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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.*

A

TABLE

OF THE

Several TITLES, with their Diviſions and Subdiviſions.

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A TABLE of the ſeveral TITLES, &c.

(D) Pleadings.

1. IN Treſpaſs the *Defendant juſtified as Bailiff of J. S. to diſtrain for Rent arrear*, and the *Plaintiff ſaid, that Riens arrear*, and a good Iſſue againſt the Bailiff; *contra againſt the Lord himſelf*; Note the Diverſity. Br. Treſpaſs, pl. 206. cites 14 H. 6. 5.

Br. Traverſe per &c. pl. 147. cites S. C. and there the Plaintiff replied, that he is not Bailiff; Priſt; and there ſee this held to be a good Plea. ——— But contra if he ſays *that he as Bailiff, and by his Command took the Diſtreſs*; for Command ſuffices tho' he be not Bailiff Br. Traverſe per &c. pl. 147. cites 14 H. 6. 5.

2. Bailiff ſhall have every *Challenge to the Array and Polls* as his Maſter ſhall have. Br. Baillie, pl. 29. cites 9 H. 7. 24. per tot. Cur.

3. And may *ſay, that the Tenements are in another Vill*, but Bailiff *ſhall not diſclaim in the Land*, contra of Attorney, and Bailiff may plead *miſnoſmer of his Maſter*, and the *other Pleas triable by the Aſſiſe*. Ibid.

4. If there are *two Coparceners of a Rent*, and the *one diſtrains and avows for himſelf, and juſtifies as Bailiff of his Companion*, it is not traverſable that he is not Bailiff. Br. Traverſe per &c. pl. 118. cites 15 H. 7. 17.

5. In *Aſſiſe*, if J. S. appears as Bailiff of the Tenant, it is not traverſable if he be *Bailiff or not*. Br. Traverſe per &c. pl. 345. cites 15 H. 7. 17.

6. *Replevin*, the Defendant made *Cognizance as Bailiff* to the E. of Bedford, *whereas in Truth he was not his Bailiff, but took the Diſtreſs againſt his will*. It was held, that the Plaintiff cannot traverſe, that he was not his Bailiff, for it is not iſſuable; nor can the Earl diſavow it, for he is not Party; nor can the Earl have an Action upon the Caſe, becauſe he is not damnified; but the Party whoſe Cattle are taken, may bring an Action of Treſpaſs for taking his Cattle; and if the Defendant juſtifies as Bailiff, he may ſay *De ſon tort Demeſne abſque tali Cauſa*, and ſo puniſh him. Cro. E. 14. pl. 3. Paſch. 25 Eliz. C. B. the Earl of Bedford's Caſe.

S. C. cited by Trevor Ch. J. but denied by him in delivering the Opinion of the Court. 11 Mod. 112. pl. 8. Paſch. 6. Ann. C B. in Caſe of Trevillian v. Pine.

7. In *Treſpaſs* the *Defendant juſtified as Bailiff* to J. S. The *Plaintiff* replied, that he took his Cattle of his own Wrong, and *traverſed his being Bailiff*. Anderſon Ch. J. ſaid, that if one has Cauſe to diſtrain my Goods, and a *Stranger of his own Wrong takes my Goods not as Bailiff or Servant* to the other, and I bring Treſpaſs againſt him, he cannot excuſe himſelf by fathering his Miſdemeanors upon me; for once he was a Treſpaſſor, and his Intent was manifeſt. *But if one diſtreins us Bailiff, tho' in truth he is not Bailiff*, if he, in whoſe Right he does it, does afterwards aſſent to it, he ſhall not be puniſhed as a Treſpaſſor; for the Aſſent ſhall have Relation to the Time of the Diſtreſs taken, and ſo is the Book of 7 H. 4. and to all this Periam agreed. And Anderſon held clearly, that the taking in this Caſe is not good, to which Rhodes agreed. Godb. 109, 110. pl. 129. Mich. 28 & 29 Eliz. C. B. Anon.

Not his Bailiff is not a good Traverſe *in Treſpaſs*; Arg. Roll Rep. 46. pl. 13. in Lee's Caſe, cites 33 H. 6. 3. And the Reporter ſays, that the Reaſon given in that Caſe is, becauſe if the Frankteneſment be in a Stranger, the Plaintiff has no Colour to have Treſpaſs, be the Defendant Bailiff or not; but there it is held, that in *Avowry for Rent* as Bailiff to a Stranger ſuch Traverſe is good, becauſe there was no Treſpaſs done if he was not his Bailiff. And ſo the Reporter ſays it is in the principal Caſe of Lee v. . . . . The taking the Beaſts of the Plaintiff in the Frankteneſment of a Stranger is a Tort to the Plaintiff, unleſs he had good Authority from the Stranger to take them; for it may be, the Stranger may bring Treſpaſs for the Damage done by the Beaſts, and then which way can the Plaintiff aid himſelf againſt the Defendant, unleſs by this Traverſe; idee quære.

S. C. cited Arg. Ld. Raym. Rep. 310. in Case of Britton v. Cole.—S.P. 1 Salk 107. pl. 1. Trevilian v. Pyne, and the Traverse held to be well taken; And a *Difference* observed *between* an Action of *Trespass quare Clausum fregit*, and an Action of *Trespass for taking Cattle or Replevin*; In the first Case, if the Defendant justifies an Entry to the Close by Command, or as Bailiff to one in whom he alleges the Freehold to be, the Plaintiff shall not in his Replication traverse the Command; because it would admit the Truth of the rest of the Plea, viz. that the Freehold was in J. S. and not in the Plaintiff, which would be sufficient to bar his Action, whether the Defendant was impowered by J. S. to enter, or not impowered; for it is not material that the Defendant has done a Wrong to a Stranger, if it be none to the Plaintiff; but in the other two Cases, if the Defendant justifies taking my Cattle as Bailiff to J. S. in whom he lays a Title to take them, as for Distress, or other Cause, there it may be material to traverse the Command or Authority; for tho' J. S. had Right to take the Cattle, yet a Stranger who had no Authority from him will be liable; so that both Parts of the Defendant's Plea in this Case must be true, and therefore an Answer to any Part is sufficient; so in Trespass for taking Goods. ——11 Mod. 112. pl. 8. Pasch. 6 Ann. C. B. the S. C. adjudged accordingly, that in Replevin or Avowry the being Bailiff is traversable; for otherwise a Man might be twice charged; for suppose the Lord brought Trespass, and the Tenant pleaded the Recovery in the Replevin, this shall not conclude the Lord; for it would be very mischievous that the Lord should be concluded, and not be able to say that he was not his Bailiff, and had no Authority express or implied An Agreement or Consent subsequent will amount to an Authority &c. and the whole Court agreed that it is traversable.

8. In Replevin the Defendant made *Conusance as Bailiff to J. S. for Damage feasant*; the Plaintiff *replied*, that one A. did pretend Right to the Land where &c. and that the Defendant took them in Right of the said A. absque hoc that he took them as Bailiff to J. S. and upon Demurrer all the Justices held clearly, that the Traverse is good. And as to a Matter which was objected, that if this Traverse should be allowed, the Meaning of the Defendant will be drawn in question, they said, that the same is not any Mischief; for so it is in other Cases, as in the Case of Reception. 2 Le. 215, 216. pl. 274. Pasch. 29 Eliz. C. B. Fuller v. Trimwell.

The Bailiff without special Warrant from the Steward, cannot distrain for an Amerciament in a Leet. Mo. 607. pl. 839.

9. In an *Avowry* for an *Amerciament* in a Court Leet upon a Vill, for not making a Tumbrel and Stocks, he must *allege, that the Pain is unpaid to the Lord*, because if any other of the Vill has paid the Pain, the Plaintiff is not distrainable; also he must plead *the Precept of the Steward* for taking the Distress, or levying the Pain, *and the Extract of the Court*, which the Bailiff ought to have for his Warrant. Mo. 574. pl. 789. Trin. 40 Eliz. Scroggs v. Stevenson.

Trin. 40 & 41 Eliz. in Case of Stevenson v. Scroggs.——Cro. E. 698. pl. 11. Mich. 41 & 42 Eliz. B. R. Steventon v. Scroggs, S. C. and Popham said, that the Defendant as Bailiff of the Manor cannot distrain for an Amerciament by reason of his Office, without an especial Warrant from the Steward or Lord, no more than a Sheriff may levy Amerciaments of this Court without Warrant; but Gawdy e contra; that he may distrain for lawful Amerciaments, by reason of the Office; but he cannot enter for a Condition broken.

S. C. cited Arg. Ld. Raym. Rep 310. in Case of Britton v. Cole.

10. In Replevin the Defendant *justified*, for *that the Place where is the Freehold of the Dean of P. and* that *he as his Bailiff took the Cattle Damage feasant*; the Plaintiff *replied*, *De Injuria sua propria, absque hoc that he is his Bailiff*. It was objected, that the Plaintiff could not traverse that the Defendant was Bailiff, because he *had confessed the Franktenement in the Dean*, in whose Right he justified. And Judgment was given per Cur. viz. Croke, Doderidge, and Haughton, that the Plea [Replication] is not good, and so against the Plaintiff. Roll Rep. 46. Trin. 12 Jac. B. R. Lee v. .....

In Replevin, the Defendant *made Connsance as Bailiff to B. for Rent* &c. The Plaintiff *replies, and traverses, that the Defendant was Bailiff to B.*

11. In *Replevin*, the Defendant made *Conusance as Bailiff of J. S.* for a Rent-charge; Plaintiff *pleaded in Bar, that he took the Distress without the Privity or Command of J. S. and that such a Day* after *J. S. had first Notice* of it, *and then disavowed the taking* aforesaid. Defendant demurred generally; and per Cur. the Bar is ill; for he *ought to have traversed the being Bailiff*, and was ruled to replead so, and to amend his Bar, paying Costs, and to go to Trial whether Bailiff or not. 3 Lev. 20. Pasch. 33 Car. 2. C. B. Dobson v. Douglas.

and Issue thereupon, and after Verdict a Motion was made for a Repleader, but denied per

per Cur. for tho' this is not traverſable, and it had been ill upon Demurrer, yet after Verdict it is good, and is not ſuch an immaterial Iſſue as to cauſe the granting of a Repleader. Ld. Raym. Rep. 405. Mich. 10 W. 3. Redding v. Lion.

A. *avowed* as a Bailiff for Rent, his *being Bailiff* is not traverſable; per Holt Ch. J. 12 Mod. 321. Mich. 11 W. 3. B. R. .... v. Goudier.

For more of Bailiff in General, See **Account, Maſter and Servant, Replevin,** and other proper Titles.

Bailment.

(A) Bailment. [*In what Caſes the Bailee is anſwerable.*]

Fol. 338.

1. **If a Man** pawns **Goods to me for Money, and I put them among my other Goods, and all** are ſtole before any tender of the Money, **I ſhall not anſwer to him for the Goods, for I had a Property in the Goods for the Time. 29 Aſſ. 28. Adjudged.** Br. Bailment, pl. 7. cites S. C. but S. P. does not appear.—Co. Litt. 89. a. S. P accordingly.——4 Rep. 83 b. S. P. reſolved in Southcote's Caſe. ——Br. Detinue de Biens, pl. 35. cites S. C. —— If I *bail Goods to you*, and you are *robbed* of them, this ſhall excuſe you, per Jenny; and per Danby Ch. J. if he receives them *to keep as his own Goods*, then this is a good Excuſe, and otherwiſe not. Br. Detinue de Biens, pl. 27. cites 9 E. 4. 40. — —If a Man *bails his Goods to J. S.* and *a Stranger takes them, Treſpaſs lies*, per Keble, and ſo he has Remedy, and therefore ſhall be charged to the Bailor. Br. Detinue de Biens, pl. 37. cites 6 H. 7. 12.——2 Ld. Raym. Rep. 912. S. C. cited by Powel J. but calls it an obiter Opinion ——*Contra where a Felon robs him of them*; for *there he has no Remedy*; Note the Diverſity; *but Fineux held that he ſhall have Remedy* againſt a Felon. *Quære*, how. Br. Detinue de Biens, pl. 37. cites 6 H. 7. 12.

2. **But it had been** otherwiſe, if **the Tender of the Money was** before the Stealing, **(for by the Tender the Property was reveſted in the Mortgagor) and I but a Bailee. 29 Aſſ. 28. Adjudged.** Iſſue was taken upon the Tender. Br. Detinue de Biens, pl. 35 cites S. C. & S. P.—— Br. Bailment &c. pl. 7. cites S. C. but S. P. does not appear.—— S. C. and ſame Diverſity cited by Doderidge J. Roll Rep. 129.——Co. Litt. 89 a. ſame Diverſity taken accordingly. —— S. P. reſolved accordingly. 4 Rep. 83. b. Paſch. 43 Eliz. B R. in Southcote's Caſe ——2 Ld. Raym. Rep. 917. in Caſe of Coggs v. Barnard, ſays, that the Bailee's having a ſpecial Property in the Pawn is not the Reaſon of the Caſe, and there is another Reaſon given for it in the Book of Aſſiſe, and which is indeed the true Reaſon of all theſe Caſes, viz. that the Law requires nothing extraordinary of the Pawnee, but only that he ſhall uſe an ordinary Care for the reſtoring the Goods; but indeed, if the Money for which the Goods were pawned be tendered to the Pawnee before they are loſt, then the Pawnee ſhall be anſwerable for them, becauſe by detaining them after the Tender he is a wrong doer, and it is a wrongful Detainer of the Goods, and the ſpecial Property of the Pawnee is determined. And he that keeps Goods by wrong, muſt be anſwerable for them at all Events, becauſe his detaining them is the Reaſon of the Loſs

3. **But a general Bailee of Goods ſhall anſwer for them, if they are ſtole with his own Goods; for when he accepts them generally, it is with a Warranty in Law. Contra 29 Aſſ. 28. per Thorp.** Br. Bailment, pl. 7. cites S. C. accordingly. —— In ſuch Caſe the Bailee is diſcharged, per Thorp. Br. Detinue de Biens, pl. 35. cites S. C. —— As where they

they are delivered to him *to be ſafely kept*, and after they are ſtolen, this will not excuſe him, becauſe by the Acceptance he undertook to keep them ſafely, and therefore he muſt keep them at his Peril. And *ſo* it is if Goods are delivered to him *to be kept*; for to be kept, and to be ſafely kept, is all one in Law. Co. Litt. 89. a.———S. P. adjudged, 4 Rep. 83. b. Paſch. 43 Eliz. B. R. Southcote's Caſe.

But if the Goods are delivered to him, *to be kept as he would keep his own*, there if they are ſtolen from him without his Default or Negligence, he ſhall be diſcharged. Co. Litt. 89 a.———S. P. 4 Rep. 83. b. in Southcote's Caſe.———Cro. E. 815. pl. 4. Southcot v. Bennet, S. C. & S. P. held accordingly, by Gawdy and Clench, cæteris abſentibus, and Judgment for the Plaintiff.

4. If I lend you my *Horſe*, and *he dies ſuddenly without* your *Default*, you are diſcharged; per Kirton. Br. Charge, pl. 2. cites 40 E. 3. 6.

2 Ld. Raym. Rep. 914. Holt Ch. J. cites this Caſe, and ſays it was but a ſudden Opinion, and that but by half the Court, and yet this is the only Ground for the Opinion of my Ld Coke in Southcote's Caſe, which beſides he has improved. But ſays, that the Practice has been always at Guild-Hall, to diſallow that to be a ſufficient Evidence to charge the Bailee, and that it was practiſed ſo all Ch. J. Pemberton's Time and ever ſince, againſt the Opinion of that Caſe. And from ſeveral Authors cited by Holt, he infers, ibid. 915. That a Bailee is not chargeable without an apparent groſs Neglect; and if ſuch there be, it is looked upon as an Evidence of Fraud; nay, ſuppoſe the Bailee undertakes to keep them ſafely and ſecurely, in expreſs Words, yet even that will not charge him with all Sorts of Neglects; for were ſuch a Promiſe put into writing, it would not even then charge him ſo far.

5. In Detinue, *Goods were bailed at the Jeopardy of the Plaintiff*, and the *Defendant ſhew'd how W. had taken the Goods*. Per Rede, This is no Plea, for the Defendant might have Action againſt the Taker. Per Keble, The *Bailor ſhall have the Action, for he has the Property*; and it was touched, that if Goods are *robbed* from the Bailee, he ſhall not be charged over, but if they are *taken by a Treſpaſſor* of whom he may have Conuſance, he ſhall be charged, for he has his *Remedy over*. But per Brian, this is of a *General Bailment*, but otherwiſe it is of a Bailment at the Peril of the Bailor, for the Bailee ſhall recover no *Damages*, for he is not charged over to the Bailor. Br. Bailment, pl. 8. cites 3 H. 7. 4.

And *Robbery* is no Plea. But if it was to keep *as his own Goods* it would be otherwiſe, Cro. E. 815. Southcot v. Bennet.———8 E. 2. tit. Detinue 59.———S. P. accordingly Went. Off. Ex. 113. ſeems of the ſame Opinion; becauſe Bailor, as well as the Bailee may have Action for Damages againſt the Treſpaſſor.

6. If on Bailment of *Goods for ſafe Cuſtody*, the Goods for want of good Cuſtody are *loſt or deſtroyed*. Caſe or Detinue lies, and Bailee ſhall be charged by Super ſe Aſſumpſit; per Frowike, Ch. J. Kelw. 77. b. Mich. 21 H. 7.

D. 22. b. pl. 137. Trin. 28 H. 8. is that for altering the Plate, either Action upon the Caſe, or Action of Detinue lies and cites Tempore E. 4.

7. If the Bailee of certain Plate will not deliver it, *Detinue* lies; but if he changes it, a *Trover & Converſion* lies. Arg. Roll Rep. 59. 60. cites 28 H. 8. D.

S. P. reſolv'd accordingly, 4 Rep. 83. b. in Southcotes Caſe, and cites it as adjudged, 8 E. 2. Tit. Detinue 59. —S. C cited by Holt Ch. J. 2 Ld. Raym. Rep. 914. Trin. 2 Ann. in Caſe of Coggs v. Barnard, and ſays that he cannot ſee the Reaſon of this Difference, nor why the Bailee ſhould not be charged with Goods in a Cheſt, as well as with Goods out of a Cheſt, for the Bailee has as little Power over them when they are out of a Cheſt, as to any Benefit he might have by them, as when they are in a Cheſt; and has as great a Power to defend them in the one Caſe as in the other.

8. If A. *leaves a Cheſt locked with B. to be kept, and takes the Key away with him*, and acquainteth not B. what is in the Cheſt, and the Cheſt together with the Goods of B. are ſtolen away; B. ſhall not be charged therewith, becauſe A. did not truſt B. with them as this Caſe is; and that which hath been ſaid before of ſtealing, is to be underſtood alſo of other like Accidents, as Shipwrecks by Sea, Fire by Lightning and other like inevitable Accidents. And all theſe Caſes were reſolved and adjudged in B. R. And by theſe Diverſities, are all the Books concerning this Point reconciled. Co. Litt. 89. a. b.

9. A. delivers Money to B. *to diſpatch his Buſineſs in the Exchequer*; B. does not do it; Action of Debt lies for it. Noy Arg. 72. cites it as the Caſe of Dowſe v. Cawley.

10. If Beaſts are bailed to feed the Land, and the *Bailee kills the Beaſts*, a general Action of *Treſpaſs* lies. 11. Rep. 82. Paſch. 13. Jac. in Lewis Bowles's Caſe. S. P. by Rhodes J. Le. 88. in pl. 103 — S. P. agreed accordingly by the Juſtices, Goldsb. 67. pl. 10 Mich. 29 & 30 Eliz. in Caſe of Bloſs v. Halman. ——If Bailee deſtroys the Thing delivered, Treſpaſs lies, per Gawdy J. Cro. E. 784. pl. 22 Mich. 42 & 43 Eliz.—— Litt. S. 71. & Co. Litt. 57. a. (k)

11. If I deliver 100*l.* *to A. to buy Cattle*, and he beſtows 50*l.* of it in Cattle, and I bring an Action of Debt for all, I ſhall be barred in that Action for the Money beſtowed and Charges &c. but for the Reſt I ſhall recover. Hob. 207. Trin. 15 Jac. in the Caſe of Speak v. Richards.

12. If *Money is delivered to A. to keep generally* without any Conſideration or Reward for ſo doing, if *A. is robbed*, he is diſcharged; and the Owner ſhall bear the Loſs. Ruled upon Evidence per Ld. Pemberton. 2 Show. pl. 166. Mich. 33. Car. 2. B. R. the King v. the Sheriff of Hertford. The Fact was; There being an Execution againſt the Plantiff, he brings 90*l.* to the Defendant, Part of the Condemnation Money, which he refuſed to take, ſaying the Plantiff in the Action would not accept it, and he had nothing to do with it, he muſt go to him; and the Party ſaid he would be in Town next Friday, pray do you keep it till then, and I will come again to you when the Plantiff will be here, and accordingly went away; and before the Friday the Defendants Chamber was robbed. And now held no Action lies againſt him. 2 Show. 172. 173. pl. 166. Mich. 33. Car. 2. B. R. The King v. Viſcount of Hertford.

13. If a Man has Goods upon a *naked Bailment*, he is not chargeable if they are loſt &c. neither is he chargeable for a common Neglect, and therefore **Southcote's Caſe** is not good Law, which ſays that a Man ſhall be charged in an Action on a general Bailment, and it has been the general Practice for twenty Years laſt paſt. If a Man hath Goods to keep, and they are ſtolen; although there be a *Neglect* in him, as if he omits to ſhut the Door &c. he ſhall not be charged with them, if he keeps them with the ſame Care as he does his own. So if a Man makes Bailment to another, and he makes an *expreſs Promiſe* to keep the Things ſafely, yet he is *not chargeable without his wilful Default*, for ſuch Promiſe ſhall not charge him further than he was chargeable before; it would not do if it was in Writing, and for the ſame Reaſon it ſhall not do it, if it is by Parol. Reſolved per tot. Cur. Comyns's Rep. 134. 135. pl. 90. Paſch. 2 Ann B. R. in Caſe of Cogs v. Barnard. Holt Ch. J. ſaid that Southcot's Caſe as reported in 4 Rep. is not all Law, but where there is a *ſpecial Undertaking*. For if there be but a *general Bailment, and a general Acceptance*, and ſo the Matter left to a Conſtruction of Law thereupon how the Goods ſhall be kept, the Law will make Conſtruction, that you ſhould keep them as you do your own; but where there is a *ſpecial Acceptance* to keep them ſafely; there, at your Peril you are bound by your ſpecial Acceptance to keep them ſafe though you have no Reward, and that you are not compellable by Law to take them; per Holt Ch. J. 12 Mod. 487. Paſch. 13 W. 3. in Caſe of Lane v. Sir Robert Cotton.

