caſe of a common Perſon, when they have been let and *poſſeſſed together* by a convenient Time. Cro. C. 168. pl. 15. Mich. 5. Car. B. R. in Caſe of Jennings v. Lake.

But per Windham J. *if* all the Matter had been *found*, and *that the Kiln was neceſſary for the Uſe of the Mills, without which they* [the Mills] *were not uſeful*, the Kiln had paſſed as part of the Mills tho' not as Appurtenances: As by Grant of a Meſſuage the Conduits and Water-pipes paſs as Parcel tho' they are remote, to which no Anſwer was given. Lev 131. in Caſe of Archer v. Bennet.——Sid. 211. pl. 9. S. C. adjudged that the Kiln did not paſs; for if it ſhould paſs, it would paſs by the Grant of the Mill with the Appurtenances, and it does not appear that it is appurtenant to the Mill, but e contra, for it might be a Lime Kiln which has no Relation to the Mill, but if it had been found to be a Malt Kiln, then it ſeemed to ſome of the Juſtices that it would paſs; becauſe a Malt Kiln may be appurtenant to the Mill for preparing Malt for the Mill.

47. A. had an *Houſe* and *Kiln* to dry Oats *built upon ſeveral Parts of a Cloſe*, and alſo 2 *Mills to make Oat-meal*, adjoining to the ſaid Cloſe, which were *uſed with the Houſe for ſeveral Years, but were lately divided*, then he *ſold the Houſe with the Appurtenances and Part of the Cloſe to one, and* ſold *the Mills with the Appurtenances to another*; and adjudged that the Kiln did not paſs; for by the Grant of the Houſe with the Appurtenances, nothing paſs'd but what properly belonged to the Houſe, as by *Cum terris pertinentibus* it might. Lev. 131. Paich. 16 Car. 2. B. R. Archer v. Bennet.