In the Caſe of Coggs v. Bernard 2 Ld. Raym. 909 &c. the Judges delivering their Opinions Seriatim, found great Fault with Southcote's Caſe; Gould ſaid it was a hard Caſe indeed, and obſerves that in Cro. E. 815. it was adjudged by two Judges only, viz. Gawdy and Clench, and Ibid. 912. Powel J. that all the Foundation of SouthcotesCaſe is that in 9 E. 4. 40. b. there is ſuch an Opinion by Danby. The Caſe in 3 H. 7. 4. was of a ſpecial Bailment, ſo that that Caſe cannot go very far in the Matter, 6 H. 7. 12. there is ſuch an Opinion by the by. But there are Caſes there cited, which are ſtronger againſt it, as 10 H. 7. 26. 29 Aſſ. 28. the Caſe of a Pawn. My Lord Coke would diſtinguiſh that Caſe of a Pawn from a Bailment, becauſe the Pawnee has a ſpecial Property in the Pawn; but that will make no Difference, becauſe he has a ſpecial Property in the Thing bailed to him to keep. 8 E. 2. Fitzh. Detinue 59. The Caſe of Goods bailed to a Man, locked up in a Cheſt and Stolen; and for the Reaſon of that Caſe, ſure it would be hard, that a Man that takes Goods into his Cuſtody to keep for a Friend, purely out of kindneſs to his Friend, ſhould be chargeable at all Events. But then it is anſwered to that, that the Bailee might take them ſpecially. There are many Lawyers don't know that Difference, or however it may be with them, half Mankind never heard of it. So for theſe Reaſons, I think a general Bailment is not, nor cannot be taken to be a ſpecial Undertaking to keep the Goods bailed ſafely againſt all Events. But if a Man does undertake ſpecially to keep ſafely, that is a Warranty, and will oblige the Bailee to keep them ſafely againſt Perils, where he has his Remedy over, but not againſt ſuch where he has no Remedy over.

2 Ld. Raym. Rep. 909 to 920. S. C. adjudged for the Plantiff.

14. Some Hogſheads of Brandy were *bailed to carry and deliver them ſafely*, but in the Carriage, *one of the Casks was ſtaved and ſeveral Gallons of the Brandy were loſt*. The Bailee had no Premium for what he undertook; notwithſtanding which, in an Action on the Caſe againſt the Bailee, Judgment was given for the Plantiff. If the Defendant had only offered himſelf to carry, there he would not be chargeable, for it would only have been Nudum Pactum, but here it being *Super ſe Aſſumpſit*, the word Aſſumpſit imports an undertaking; and when a Man undertakes to do a Thing and miſdoes it, an Action lies againſt him for it, though no-body could have compelled him to do the Thing. Comyns's Rep. 133. pl. 90. Paſch. 2 Ann. B. R. Coggs v. Barnard.

15. If *A. bail* Goods *to C.* and after *gives his whole Right in them to B.* B. can't maintain *Detinue* for them againſt C. becauſe the ſpecial Property that C. acquires by the Bailment, is not thereby transferred to B. Per Holt Ch. J. 6 Mod. 216. Trin. 3 Ann. B. R. Rich. v. Aldred.

(B) Bailee. Who; and his Power and Intereſt.

Per Doderidge J. in ſuch caſe there needs preciſe Requeſt, becauſe it is Part of the Contract, and the Requeſt in pleading ought to be alleged. But if I deliver Goods to re-deliver, *without ſaying on Requeſt*, there needs not a preciſe Requeſt. Ibid.

1. IF I bail Goods *to deliver on Requeſt*, yet I may ſeiſe them without Requeſt. Arg. Godb. 403. cites 26 H. 6.

2 Le. 31. pl. 36. S. C. in totidem Verbis.

2. By Manwood. If Goods be delivered to A. *to pay to B.* A. may ſell them. 2 Le. 90. pl. 113. Mich. 29 Eliz. in the Exchequer in Clark's Caſe.

Cro. J. 236 pl. 8. S. C. adjudg'd for the Plantiff in Action of Battery, for aſſaulting him &c. and endeavouring to take the Horſe from him.——Brownl. 217. S. C. adjudged for the Plantiff.

3. A. lent B. *an Horſe to ride from G. to N.* at 4*s.* for two Days; B. *goes out of the Road* from G. to N. yet A. cannot take the Horſe from B. For, for thoſe two Days B. has a ſpecial Property againſt all the World; and A.'s Remedy for riding out of the Road, is by *Action on the Caſe*, but not to *ſeize the Horſe*. Yelv. 172. Hill. 7 Jac. B. R. Lee v. Atkinſon.

M. S. Rep. Trin. 4 Geo. in Canc. Warner & al'. v. Jenkins & al'.

4. Snow, Mr. Warner's Partner, a Goldſmith, having loſt 21 *Lottery-Tickets, and a Lottery-Order* for 50*l.* immediately upon the Loſs of them ſends to the Goldſmiths Company, and gets a Number of printed Tickets of the Loſs, with the Number and Deſcription of the ſeveral Lottery-Tickets and Order, which the Beadle and Servants of the Company, according to the Uſage in ſuch Caſes, delivered at all the Goldſmiths Shops in London, and ſeveral Coffee-Houſes in and about the Royal-Exchange, and at the Exchequer &c. and the next Day he put Advertiſements in ſeveral publick Prints, Gazette &c. Some few Days after theſe Tickets and Order were loſt, one Samuel Snow, a Broker, but of bad Credit and Reputation in his Buſineſs, brings theſe Tickets and the Order to the Defendants Shop, being a Goldſmith in Lombard-ſtreet, where the ſaid Samuel Snow did uſually take up Money, upon pawning or leaving Lottery-Tickets, or other Government Securities as a Pledge for the Money ſo received; but the Defendant did never give him Credit for any Sum of Money, without having ſome Pledge in his Hands for his Security; and in this Way of Dealing, they had paid and re-paid 20,000*l.* in three Months Time.

The

The Defendant Jenkins, advances to Samuel upon the Delivery of these Tickets and Order, a Sum of Money near to the Value of them. A Bill being brought by the Plaintiffs for a Satisfaction for these Tickets and Order; the Defendant insists upon the Property, they being *payable to Bearer*, and that he is a fair Purchaser, and denies express Notice that they were lost by the Plaintiff Snow, and says that he took the Tickets and Order without examining the Number, and only cast up the Sums and Value of them, being left in his Hands only as a Pledge and by a Broker, and that is the usual Way of transacting between Goldsmith's and Brokers, where Money is taken up upon such publick Securities, which are left with the Goldsmith only as a Pledge till the Money is re-paid. Per Parker C. If a Person will buy Lottery-Tickets, or any other publick Securities payable to Bearer or Indorsee, with *Notice that they were lost or stolen, and that the Vendor came to them without a fair Consideration*; this will not vest a Right or Property in the Buyer. In this Case, though here is not Proof of express Notice to the Buyer, yet the *printed Notice left at his Shop*, and the several *Advertisements in the printed Papers*, will amount to sufficient Notice so as to avoid the Purchase; and though there is no direct Proof of Fraud in the Defendants, yet here is a very gross Neglect in not examining the Tickets and Order, and since the Plaintiff did every Thing in his Power to retrieve the Tickets and Order, and it was the Defendants fault and carelessness not to examine them before he bought them, and Samuel Snow being broke and run away, the Defendant Jenkins ought to make Satisfaction to the Plaintiff, and decreed accordingly, but without Costs.

5. The Plaintiff, living in the Country, leaves with the Defendant, his Banker in Town, some *Lottery-Tickets and Lottery-Orders*, for which the *Defendant gives him a Note, promising to be accountable for them on Demand.* There was no Letter of Attorney, or any express Authority given to the Defendant about them. The *Defendant continues to receive the Interest, and once received 50 l. of the Principal, which the Plaintiff approved of*; but whether this 50 l. was by Sale of any of them, or was paid in the Course of Discharge by the Government, or whether the Defendant had any particular Authority concerning this 50 l. did not appear. The *Defendants, without any express Authority, subscribed these into the S. S. Company in the Name of the Plaintiff, and Stock for them was made out in the Books in the Plaintiff's Name also.* The Plaintiff brings his Bill for an Account and Satisfaction &c. For the Plaintiff the Arguments turned upon the Defendant's being only a Depository to receive the Interest; that this was the only Power that a Banker is understood to have in such Cases which are common; that in regard to the 50 l. Principal, he must be supposed to have had a particular Order for that, as it appeared to be a particular Transaction. As to the Lottery-Tickets, that he had admitted himself to be accountable for the Loss that accrued upon them, by an Offer he made to pay such Loss or Difference; that this was within the old Rules of a Loss arising from the unauthorized Act of a Depository, and therefore, if it was a new Case, it was only so on the Defendant's Side, and the Consequences would be too extensive to make a Precedent in his Favour. For the Defendant it was insisted, that he had the legal Interest in these Things as Bearer, was the Plaintiff's Trustee, and therefore is fully indemnified by the S. S. Act, which impowers all Trustees to subscribe; that his being possessed of these Things, imply'd a Power to discharge or dispose of them. The Law infers such a Power from the leaving a Bond in the Hands of a Scrivener, who was Agent in the lending Money: He may receive it, and on Payment deliver up the Bond, without any express Authority. The Case of **Parry and Stokes**, lately decreed, was much stronger:

MS. Rep. Pasch. 8 Geo. in Canc. Bluck v. Nicols & al'.

ſtronger: The Defendant there gave a Note to transfer 150 l. Bank Annuities to the Plaintiff on Demand; but when the Plaintiff demands them, he ſays he has ſubſcribed them. There the only Queſtion was, whether they were indeed ſubſcribed, being in the Defendant's own Name; but if they were ſubſcribed, it was agreed the Plaintiff would be bound by it. Here the Subſcription is in the Name of the Plaintiff. The laſt Act deſigned to give Validity, and cure all Defects in the Subſcriptions. In this Caſe the Company don't want its Aſſiſtance, in regard to them; The Subſcription is certainly valid, and therefore, if private Perſons are bound as to the Company, the Act has certainly concluded all Queſtions between themſelves; for the ſame Subſcription cannot be valid in regard to one, and void as to another. But if this Caſe is not within any of the Acts, if the Defendant is not a Truſtee, but only an Agent or Factor, or any thing elſe, yet he is unattended with any of thoſe Circumſtances which ſhould induce a Court of Equity to charge him with the Loſs. He has been guilty of no Fraud, and had good Reaſon to juſtify his Miſtake. The Legiſlature recommended theſe Subſcriptions; it was the Opinion of moſt Men, that they would be advantageous. The Court ſhould take Notice of the Hurry People were then in. The Defendant acted as well for the Plaintiff as he did for himſelf; he could have no Advantage from this Subſcription, becauſe it was in the Plaintiff's Name. The Plaintiff might have received Benefit from it, ſince it is proved it bore a Premium. There was therefore no Reaſon to charge the Defendant. Per Maſter of the Rolls, This Caſe ariſes upon the Conſtruction of ſeveral Acts of Parliament; the S. S. Act, and the two Subſcription Acts, that were made to confirm and ſupply what was done upon it. He ſeemed to expreſs ſome Doubts concerning the Equity of thoſe Acts, and enlarged much upon the Conſtruction of ſome Parts of them out of this Caſe; but he ſaid, that every one that ſits in this Court ſhould act according to Law; that he ſat there Jus dicere, non dare. This was agreeable to the Rule of judging ſecundum Diſcretionem boni viri; for Vir bonus eſt quis? Qui conſulta Patrum, qui leges Juraq; ſervat; That this Caſe is not at all accompany'd with any Impoſition or Fraud, or Deſign of Profit to the Defendant. The two Sorts of Security depoſited, ſhould receive a diſtinct Conſideration: As to the Lottery-Tickets, the Defendants are plainly Truſtees; but I don't think in all Caſes, where a Thing is payable to Bearer, the Bearer will have the legal Property; As where a Ticket is ſtolen. And yet in ſuch Caſe, if ſuch Ticket was ſubſcribed, the Company would have good Right from the Bearer. Here plainly the Defendants were Truſtees by being Bearers, becauſe, by having the Securities, they had a Power to receive the Principal, which alſo the Owner muſt know. I think this is a ſtronger Caſe than that of a Scrivener; for if he is enabled to diſcharge the Debt by only having the Cuſtody of the Bond, without any legal Property, a Fortiori here, where the Defendant is truſted with the legal Property: But if the Scrivener does deliver up the Bond without Payment of the Money, that will not diſcharge even the Debtor, but he will continue ſtill liable for the Debt. The Defendant's Offer ſhall not bind him; for he would always ſtick to Ld. Cowper's Rule, that no Offer ſhould prejudice the Perſon offering. As to the Caſe Mr. Lutwich put of a Perſon intruſted to deliver over a Thing to another, he is in no Senſe a Truſtee, but a meer Porter or Carrier; he can receive nothing, and yet even this Perſon would be a Truſtee in regard to the S. S. Company, but not ſo as to be himſelf indemnified for a Subſcription; but he thought there was no Caſe of a real Truſtee that was not within the Act. 'Tis plain the Legiſlature intended to take in all Sort of Truſts whatſoever. If a Man was any ways intruſted, tho' not a formal Truſtee, he had a Power to ſubſcribe:

Even

Even Creditors are bound by the Subſcription of Executors, which is the hardeſt Caſe. And yet, tho' the Defendants are Truſtees, if there had been any Fraud, any Advantage to themſelves, I would charge them, tho' their Subſcriptions would be valid as to the Company. The Courſe of dealing in theſe Caſes is very well known; the Hurry was very great, the Defendants thought they were acting for the Benefit of the Plaintiff, and for a ſmall time it was for his Benefit; he might have ſold them [contracted for them] at a Premium. The ſecond Point concerning the Lottery-Orders is not ſo clear to be a Truſt, nor do I think I need declare any Opinion whether it was a Truſt or not; ſo far it reſembles a Truſt, becauſe the Defendants plainly had a Power over the Principal and Intereſt, and that by the Delivery of the Party himſelf. He has made Uſe of that Power, as to the Principal, by receiving the 50l. The Aſſignment of theſe Orders is with a Blank. The Bearer has a Power to fill up that Blank. The Defendants had a Power to make themſelves Truſtees, by filling it up to themſelves, and then they would have been good Truſtees in the Senſe of the Act. But tho' he had the Power to make himſelf a Truſtee, he has not made himſelf one; but the Form of a Truſtee ſeems not to be conſidered by the Act, but whether the Perſon was in any Senſe intruſted. Upon the late Act, I will not ſay how it will be where the Company have got Poſſeſſion of Orders without the Act of the Proprietor, or any Authority from him, expreſs or implied, that is a Queſtion of Right: But ſuppoſe here this Subſcription is a void Subſcription, and not within the Proviſo of the late Act, can the Plaintiff make the Defendants ſtand in the Place of the S. S. Company, and make that Satisfaction which the Company ought to make, without making the Company Parties? I think the Defendant ſhould not be charged. If he has done Wrong, it is without any Ingredient of Fraud to bring it into this Court, and therefore, as a Tort, ſhould be proſecuted at Law. What can this Court decree for a Tort? Can they decree that the Defendant ſhall pay to the Plaintiff the Intereſt of theſe Annuities, till the Government would have redeemed them? And ſhould we decree the Payment of a certain Sum, this would be directly to decree Damages for a Tort, and ſuch an Invaſion upon the Common Law, as I hope never to ſee in this Court. If this Act has authenticated this Subſcription as to the Company, it has alſo as to the Proprietor. Bill diſmiſs'd per Jekyll, Maſter of the Rolls.

6. *Securities were delivered by A. to B. in order that B. ſhould advance a* Sum of *Money upon them* the next Day; but *no Money was* then *advanced.* The Queſtion was, whether B. can keep theſe Securities, ſo delivered to him for this particular Purpoſe, in order to have a Satisfaction for a precedent Debt due to him from A. Per Ld. C. Macclesfield, B. ought not to *retain theſe Securities in Satisfaction of a precedent Debt* due to him from A. ſince they were delivered to him for another Purpoſe, *viz.* as a Pledge or Security for another Sum of Money, intended and propoſed to be advanced and lent to him; and ſince B. did not advance the Money according to the Agreement, he ought to return the Pledge upon Demand; and ſince he has not complied with his Part of the Agreement, he ſhall not retain the Securities which he got into his Hands by ſuch a Pretence and Artifice, to ſecure to himſelf a Satisfaction for a precedent Debt; and gave Coſts againſt the Defendant. MS. Rep. Trin. 8 Geo. in Canc. Fothering-hill & al' v. Froſt.

7. Plaintiff brought *Trover* againſt Defendant *for a Diamond Ear-ring, and other Jewels*, to which Defendant pleaded Not Guilty. Upon a ſpecial Verdict the Caſe was, That Plaintiff being *Owner of the Goods* mentioned in the Declaration on the 12th of January, 1729, *lodged them, for ſafe Cuſtody only, in the Hands of Seymour the Goldſmith, incloſed in a Paper and Bag, and took the Receipt following.* " *12th of Jan. Received* " *of Sir John Hartop the following Jewels, mentioning them all which are* MS. Rep. Eaſter 1745. in B. R. Hartop v. Hoare.

" *ſealed up in a Bag*; *which Bag, ſealed up, I promiſe to take care of for* " *him.*" That afterwards *Seymour broke open the Seals*, and carried the Jewels to Defendant's Shop, which is an open Shop in London, as a Banker; that Seymour *borrowed of Defendant* 300 *l. upon the Pledge of the Jewels*, and gave his Note for that Sum. No Authority is found from the Plaintiff to ſell them; but he demanded them of the Defendant, who, not being paid his Money, refuſed to deliver them. Seymour was in Poſſeſſion of theſe Jewels till he pledged them as aforeſaid, which was in the Year 1736. Seymour afterwards became a Bankrupt; (but that is not material to the preſent Queſtion.) The Value of the Jewels is found to be 750 l. After ſeveral Arguments the Ch. J. pronounced the Reſolution of the Court. The general Queſtion upon this Special Verdict is, whether, by any Facts found, the Plaintiff is barr'd from having the Goods deliver'd to him, or from having Satisfaction; and 1ſt, it is to be conſidered in what Relation Seymour ſtands with reſpect to the Plaintiff. 2dly, whether any Thing that is found diveſts the Property of theſe Diamonds from the Plaintiff. As to the firſt Delivery to Seymour, it was nothing more than a naked Bailment for the Uſe of the Bailor, lodged there for ſafe Cuſtody only. Holt Ch. J. calls it a Depoſiting, **Southcote's Caſe**, 4 Co. In ſome reſpect the Bailee has a Property to keep, for the Uſe of the Bailor only. That upon Seymour's breaking the Seal, he was a Treſpaſſor to the Plaintiff, and that Treſpaſs would lie againſt him; cites Moor 248. and Salk. 655. the Opinion of Trevor Ch. J. The ſecond Conſideration is, how far the Plaintiff is affected by any Thing done by Seymour; whether his Property is diveſted by any Thing that is found. Seymour had the Poſſeſſion originally by Right, but by breaking the Seal he became a Treſpaſſer, and from thence a Poſſeſſor of the Goods by Wrong. It is objected, that the Plaintiff was not privy to Seymour's Wrong; that he lent his Money innocently, and therefore, as is objected, more reaſonable the Loſs ſhould fall on the Plaintiff than Defendant; and for this was cited Salk. 289. But that is not this Caſe; the Jewels here were ſealed up with the Plaintiff's own Seal, which reſembles the locking a Box, and taking away the Key, 1 Inſt. 19. There is no Fault in the Plaintiff. Then to conſider what is the Law touching Sales in open Shops; that Sales in open Shops does not alter the Property of a Stranger, as Sales in Market-Overt or Fairs, Moor 625. That a Cuſtom of London pleaded, that every Freeman might buy all manner of Wares in every Shop in London, is too general; for then a Scrivener might buy Plate in his Shop, and the like, which is unreaſonable, Cro. Jac. 69. Bacon's Uſe of the Law, 80. 5 H. 7. 15. By theſe Caſes it appears, that the true Owner never loſt the Property of his Goods by Sale, unleſs in a Market-Overt. For the Defendant it was inſiſted, that if a Perſon who loſt Money with the Plaintiff at Play, and gave him for Payment a Goldſmith's Note, the Goldſmith ſhall not be obliged to pay this Note, the Plaintiff being a Perſon within the Meaning of the Gaming Act. This is true; but if the Plaintiff had negotiated this Note to a 3d Perſon, then the Caſe would have been between two Perſons Strangers to the Proviſions of the Gaming Acts, and ſo thoſe Acts would not take Place, as between Acceptor and Aſſignee of the Note, Carth. 357. Salk. 344. So where Bank-bill, payable to A. or Bearer, and A. loſes the Note, and the Stranger who found it transfers it, for valuable Conſideration, to C. the Money being paid to Bearer, diſcharges the Drawer; for 'tis the very Terms of the Note, and by Courſe of Trade theſe Notes are looked upon as Change of Money for Money; but there is no ſuch Courſe of Trade with reſpect to Goods: The Property does not follow the Poſſeſſion, unleſs in Caſes where the Owner has no Mark to know his own again, as in Money, Cro. Eliz. 746. **Higgs v. Holiday.**

day. Salk. 283. **Ford v. Hopkins.** In the preſent Caſe the Owner never gave any Power to ſell or diſpoſe of them, and Poſſeſſion merely does not change the Ownerſhip of Goods, tho' it does of Money. If Bill or Note is made payable to A. or Bearer, if no Indorſement, the Vendee is without Remedy againſt Vendor; for theſe Notes are look'd upon as lodging Money for Money. The next Matter for Conſideration is, whether the Place where the Pawn is made will intitle the Defendant to retain theſe Jewels. On the Finding, it is inſiſted that Sales in open Shops are the ſame as Sales in Markets-Overt: But by this Special Verdict no Cuſtom is found, and, unleſs it was found, the Court cannot take Notice of ſuch a Cuſtom; as was determined in the Caſe of **Argyle v. Hunt**, in this Court, Trin. 5 Geo. 1. where a Libel in the Spiritual Court, for calling a Woman Whore, and after Sentence applied for a Prohibition, yet denied; for that the Court would not take Notice of the Cuſtom of London, where 'tis actionable to call a Woman Whore. Carth. 75. Then 'tis objected, that upon the Finding of the Jury, the Cuſtom is to be certified. Hob. 86. Cro. Car. 516. Cro. Jac. 69. But this Caſe is not within the Cuſtom, as to Sales in Market-Overt; for Pawns, as this is, and Sales are quite different; and a Cuſtom which extends to Sales in Market-Overt, will not include Pawns or Pledges; and for that Purpoſe 35 H. 6. Fo. 25. is in Point, where 'tis expreſly ſaid, that the Cuſtom extends to a Sale, and not to a Pawn. There is no Inſtance where this Caſe has been allow'd, with reſpect to Pawns.

(C) The ſeveral Sorts of Bailments.

1. THERE are *ſix Sorts of Bailments*. The firſt Sort of Bailment is a bare *naked Bailment of Goods, delivered by one Man to another, to keep for the Uſe of the Bailor*, and this I call a *Depoſitum*; and it is that Sort of Bailment which is mentioned in Southcote's Caſe. The 2d Sort is, when *Goods or Chattels*, that are *uſeful*, are *lent to a Friend gratis, to be uſed by him*; and this is called *Commodatum*, becauſe the Thing is to be reſtored in Specie. The 3d Sort is, when Goods are left with the Bailee, to be uſed by him *for Hire*: This is called *Locatio & Conductio*, and the Lender is called Locator, and the Borrower Conductor. The 4th Sort is, when Goods or Chattels are *delivered to another as a Pawn*, to be a Security to him for Money borrow'd of him by the Bailor; and this is called in Latin *Vadium*, and in Engliſh a Pawn or a Pledge. The 5th Sort is, when Goods or Chattels are *delivered to be carried, or ſomething is to be done about them for a Reward*, to be paid by the Perſon who delivers them to the Bailee, who is to do the Thing about them. The 6th Sort is, when there is a Delivery of Goods or Chattels to ſomebody, who is to carry them, or do ſomething about them *gratis*, without any Reward for ſuch his Work or Carriage; per Holt Ch. J. 2 Ld. Raym. Rep. 912, 913. Trin. 2 Ann. in Caſe of Coggs v. Bernard.

Comyns's Rep. 134. pl. 90. S. C. and ſame Diviſion.

(D) Revo-

(D) Revocable. Or Property alter'd. In what Caſes.

1. DEtinue *againſt Baron and Feme*, and *counted of Bailment of Sheep to the Feme before the Coverture*, by which the *Defendant ſaid that after he took the Feme to Wife, and the Sheep were bailed to him to compeſter the Land, by which he commanded him to take his Cattle, and he would not, wherefore the Defendant took the Cattle in his Land, Damage feaſant*; and demanded Judgment if of ſuch Taking &c. And the Opinion of Thorpe was, that it is a good Diſcharge of the Bailment, without other Poſſeſſion in the Plaintiff again, by which the Plaintiff traverſed the Commandment. Quod nota. Br. Detinue de Biens, pl. 13. cites 43 E. 3. 21.

2. Where I *bail* 10 *l. to J. N. to deliver to P.* and J. N. offers it, and *P. refuſes*, I ſhall have Debt againſt J. N. For he ſhall not retain the 10 l. for the Refuſal of P. where there is no Default in me. Br. Conditions, pl. 53. cites 19 H. 6. 34.

3. If a *Feme Covert bails Goods to a Man, and after ſhe takes him to Baron*, and he dies, the Feme ſhall not have Action of Bailment; for the Bailment was diſcharged by the Inter-marriage; but ſhe may declare upon a Trover. Quod nota, per Fineux. Br. Bailment, pl. 6. cites 21 H. 7. 29.

D. 49 a pl. 7. Paſch. 33 H. 8. Lyte v. Penny.

4. A delivers 20 *l.* to B. *to the Uſe of C.* a Woman, *to be delivered her the Day of her Marriage.* Before her Marriage A. countermands it, and calls home the Money. C. ſhall not be aided in Chancery, becauſe there is no Conſideration why ſhe ſhould have it. Cary's Rep. 12. cites D. 49.

2 Le. 89. pl. 113. Mich. 29 Eliz. S. C. in totidem Verbis.—— D. 49 a. Marg. pl. 10. cites Mich. 31 & 32 Eliz. Clerke v. Archdale, in the Exchequer, S. P. adjudged, that the Property is immediately altered.—— As if A. indebted to B. by Bond, delivers ſome Hogſheads of Wine to C. *to ſatisfy B. his Debt.* C. was Surety for A. to B. Adjudged that the Property of the Goods, by the Delivery over by C. is altered. 2 Le. 89 pl. 113. Mich. 29 Eliz. in the Exchequer.——2 Bulſt. 306. Iſaac v. Clark, S. C.——S. P. agreed Arg. Cro. J. 687. pl. 1. Trin. 22 Jac. B. R. in Caſe of Harris v. Bervoir——S. P. accordingly by Doderidge J. and ſo by Ley Ch. J. if the 3d Perſon, to whom it was to be bailed over, aſſents, it is not countermandable. 2 Roll Rep. 441. Trin. 21 Jac. B. R. in S. C.——Yelv. 4. in a Note on the Caſe of Riches v. Briggs.

5. If Goods be bailed to bail over on a *Conſideration precedent, on his Part, to whom they ought to be bailed*, the Bailor can't *countermand* it; otherwiſe where 'tis *voluntary*, and without Conſideration. But where 'tis *in Conſideration of a Debt*, it is not countermandable; otherwiſe if it be *to ſatisfy the Debt of another*; per Egerton. Le. 30. pl. 36. Mich. 31 Eliz. Clerk's Caſe.

6. If A. bails Goods to B. at ſuch a Day to rebail, and *before the Day B. ſells* the Goods in *Market-Overt*, yet at the Day Bailor may ſeiſe the Goods, becauſe the Property of the Goods was always in him, and not alter'd by the Sale in Market-Overt. Godb. 160. pl. 224. Mich. 7 Jac. B. R. Anon.

7. A. indebted in 100 l. to B. delivers Goods to C. amounting to the Value of the Debt, *to ſatisfy B. the ſaid* 100 *l. with the Goods in his Hands.* B. has an Intereſt and Property in the Goods. Yelv. 164. Mich. 7 Jac. B. R. Brand v. Liſley.

(E) Actions

(E) Actions and Pleadings.

1. *Detinue in London upon Bailment* made by the Plaintiff to the Defendant &c. He *said that he bailed it* to him *in another County, in Pledge* &c. and no Plea, per Finch, if he *does not traverse the Bailment in the first County*; and after they were at Iſſue, if it was bailed in Pledge or not, and the Viſne was where the Receipt in Pledge is ſuppoſed. Br. Traverſe per &c. pl. 41. cites 46 E. 3. 30.

2. *Detinue of certain Charters.* The *Plaintiff counted of Bailment* by him to the *Defendant*, who *ſaid that he found the Deeds by Fortune in his Houſe, and J. N. had brought the like Writ againſt him to return them now*, and pray'd that they interplead, abſque hoc that the Plaintiff bailed to the Defendant as here; and a good Plea, per Martin, and the Bailment traverſable as here; for if he confeſſes Bailment, then he charges himſelf to the Plaintiff, and to the ſaid J. N. alſo. Quod nota; for it was not contradicted. Br. Traverſe per &c. pl. 60. cites 7 H. 6. 22. S. P. but now he ſhall be charged to him who has Right. Br. Bailment, pl. 5. cites S. C.

3. Detinue, *ſuppoſing the Bailment to the Defendant at B. in the County of N. to rebail* &c. The *Defendant ſaid*, that the ſame Day and Year, *at B. in the County of B. the Plaintiff bought the Goods of the Defendant for* 10*l. upon Condition, that if he did not pay* the 10l. ſuch a Day, *that the Sale ſhall be void, and that he did not pay at the Day, abſque hoc* that the Plaintiff bailed them in the County of N. to rebail, prout &c. and admitted for a good Plea. Br. Traverſe per &c. pl. 65. cites 8 H. 6. 10.

4. Treſpaſs *of taking his Bowl.* The *Defendant ſaid that the Plaintiff delivered it to W. E. in Pledge, who bailed it to the Defendant, who rebail'd it to W. E.* and the *Plaintiff ſaid that R. C. gave to him, and the Defendant took it, abſque hoc that he bailed it to W. E. in Pledge*, and *did not traverſe the Bailment by W. E. to the Defendant*, and well; for the Bailment of the Plaintiff to W. E. is the Effect of the Bar, which binds the Plaintiff. Br. Traverſe per &c. pl. 373. (bis) cites 10 H. 6. 25.

5. Detinue *by Feme upon Bailment made by herſelf of a Cheſt of Charters*; the *Defendant ſaid, that they came to him as Executor of the Executor of the Father of the Plaintiff, whoſe Heir ſhe is, and that he had delivered them to the Baron of the Plaintiff who is dead*, abſque hoc *that the Plaintiff bailed them prout* &c. and a good Plea; for the Bailment of the Baron without the Traverſe, nor the Traverſe without the Plea precedent, is not good. Br. Traverſe per &c. pl. 374. cites 11 H. 6. 9.

6. In Detinue, the Plaintiff *counts upon ſimple Bailment*, the *Garniſhee may ſay that it was upon Condition*, without traverſing the ſimple Bailment, and if the Plaintiff ſays that it was bailed upon other Condition, then he ought to traverſe the Condition alleged by the Garniſhee, and ſo he did, and well; per Cur. Br. Confeſs and Avoid, pl. 62. cites 11 H. 6. 50.

7. If the Plaintiff brings *Detinue in the County of C.* and *counts upon ſimple Bailment*, it is a good *Plea that it was delivered in another County upon Condition* &c. abſque hoc *that it was delivered in the Place* &c. by reaſon of the double Charge, if Action be brought of this again in the County; quod non negatur. Br. Traverſe per &c. pl. 22. cites 33 H. 6. 25. S. P. per Newton, in a Note. Br. Bailment, pl. 3. cites S. C.

8. *Detinue of a Box of Charters, and one Charter ſpecially bailed to the Defendant*, and he *pleaded to the Bar Non detinet, and to the Charter ſpecial made Title to the Land, of which* &c. *abſque hoc that the Plaintiff bailed to him to re-bail* &c. and no Plea, becauſe the *Defendant did not*

 confeſs

confeſs any Livery made by the Plaintiff, quod fuit conceſſum. Br. Traverſe per &c. pl. 29. cites 34 H. 6. 42.

9. *Contra* where he *confeſſes Delivery* by the Plaintiff, to him *to bail over which he has done*, abſque hoc that he bailed to re-bail to him, this is a good Traverſe. Br. Ibid.

10. *And* per Moil, he may *intitle himſelf to the Land and Deed*, and give *Colour of Poſſeſſion to the Plaintiff*, and nevertheleſs well, but not to traverſe the Bailment as above. Br. Ibid.

Br. Replication, pl. 39. cites S. C. ——*And where the Plaintiff and Defendant claims by one and the ſame Perſon*, there the Traverſe of the Gift is good, and ſo here; per tot. Cur. Br. Traverſe per &c. pl 200. cites 5 E. 4 133

11. Treſpaſs againſt H. G. of *a Box of Evidences taken*, the *Defendant ſaid, that J. G. his Father was poſſeſſed thereof, and gave it to the Defendant, by which he was poſſeſſed, and after delivered it to A. B. to keep to the Uſe of the Defendant, who after delivered it to the Plaintiff to keep to the Uſe of the Defendant, and the Defendant required him to deliver it, and he refuſed, by which the Defendant took it*; the *Plaintiff ſaid, that J. G. gave them to him*, abſque hoc *that he gave them to the Defendant prout* &c. and ſo to Iſſue, and *found for the Plaintiff*, who prayed Judgment, and the Defendant pleaded in Arreſt of Judgment, that the Bar is not anſwered, for the Subſtance of the Bar is, that the Defendant bailed them to his Uſe, which ought to be traverſed, and not the Gift, but after long Argument tota Curia e contra. Br. Traverſe per &c. 200. cites 5 E. 4. 133.

12. In *Detinue of Charters*, the *Defendant may traverſe the Bailment*, becauſe he cannot wage his Law. Br. Traverſe per &c. pl. 228. cites 8 E. 4. 3.

13. *But where he may wage his Law*, there he cannot traverſe the Bailment, by all the Juſtices. Br. Ibid.

14. If Bailee brings Treſpaſs, he ſhall ſay, ad damnum to himſelf; for he ſhall be charged over. Br. Damages, pl. 124. cites 8 E. 4. 6.

15. Detinue of Charters *againſt J. N. Son and Heir of J. N.* and *counted of Bailment made by the Plaintiff to the Defendant*, who *ſaid, that he is Son and Heir of W. and not Son and Heir of J. N.* Per Moyle, this is no Plea, becauſe it is of *his Poſſeſſion, and not brought againſt him as Heir*, and ſo it is Surpluſage, as in Treſpaſs De ſon tort Demeſne is no Plea. Br. Traverſe per &c. pl. 235. cites 10 E. 4. 12.

16. *Contra in Debt* againſt him as Heir, *or in Detinue againſt him as Heir*. Br. Ibid.

17. In *Detinue of Bailment of the Plaintiff to the Defendant to re-bail to him*, it is a good *Plea that he bailed to him to bail to J. N. which he has done*, without that *that he bailed to him to re-bail to the Plaintiff, prout* &c. and a good Plea, tho' the Defendant may wage his Law. Br. Traverſe per &c. pl. 243. cites 12 E. 4. 11. 21.

18. *So* of Bailment *upon Condition in another County*, there he *ſhall traverſe the Bailment in the firſt County*. Br. Ibid.

19. Detinue of Goods, and *counted of Bailment*, the *Defendant ſaid, that the ſame Day* &c. *and at another time the Plaintiff gave to the Defendant the ſame Goods*, abſque hoc *that he bailed them to the Defendant prout* &c. and per tot. Cur. except Bryan, it is no Plea; for it is only Argument. Br. Traverſe per &c. pl. 275. cites 22 E. 4. 29.

Kelw. 77. b. per Frowike S. P. if the Goods are either loſt or deſtroyed.

20. If A. delivers B. *Cloth* to keep, and B. *keeps it negligently*, A. may have either *Detinue or Action on the Caſe*; per Gawdy J. Goldsb. 152. pl. 79. cites 2 H. 7.

21. *Debt* was brought againſt T. becauſe *N. was indebted to the Plaintiff, and delivered the Money* to the ſaid T. *to deliver to the Plaintiff*, which he did not do; Quod Nota. Br. Dette, pl. 6. cites Lib. Intrac.

22. Whether, in Caſe of Bailment of Goods to a Teſtator, the *Executor in Detinue* againſt him muſt be named Executor? See Kelw. 118. b. pl. 62. Caſus incerti Temporis.

23. If

23. If *Money is delivered to a Man to buy Cattle*, or to *Merchandize* with, tho' the Money be *ſealed up in a Bag*, yet the Property of the Money is in the Bailee, and the Bailor cannot have Action for the Money, but only an *Account*, tho' he never buys or merchandizes. 3 Le. 38. pl. 62. Mich. 15 Eliz. B. R. Anon. Per Powel J. if I give Money to another to buy Goods for me, and he neglects to buy them, for this Breach of Truſt I ſhall have Election to bring *Debt or Account*, and cited 4 or 5 Caſes; but per Holt Ch. J. contra if the Party did *not take it as a Debt, but ad Computandum, or ad Merchandizandum*, it muſt be an *Account*, and he ſhall have the Benefit of an Accountant, which is, he may plead being robbed, which ſhall be a good Plea in the laſt Caſe, and not in the firſt. Adjourned. 11 Mod. 92. pl 16. cites 2 Lev. 5.

24. If A. lends Money to B. and B. delivers a Thing of the Value to A. in pawn, now the *Converſion is traverſable*, tho' generally Converſion is not traverſable but upon ſpecial Matter; per Wray and Fenner J. and ſo in the principal Caſe, which was, a Bag of Money was delivered to C. by A. and B. to keep till A. and B. were agreed. Le. 247. pl. 335. Trin. 33 Eliz. B. R. Anon.

25. *Debt upon Bill ſealed*, whereby Defendant acknowledged that he had *received 7 l. ad Emend'* ſuch and ſuch Things, and avers, that he had not bought the Things, or paid the Money. It was held, that Plaintiff might bring either Debt or Account at his Election. Cro. E. 644 pl. 48. Mich. 40 & 41 Eliz. B. R. Lincoln(Earl) v. Topcliff. S. C. cited Noy 72 in Caſe of Britton v. Barton.

26. If *Money* is delivered *to be re-delivered*, it cannot be known, and therefore the Property is altered, and *Debt* lies for it; but if *Portugal*, or other Money which may be known, be delivered to be re-delivered, *Detinue* lies. Ow. 86. Mich. 41 & 42 Eliz. Bretton v. Barnett. Noy 72. S C. accordingly.

27. Action *on the Caſe*, ſuppoſing that he had delivered to Defendant certain Wools to keep, and the Defendant had *converted them to his own Uſe*; Per 2 Juſtices the Action well lies; (tho' it was urged, that the Converſion doth not *take away the Property* from the Plaintiff, but that he may always have *Detinue*) for they held, that the Converſion did take away the Property, and was an Offence, for which this Action lies, and adjudged accordingly, cæteris Juſticiariis abſentibus. Cro. E. 781. pl. 17. Mich. 42 & 43 Eliz. B. R. Gumbleton v. Graſton.

28. Bailee, in Caſe of *Robbery*, where he accepted the Goods to keep ſafely, is chargeable in Detinue for them, becauſe he has his Remedy over by *Treſpaſs or Appeal* to have them again. Cro. E. 815. pl. 4. Paſch. 43 Eliz. B. R. Southcott v. Bennet.

29. A. delivers to B. *a Bag of Money ſealed*, B. promiſes to deliver it on Requeſt, no Aſſumpſit lies on this, for B. has no Benefit by it; for the Money being in a Bag ſealed, B. cannot have any Uſe or Employment of the Money at all, and ſo has only a Charge impoſed for the keeping. Yelv. 50. Mich. 2 Jac. B. R. in the Caſe of Game v. Harvy.

30. A. delivered Money *to B. to the Uſe of C.* In ſuch Caſe *C. may have Debt on Account* againſt B. for the ſame at his Election. Godb. 210. pl. 299. Mich. 11 Jac. C. B. Clerk's Caſe.

31. In Caſe the Plaintiff declared, that he *delivered a Bond to the Defendant, to keep and re-deliver it upon Requeſt*; and afterwards the *Defendant tore it*. The Defendant *pleaded, that the Plaintiff delivered it to him to be cancelled*, and which he did; and upon Demurrer Doderidge and Crooke held, that Delivery to be re-delivered ought to have been traverſed; but Coke and Haughton e contra; for they held, that *the Delivery is only an Inducement*, but that the *tearing is the Point of the Action*, and therefore the Delivery need not to be traverſed. Roll Rep. 394. pl. 16. Trin. 14 Jac. B. R. Pope v. Butler.

32. If A. bail the Goods of C. to B. and C. the *Owner brings Detinue againſt Bailee* for them, B. may *plead* the Bailment by A. to him to be re-delivered by A. and ſo *bring in A. as Garniſhee* to interplead with C.

Per

Per Holt Ch. J. 6 Mod. 216. Trin. 3 Ann. B. R. at a Trial of Rich v. Aldred.

33. If *A. bails Goods to C.* and after *gives his whole Right in them to B.* B. cannot maintain Detinue for them againſt C. becauſe *the ſpecial Property that C. acquires by the Bailment is not thereby transferred to B.* per Holt Ch. J. 6 Mod. 216. Trin. 3 Ann. B. R. Rich v. Aldred.

For more of Bailment in General, See **Account, Detinue, Enterpleader,** and other proper Titles.

Fol. 353.

Bar.

(A) Action. [One Action where a Bar of another Action of the like Nature.]

Roll Rep. 391. pl. 12. S. C. adjudged for the Plaintiff.

1. IN an Action upon the Caſe, upon an Aſſumpſit to pay a certain Sum upon Requeſt for ſuch a thing bought, if the Plaintiff be barr'd by Verdict upon non Aſſumpſit Modo & Forma pleaded, yet in a new Action for the ſame Sum, for the ſame Thing, if the Count be upon an Aſſumpſit to pay the Sum at ſeveral Days, the firſt Verdict and Judgment ſhall not be any Bar thereof, tho' it be averred to be the ſame Contract, for it cannot be the ſame Contract, this being to be paid at ſeveral Days. By Reports, 14 Jac. *Payne againſt Selle.*

Roll. Rep. 392. pl. 12. Coke Ch. J. ſaid, that preadventure, if the conceſſum, Contract.

2. But otherways it had been if he had recovered in the firſt Action. By Reports 14 Jac. (but quære, for it ſeems that this cannot be the ſame Promiſe.

Plantiff had recovered in the firſt Action, it ſhould be a Bar in this Action, Quod fuit per Doderidge. But the Reporter ſays Quær, becauſe it cannot be intended the ſame

3. If a Man grants a Rent to another, payable at a certain Day, and Covenants to pay the Rent accordingly; if the Grantee after recovers in an Action of Covenant for the Non-payment of the Rent, this will be a Bar of any Action after for the Rent; for in the Action of Covenant, he ſhall recover all the Rent in Damages. Mich. 7 Jac. B. between *Strong and Wats*, per Curiam.

Hob. 3. pl. 6. Pincombe v. Rudge S. C. adjudged, and upon Error brought in the Exchequer

4. If A demiſes Lands to B. for Life with Warranty, and after a Warrantia Chartæ is brought upon this Warranty by B. againſt A. and after B. brings an Action of Covenant againſt A. upon the ſame Warranty, and aſſigns for Breach, that the ſaid A. before the Leaſe to B. demiſed it for Years to I. S. who hath entered and evicted him: It is no Bar of this Action of Covenant, that B. hath a Warrantia Chartæ depending upon the ſame Warranty, becauſe this

this Action is grounded upon the Eviction of a Chattle, Scilicet, a Leaſe for Years, in which there cannot be any Voucher, Rebutter, or Warrantia Chartæ. Hobart's Reports 5. between *Rudge and Pinconb.* Chamber; all the Judges agreed that this Action lies.—Yelv. 139. Mich. 6 Jac. B. R. S C. adjudged.——Roll. Rep. 25. Paſch. 12 Jac. S. C. and Judgment affirmed in the Exchequer Chamber.——Noy. 131 Pinkard v Ridge, S. C. and the Court held that Covenant well lies, notwithſtanding the Warrantia Chartæ pending.——Jenk. 291. pl. 31. S. C.

5. If an Informer exhibits an Information againſt B. upon the Statute for taking Farms, and the ſame Day C. exhibits an Information for the ſame Caſe againſt B. In this Caſe the Defendant may plead the Truth of the Caſe to both, and bar them; for inaſmuch as there is not any Precedency of Suit to attach it in either of them, the Court cannot give Judgment for either of them. Hobart's Reports 171. between *Pie and Cook*, per Cur. Hob. 128. pl. 161. S. C. in much the ſame Words. ——Mo. 864. pl. 1193. Mich. 14 Jac. S. C. and the Court adjudged that he ſhould anſwer neither of them, and ſays it is like two Replevins by two Perſons at one time for the ſame taking, the Defendant ſhall anſwer neither of them.——See Tit. Information (D) pl. 4.

6. After the bringing of Aſſiſe of *Mortdanceſtor*, the ſame Demandant brought Writ of *Admeaſurement of Dower* againſt the ſame Tenant of the ſame Land. Thel. Dig. 151. Lib. 11. cap. 38. S. 9. cites 13 E. 1. It. North. Eſtoppel 272.

7. A Feme, after the bringing of *Aſſiſe*, may maintain *Writ of Dower ex aſſenſu patris*, of the ſame Land. Thel. Dig. 151. Lib. 11. cap. 38. S. 10. cites Tempore E. 1. Eſtoppel 271.

8. A Man was diſſeiſed, and afterwards he brought *Dum fuit infra ætatem*, againſt the Diſſeiſor, in which he was nonſuited, and afterwards was received to maintain *Writ of Entry ſur Diſſeiſin* againſt the Diſſeiſor well enough. Thel Dig. 151. Lib. 11. cap. 38. S. 6. cites Mich. 5 E. 2. Eſtoppel 257.

9. In *Formedon of a Gift made to his Mother and her Baron in Frank-Marriage*, notwithſtanding that the Demandant be nonſuited after the View, yet he may maintain *a new Writ of the ſame Land, ſuppoſing the Gift to be made to his Mother and the Heirs of her Body* &c. Thel. Dig. 152. Lib. 11. cap. 38. S. 14. cites 3 E. 3. Iter' Not' Eſtoppel 134.

10. Another Diverſity there is *in Actions Real and Perſonal, between Plea to the Action of the Writ, and Plea to the Writ*; as *Formedon in Remainder*, were it ſhould be Formedon *in Reverter*; ſuch Action without Judgment upon Verdict or Demurrer &c. does not bar the Demandant of his rightful Action; and therefore if Demandant in ſuch Caſes be nonſuited, or the Plea be diſcontinued, he may bring his rightful Action, and with this Accords 27 E. 3 84. 6 H. 4. 4. 2 R. 2. Eſtoppel 210. 4 E. 3. 54. But if the Plea is only to the Writ, ſo that the ſame Nature of the Writ remains, there though the Plea to the Writ be adjudged againſt the Demandant upon Demurrer or Verdict &c. yet he ſhall maintain the ſame Writ again; for the Judgment extends only to the Writ. 6 Rep. 7. b. 8. a. in Ferrar's Caſe cites 3 E. 3. Eſtoppel 134. & 30. Aſſ. 8. accordingly.

11. If a Man brings *Writ of Meſne, ſuppoſing the Defendant to be Meſne between him and one A.* yet afterwards he may have Writ, *ſuppoſing another to be Meſne between him and the Defendant* of the ſame Land. Thel. Dig. 152. Lib. 11. cap. 38. S. 30. cites Paſch. 29 E. 3. 44.

12. If one bring *Writ of Ward* againſt one, *of the Heir of one Jo.* and the *Defendant dies*, the Plantiff may have *Writ of Ward againſt his Executors of the ſame Infant, ſuppoſing him to be Heir to another.* Thel. Dig. 153. Lib. 11. cap. 38. S. 37. cites Hill. 31 E. 3. Brief 332.

13. A Man ſhall only have one *Appeal of the Death* of the ſame Perſon, and ſuch Plea to the Writ was adjudged good. Thel. Dig. 153. Lib. 11. cap. 38. S. 40. cites Mich. 9 H. 4. 1.

14. Writ of *Treſpaſs againſt* 3 was diſcontinued, and the Plantiff brought *another Writ againſt two of them* of the ſame Treſpaſs, and was maintained. Thel. Dig. 153. Lib. 11. cap. 38. S. 41. cites Mich. 11 H. 6. 10.

15. In *Debt upon an Obligation ſuppoſed to be made to B.* the *Plantiff was nonſuited*, and brought *another Writ upon the ſame Obligation, and counted that it was made to C.* and held a good Writ per Juyn. Thel. Dig. 153. Lib. 11. cap. 38. S. 42. cites 14 H. 6. 9. and that ſo agrees 6 H. 4. 4. and ſays ſee 21 H. 7. 24.

Where one ſues *Replevin and is nonſuited*, and the Defendant has return,

16. Where Writ of *Replevin is abated*, and the Defendant has return, yet the Plantiff ſhall have *another Replevin* of the ſame taking, for ſuch Return is not irreplegiable. Thel. Dig. 153. Lib. 11. cap. 38. S. 43. cites Paſch. 34 H. 6. 37. and that ſo agrees Wood, Mich. 12 H. 7. 5.

the Plantiff ſhall not have another Replevin, but ſecond Deliverance by the Statute. Thel. Dig. 153. Lib. 11. cap. 38. S. 45. cites Mich. 19 E. 2. Replevin 25.

17. A Bar in one *Formedon in Deſcender*, is a good Bar in any other Formedon *in Deſcender*, to be brought afterwards, *of the ſame Gift*. Co. Litt. 393. b.

18. In *Ejectment*, the Defendant pleaded in Bar *a Recovery had in B. R. againſt the Leſſor of the Plaintiff*. This was held by Anderſon, Periam, and Rhodes to be a good Bar. Goldsb. 43. pl. 22. Mich. 29 Eliz. Clayton v. Lawſon.

S. C. & S. P. cited Skin. 58. pl. 1. Mich. 34 Car. 2. B. R. in Caſe of Foot v. Raſtall,

19. A Bar in any Action Real or Perſonal, *by Judgment upon Demurrer, Confeſſion, Verdict &c.* is a Bar as to this or like Action of the ſame Nature, for the ſame Thing for ever. Reſolved. 6 Rep. 7. a. Mich. 40 & 41 Eliz. C. B. in Ferrer's Caſe.

and the Court held it to be good Law; but Pemberton Ch. J. ſaid it was to be underſtood when it appears judicially to the Court, that the Evidence in the one Action would maintain the other; but otherwiſe, he ſaid, the Court ſhall intend that he has miſtaken his Action.

20. But there is a *Diverſity between Real and Perſonal Actions*; for in Perſonal Actions, as in Debt, Account &c. the Bar is perpetual, becauſe the Plaintiff cannot have an Action of a more high Nature, and therefore in ſuch Caſe he has no Remedy, but by Error or Attaint; but if the Demandant be barr'd in a Real Action by Judgment upon Verdict, Demurrer, Confeſſion &c. yet he may have an Action of a higher Nature, and try the ſame Right again, becauſe it concerns his Freehold and Inheritance. Reſolved. 6 Rep. 7. a. b. Mich. 40 & 41 Eliz. C. B. Ferrer's Caſe.

21. Another *Diverſity* there is *in Real Actions between Perſons that have* not the mere Right, but *only a qualified Right*; tho' ſuch are barr'd in Real Actions, without making ſuch as have Intereſt Parties, it ſhall not bind the Succeſſor, as Parſon, Prebendary &c. For in ſuch Caſe, if a new Action of the ſame Nature be brought againſt the Succeſſor, he may falſify; and the Recovery does not make any Diſcontinuance, but that the Succeſſor may enter. But otherwiſe it is of Abbots, Biſhops, &c. who *have the intire Fee in them*; for in ſuch Caſes the Succeſſor, at the Common Law, ſhall not falſify in Sci. Fa. or in a new Action of the ſame Nature, and the Law is the ſame when a Recovery is had againſt them. 6 Rep. 8. a. in Ferrer's Caſe.

22. In *Trover and Converſion brought of an Ox*, the Defendant *pleaded that at another Time the Plaintiff, and another Perſon, now dead, brought an Action againſt J. S. and two others for the ſame Ox, who juſtified as for a He-*

a Heriot; and upon Demurrer, adjudged againſt the then Plaintiffs, and averr'd that the Taking was the ſame &c. and that the Trover &c. in this Act, ſuppoſed to be by this Defendant only, was committed by the other Defendants with him, and that the omitting them in this Action, and the omitting this Defendant in the former Action, was covenouſly done, Et hoc paratus &c. Judgment if the Plaintiffs to this Action, of the ſame Matter, ſhall be received &c. Walmeſley and Kingſmill held the Bar good; but Anderſon and Glanvill e contra. Et adjornatur; and afterwards it was ended by Arbitrement. Cro. E. 667. pl. 24. Paſch. 41 Eliz. C. B. Ferrers v. Arden.

23. Motion made, that Plaintiff may file his Original, and enter up the Iſſue on Record; for he hath ſince *arreſted the Defendant 3 times for the ſame Cauſe of Action*; and the Defendant doubted whether he might *plead in Bar another Action pending, with a Prout patet per Record', before it was entered.* Per Cur. he may; If they do not enter it, you may without any Motion in Court, give a Rule to enter it. 12 Mod. 91. Paſch. 8 W. 3. Armitage v. Row.

(A. 2) Where bringing an Action of one Nature ſhall be a Bar to the bringing an Action of another Nature.

1. TWO *Executors with another named Executor in the Teſtament, and afterwards removed by the Teſtator, brought Writ of Debt*, which took final Iſſue without Challenge of the Party; and afterwards *the two Executors, without naming the 3d, being alive, brought Writ of Debt againſt the ſame Defendant*, and adjudged good. Thel. Dig. 151. Lib. 11. cap. 38. S. 11. cites Hill. 8 E. 2. Eſtoppel 267.

2. In *Quod permittat of Common* Appurtenant &c. the Tenant ſaid that the Demandant at another time brought *Writ of Right* of the ſame Common, of the Seiſin of the ſame Anceſtor, *againſt the Predeceſſor of the Tenant*, who demanded the View &c. in which Writ the Demandant was *nonſuited*, Judgment of this Writ brought of a more baſe Nature &c. Adjudged a good Plea, and the Demandant took nothing by his Writ. Thel. Dig. 151. Lib. 11. cap. 38. S. 7. cites Hill. 12 E. 2. Eſtoppel 261.

3. After one is barr'd in *Aſſiſe*, he may have *Aſſiſe of Mortdanceſtor*. Thel. Dig. 151. Lib. 11. cap. 38. S. 12. cites 4 E. 3. It. Derby Eſtoppel 133. But adds Quære; for it is ſaid that he ſhall not have it, without *ſpecial Monſtrance; As where the Heir enters upon the Diſcontinuee, or Deſcent, and he re-enters* &c. Per Littleton and Jenny. Mich. 12 E. 4. 13. Quære.

If a Man be barr'd in Aſſiſe of Novel Diſſeiſin, yet upon ſhewing of a Deſcent, or other ſpecial Matter, he may have Aſſiſe of Mortdanceſtor, Ayel, Beſaiel, Entre ſur Diſſeiſin to his Anceſtor. Reſolved. 6 Rep. 7. b. Mich. 40 & 41 Eliz. C. B. in Ferrer's Caſe.

4. Where one is *nonſuited after Appearance in Writ of Beſail*, he may well have *Writ of Coſinage* againſt the ſame Tenant of the ſame Land, of the ſame dying ſeiſed of the ſame Anceſtor. Thel. Dig. 152. Lib. 11. cap. 38. S. 16. cites Mich. 4 E. 3. 168. and 29 E. 3. 21. And a Man may *vary from the Deſcent made by the Anceſtor of the Demandant* in another Writ. Ibid. cites Mich. 13 H. 4. 14. in Scire Facias.

And notwithſtanding that a Man brings Writ of *Ayel*, and is *nonſuited* after Appearance, yet he may have Writ of *Formedon in the Deſcender*, of the ſame Land againſt the ſame Tenant, upon Gift in Tail made to the ſame Grandfather. Thel. Dig. 152 Lib 11. cap. 38. S. 20. cites Paſch. 9 E. 3. 454 and 6 H. 4 3. accordingly in Mortdanceſtor.

And

And where in *Aſſiſe of Stagno exaltato ad Nocumentum liberi Tenementi* &c. after Iſſue taken upon the Enhancement, the Plaintiff was *nonſuited*, yet he was received to maintain *Aſſiſe of Nuſance Quare Levavit* the ſame *Stagnum ad Nocumentum of the ſame Franktenement.* Thel. Dig 152. Lib. 11. cap. 38. S. 19. cites Paſch. 8 E. 3. 389.

And concordat 4 E. 3. that bringing of *Writ of Entry* is no Bar *in Formedon.* Ibid.

5. In *Aſſiſe*, it is no Plea *in Bar of the Aſſiſe*, that the Plaintiff had brought againſt him *Writ of Formedon of the ſame Land in which the View is made*; for it ſeems to be a Plea to the Writ, and not in Bar. Br. Barre, pl. 60. cites 14 Aſſ. 6.

6. In *Aſſiſe againſt Tenant for Life, and him in Reverſion, who was received in Default of the Tenant for Life*, and *pleaded the bringing of a Writ of a more high Nature againſt the Tenant for Life* &c. And it was held a good Plea in his Mouth in Bar of Aſſiſe, without ſhewing Record thereof ſub pede Sigilli. Thel. Dig. 152. Lib. 11. cap. 38. S. 22. cites 16 Aſſ. 17.

7. In *Quare Impedit* by the King againſt a Biſhop, the Biſhop ſaid that the King at another Time had brought *Quare non admiſit* againſt him of the ſame Church, ſuppoſing that the Defendant had nothing, but only as Ordinary &c. Judgment of this Writ, in which the Defendant may claim the Advowſon, and adjudged no Plea. Thel. Dig. 153. Lib. 11. cap. 38. S. 46. cites Paſch. 16 E. 3. Quare Impedit 145.

8. After the bringing of *Aſſiſe*, the Feme had *Cui in Vita* of the ſame Land *of her own Seiſin, notwithſtanding that it was found by the Aſſiſe that ſhe was never ſeiſed.* Thel. Dig. 152. Lib. 11. cap. 38. S. 23. cites Mich. 17 E. 3. 65. But adds Quære, the Tenant in the Cui in Vita durſt not demur.

But it was adjudged, where he had brought *Formedon in Remainder, claiming Fee-Tail* by the Remainder, and the *Writ abated by Ley Gager of Non-Summons*, that he ſhould maintain *Formedon in Deſcender* againſt the ſame Tenant of the ſame Land well enough. Thel. Dig. 152. Lib. 11. cap. 38. S. 25. cites 18 E. 3. 54. 28 E. 3. 98.

9. After the bringing of *Dum non fuit Compos* of the Seiſin of his Anceſtor *demanding Fee ſimple*, to which Suit he appeared, he cannot maintain *Formedon in Deſcender* againſt the ſame Tenant of the ſame Land, making his Deſcent by the ſame Anceſtor; by Judgment. Thel. Dig. 152. lib. 11. cap. 38. S. 25. cites Mich. 18 E. 3. 31.

10. In *Dower* the Tenant ſaid, that the Demandant had brought *Cui in Vita* againſt him of all the Land of which &c. of the Demiſe of the ſame Baron, to which Writ ſhe appeared &c. and adjudged a good Plea. Thel. Dig. 152. lib. 11. cap. 38. S. 24. cites Trin. 18 E. 3. Eſtoppel 221. & 33 Aſſ. 18. agreeing.

11. In *Formedon, if Iſſue be taken upon the Gift, and found againſt the Demandant*, that he Ne dona Pas &c. yet the Demandant may afterwards have *Aſſiſe of Mortdanceſtor* upon the dying ſeiſed of the ſame Anceſtor to whom the Gift was ſuppoſed to be made. Thel. Dig. 152. lib. 11. cap. 38. S. 26. cites Paſch. 19 E. 3. Eſtoppel 227.

12. In *Writ upon the Statute of his Servant and Apprentice taken* and eſloigned; the Defendant ſaid, that the Plaintiff, pending this Writ, brought Writ of *Raviſhment of Ward* againſt the ſame Defendant, ſuppoſing the Raviſhment out of his Ward of the ſame Perſon whom he ſuppoſes to be his Servant, and held a good Plea to the Writ. Thel. Dig. 152. lib. 11. cap. 38. S. 29. cites 27 Aſſ. 21.

S. C. cited per Cur. 6 Rep. 7. b. 8. a. Mich. 40 & 41 Eliz. C. B.

13. In *Formedon in Remainder*, if the Demandant be *nonſuited*, he may well ſue *Scire Facias out of a Fine* for the ſame Land againſt the ſame Tenant, *ſuppoſing that the Land ought to revert to him.* Thel. Dig. 152. lib. 11. cap. 38. S. 27. cites Mich. 27 E. 3. 84.

14. Upon

14. Upon a Deed by which a Man is obliged in a Debt, and to render Account, if the Plaintiff brings *Writ of Account*, to which he appears, he may afterwards maintain Writ *of Debt*. Thel. Dig. 152. lib. 11. cap. 38. S. 28. cites 27 E. 3. 89. 28 E. 3. 98.

15. Feme, Tenant for Life, took Baron, and was diſſeiſed, and after the Death of the Baron ſhe brought *Cui in Vita upon the Demiſe of her Baron againſt one A.* who came and ſaid, that he entered by another, and not by the Baron, which was not denied by the Feme, by which ſhe took nothing by her Writ, and afterwards ſhe brought *Aſſiſe againſt the Heir of A. and others*, *Diſſeiſors*, who continued their Eſtate by the firſt Diſſeiſin till ſhe entered, and was ſeiſed till at another time diſſeiſed, and adjudged that the Aſſiſe lay well. Thel. Dig. 153. lib. 11. cap. 38. S. 31. cites Mich. 30 E. 3. 24. 30 Aſſ. 48.

16. Where 3 *join in Aſſiſe*, and afterwards *are nonſuited, two of them*, leaving out the one, *may have a new Aſſiſe* of the ſame Land in the Life of him who is left out, well enough. Thel. Dig. 153. lib. 11. cap. 38. S. 32. cites 31 Aſſ. 14.

17. If a Feme brings *Cui in Vita* againſt one, ſhe cannot afterwards maintain *Aſſiſe againſt the Feoffee of the firſt Tenant in the Cui in Vita*; *but if* the *Tenant in the Cui in Vita diſclaims, and ſhe enters*, and afterwards is ouſted by his Feoffee, then ſhe ſhall have Aſſiſe. Thel. Dig. 153. lib. 11. cap. 38. S. 34. cites 33 Aſſ. 18.

18. After *Nonſuit in Appeal of Maihem* a Man ſhall not have *another Appeal* againſt the ſame Defendants, ſuppoſing thoſe who were Principals in the one to be Acceſſories in the other, & e contra. Thel. Dig. 153. lib. 11. cap. 38. S. 35. cites 40 Aſſ. 1.

19. The Demandant brought *Formedon in Remainder, and counted of the Gift of S.* and afterwards he brought Formedon *in Deſcender, and counted of the Gift of E.* and therefore well, by Finch J. but he held, that it would have been otherwiſe had it been of the Gift of one and the ſame Perſon. Quære. Br. Eſtoppel, pl. 225. cites 40 E. 3. 14. 21. Br. Brief, pl. 503. cites 40 E. 3. 21. S. C. & S. P. by Finchden clearly, and yet by the one the Demand was of a Fee-ſimple, and by the other of a Fee-tail.——Br. Formedon, pl. 77. cites S. C. & S. P. by Fincham J. Quære. But Belk. held, that the Formedon in Remainder is not more high than the Writ of Deſcender; for the Formedon in Deſcender is a Writ of Right in its Nature.——Thel. Dig. 153. lib. 11. cap. 38. S. 38. cites S. C.

If the Heir brings *Formedon in Deſcender*, yet he may have Formedon *in Remainder* or *Reverter*. 5 Rep. 33. Paſch. 1 Jac. C. B. in Robinſon's Caſe.——S. C. cited, and S. P. reſolved, tho' the Heir is barr'd in Formedon in Deſcender; becauſe Formedon in Remainder or Reverter is an Action of an higher Nature, becauſe in this a Fee-ſimple is to be recovered. 6 Rep. 7. b.

20. After bringing of *Formedon*, the Demandant cannot maintain *Aſſiſe* of the ſame Land *againſt the Heir of the firſt Tenant in Formedon*, without ſhewing Title How &c. Thel. Dig. 153. lib. 11. cap. 38. S. 36. cites Paſch. 43 E. 3. 17. and 43 Aſſ. 42.

21. *After Nonſuit* in Appeal *of Maihem* a Man cannot have Action of Treſpaſs of *Battery, and of this ſame Maihem.* Thel. Dig. 153. lib. 11. cap. 38. S. 35. cites 43 Aſſ. 39. 12 R. 2. Corone 110. But after the Plaintiff in Appeal of Maihem has recovered Damages for the Maihem, he may bring Writ of Treſpaſs of that Battery, and recover Damages for the Battery. Br. Treſpaſs, pl. 241. cites 22 Aſſ. 82——Br. Appeal, pl. 60. cites S. C——In Treſpaſs of Aſſault and Battery the Plaintiff recovered, and had Execution, and afterwards brought an Appeal of Maihem againſt the ſame Perſon upon the ſame Matter; the ſaid Recovery and Execution was a good Bar; cited Le. 19. pl. 24. by Ayliff J. as one Cobham's Caſe.

22. If a Man ſues *Replevin* of his Beaſt taken, *and has Deliverance*, he cannot have Action of *Treſpaſs Vi & Armis* of the ſame taking. Thel. Dig. 153. lib. 11. cap. 38. S. 39. cites Hill. 5 H. 4. 2. and ſays, that ſuch Plea to the Writ was held good. 38 E. 3. 41. 46 E. 3. 26. and 17 E. 3. 58.

A. B. and C. Executors of R. bring Debt upon a Bond, and the Defendant pleads, that before the Purchaſe of this Writ, *the ſaid A. one of the Plaintiffs, as Adminiſtrator of R. brought Debt upon the ſame Bond againſt the Defendant, who then pleaded, that R. made Executors, who adminiſtered, and traverſed that he died inteſtate; and the Plaintiff then replied*, that Adminiſtration was committed to him Pendente lite between the Executors of the ſaid Will, whereupon *Defendant demurr'd, and it was adjudged for him*, and pleads this Matter by way of Eſtoppel, and demands Judgment, if, as Executor, he ſhall have an Action upon the ſame Bond againſt the ſame Defendant; but Judgment was now given for the Plaintiff; for by the firſt Judgment the Plaintiff was only barr'd as to the Action of the Writ, viz to have any Action as Adminiſtrator, but this Miſtake of his Action is no Bar nor Eſtoppel to his bringing his true Action. 5 Co. 32, 33. Paſch. 1 Jac. C. B Robinſon's Caſe.——Cro. J. 15. pl. 20. Robinſon v. Robinſon, S. C. ſtates it, that A. had taken out Adminiſtration, he *not knowing at the Time of* taking it, or *bringing the Action, that there was any Will*; and adjudged, the bringing the Action as Adminiſtrator is no Bar to his bringing Action as Executor; [in which he was ſole Plaintiff, the other Executor being dead] for tho' once a Bar in a Perſonal Action is a Bar perpetual, that is to be underſtood, when it is a Bar to the Right; but here it was not any Bar, but by the miſconceiving his Action it abated, and ſo no Bar to a new Action.——S. C. and ſame Diſtinction cited Arg. 2 Mod. 319.

23. After the bringing of Writ of *Debt by one as Adminiſtrator*, he may have *another Writ as Executor* to the ſame deceaſed Perſon againſt the ſame Defendant. Thel. Dig. 151. lib. 11. cap. 38. S. 13. cites Paſch. 17 H. 6. Eſtoppel 273.

24. In *Reſcous, ſuppoſing that the Defendant held of the Plantiff one Houſe and three Acres of Land, by* 10 *Marks Rent.* The Defendant *ſaid, that the Plantiff at another time brought Aſſiſe againſt him of the ſame Rent, and made Title that the Defendant held the ſaid Houſe and three Acres of Land and a Mill of the Plantiff by this Rent, in which Aſſiſe he was nonſuited:* Judgment, if he ſhall be received now to ſay, that the Rent is now iſſuing out of the Houſe and the three Acres of Land only &c Sed non Adjudicatur; for the Juſtices were in divers Opinions. Thel. Dig. 153. Lib. 11. cap. 38. S. 44. cites Brief 5 E. 4. 9. Mich. 7 E. 4. 19. 20.

25. In *Debt againſt Executor*, who *ſaid that the Plantiff had ſued againſt the Ordinary for the ſame Debt, ſuppoſing that the Teſtator had died Inteſtate, and had Judgment to recover*; Judgment of this Writ ſued againſt him as Executor &c. and adjudged no Plea. Thel. Dig. 153. Lib. 11. cap. 38. S. 47. cites 18 E. 4. 1.

26. *Treſpaſs Quare Clauſum fregit &c.* the Defendant *pleaded, that before this Time he had brought an Ejectment* againſt the now Plantiff, *and recovered and had Execution* &c. Judgment ſi Actio &c. and this was adjudged a good Bar, and the Concluſion of the Plea good. Leon. 313. pl. 437. Mich. 31 & 32 Eliz. C. B. Kempton v. Cooper.

Agreed by all, that Damages recovered in an Aſſumpſit, may be a Bar of a Debt,

27. If one be *bound in an Obligation*, and afterwards *promiſes to pay the Money*, Aſſumpſit lies upon this Promiſe; and if he *recovers all in Damages*, this ſhall be a Bar in Debt upon the Obligation; agreed by all the Juſtices. Cro. E. 240. pl. 112. Trin. 33 Eliz. B. R. Aſhbrooke v. Snape.

yet it is not ſo by Law where the Conſideration is Collateral. Cro. J. 119. pl. 7. Hill. 3 Jac. B. R. in Caſe of Lee v. Mynne.——Yelv. 48. S. C.

28. In *Aſſumpſit to pay* 100*l.* the Defendant *pleaded that the Plaintiff had brought Action of Account againſt him* for the ſame Money; Judgment ſi Actio Pending the Action of Account, adjudged and affirmed in Error, that this is no Plea in Bar; becauſe Damages are recoverable in Action on the Caſe, but not in Action of Account. Mo. 458. pl. 633. Mich. 38. & 39 Eliz. Barkby v. Foſter.

But unleſs he bring a Writ of a more higher Nature than that in

29. If any be barred *by Judgment in any real Action* of the Seiſin of his Anceſtor, or of his own Poſſeſſion; he may have Writ of Right, in which the Matter ſhall be try'd and determined again; reſolved. 6 Rep. 7. b. in Ferrer's Caſe.

which he was barred, he and his Heirs are not only barred of the ſame Action, but alſo, ſo long as

as the Record of the Judgment ſtands in force; he and his Heirs are barred of their Entry. 6 Rep. S. a. reſolved in S. C.

30. *But* Recovery or Bar *in Aſſiſe*, is a Bar *in every other Aſſiſe*, and in Writ of Entry or Aſſiſe; for *both are of his own Poſſeſſion and of one and the ſame Parties.* 6 Rep. 7. b. in Ferrer's Caſe. Regularly a Bar in Aſſiſe is a Bar in an Action of the ſame Nature. But this Rule hath *three Exceptions*, 1ſt, In caſe of a *Parſon, Prebend, or Tenant in* Tail, as the Book of 8 Ed. 3. 28. is. 2dly, If he be *in from any Title*, as 10 H. 7. 5. 22 H. 6. 18. 3dly, If he be an *Infant*, as 5 Ed. 3. 32. For an Aſſiſe is not ſo ſtrong an Eſtopple as other Actions; Per Mountague Ch. J. Cro. J. 467. pl. 13. Hill. 15 Jac. B. R. in Caſe of Holford v. Platt.

31. Bar *in a wrong Action* brought is not any Bar where the right Action is brought. Cro. E. 668. pl. 24. Paſch. 41 Eliz. C. B. in Caſe of Ferrers v. Arden. As where one *delivers Goods to keep, and brings Treſpaſs* againſt the Bailee for thoſe Goods, and be barred by Verdict or Demurrer, that ſhall not be a Bar in *Detinue or Account*, per Anderſon and Glanville. But per Walmſley J. where a *Title is pleaded in Bar to a Thing demanded*, and by Reaſon thereof, the Plantiff is barred *upon Demurrer or Verdict*, the Intereſt thereby is bound, and the Plantiff ſhall be barred from bringing a new Action, per Anderſon and Glanvil. Cro. E. 668. pl. 24. Paſch. 41 Eliz. C. B. in Caſe of Ferrers v. Arden.

32. S. *ſold all his Corn ſtanding and growing* in ſuch a Cloſe for ſo much, and afterwards brought an *Aſſumpſit* for the Money. It was objected, that Debt lay, but not this Action; but it was held that a *Recovery* or Bar *in this Action, ſhall be a good Bar in Debt* brought upon the ſame Contract, and ſo *vice verſa*, a Recovery or Bar in Action of Debt, is a good Bar in Action on the Caſe upon Aſſumpſit. 4 Rep. 92. b. 94. b. Trin. 44 Eliz. Slade's Caſe.

(A. 3) Where the Heir may bring a Writ for the ſame Thing, for which the Anceſtor had brought a Writ.

1. NOtwithſtanding the Anceſtor brought *Formedon in Remainder*, and died pending this Plea, yet his Son and Heir may maintain *Writ of Entry ſur Diſſeiſin* made to the ſame Anceſtor of the ſame Land; becauſe the one Writ is not of a higher Nature than the other. Thel. Dig. 152. Lib. 11. cap. 38. S. 15. cites Paſch. 4 E. 3. 130. & 14. Aſſ. 6.

2. Where the Anceſtor has brought *Writ of Right, in which View and Voucher have been had* &c. yet his *Heir may maintain Writ of Entry of the ſame Land, againſt one who was not Party to the Writ of Right, nor Heir to the Party*, per Opinionem. Thel. Dig. 152. Lib. 11. cap. 38. S. 17. cites Trin. 6 E. 3. 272. But Ibid. S. 18. ſays Herle held the Contrary, Paſch. 7 E. 3. 321. where the Demandant himſelf brought the one Writ and the other, and the firſt Tenant had infeoffeed the 2d Tenant with Monſtrans of Record ſub pede Sigilli &c. and that ſuch bringing of Writ of a more high Nature, ſhall abate Writ of a more baſe Nature, and cites 33 Aſſ. 18 agreeing.

3. Notwithſtanding that the Father has had *Quod permittat of Common of Paſture*, yet his Son and *Heir may have Aſſiſe* of the ſame Common. Thel. Dig. 152. Lib. 11. cap. 38. S. 21. cites 15 Aſſ. 3.

4. If Demandant be barred in *Writ of Error, on Releaſe of his Anceſtor*, yet his *Iſſue in Tail ſhall have a new Writ of Error*; for he claims in not only as Heir, but per Formam Doni, and by the Statute he ſhall not be barred by Feint Pleading or falſe Pleading of his Anceſtor, ſo long as the Right of the Entail remains; reſolved. 6 Rep.

Rep. 7. b. in Ferrer's Caſe, and ſays that with this agrees 10 H. 6. 5. & Dyer 188. pl. 8. 3 Eliz. Sir Ralph Rowlet's Caſe.

5. In *Formedon in Deſcender*, if the Demandant be barred by Verdict or Demurrer, yet the *Iſſue in Tail ſhall have a new Formedon in Deſcender*, upon the Conſtruction of the Stat. of W. 2. cap. 2. Reſolved. 6 Rep. 7. b. Mich. 40 & 41 Eliz. C. B. in Ferrer's Caſe.

(B) Action. [Judgment in one Action, where a Bar in another Action by the ſame Perſon.]

S. C. cited Arg. 2 Mod. 42. 43. by the Name of Leach v. * Fol. 354. Thompſon.

1. IN an Action upon the Caſe, if A. the Plaintiff declares, whereas he Magnam Curam de Negotiis in Lege of B. the Defendant, habuiſſet & a permultis periculis ipſum præſervaſſet; and whereas the Plaintiff at the Requeſt of the Defendant eidem Defendenti promiſiſſet to take to Wife the Daughter of the Defendant, the Defendant did aſſume to pay to the Plaintiff 1000*l.* and upon Non * Aſſumpſit pleaded, the Jury find for the Defendant, and Judgment is given accordingly; and after A. brings another Action, and declares, that in Conſideration that the Plaintiff ante tunc, at the Requeſt of the Defendant, Magnam Curam de Negotiis in Lege of the Defendant habuiſſet & ipſum Defendentem a multis periculis præſervaſſet, and to the Defendant ad tunc, at his Requeſt Promiſiſſet ducere in Uxorem ſuam filiam Defendentis, the Defendant did aſſume to pay to the Plaintiff 1000*l.* cum inde requiſitus eſſet. The Judgment in the firſt Action is not any Bar of this Action, becauſe the Promiſe is a collateral Promiſe, and the Defendant promiſed to pay the 1000*l.* generally without any Requeſt, which is to be paid within a convenient Time, but in the laſt Promiſe it is to be paid upon Requeſt, which Requeſt is Part of the Promiſe, and a ſpecial Requeſt ought to be alleged, with the Time and Place of Requeſt, this being a collateral Promiſe; but this is not to be alleged in the firſt Promiſe, becauſe no Requeſt is mentioned to be Parcel of the Promiſe, and therefore theſe two Promiſes differ materially, and therefore the Judgment in the firſt Action is not any Bar of this laſt Action. Mich. 22 Car. B. R. between *Leach and Bromfill*, adjudged upon Demurrer.

9 E. 4. 51. a. in pl. 10. cites 40 E. 3. that it was held a good Plea, and cites alſo 20 H. 6. the like Matter.

2. Treſpaſs in Bank. The Defendant pleaded that the *Plaintiff at another Time recover'd* againſt him for the ſame Treſpaſs in London 40 *l. which he has been at all Times ready to pay, and yet is*; Judgment &c. and becauſe the *Plaintiff* could not deny it, but *demurred becauſe he had not taken Execution*, it was awarded that the Plaintiff ſhould take nothing by his Writ &c. Br. Treſpaſs, pl. 39. cites 40 E. 3. 27. & 20 H. 6. 11.

3. Tho' the Statute gives Writ of Quare Ejecit infra Terminum for the *Leſſee who is ouſted*, yet he *may have Writ of Covenant againſt his Leſſor*, which is given by the Common Law; therefore Quære in this Caſe, if he brings *Quare Ejecit infra Terminum againſt the Feoffee alſo*, if he ſhall not recover again. Br. Parliament, pl. 8. cites 46 E. 3. 4.

4. *For* he may *recover twice in* 2 *Quare Impedits againſt ſeveral Diſturbers, by ſeveral Writs of Quare Impedit.* Br. Parliament, pl. 8. cites 46 E. 3. 4.

6 Rep. 8. b. in Ferrer's Caſe, in a

5. Notwithſtanding a *Recovery* be had *in Aſſiſe* againſt one, yet he ſhall be *reſtored to his firſt Action* to demand his Right; as in the Caſe of

of a *Formedon*, *Cui in Vita*, and the like. 6 H. 4. 2. a. pl. 12. per Markham. Nota of the Reporter, cites S. C. and in Marg. cites Doct. Placitandi, 65.

6. *In Debt*, if the Defendant pleads a former *Recovery by the Plaintiff in Plea Real or Perſonal, without Execution*, it is no Bar; becauſe he that recovered may, at his Pleaſure, bring a new Writ. Heath's Max. 63. cites Br. Bar, 12. 20 H. 6. and 43 Ed. 3. Br. Barre, pl. 11. cites 43 E. 3. 2. & 20 H. 6. 12. S. P. per Thorpe.

7. *In Treſpaſs, Judgment in another Writ of Treſpaſs of the ſame Treſpaſs is no Plea, without Execution.* Br. Execution, pl. 5. cites 20 H. 6. 11, 12. S. P. and ſo in Account, Debt, and the like. Br. Barre, pl. 43. cites 9 E. 4. 50. by Danby and Moile; but Littleton and Choke e contra.——Br. Judgment, pl. 47. S. P. accordingly, but the Year and Page is miſprinted.——Br. Account, pl. 57. cites S. C. & S. P. accordingly, as to Account.

8. A *Recovery upon Bailment in one County* cannot be intended a Recovery upon Bailment *in another County*, nor it ſhall not ſerve for Bar there. Br. Judgment, pl. 32. cites 21 H. 6. 35.

9. If a Man recovers in *Debt upon Contract, and does not take Execution*, yet he cannot have a new Action of Debt on the Contract; for the Contract is determined by the Judgment on Record. Br. Contract, pl. 39. cites 9 E. 4. 51. But if a Man *recovers Debt upon an Obligation, and does not take Execution*, he may * have a new Action of Debt upon the Obligation; for Record ſhall not determine Specialty without Execution; per Danby & Needham. 9 E. 4. 50. b. 51. a. pl. 10.——Br. Barre, pl. 43. cites S. C. that it is no Plea, That the Plaintiff at another Time recovered in Account, Debt, Treſpaſs &c. if he does not ſay that he had Execution; per Danby and Moyle; but Littleton and Choke contra.——Br. Judgment, pl. 47. cites 4 E. 4 54. S. P. [but it ſhould be 4 E. 4. 51. and there are not ſo many Pages as 54] And there it is ſaid by Littleton, that they were all agreed that if a Man recovers upon a *ſimple Contract*, he ſhall not have a new Action upon this Contract, while the Judgment is in Force; for by the Recovery the Nature of the Duty is changed. 9 E. 4. 51. a.

If a Man brings Debt on an Obligation, and is barr'd by Judgment, he cannot have a new Action ſo long as this Judgment ſtands in Force; and by the like Reaſon, when he has had Judgment in an Action upon the ſame Obligation, ſo long as this Judgment ſtands in Force he ſhall not have a new Action. 6 Rep. 46. a. Mich. 3 Jac. C. B. in Higgins's Caſe.

* Br. Contract, pl 39. S. C. has the Word (not.)

10. To plead a *Recovery of the Land* in Queſtion *againſt the Plaintiff, or one whoſe Eſtate he hath*, in the ſame or higher Nature of Action, 'tis a good Bar by many Books. Heath's Max. 62.

11. In *Treſpaſs upon the Stat. of 5 R. 2. by* 3 Perſons, a *Recovery of a 3d Part of a Moiety againſt one of them*, and *Execution* thereupon is a good Bar. Heath's Max. 62. cites 18 E. 4. 28. Bro. 70. Br Joinder in Action, pl. 70. cites S. C. & S. P. per Cur.——Br. Barre, pl. 83. cites S. C.

12. Debt *upon an Obligation with Condition*, and the *Obligee ſues* the Obligation where the *Condition is not broken*, by which he is barr'd. He ſhall never ſue this Obligation again; for once a Bar is for ever. Br. Dette, pl. 174. cites 29 H. 8.

13. *A. recovered in Ejectment againſt B.* Afterwards *B. made a new Leaſe for Years to J. S. and A. ouſted him. J. S. brought an Ejectment*, and *A. pleaded the former Recovery.* This was held a good Bar by all the Juſtices except Windham and Periam, who held it no Eſtopple; for the Concluſion ſhall be Judgment ſi Actio, and not Judgment if he ſhall be anſwer'd; and tho' it be an Action Perſonal, and in Nature of Treſpaſs, yet the Judgment is Quod habeat Poſſeſſionem Termini ſui, during which Time the Judgment is in Force; and it is not reaſonable

that he, againſt whom he recovered, ſhould ouſt him. 4 Le. 77. pl. 163. Paſch. 28 Eliz. C. B. Spring v. Lawſon.

4 Rep. 43. pl. 7. S. C. reſolved accordingly. —Le. 318. pl. 447. S. C. adjudged againſt the Plaintiff, and cites it as adjudged accordingly, Paſch. 19 Eliz. in Caſe of Rider v. Cobham; and ſays that the Book which deceived the Plaintiff was 22 E. 3. 82 where it was ſaid by Thorpe, that notwithſtanding Recovery in Appeal of Maihem, yet he may after recover in Treſpaſs; but non dicit e contra.——S. C. cited 2 Mod. 319. and the Court ſaid that there can be no Maihem without an Aſſault; and tho' the Appeal of Maihem be of a higher Nature than the Aſſault, becauſe it ſuppoſes Quod Felonice Mayhemavit, yet the Plaintiff can only recover Damages in both.——See Tit. Judgment, (Q) pl. 3. in the Notes there.

14. Damages recover'd in Treſpaſs of *Battery* is a good Plea in Bar of *Appeal of Maihem* for the ſame Battery. Mo. 268. pl. 419. Mich. 30 & 31 Eliz. Hudſon v. Lee.

15. A Recovery in *Aſſumpſit* againſt the Father, *upon a collateral Promiſe*, is a good Bar in *Debt on Bond* againſt the Son, who was the Obligor. Cro. E. 283. pl. 5. Trin. 34 Eliz. B. R. Pyers v. Turner.

16. In *Account for Malt*, the Defendant *pleaded that the Plaintiff had formerly brought Trover and Converſion for this and other Malt* againſt him, and that he was *found guilty as to Part, and Not guilty as to other Part, and Damages aſſeſs'd.* Adjudged that this was no Bar; for it might well be that he did not convert the Malt, as the firſt Action ſuppoſed, and yet he ought to account as this Action ſuppoſes. Mo. 463. pl. 653. Hill. 36 Eliz. Mortimer v. Wingate.

Cro. E. 342. pl. 21. May v. Middleton, S. C. & S. P. adjudged accordingly againſt the Opinion of Popham; becauſe the Plaintiff by his own Act falſifies his own Writ; but it was ſaid, that a Recovery is by Act in Law, which may help the Caſe; but otherwiſe of a bare Acceptance.

17. After Action brought Plaintiff *attaches in London a Debt* due by another to Defendant, and has Judgment to recover; adjudged that this ſhall be pleaded in Bar of the Action for ſo much of the Money. Mo. 598. pl. 820. Paſch 36 Eliz. Moy v. Middleton.

In Debt *againſt 2 as Executors*, they *pleaded a Judgment againſt one as Adminiſtrator*; reſolved, that it was well pleadable in Bar. Lev. 261. Hill. 20 & 21 Car. 2. B. R. Parker v. Amys &c.—— Sid. 404. pl. 11. Parker v. Maſters & al' S. C. adjudged accordingly.

18. In *Debt againſt the Defendant as Adminiſtrator*; he *pleaded a Recovery againſt him as Executor*, and that he has not Aſſets ultra; and adjudged a good Plea. Cro. E. 646. pl. 57. Mich. 40 & 41 Eliz. C. B. Smalpiece v. Smalpiece.

Cro. J. 284. pl. 5. S. C. and the Court held the Plea inſufficient.—S. C. cited per Cur. 2 Mod 295. Hill. 29 Car. 2. C. B. in Caſe of Roſe v. Standen.

19. In *Debt on a Bond*, the Defendant pleaded, that the Plaintiff brought a former Action in London upon the ſame Bond; and upon Non eſt Factum pleaded, it was *found Not his Deed*; and the *Entry was, that the Defendant recovered Damages* againſt the Plaintiff, *and ſhould go ſine Die, but no Judgment that the Plaintiff ſhould take nothing by his Writ*; therefore there was no Judgment to bar him in another Suit, for this was only a Trial, and no Judgment, and ſo the Plea was held naught by the whole Court. Brownl. 81. Paſch. 9 Jac. Level v. Hall.

Hutt 81. Laicon v. Barnard, S. C. ſays, Yelverton at firſt hæſitavit, but afterwards agreed, and Judgment for the Plaintiff ——

20. In *Treſpaſs for taking and driving away* 100 *Sheep*, *Judgment* was given *for the Plaintiff, and 2 d. Damages.* Afterwards the Plaintiff brought *Trover and Converſion* for the ſame 100 Sheep. The Defendant pleaded the former Recovery in Bar; but all the Judges, except Yelverton, held, that the 2 d. Damages could not be intended to be given for the Value of the Sheep, but for the taking and driving only, and therefore that the Trover and Converſion well lay; and Judgment was given for the Plaintiff. Cro. C. 35. pl. 9. Paſch. 2 Car. C. B. Lacon v. Barnard.

See Tit. Actions (L. 5) pl. 30.

22. In

21. In Caſe for *falſely and maliciouſly procuring a Commiſſion of Bankruptcy to iſſue out againſt the Plaintiff &c. by Virtue whereof the Defendant broke his Shop, and took away his Goods and Shop-Books, whereby he was diſcredited, and loſt his Trade, to his Damage* &c. and the Defendant *pleads, that the Plaintiff had before brought* an Action of *Treſpaſs for breaking his Shop, taking his Goods* &c. and recovered Damages againſt him in that Action, this is no good Plea; for this Action is not brought for the ſame Thing as the former was, that being for the Treſpaſs, and this for the Loſs of his Credit, and conſequently his Trade, and in the Action of Treſpaſs no Damage could be recovered for the Scandal upon which this Action is grounded, and held that the Action well lies. Sty. 3. 201. Hill. 21 Car. and Hill. 1649. Watſon v. Norbury.

22. *Aſſumpſit* againſt *Executor*, he pleads a *Judgment in Debt* againſt him *upon ſimple Contract*; tho' Debt lies not in the Caſe, the Judgment is a Bar of the Aſſumpſit till it be reverſed. 3 Lev. 181. cited per Cur. as the Caſe of Patmer v. Lawſon. Sid. 332. pl. 17. Paſch. 19 Car. 2. B. R. the S. C. & S. P. reſolved. — Lev. 200. S. C. adjudged for the Defendant.

23. A Judgment *in an inferior Court* is pleadable in Bar in a ſuperior Court; per Wilde J. of Aſſiſe at Lancaſter upon Adjournment to his Chambers at Serjeant's-Inn. 2 Lev. 93. Mich. 25 Car. 2. Atkinſon v. Woodbarn. See Tit. Judgment (M. a) pl. 1.

24. The Plaintiff brought an Indebitatus Aſſumpſit, and an *Inſimul Computaſſet* for Wares, whereas at that Time no Account was ſtated, and Verdict for the Defendant. Afterwards the Plaintiff brought Action of Account, and the Defendant pleaded the former Action. But the Court held the Plea not good, and that if the Plaintiff had recovered, it could not have been pleaded in Bar to him; for if he *miſconceives his Action, and a Verdict is againſt him, and then brings a proper Action*, the Defendant cannot plead that he was barred to bring ſuch Action by a former Verdict; becauſe where it is inſufficient it ſhall not be pleaded in Bar. 2 Mod. 294. Hill. 29 & 30 Car. 2. C. B. Roſe v. Standen.

25. Where the Party being barr'd in one Action ſhall be barr'd in another, is *intended* in an Action *of the ſame Concernment*, As a Bar to one *Treſpaſs* is a Bar in another for the ſame taking; but a Bar in Treſpaſs is not a Bar in *Detinue*, or a Bar in Trover is not a Bar in Account. Arg. Skin. 48. in Caſe of Foot v. Raſtall. And Saunders ſaid, that a Recovery in *Treſpaſs* is a Bar in *Detinue*, *Account*, or *Trover*; for the Plaintiff hath *Damages* given *to the Value* of the Thing taken, and thereby the Property is gone; but if Damages are given not for the Value, but *for a collateral Reſpect*, as for *miſuſing* &c. there Bar in Treſpaſs is no Bar in Trover; and for this he cited 1 Cr. 35. but in this Caſe the Jury *find for the Defendant*, and ſo no Property is altered; for the Party may, notwithſtanding he is barr'd in the Action, *ſeize the Goods* if he can come at them, quod fuit conceſſum per totam Curiam. Skin. 57. S. C.

26. A Difference was taken, per Pemberton Ch. J. that where the *ſame Evidence will maintain the one or the other* Action, there a Bar in the one will be ſo in the other, as in Ferrar's Caſe; but where it *will not*, it is otherwiſe. 2 Show. 213. Trin. 34 Car. 2. B. R. in Caſe of Putt v. Rawſtern. Raym. 472. S. C. Mich. 34 Car. 2. B. R. and the S. P. by Pemberton.

27. Bar for *want of Averment of a Life* in one Action is no Bar in another, in which the Continuance of the Life is averr'd, it not being upon the Matter, but upon the Manner of the Plea, Arg. and to this the Court inclined. 2 Lev. 210. Mich. 29 Car. 2. B. R. in Caſe of Ingram v. Bray.

28. *Trover* of Goods; the Defendant *pleads* in Bar, *that Treſpaſs was formerly brought againſt him for the ſame Goods, and* upon Not Guilty pleaded, a *Verdict for him*; the Plaintiff demurr'd; and by Pemberton Ch. Raym. 472. Put v. Rawſterne, S. C. adjudged for

the Plaintiff in Trover, becauſe Trover and Treſpaſs are ſometimes Actions of different Natures; for Trover will lie where Treſpaſs Vi & Armis will not, as if I deliver my Goods to one to keep for me, and I afterwards demand them, and they are not delivered, here Trover will lie, but not Treſpaſs; becauſe here was no tortious Taking; but where there is a wrongful Taking and detaining the Goods, the Plaintiff may have either Treſpaſs or Trover, and in ſuch Caſe Judgment in one Action is a Bar to the other, and the Rule is, viz. whereſoever the ſame Evidence will maintain both the Actions, there the Recovery or Judgment in the one, may be pleaded in Bar to the other, and this will not claſh with Ferrer's Caſe; for here it is to be preſumed that the Plaintiff, in the firſt Action, had miſtaken his Action, by bringing Treſpaſs Vi & Armis, whereas he had no Evidence to prove a wrongful Taking, but only a Demand and Refuſal, and for that Reaſon the Verdict paſſed againſt him in the Action of Treſpaſs, and therefore he was obliged to begin again in Trover.——2 Mod. 318. S. C. and the Court were of Opinion, that Trover will lie where a Treſpaſs will not, and if the Plaintiff has miſtaken his Action, that will be no Bar to him.——3 Mod. 1. S. C. adjudged by 3 Judges for the Plaintiff——Pollexf. 634, to 645. S.C. argued by the Reporter, and ſays, Judgment was given for the Plaintiff in the Action; but a Writ of Error intended.——Skin. 48. pl. 2. Foot v. Raſtal, S. C. adjornatur; but Ibid. 57. pl. 1. adjudged niſi.——But in the Caſe of Lechmere v. Toplady, Show. 146. Hill. 1 W. & M. it was held, that Judgment in Treſpaſs on a ſpecial Verdict is a good Plea in Bar to Trover brought for the ſame Goods.——See Tit. Actions (L. 5) pl 35, 36. Ch. J. Jones, and Raymond, (Dolben hæſitante) Judgment was given for the Plaintiff. 2 Show. 211. pl. 219. Trin. 34 Car. 2. B. R. Putt v. Royſton.

29. *T. brought* Treſpaſs of *Aſſault and Battery* in B. R. *againſt S.* to which S. pleaded Son Aſſault Demeſne, and found for the Plaintiff. Afterwards *S. brought* Treſpaſs of *Aſſault and Battery againſt T.* in C. B. and *T. pleaded this Verdict and Judgment* in Bar; and the Court would not ſuffer this Action to proceed. Cited Skin. 58. Mich. 34 Car. 2. by Pollexfen, Arg. as the Caſe of Turbervill v. Savage.

30. If there be 2 *Obligees*, and *Debt* is brought *againſt one*, and he *pleads Non eſt Factum*, and found for the Defendant, an Action may be brought againſt the other; *but* if he pleads *Conditions performed*, and found for him, it is otherwiſe. Skin. 58. Arg. pl. 1. Mich. 34 Car. 2. B. R. in Caſe of Foot v. Raſtall.

The Reaſon why the firſt Declaration is naught, is, becauſe he ſays the Defendant releaſed to J.S. and *ſaith not without the Plaintiff's Conſent, and ſo for aught appears it was with it*, and then it is no Breach of Covenant. Skin. 120. Coppin and Steymaker.

31. The Plaintiff declared in an Action of *Covenant*, that whereas the Defendant had covenanted and agreed with the Plaintiff *not to releaſe to J. S. without the Plaintiff's Conſent, that notwithſtanding he had releaſed to him*, and this Declaration being ill, Judgment was for the Defendant; and after the Plaintiff brought *another Action*, and the Defendant pleaded this in Bar; and upon a Demurrer, the Counſel for the Defendant urged 6 Rep. 7. and Dyer, and the Counſel for the other Side cited Mod. Rep. 207. The Court took a *Difference between a Bar and Demurrer to the Declaration*, and a *Judgment upon a Demurrer to the Plea, or upon a Verdict or Confeſſion*; for in the Caſe of a Demurrer to the Declaration, the Right was never tried. Skin. 120. pl. 15. Trin. 35 Car. 2. B. R. Coppin and Steymaker.

32. In *Replevin* the Defendant avowed, and there was a *Demurrer to the Avowry* &c. and after a *new Replevin* was brought, and this Judgment pleaded in Bar, and they could never get over it. Cited by Pollexfen, as a Caſe wherein he was of Counſel; and yet he ſaid an Avowry is like to a Declaration. Skin. 120. Coppin and Steymaker.

33. Recovery in a former Action by A. and B. for *throwing down their Houſe, and ſpoiling Goods*; upon which was a Verdict, and 140l. Damages, is a good Bar to an Action of Treſpaſs brought after by A. alone for Damages, *little varying from what was alledged in the former Action*, as Loſs of Trade &c. 3 Lev. 179. Trin. 36 Car. 2. C. B. Barwell v. Kenſey.

34. *Recovery* in *Trover*, or *Battery* againſt an *inſolvent* Perſon, is a Bar to ſue any other of the Parties. Arg. Show. 168. Trin. 2 W. & M.

35. *Debt*

35. *Debt* was brought *upon a Bond for Performance of Covenants.* The Defendant *pleaded* in Bar, *that for all the Breaches, till ſuch a Time, he had brought Covenant, and recovered Damages, and that there was no Breach ſince that Time*; and Demurrer, and Judgment for the Plaintiff; for by the very Plea the Bond was forfeited. 12 Mod. 321. Mich. 11 W. 3. Pierce v. Hutcheſon.

36. After Recovery of *Damages in Aſſault*, Battery &c. no Action will lie for *conſequential Damages*; as where, after ſuch Recovery, a Piece of the Man's Skull came out. 12 Mod. 542. Trin. 13 W. 3. Fitter v. Veal. 1 Salk. 11. pl. 5. Fetter v. Beal, S C. adjudged accordingly.

37. Recovery in Treſpaſs and *Battery* is a good Bar in *Maihem*; per Cur. 12 Mod. 543. Trin. 13 W. 3. Fitter v. Veal.

38. If A. *wound B.* and he thereof *die* within the Year, *thro' the Unſkilfulneſs of Surgeons*, yet it is Felony in A. Per Holt Ch. J. 12 Mod. 544. Trin. 13 W. 3. in Caſe of Fitter v. Veal.

39. *And* if A. brings an Action for *Words* actionable in themſelves, and *recover Damages*; and *after*, by reaſon of the Words, ſhe *loſes a Huſband*, yet no Action will lie after for the Special Damage; per Holt Ch. J. 12 Mod. 544. Trin. 13 W. 3.

40. *So* if the Words be actionable for *Special Damage*, which the Party has ſuffered by reaſon of them, and for that Damages are recovered, and after the Party has *another Special Damage*; per Holt Ch. J. 12 Mod. 544. Trin. 13 W. 3.

41. And Action of Treſpaſs for Battery and Wounding is not like the Caſe of a *Nuſance* in erecting a *Pent-houſe*, whereby the Rain falls upon my Houſe or Garden; or ſtopping my Lights, wherein I ſhall recover *Damages for every new Hurt in Infinitum*; for, firſt, the *Battery is a tranſitory Act*, and the *Nuſance* is *a continued one* as long as it laſts; therefore Damages cannot be *recovered* for it *at once.* 2dly, every new Rain that falls, or every Light that is ſtopt, is a new Nuſance; but every new ill Conſequence of the Battery is not any new Wrong of the Defendant. Et per tot. Cur. Jud' pro Defendant. 12 Mod. 544. Trin. 13 W. 3. Fitter v. Veal. 1 Salk. 11. pl. 5. S. P. and by Holt Ch. J. in Treſpaſs the Grievouſneſs or Conſequence of the Battery is not the Ground of the Action, but the Meaſure of the Damages, which the Jury muſt be ſuppoſed to have conſidered at the Trial; and Judgment for the Defendant.

(B. 2) Judgment in one Action, where a Bar in another Action, tho' brought by or againſt another Perſon, it being for the ſame Thing.

1. TWO are *bound, Conjunctim & Diviſim*, and the Obligee recovers againſt one of them, and does not ſue Execution, yet he may have a new Action againſt the other if he will, ſo the Nature of the Deed is not changed by this Recovery &c. 9 E. 4. 51. a. pl. 10. per Pigot. And tho' he has that one in Execution, he may implead the other, and take him in Execution alſo, becauſe Execution is not a Satisfaction; but if the one ſatisfies the Plaintiff, he ſhall not have Execution after. Br. Executions, pl. 132. cites 29 H. 8. per tot. Cur. in C. B.

In Caſe of an Obligation againſt 2, each of them is chargeable and liable to the intire Debt, and therefore a Recovery againſt the one is no Bar againſt the other till Satisfaction; per Cur. Cro J. 74. in pl. 3. Trin. 3 Jac. B. R.——Yelv. 67. S. P. obiter, cites 4 H. 7. 22.——See 5 Rep. 86. b. Blumfield's Caſe.——As to him againſt whom the Judgment is, it is become a Record; but as to the other, it continues a Writing as it was before; per Cur. 6 Rep. 40. b.——The Nature of the Obligation is not changed againſt the other, but that the Obligee may have Action of Debt upon the ſame Obligation againſt the other Obligor, and he may plead Non eſt Factum, notwithſtanding the Judgment againſt the other. 6 Rep. 45 a. 46. a. Mich. 5 Jac. C. B. in Higgins's Caſe.

So if the *Bailee recovers first.* Br. Ibid.

2. If *Goods of the Bailor are taken*, and *he recovers Damages*, the *Bailee shall not have Action after.* Br. Treſpaſs, pl. 442. cites 20 H. 7. 5.

3. In Treſpaſs for Battery of his Servant, the *Maſter may recover for the Services, and the Servant for the Battery.* Br. Treſpaſs, pl. 442. cites 20 H. 7. 5.

4. It ſeems that if *Termor recovers in Ejectment, and re-enters*, the *Leſſor ſhall not have Aſſiſe.* Br. Treſpaſs, pl. 442. cites 20 H. 7. 5.

5. *So of Tenant by Statute-Merchant*, Tenant by *Elegit* &c Br. Treſpaſs, pl. 442. cites 20 H. 7. 5.

Mo. 762. pl. 1060. S. C. and the Plea adjudged good.—— Yelv. 67. Broome v. Wootton, S. C. and a Diverſity was taken by the Court

6. In *Trover* and Converſion of certain Plate, the Defendant *pleaded that at* another Time the *Plaintiff had brought his Action againſt J. S. for the ſame Plate*, ſuppoſing the Converſion to have been by him, and in that Action he had *recovered* 20*l. Damages, and had J. S. in Execution* for thoſe Damages. Reſolved a good Bar; and it was ſaid, if one have Cauſe of Action againſt 2, and obtains a Judgment againſt one of them, he ſhall not have any Remedy againſt the other; and Judgment per tot. Cur. for the Defendant. Cro. J. 73, 74. pl. 3. Trin. 3 Jac. B. R. Brown v. Wootton.

between a Thing certain and uncertain; As where 2 are bound in 100 l. to J. S. jointly and ſeverally, a Recovery and Execution againſt one is no Bar againſt the other; for Execution is no Satisfaction of the 100 l. demanded. But where *Treſpaſs is done by* 2, which *reſts only in Damages*, and the Plaintiff *recovers againſt the one, and has Execution*, there it is a good Bar againſt the other. And it was further agreed, that the very Judgment is a ſufficient Bar, Quia tranſit in rem judicatam; and the Thing uncertain is now by the Judgment made certain, and thereby altered and changed into a Thing of another Nature than it was at firſt, and therefore he cannot reſort to demand the Uncertainty again, the firſt Judgment being a Bar to it.——The ſame Law of a Battery againſt ſeveral, and Recovery had againſt one. Ibid. 69. cites it as agreed the ſame Term, in Caſe of Hickman v. Poynes.

(C) Action upon the Caſe, Bar [to another Action on the Caſe.]

2 Brownl. 122. S. C. ſays it was agreed by all, that Judgment

1. If the Defendant be found Not guilty in an Action upon the Caſe for Words, yet this Verdict, if no Judgment be given thereupon, ſhall be no Bar of another Action upon the Caſe for the ſame Words. Mich. 9 Jac. B. between *Jacob and Sowgate*, per Curiam.

ſhould be given for the Defendant, Niſi.——But Brownl. 11. Jacob v. Songate, Trin. 9 Jac. S. C. agrees with Roll ſupra, that it was adjudged no Bar, becauſe no Judgment was given in the firſt Action, and ſo Judgment enter'd for the Plaintiff.

2. In an Action upon the Caſe, upon a Promiſe, if the Plaintiff declares, that in Conſideration that he demiſed to the Defendant a Houſe for a Year for certain Rent, and delivered the Key thereof to him, the Defendant did aſſume, at the End of the Year, either to deliver the Poſſeſſion or give 5 l. to the Plaintiff, and for the Non-delivery of the Poſſeſſion, or Payment of 5 l. the Action is brought; it is no Plea in Bar of this Action for the Defendant to ſay, That the Plaintiff had nothing in the Houſe at the Time of the Demiſe; for if it ſhould be admitted, yet the Delivery of the Key and Poſſeſſion is a ſufficient Conſideration to bind the Defendant, either to redeliver the Poſſeſſion, or give 5 l. Mich. 13 Car. B. R. between *Page and Lownes*, adjudged upon Demurrer.

(D) In

(D) In what Cafes a Diſcharge pro Tempore ſhall be a Bar. And How.

1. IN *Debt againſt Executors* who *plead Plene Adminiſtravit*, and it is *found for them*, the Plaintiff ſhall be barr'd, and *after Goods came to their Hands* by Recovery or otherwiſe, the Plaintiff ſhall have another Action of Debt De novo. Br. Dette, pl. 92. cites 19 H. 6. 37. per Markham. S. P. and ſhall not have Scire Facias; for by the Judgment the Record is determined; per Martin; quod tot. Cur. conceſſit. But Brooke ſays Quære inde; for it ſeems that Debt does not lie after the Plaintiff is once barr'd. Br. Executor, pl. 85. cites 4 H. 6. 4. —— S. P. Br. Dette, pl. 105. cites S. C.

2. *So in Debt againſt the Heir*, who *pleads Riens per Deſcent*, and after *Aſſets comes to him*, in a new Action he ſhall be charged, and the firſt Matter no Bar. Br. Dette, pl. 92. cites 19 H. 6. 37. per Markham.

3. Where a Man grants to his *Debtor*, that he *ſhall not be ſued before Michaelmas*, this is a good Bar for ever. Br. Grants, pl. 58. cites 21 H. 7. 23.

4. Grant that a Man *ſhall not be diſtrained for* 3 *Years*, or that he ſhall not be impeached of Waſte; theſe are good Bars, and the Party ſhall not be put to his Action of Covenant. Br. Grants, pl. 58. cites 21 H. 7. 23.

(E) In what Cafes a Man may be reſtored to his Action.

1. IF *a Man who has Title of Action* of Aſſiſe *of Mortdanceſtor diſſeiſes the Tenant*, and the *Tenant recovers by Aſſiſe*, the *other is reſtored to his* Aſſiſe of *Mortdanceſtor*; for the Eſtate and laſt Seiſin is now defeated. Br. Reſtore, pl. 3. cites 5 Aſſ. 1.

2. A Man *died ſeiſed*, and *the Land deſcended to W. N.* and after *J. S. abated and died ſeiſed*, and *his Heir enter'd*, and the *Heir of W. N. entered upon him*, againſt whom *the Heir of J. S. brought Aſſiſe and recovered*; there the *Heir of W. N. may have Aſſiſe of Mortdanceſtor, and confeſs and avoid the Recovery in Aſſiſe of Novel Diſſeiſin*; for he is reſtored to the firſt Action. Br. Reſtore, pl. 4. cites 10 Aſſ. 16. Br. Mortdanceſtor, pl. 4. cites S. C.

3. In *Aſſiſe the Plaintiff was outlaw'd in Action of Treſpaſs after the Diſſeiſin*, and after *obtain'd Charter of Pardon, and brought Aſſiſe*, and the *Defendant pleaded the Outlawry in Treſpaſs in Bar*, and the *Plaintiff ſhewed* the Charter of *Pardon*; and by this the Aſſiſe lies well of the firſt Diſſeiſin, without Title after the Outlawry; for by the Charter of Pardon the Plaintiff is reſtored to his firſt Action, viz. the Aſſiſe, without other Seiſin or Entry after. Br. Reſtore, pl. 7. cites 13 Aſſ. 5.

4. A Man *recovered by Scire Facias upon a Fine, and made Feoffment upon Condition, and re-enter'd for the Condition broken*, and the *Tenant reverſed the firſt Judgment*, and Execution thereupon by Writ of Diſceit, and enter'd; and the firſt Plaintiff brought another Scire Facias to execute the ſame Fine, and the Iſſue taken if the Feoffment was ſingle, or upon Condition. Br. Reſtore, pl. 2. cites 38 E. 3. 16. Br. Sci. Fa. pl. 88. cites S. C.

5. *Dower*

5. *Dower of the Poſſeſſion of the Baron of the Demandant.* The *Tenant* came and *ſaid that Fine was levied between J. & E. and the Tenant, and that the ſame Tenant brought Scire Facias upon the ſame Fine againſt the ſame Feme now Demandant*; and *ſhe ſaid as to Parcel, that ſhe held of the Dowment of the ſame Baron*, and *of whoſe Dowment ſhe now holds of the Aſſignment of W. C. and pray'd Aid of him*; and *to the reſt, that ſhe held for Term of Life of the Demiſe of this ſame W. C. and pray'd Aid of him*; *upon which came the Prayee, and they pleaded Feoffment of the Baron, to whom the Remainder of the Fee-ſimple by the ſame Fine was intail'd, to whom the now Tenant and then Plaintiff in the Scire Facias ſaid that Riens paſſa by the Deed*; and after the *Prayee made Default*, and *the now Demandant, then Tenant, maintained the ſame Plea which was found againſt the Feme now Demandant*; *by which the now Tenant, then Plaintiff in the Scire Facias, had Execution*; *Judgment if againſt this Recovery, againſt herſelf, ſhe ſhall be received to demand Dower*, and the *Demandant demurr'd, inaſmuch as this Recovery affirms the Poſſeſſion of the Baron*; for by his Pretence the Feme, by ſuch Recovery, is reſtored to her firſt Action; but the beſt Opinion was e contra, and that when ſhe is lawfully in, in Dower, and loſes by Recovery, that in this Caſe ſhe has no Remedy but by Writ of Error or Attaint, or Writ of Right, and ſhe upon this Eſtate cannot have Writ of Right; and it was ſaid, that it was Folly in the Feme that ſhe had not ſaid that ſhe was in in Dower, ready to be Attendant to whom the Court ſhould award, and upon ſuch Plea ſhe ſhall hold the Poſſeſſion, and the Reverſion ſhall go to him who has Right to it. Per Belk. but when *one is in by Tort, as by Diſſeiſin upon a Deſcent to the Heir of the Diſſeiſor, or by Entry upon a Diſcontinuance, and the Heir of the Diſſeiſee or the Diſcontinuee recovers*, there the *Diſſeiſor, or the Feme, or his Heir, ſhall have in the one Caſe Writ of Entry, and in the other Cui in Vita*; *contra where he who is in by rightful Title loſes by Recovery, he has no Remedy but by Attaint, Writ of Error, or Writ of Right.* But per Clopton, this is where the Iſſue is upon the Entry; but if the Iſſue be upon a Releaſe, or other Point which goes to the Tenancy or to the Right, there, if this be found againſt him, he ſhall not be reſtored to the firſt Action. Note the Diverſity by him; but Quære of his Opinion thereof. And per Wich, where *Land is recovered againſt the Baron upon Dilatory*, As *Nontenure, Miſnoſmer of the Vill* &c. there the *Feme ſhall have Dower, and may falſify the Recovery*; for this does not falſify the Poſſeſſion of the Baron; but *contra* it ſeems *upon Recovery upon Dilatory againſt the Feme herſelf, being in in Dower.* Note the Diverſity. Br. Reſtore, pl. 1. cites 50 E. 3. 7.

Br. Sci. Fa. pl. 60. cites S. C.

6. An *Infant had Title by Fine Executory and Entry*, and *he upon whom he enter'd ouſted him*, and *the Infant brought Aſſiſe*, and the *Defendant pleaded to the Aſſiſe*, and the *Jury found for the Defendant* in the Aſſiſe; *ſo that the Infant Plaintiff was barr'd, by reaſon that there was a Divorce which was not pleaded by the Infant*, by which the Plaintiff was barr'd of the Aſſiſe; and yet he after brought Scire Facias to execute the Fine, and the Tenant in the Aſſiſe pleaded Record of the Aſſiſe, by which the now Plaintiff was barr'd in the Aſſiſe, and yet the Plaintiff recover'd, and was not barr'd by the firſt Judgment, by reaſon that he was an Infant at the Time of the Judgment, and this notwithſtanding the Fine was executed in the Infant by his firſt Entry. Quod mirum. Br. Reſtore, pl. 6. cites 7 H. 4. 22.

7. In ſome Caſe the *Original* may be revived by Writ of Error, and in ſome Caſe *the Action*; As where an Exception to the Writ is awarded good, by which the Writ abates, and after the other reverſes it by Error, the Original is revived, and he ſhall have Writ of Reſummons; but if *an ill Bar be adjudged good*, and the *Demandant reverſes it* by Writ of Error, he is reſtored to his Action. Brooke ſays, ſee elſewhere if in

in such Case the Court will not award that the Demandant recover; and says it seems they will. Br. Error, pl. 7. cites 9 H. 6. 38.

8. If *a Man intrudes after the Death of my Tenant for Life*, and *I bring Writ of Intrusion, and recover, and after make Feoffment to a Stranger*, and after the *Intruder reverses the first Judgment by Writ of Deceit, Error, or Attaint*, there I am without Remedy, and am not restored to my first Action, and Writ of Right does not lie; for my Feoffment gives my Right to the Feoffee, who cannot revest it in me by the Reversal of the Recovery. Contra if he had not made Feoffment. Br. Restore, pl. 8. cites 9 H. 7. 24.

9. If *a Man enters where his Entry is not lawful*, as *the Heir in Tail after his Discontinuance*, or the *Heir of a Feme*, or the *Feme herself after Discontinuance*, and the *other upon whom he enters recovers against him*; there he, his Heir in Tail, or the Feme, or her Heir, is restored to their first Action of Formedon, or Cui in Vita. Br. Restore. pl. 5. cites 23 H. 8.

10. *But if such* who enters, where his Entry is not lawful, *makes Feoffment*, and the *other upon whom he enters recovers*; now the first Action is not restored to the Issue in Tail, or to the Feme, or to her Heirs, by Reason of the *Feoffment*, which *extinguishes Right and Action.* Ibid.

11. *But* if such who so enters, makes *Feoffment upon Condition, and for the Condition broken re-enters, before that he upon whom he enters has recovered*, and he recovers after the Re-entry made by the Condition, there he who made the Feoffment upon Condition, is restored to his first Action; for the Entry by Condition extinguishes his Feoffment. Ibid.

(F) Barr. Good, to a common Intent.

1. IF a Bar be good to common Intent, it sufficeth. Br. Barre, pl. 41. cites 9 Ed. 4. 12. by Moyle. Heath's Max. 53. cites S. C.——

Br. Barre, pl. 87. cites 21 E. 4. 83. that a Plea in Bar by Matter of Fact, is good to a common Intent.——The Defendant in *Maintenance* did plead, that the Party was his Servant, and that he did retain A. to be his Counsel; and for the Reason aforesaid it shall be intended, that he retained him with his Servant's Money, and not with his own Money; quod nota. Heath's Max. 54. cites 21 H. 6. 1.

A Bar may be good to a common Intent, though not to every Intent, as if *Debt* be brought *against five Executors*, and *three of them make Default*, and *two appear and plead in Bar a Recovery had against them two of* 300l. *and that they have nothing in their Hands over and above that Sum.* If this Bar should be taken strongest against them, it should be intended that they might have abated the first Suit, because the other three were not named, and so the Recovery not duly had against them; but according to the Rule, the Bar is good. For that by common Intendment it will be *supposed, that the two others did only administer*, and so the Action well considered, rather than to imagine that they would have lost the Benefit and Advantage of abating the first Writ. Heath's Max. 54. cites Touchstone of Precedents, Tit. Pleas and Pleadings, Fol. 192. Reg. 7.

So if a Bar *have Matter of Substance in it, and* be good to common Intent *it is sufficient, albeit it be not good to every special Intent*; As where *one sues as Executor*, and the *Defendant saith, That the Testator made the Plaintiff and one J. S. Executors*, and does not say after this, that he did not make the Plaintiff Executor, yet this may be sufficient. Heath's Max. 55. cites 3 H. 7. 2. Plowd. 26. by Cooke Serj. Arg. Pl. C. 26. a. cites 33 H 6. [but I do not observe S P. at 3 H. 7. 2.]

So in *Trespass* where the Defendant *pleads that the Place is his Freehold*, this is good, yet the Plaintiff may have a particular Estate. Heath's Max. 55.——Pl. C. 26 a. cites Trin. 10 H. 7. 25. S P.

So upon an *Obligation to perform Covenants*, the Defendant alledgeth two Covenants, and saith he hath performed them, and doth not say there are no more Covenants in the Deed to be by him perform'd, yet it is good; for it shall be intended there are no more for him to perform. Heath's Max. 55.——Pl. C. 26. a. cites 6 E. 4 1. S. P. and Fitzh. Barre 89 and Br. Condition, pl. 144 S. C.

* S. P. Br. Barre, pl. 87. cites 21 E. 4. 83. that an Eſtoppel ought to be good to every Intent, per Brigges.

2. *But* if the Defendant pleads in Bar a *Record* or * *Eſtoppel*, that muſt be certain and good to every Intent. Heath's Max. 54. cites 22 E. 4. 83.

3. If a *Leaſe* be made *to A. and B. for Life*, the *Remainder to C. and if C. ſhall die during the Life of A. or B. then* that *it ſhall remain to E. for Life, Si ipſe vellet eſſe Reſidens &c.* and E. (being Defendant) *pleads his Entry after the Death of A. and B. and C.* and doth *not ſay when they died*, yet held to be good in a Plea in Bar: *For* if it be a Condition, it ſhall be intended that the Defendant did enter as ſoon as his Title accrued; and if the Caſe be otherwiſe in Truth, than by common Intendment it is taken to be, the Plaintiff muſt ſet it forth in his Pleading. As in a *Formedon in Diſcender*, if the Tenant pleads in Bar a Releaſe of the Demandant without Warranty, it is good; and yet the Releaſe might be made by the Demandant in the Life of his Father, and then it is no Bar to the Iſſue. Heath's Max. 56, 57. cites Plowd. 32, 33. [Paſch. 4 E. 6. Colthirſt v. Bejuſhin.]

So if one ſaith he was *Lord of a Manor*, and entered for an *Alienation in Mortmain*, and do not *ſhew that he did it within the Year*, this ſhall not be intended unleſs it be ſhewed. Heath's Max. 55.——Pl. C. 27. b. cites Hill. 3 H. 7. 2 b.——S. P. by Doderidge J. Lat. 171. & Ibid. 172. Jones J. agreed.——Yet per Plowden 28. if one *pleads a Feoffment in Bar*, it ſhall be allowed as good, albeit it *might be an Infant, or per Dureſs &c.* unleſs it be ſhewed on the other Side. Heath's Max. 55.——Pl. C. 27. b. S. P.——*And* if the *Leſſor covenants with the Leſſee, that if he be ouſted within the Term*, that *he ſhall have as much other Land*, he muſt *ſhew that he was ouſted on ſuch a Day in certain within the Term.* Heath's Max. 55.——Pl. C. 27. b S. P. Arg.——*So* to plead in Bar, *that J. S. died ſeiſed, and R. S. entred as Son and Heir to him*; this is good, though he *ſay not that he was his Heir*, for that ſhall be intended, and the beſt ſhall be taken for the Defendant. Heath's Max. 56.——Pl. C. 28. a.——*So* in an *Aſſiſe*, if the Tenant *pleads in Bar a Deſcent to the Plaintiff and two others, and that he hath the Eſtate of one of them*; it is good, yet he might have it by Diſſeiſin; but it ſhall be taken in the beſt Senſe, that he had it lawfully. Heath's Max. 56.—— Pl. C. 28. b. S. P. ——*So* where the *Anceſtor is Tenant pur auter vie*, and the *Heir pleads that he entred as Heir to him*, and ſays not that he entred firſt after his Death, for *Occupanti conceditur*. Heath's Max. 56.——Pl. C. 28. b. cites Fitzh. Barre 73. & Br. Aſſiſe 271. in 27 Aſſ. 31.

4. *But no ſubſtantial Part of a Bar may be omitted.* As where one is *bound to do a Thing between ſuch and ſuch a Time*, and the Defendant *ſaith that he did it, or did it before the Day*, this is not ſufficient, but he *muſt ſhew that he did it ſuch a Day within thoſe Times.* Heath's Max. 55.

5. *Debt againſt an Executor upon a Bond of the Teſtator.* The Defendant *pleaded a Statute* acknowledged *by the Teſtator* &c. and *averred that he has not, nor at the Day of the Bill brought, he had not any Goods which were the Teſtator's tempore mortis ſuæ*, in his Hands to be adminiſtred, *unleſs to ſatisfy the ſaid Statute*; and upon Demurrer to this Plea, it was objected that it was ill, becauſe the Defendant might have Goods liable to Debts, though they were not the Teſtator's Goods tempore mortis ſuæ; but all the Court except Williams J. held it well, the Bar being good to a common Intent, and it ſhall not be intended that he had ſuch Aſſets, being ſpecial Aſſets, unleſs it was ſpecially ſhewed; and denied the 7 H. 4. 39. which was cited to be good Law in that Point, and Judgment for the Plaintiff. Cro. J. 131. pl. 4. Mich. 4 Jac. B. R. Gewen v. Roll.

6. Though a Bar ſhall be taken good by a common Intent, yet when the Bar *depends upon Circumſtance*, there in pleading the Matter he *muſt ſhew it to be within the Circumſtance.* Per Doderidge J. Lat. 171. Trin. 2 Car.

7. Debt upon *Bond for quiet Enjoyment* from the Time &c. The Defendant *pleaded, that* after the making the ſaid Bond *to the Day of the Bill the Plaintiff had enjoyed the Lands*; and upon Demurrer to this Plea it was objected, that the Defendant does *not ſay, a Die Confectionis*

tionis ſcripti Obligatorii & ſemper poſt Confectionem &c. ſed non allocatur; for the Bar is good to a common Intent, and it ſhall be intended that he always enjoy'd it, unleſs the contrary is ſhewn. Cro. C. 141. pl. 6. Trin. 6 Car. B. R. Harlow v. Wright.

8. The *Reaſon why* a Bar is good to a common Intent, is becauſe it *is to excuſe from a Charge.* But a Replication muſt have a general Certainty, becauſe it is to deſtroy the Excuſe of the Defendant, which is always received favourably. Per Holt Ch. J. 12 Mod. 665. Hill. 13 W. 3. Heath's Max. 57. S. P.

For more of Bar in General, See **Abatement, Actions, Judgment,** and the Pleadings under the ſeveral other Titles.

Baron and Feme.

Fol. 340.

(A) Who ſhall be ſaid to be Baron and Feme.

1. **If a Man eſpouſes his Mother, they are Baron and Feme till it be defeated.** 9. H. 9. 34. For when the Banes and Eſpouſals are made in Facie Eccleſiæ, this is ſufficient to us, and whether it be lawful Matrimony or not, is nothing to us per Paſton; but per Cavendiſh, notwithſtanding the Celebration, the Court ſhall take Notice whether the Eſpouſals are lawful or not. Ibid.

2. **If a Woman takes a 2d Husband, living the firſt Husband, this is void Marriage by our Law, as by the Spiritual Law. Contra 9 H. 6. 34.** See Tit. Baſtard (A. 2) pl. 1. & (F) pl 1. S. P. ——S. P.

Arg. Mo. 226.——Adjudged that where the Husband took a ſecond Wife, the Marriage was void ab Initio, and ſhe was always Sole, and there needed no Sentence of Divorce, and ſuch Divorce is only declaratory. Cro. E. 857. pl. 25. Mich. 43 & 44 Eliz. C. B. Riddleſden v. Wogan.

3. **If a Man baptizes the Couſin of A. S. and after marries with A. S. they are Baron and Feme till a Divorce.** 39 Ed. 3. 31. b. Br. Baſtardy pl. 23. cites S. C. [This it ſeems was looked upon as a Spiritual Affinity, ſo as their Intermarriage was prohibited, and as I think, I remember Sir Paul Rycaut mentions it to be ſtill obſerved in the Eaſtern Churches]—See Tit. Baſtardy (A. 2) pl. 4. and the Notes there.

4. **So if a Man takes his Siſter to Wife, they are Baron and Feme till a Divorce.** 39 Ed. 3. 31. b. Br Baſtardy pl. 23. cites S. C.—See Tit. Baſtard. (A. 2) pl. 3. S. C.

5. **If a Man takes A. S. to Wife by Dureſs, tho' the Marriage be ſolemnized in Facie Eccleſiæ, yet it is merely void, and they are not Baron and Feme; becauſe there is not any Conſent, and cannot be a Marriage without a Conſent. Dubitatur** * 11 H. 4. 14. † 19 H. 7. * Fitzh. Corone, pl. 86. cites Mich. 11 H. 4. 13. S. C † Kelw. 52. b pl 7.

Trin. 19 H. 7. Keble v. Vernon.——D. 13. a Marg. pl 61. ſays, that Noy Attorney General held, that

that Marriage by Dureſs was good, contrary to the Opinion of Frowike. Cro. [Kelw.] 52 becauſe otherwiſe upon ſuch Allegation Divorces will be frequent to ſatisfy Mens Luſts, and cites Fitzh. Attachment fur Prohibition 8. and 11 H. 4. 13. and Swinb. 241. ——Marriage by Force and Dureſs of the Feme is void, and Treſpaſs thereof well lies; per Windham J. and cites it as by Babington, in L. 5 E. 4. 61. b.——2 Inſt. 687. S. P cites 11 H. 4. 14 Rot. Parl. 17 H. 6. Numb. 15. Iſabel (Lady) Butler's Caſe.——See Mod. 102. Mich. 1 Ann. B. R. the Queen v. Swanſon & al'——See Tit. Marriage (H. a) per totum.

6. If a Woman, after carnal Knowledge of her Husband, enters into Religion without the Conſent of her Husband, and the Husband after takes another Wife, this is void; becauſe he may detaign his Wife. 18 H. 6. 33.

7. So the ſecond Marriage would be void, tho' the Wife had entered into Religion by the Aſſent of the Baron; becauſe the Baron, by his Aſſent, had in a Manner vowed Chaſtity.

Baſtard (A. 2) pl. 8. S. C.—S. C. cited Sid. 112.

8. If an Idiot a Nativitate takes a Wife, they are Baron and Feme in Law, and their Iſſue legitimate; for he may conſent to a Marriage. Trin. 3 Jac. B. R. between *Still and Weſt*, adjudged upon a ſpecial Verdict.

* Br. Verdict, pl. 21. cites S. C.—Br. Baſtardy, pl. 25. cites S. C. quod Nota bene, quia nemo negavit. ——Fitzh. Baſtardy, pl. 33. cites S. C.——2 Inſt. 687 Ld. Coke ſays, that it appears in our Books, that if a Deacon or ſecular Prieſt had taken Wife, the Marriage was not void, but voidable Cauſa Profeſſionis; and if either Party had died before Divorce, their Iſſue had been legitimate, and ſhould have inherited; for that Deacons and Prieſts within England were not Votaries, that is, had not vowed Chaſtity; but if a Monk or a Nun had married before the Statute of 32 H. 8. cap. 38. and of 2 E. 6. cap. 21. and this Act of 5 E. 6. the Marriage had been (as it was then holden) merely void; for that they had taken a Vow of Chaſtity, as it appeareth by our Books in 5 E. 2. Tit. Non Hability 26. 19 H. 7. Tit. Baſtard' 33. 21 H. 7 39. b. for avoiding of which Scruple, the ſaid Acts of 32 H. 8. 2 E. 6. and 5 E. 6. were made.

9. If a Man takes the Order of a Deacon, and after takes Wife, this Marriage is not void; for the Iſſue is no Baſtard. * 21 H. 7. 39. 19 H. 7. Baſtardy 33. adjudged by Advice in the Exchequer Chamber.

10. So if a Prieſt takes a Wife, this is not void, but they are Baron and Feme. * 21 H. 7. 39. 19 H. 7. Baſtardy 33. per Frowick.

11. So if a Nun takes Husband, it is not void, but voidable, contra ibidem, per Daviſor.

The Age of a Feme for Conſent to Marriage is 12 Years. Br. Age, pl. 73. cites Lib. B. fol. 117.——Br. Gard, pl. 7. cites 35 H. 6. 40. S. P.——Mo. 741. Arg. cites S. C. & S. P by Wankford.——2 Inſt. 90 S. P.—— Co. Litt. 79. a. S. P. —— Br. Age, pl. 41. cites 8 E. 4. 7. but ſays, that thoſe of the Spiritual Law ſay, that it was *not ſo then, unleſs at that time ſhe be Apta Viro.*

12. If a Man within the Age of 14, takes a Wife above the Age of 12, this is a Marriage, and they are Baron and Feme de Facto, ſo that the Baron may have Treſpaſs de Muliere Abducta cum bonis viri. Trin. 12 Jac. B. between *Bradſhaw and Fletcher*, per Curiam.

Mo. 575. pl. 794. Warner v. Babington, S. C. the Queſtion was, if ſhe ought to agree or diſagree ante Annos Nubiles, or what Time the Law has appointed for it; Popham ſaid, that if ſhe marries another Baron infra Annos Nubiles, this ſhall be a Diſagreement, to which Fenner agreed; & adjornatur.——See pl. 16.

13. If a Man marries a Woman that is within the Age of 12, and after the Woman at the Age of 11 Years diſagrees to the Marriage, this Diſagreement is void, it being within the Age of Conſent, and ſo they continue Baron and Feme, notwithſtanding the Diſagreement. Tr. 24 Eliz. ..... adjudged, cited M. 41 & 42 El. B. R. by Coke. Co. Litt. 79. M. 41. 42 Eliz. B. R. per Curiam, between *Babington and Warner.*

Fol. 341.

14. If a Man marries a Woman that is within the Age of 12 Years, and after the Woman at 11 Years of Age diſagrees to the Mar-

Marriage, and after the Husband takes another Wife, and has Iſſue by her, this is a Baſtard; for the firſt Marriage continues, notwithſtanding the Diſagreement of the Woman, for ſhe cannot diſagree within the Age of 12 Years, and ſo her Diſagreement void. Trin. 35 Eliz. B. R. adjudged, cited H. 41, 42 Eliz. B. R. by Coke. Quære.

15. If a Man of the Age of 14 takes a Woman of the Age of 10, the Baron, when the Feme comes to the Age of 12, may diſagree as well as the Feme; becauſe in Contracts of Matrimony each ought to be bound, and equal Election given to both. Co. Litt. 79. [b.]

16. If a Man marries a Woman that is within the Age of 12 Years, and after the Feme, within the Age of Conſent, diſagrees to the Marriage, and after the Age of 12 Years marries another, now the firſt Marriage is abſolutely diſſolved, ſo that he may take another Wife; for tho' the Diſagreement within the Age of Conſent was not ſufficient, yet her taking another Husband after the Age of Conſent affirms the Diſagreement,, and ſo the Marriage avoided ab initio. H. 41, 42 El. B. R. between *Babington and Warner*, adjudged in a Writ of Error upon a Judgment given in Banco, where the ſame Point was alſo adjudged. Mo. 575. pl. 794. Warner v. Babington, S. C. in Debt upon Bond the Defendant pleaded, that the Feme had another Baron in full Life; the Plaintiffs replied, that the Feme ad Annos Nubiles diſagreed; and upon Demurrer it was adjudged for the Plaintiffs, becauſe after the Age of Conſent ſhe always cohabited with the ſecond Baron; and ſo a Judgment in C. B. was affirmed in B. R ——— D. 13 a. Marg. pl. 61. cites S. C. and the ſecond Marriage adjudged good, tho' the Feme diſagreed within Age, and ſays, that ſo was the Opinion of Noy, Attorney General, and Harriſon, Reader of Lincoln's-Inn, 1632; and Noy's Reaſon was, that the Church providing againſt Change of Luſt, had prohibited Divorces, but in this Caſe, under the Age of 12 Years, there was no ſuch Miſchief.

17. If an Infant within the Age of Conſent, as of the Age of 10 Years, takes A. S. to Wife, and after, when he comes to the Age of 14, they both being preſent together, ſeverally diſagree to the ſaid Marriage, which Diſagreement is put in Writing, and the ſaid Infant puts his Hand thereto, and after they agree again, and live together as Man and Wife, this is a good Agreement, and ſo the Marriage continues; for the ſaid Diſagreement by Parol is not ſuch a binding Diſagreement, but that they may well after agree to the firſt Marriage without any new Marriage, for Affection may increaſe. P. 7 Jac. B. between *Lee and Aſhton*, adjudged per Curiam.

18. But otherwiſe it had been if the Diſagreement had been before the Ordinary; for there they could not ever agree again to make it a good Marriage. Tr. 12 Jac. B. per Warburton.

19. If a Man within the Age of 14 takes a Wife of full Age, and after brings a Writ de Muliere abducta cum bonis viri, and after comes to the Age of 14, if after he makes any Continuation of the Action, this ſhall be an Agreement to the Marriage, ſo that it cannot after be defeated. Trin. 12 Jac. B. per Curiam.

21. If Baron and Feme are divorced Cauſa Adulterii, yet they continue Baron and Feme; for the Divorce is but a Menſa & Thoro, & Matrimonii Obſequiis. By Reports, 14 Jac. * *Motam and Motam*, 44 El. † *Stevens againſt Totte*, Trin. 2 Jac. B. Rot. 1815. between ‡ *Stowel and Wikes*, adjudged; and that ſhe ſhall not loſe her Dower by this Divorce. Quod vide Co. Lit. 33. b. * 3 Bulſt. 264. Motteram v. Motteram, S. C. & S. P. admitted — Roll Rep. 426. pl. 19.

S. C. & S. P. admitted. † See (F) pl. 8. S. C. ——— S. C. cited by Doderidge J. 3 Bulſt. 264. ——— S. C. cited Arg Roll Rep. 426. ‡ Noy 108. Powell v. Weeks, S. C. & S. P. reſolved. ——— Godb. 145. pl. 182. Lady Stowell's Caſe, S. C. adjudged. ——— S. C. cited Cro. C. 463. ——— S. P. declared per tot. Cur. in the Star-Chamber accordingly; and Archbiſhop Whitgift ſaid, that he had called to him at Lambeth the moſt ſage Divines and Civilians, who all agreed to the ſame. Mo. 683. pl. 942. Hill. 44 Eliz. Rye v. Fuliambe. ——— Noy 100. Rye v. Fullcumbe, S. C. & S. P. accordingly. ——— S. P. Mar. 101. pl. 173. Trin. 17 Car. B. R. Williams's Caſe; reſolved, without Argument by Bramſton Ch. J. and Heath J. abſentibus aliis, that it is within the Statute of 1 Jac. cap. 11. and Heath ſaid that, by the Law of Holy Church, the Parties divorced Cauſa Adulterii might marry; but Pars rea not without Licence.

* See Baſtard (B) pl. 18. ——See Tit. Marriage (E. 2) (F) (F. 2)

21. If a Man and a Woman are married by a Prieſt in a Place which is not a Church or Chapel, and without any Solemnity of the Celebration of Maſs, yet it is a good Marriage, and they are Baron and Feme. Contra * 10 E. 4. 5. Rot. 23. adjudged; for their Iſſue adjudged a Baſtard.

22. Marriage *by a meer Layman, Miniſter of a ſeparate Congregation*, will not intitle the Man to be Adminiſtrator to the Woman, notwithſtanding Cohabitation for ſeveral Years as Man and Wife. Affirm'd on Appeal to the Delegates. 1 Salk. 119. 9 Ann. Haydon & Ux. v. Gould.

Fol. 342. N. B. Roll has no Letter (B)

(C) What Perſons ſhall be ſaid Baron and Feme. In reſpect of their *Age*.

See (A) pl. 12. and the Notes there. * Br. Garde, pl. 7. cites 35 H. 6. 40. S. C. but S. P. does not appear.——Fitzh. Tit. Garde, pl. 59. cites S. C. but I do not obſerve S. P.

1. By the Law of England the Age of Conſent to a Marriage, for a Male, is the Age of 14, ſo that he cannot marry himſelf before this Age, to make a compleat and perfect Marriage, but then he may, Lit. 22. b. * 35 H. 6. 41. b. For then he is Puber, and ſuch that he may engender.

2. With this agrees the Law of Scotland. Skene Regiam Majeſtatem, 43. b. againſt 2 ..... and ſo is the Civil Law, Juſtin. Inſtitutiones.

Fitzh. Garde, pl. 59. cites Hill. 35 H. 6. 40. S. C. but I do not obſerve S. P. ——Br. Garde, pl. 7. cites S. C. & S. P. by Wangford.——See (A) pl. 12.

3. The Age of Conſent by our Law to a Marriage, for a Female, is the Age of 12 Years; ſo that ſhe may marry herſelf at ſuch Age, and this be a perfect Marriage, but not before this Age. 35 H. 6. 41. b. 53. 8 Ed. 4. 7.

4. With this agrees the Civil Law, Juſtin. Inſtit.

5. But by the Law of Scotland, the Age of Conſent for a Female is 14, as well as for a Male. Skene Regiam Majeſtatem, 43. b. 2.

Before the Age of 7 Years they ſhall not be ſaid to be Sponſalia; but at that Age they are ſaid to be Nuptiæ inchoatæ, and at 12 ſhall be ſaid to be Nuptiæ Perfectæ & Conſummatæ. D. 13. a. Marg. pl. 61. cites it as the Opinion of Harriſon, Reader of Lincoln's-Inn in Lent 1632. and of Noy, Attorney-General.

6. A Woman cannot contrahere Sponſalia before 7 Years of Age, by the Law of Scotland, but ſhe may after this Age. Skene Regiam Majeſtatem, 43. b. 2.

(C. 2) What of the Feme ſhall veſt by the Marriage in the Baron. *Freehold Land.* How.

1. If a Man takes to Wife a Woman ſeiſed in Fee, he gains by the Intermarriage *an Eſtate of Freehold* in her Right, which Eſtate is ſufficient to work a Remitter; and yet the Eſtate which the Husband gaineth dependeth upon Uncertainty, and conſiſteth in Privity. Co. Litt. 351. a.

(C) What

(D) What *Things of the Feme* the Baron ſhall have by the Inter-marriage or Coverture. What not. Chattels in Action.

1. IF a Statute be acknowledged to Baron and Feme, they are Joinetenants of this, and the Feme ſhall have all by Survivor. 48 Ed. 3. 12. b. But the Baron alone may make Defeaſance, and it ſhall ſerve for both. Br. Baron and Feme, pl. 24. cites S. C. per Opinionem.——See Tit. Execution (Q. 3) pl. 1. S. C.

2. The ſame Law, if an Obligation be made to Baron and Feme. Contra 48 E. 3. 12. b. Peradventure the ſame Law ſhall be of an Obligation; per Finch. Br. Baron and Feme, pl. 24. cites S. C.

3. If Baron and Feme recover Land and Damages, the Feme ſhall have Execution of the Damages, and not the Executor of the Baron. * 48 Ed. 3. 13. † 28 Aſſ. 45. * Br. Baron and Feme, pl. 24. cites 48 E. 3. 12. per Finch. [but the Saying is 48 E. 3. 13. a. and gives for Reaſon, that the Thing is proved to them two by Matter of Record.]

† Br. Executions, pl. 83. cites S. C. accordingly.—— After the Year they ſued Sci. Fa againſt the Ter-tenants to have Execution of the Damages, and one came and ſaid that the Baron is dead; Judgment of the Writ, and upon Nient dedire the Writ abated. Br. Brief, pl. 293. cites S. C.—Fitzh. Execution, pl. 112. cites S. C. accordingly.

4. If Baron and Feme recover Damages in a Real Action, they may ſue Execution jointly. 28 Aſſ. 45. Fitzh. Execution, pl. 112. cites S. C. & S. P. admitted.——Br. Execution, pl. 83. cites S. C. & S. P. admitted.

5. If a Feme ſole Obligee takes Baron, and the Baron makes a Letter of Attorney to J. S. to receive the Money, who receives it accordingly, and after the Feme dies, the Baron ſhall have an Action of Account for the Money; for by the Receipt this was become a Thing in Poſſeſſion. Trin. 39. Eliz. B. R. per Popham. Mo. 452. pl. 618. Huntley v. Griffith, S.P. and ſeems to be S. C—— Goldsb. 160. in pl. 91. S. P. by Popham and Fenner accordingly.

6. [So] If a Legacy be deviſed to a Feme who takes Husband, and the Baron makes a Letter of Attorney to J. S. to receive the Legacy, and he receives it accordingly, this, by his Receipt, is become the Chattel of the Husband. Trin. 39 El. B. R. agreed. Goldsb 159. pl. 91. S. C. & S. P. held accordingly, by Popham, Gawdy, and Fenner.

7. So if the Baron and Feme had made a Letter of Attorney to J. S. to receive the Legacy, and he had received it accordingly, by this Receipt this ceaſes to be a Thing in Action, and is become a Thing in Poſſeſſion, and the Husband, or his Executor, after the Death of the Feme, may have an Account upon this Receipt againſt J. S. Trin. 39 El. B. R. between *Huntly and Griffith*, adjudged. Mo. 452. pl. 618. Paſch. 38 Eliz. Huntley v. Griffith, S. C. adjudged, where after the Death of the Feme the Baron died inteſtate, and his Adminiſtrator brought Account for the Money, and held maintainable.——Goldsb. 159. pl. 91. S. C. adjudged accordingly.

8. Feme *Executor takes Baron*, he ſhall not have the *Goods* by the Inter-marriage; for they are the Goods of the Teſtator. Arg. Roll Rep. 140. cites 9 H. 6.

9 In

Dal. 30. pl. 9. Anon. but S. C. accordingly.

9. In Detinue by the Plaintiff, the Defendant pleaded, that after the *Bailment* she took *Husband*, who *after his Inter-marriage released all Actions to the Bailee*; all the Justices held, that the Plea was not double; for he could not plead the Release without pleading that it was after the Marriage; and by the Marriage the Property of the Goods was in the Husband. Mo. 25. pl. 85. Pasch. 3 Eliz. Lady Audley's Case.

10. Baron surrenders a *Copyhold* of Inheritance to himself for Life, then *to his Wife till his Son is* 21, Remainder to his Son in Tail, Remainder to his Wife for Life, and dies; the Ld. admits accordingly; the Wife takes Baron and dies, another takes Administration, and is admitted by the Ld. yet resolved the Entry of the Baron lawful, unless there is *a special Custom* to the contrary; but otherwise it would be if the Feme had been only Guardian or Prochein Amy of this Land &c. and Judgment for the Baron. D. 251. a. pl. 90. Hill. 8 Eliz. Hauchett's Case.

But the Reporter says Quære; for the Rent belonging to a Feme does, in Case she survive the Husband, belong to the Wife, and so do the Arrears that incur during the Coverture. Ibid. cites Co. Litt. 351. —— 3 Salk. 65. pl. 8. S. C.

11. 300 *l. Portion was charged on Lands* to a Feme, who afterwards married W. R. who settled a Jointure on her, and had no other Portion but the 300 *l.* W. R. died, the 300 *l.* not paid. The Executor of W. R. sued the Widow and the Heir for the 300 *l.* The Ld. Keeper declared, that this 300 l. being to go out of the Rent of the Lands, and charged upon Lands, is not in the Nature of a Thing in Action, but of a Rent, and given to the Husband by the Marriage; and decreed accordingly. Chan. Cases 189. Mich. 22 Car. 2. Withers v. Kelsea.

Bill for a Discovery of Assets, and to have a Satisfaction for a Debt due by Bond brought against the *Widow and Executrix of the Obligor*. Defendant insists by Answer, that she has not Assets to satisfy the Debt. The Case upon the Proofs was, that the Defendant *had Lands to the Value of* 700 *l. and also* 500 *l. due to her upon Bond, which remained in her Brother's Hands.* Her *Husband before Marriage makes a Marriage Settlement, and in Consideration of a considerable Fortune and Portion* with his intended Wife, he *does grant* &c. But *the Particulars* wherein her Portion did consist, *did not appear by the Deed*; and the Question was, *if this Bond* to the Defendant for 500 l. part of her Portion, (*being a Chose en Action, and not called in by the Husband*) *should be Assets in Equity to satisfy a Debt of the Husband*, the Wife having enjoyed the Benefit of the Settlement made to her out of her Husband's Estate, which would have been liable to the Debt? It was argued for the Plaintiff, that if this Bond of 500 l. had been mentioned in particular as Part of the Consideration of the Settlement, there would be no Doubt but it would be Assets of the Husband; for in Equity the Husband is a Purchasor of it by making the Settlement, and that there was no Difference where the Consideration is general of the Wife's Portion, especially in this Case, where the Wife had nothing but Lands besides this Bond of 500 l. so that this Bond must be taken as the Consideration of the Settlement, there being no other, and the rather in favour of a fair Creditor, who otherwise must lose his Debt, and if there had not been such a Settlement made, might have had a Satisfaction out of those very Lands. Parker C. said the Case was so very clear, that the Defendant's Council need not to argue it. Creditors in this Case cannot be in a better Condition than the Executor of the Debtor, and can it be imagined, that if another Person had been made Executor to the Husband, and such Executor had brought a Bill against the Wife to compel her to assign this Bond, that the Court would have decreed for the Executor? What the Law gives the Husband by the Inter-marriage, is a good Consideration for making a Settlement, but the Husband's making a Settlement, does not vest in the Husband the Choses en Action of the Wife, unless it be *expressly so agreed* between the Parties, *and* that *appears to be part of the Consideration of the Settlement*; for then the Husband is a Purchasor, and well intitled to them in a Court of Equity. An Account was decreed to be taken of the Assets of the Husband, but not of this Bond of 500 l. to the Wife. MS. Rep. Mich. 6 Geo. in Canc. Heaton v. Hassell.

(E) Chattles real.

* If the Baron charges the Land and dies, yet by the best Opinion she shall hold it discharged; for tho' the Baron may give or forfeit it,

1. IF a Feme termor takes Husband, yet the Term continues in her. * 7 H. 6. 2. † 9 H. 6. 52. b.

it, yet he cannot charge it. Br. Charge, pl. 41. cites S. C. ———Fitzh. Charge, pl. 1. cites S. C. that ſhe ſhall be adjudged in as of her better Right, which is before the Charge, and that ſo was the Opinion of the Court. † Br. Charge. pl. 1. cites S. C. for if he dies without altering the Property of it, there it remains to the Feme in ſtatu ut ante.———Fitzh. Charge, pl. 2. cites S. C.

2. **Baron and Feme** may be Jointenants for Years. * 47 Ed. 3. 12. b. † 48 Ed. 3. 13. ‡ 2 H. 4. 19. b. ‖ 3 H. 4. 1. b. ¶ 14 H. 4. 24. b. (Fol. 343.)

* Br. Covenant, pl. 10. cites S. C ———Br. Baron and Feme, pl. 23. cites S. C.——— Fitzh. Joinder en Action, pl. 25. cites S. C. & S. P. implied; for by theſe Books they may join in Action of Covenant, becauſe the Land ſhall ſurvive to the Wife. † Br. Baron and Feme, pl. 24 cites S. C. but S. P. does not appear. ——Br. Brief, pl 80. cites S. C. but S. P. does not appear. ‡ See (X) pl. 1. and the Notes there. ‖ See (X) pl. 2, 3. and the Notes there. ——— Br. Baron and Feme, pl. 29. cites S. C. ¶ See infra, pl 3.

3. **The ſame Law** of a Ward. * 48 Ed. 3. 13. † 14 H. 4. 24. **b. they may be Joint-Grantees thereof.** * See (X) per totum.— † Br. Baron and Feme, pl. 42. cites S. C for if the Baron dies the Feme ſhall have it, and not the Executor of the Baron, becauſe it is a Chattle real; contra of a Chattle perſonal veſted; note the Diverſity. ——Br. Raviſhment de Garde, pl. 15. cites S. C.———Fitzh. Joinder en Action, pl. 20. cites S. C. & S. P. admitted.

4. **If a** Feme Guardian in Soccage takes Husband, **yet the Feme continues Guardian.** Com. 293. b. [Mich. 7 & 8 Eliz. *Osborne v. Carden & Joye.*] Co. Litt. 351. a. S. P.

5. If a *Feme has Goods*, and *takes Baron*, and the *Baron dies*, the Executors of the Baron ſhall have the Goods, and not the Feme; for the *Property was changed by the Eſpouſals*; contra of Goods which ſhe has as † *Executrix*. Br. Property, pl. 22. cites 21 H. 7. 29. * Co. Litt. 351. b. S. P. † Co. Litt. 351. a. S. P.

(E. 2) Separate Eſtate. What ſhall be ſaid the Wife's ſeparate Eſtate.

1. LANDS were deviſed *to Truſtees and their Heirs*, to pay and diſpoſe the Rents and Profits to a Feme Covert, or to ſuch Perſon *as ſhe by Writing ſhould appoint*, whether ſole or Covert, and the Husband not to intermeddle, or have any Benefit thereof; and *as to the Inheritance* of the Premiſſes in Truſt for ſuch Perſon or Perſons, and for ſuch Eſtate and Eſtates as ſhe by any Writing purporting her Will, or other Writing, ſhould appoint, and *for want of ſuch Appointment, in Truſt for her and her Heirs*; this is only a Truſt, and not an uſe executed by the Statute. Vern. 415. Mich. 1686. Nevil v. Sanders.

2. If a *Real Eſtate* be *deviſed to a Feme Covert for her ſeparate Uſe, and* a Declaration *that the Husband ſhould not intermeddle* with the Profits, but that ſhe ſhould enjoy them ſeparately, Ld. C. Cowper ſaid, that he doubted this would be a repugnant Clauſe, and that the Husband would enjoy them. Wms's. Rep. 126. Trin. 1710. in Caſe of Harvey v. Harvey. But this Point was decreed contra in the Caſe following, viz. A. deviſed Lands to M. his Daughter, the Wife of B. for her ſeparate and peculiar Uſe, excluſive of her Husband, to hold the ſame to her and her Heirs, and that the Husband ſhould not be Tenant by the Curteſy, nor have theſe Lands for his Life, in Caſe he ſurvived his Wife, but that upon her Death they ſhould go to her Heirs. B. the Husband becomes *Bankrupt*. The Commiſſioners aſſign the Lands in Truſt for the Creditors. The Wife by her next Friend brought a Bill againſt the Aſſignee and the Husband, to compel them to aſſign over this Eſtate to her ſeparate Uſe. The Maſter of the Rolls took it to be a clear Caſe, that *it was a Truſt in the Husband*, and that there was no Difference where the Truſt was *created by the Act of Law*, and where by Act of the Party As in Caſe of a Deviſe charging Lands with Debts

Debts and Legacies, the Heir taking such Lands by Descent is but a Trustee, and no Remedy for these Debts or Legacies but in Equity; so in the principal Case there being *an apparent Intention, and express Declaration that the Wife should enjoy these Lands to her separate Use*, by that Means the Husband, who would otherwise be intitled to take the Profits to his own Use, is now debarr'd, and made a Trustee for his Wife; and had he been a Trustee for J. S. his Bankruptcy should not in Equity affect the Trust Estate; and that tho' in the present Case the Bankrupt might be Tenant by the Curtesy, yet he should be but Trustee for the Heirs of the Wife; and the Testator having Power to have devised the Premisses to Trustees for the separate Use of the Wife, this Court, in Compliance with his declar'd Intention, will *supply the want of Trustees, and make the Husband Trustee*, and the Assignee, who, claiming under the Husband, can have no better Right than the Husband, must join in a Conveyance for the separate Use of the Wife, and decreed accordingly; Per Sir Jos. Jekyl at the Rolls. 2 Wms's. Rep. 316. to 319. Mich. 1725. Bennet v. Davis

The Wife cannot have a separate Property in a *personal Thing without a Trustee*; Per Ld. C. Macclesfield, in Case of Dowry Money claimed by the Widow, which was given to herself. 2 Wms's Rep. 79. Trin. 1722. in Case of Burton v. Pierpoint.

(F) Of what *Things* which are *not given by the Intermarriage*, the Husband hath Power to dispose.

1. IF Baron and Feme are Jointenants for Years of Land, the Baron may dispose of the whole. * 47 Ed. 3. 12. b. admitted. † 48 Ed. 3. 13. 2 H. 4. 19. b. 14 H. 4. 24. b.

* Br. Baron and Feme, pl. 23. cites S. C. & S. P. admitted.——
† Br. Baron and Feme, pl. 24. cites S. C. but S. P. does not appear.

2. So if the Baron hath a Term in the Right of his Feme, he may grant over the whole. 7 H. 6. 1. b.

Fitzh. Charge, pl. 1. cites S. C. but S. P. does not appear ——Br. Charge, pl. 12. cites S. C. but S. P. does not appear.——But Ibid. pl. 41. cites S. C. & S. P. obiter.——Co. Litt. 351. a.

3. If a Feme Guardian in Socage takes Husband, the Baron by his Grant of the Ward, cannot bind the Feme, after the Death of the Baron. Com. *Osbourn against Carden and Joye*, 293. b. adjudged.

4. If a Baron be Guardian in Chivalry in right of his Feme, he may dispose and alien the Ward of the Body to another, and this shall bind the Feme after his Death. 34 Ed. 1. Ald. 184.

Lane 54. Trin. 7 Jac. Wikes's Case S. C. Tanfield Ch. B. Snigg and Altham thought the Trust might be forfeited; but because there was no Bill before the Court, demanding any Thing for the King, therefore the Court gave no Resolution, If by Equity, the Husband shall forfeit a Trust which he had for Years in the Right of his Wife.

5. If a Baron possessed of a Term for Years, grants it over in trust, and for the Benefit of his Feme, he may after dispose or forfeit this Trust and bar the Feme. Pasch. 8 Jac. in Camera Scaccarii, *Wiche's Case*; for he hath as great Power of the Use which he hath in the Right of the Feme, as he hath of a Term in the Right of his Feme.

S. P. by Brock, and not denied. Lane 55 Trin. 7 Jac. in Cam. Scacc. in Wikes's Case, S. C.

6. If the Baron makes a Lease for Years to another, to the Use of his Feme if she lives so long, for the Jointure of the Feme, the Baron cannot dispose of this Trust. Pasch. 8 Jac. in Camera Scaccarii.

Lane 54. Trin. 7 Jac. Wikes's

7. [So] If the Baron grants over a Term in Trust, and for the Benefit of his Wife and Children; it seems he cannot dispose of

of the Truſt of the Children. Dubitatur, Paſch. 8 Jac. in Camera Scaccarii. Caſe, S. C. and Tanfield Ch. B. and Snigg and Altham thought the Baron might diſpoſe of it being only a Chattel, as he might have done of a Chattel whereof the Wife was poſſeſſed, and that he might have wholly releaſed this Truſt; but by Bromley, his Releaſe ſhall bind only during his Life; but the Attorney General ſaid he might releaſe all.——See pl. 5.

8. If Baron and Feme are divorced cauſa Adulterii in one of them, yet the Baron may after releaſe a Legacy due to the Feme, for the Divorce does not diſſolve vinculum Matrimonii, but a Menſa & Thoro. 44 Eliz. *Stevens and Totte*, adjudged, my Reports, 14 Jac. Cro. E. 908. pl. 19. S. C. and S. C. and S. P. affirmed by the Doctors of the Civil Law; and admitted by all the Juſtices.——Noy. 45. S. C. and S. P admitted per Cur.——Mo. 665. pl. 910. S. C. and S. P. ſeems admitted ——S. C. cited, Arg. Roll. Rep. 426. in pl. 19.——S. C. cited by Doderidge J. 3 Bulſt. 264.

9. But if after ſuch a Divorce the Feme ſues without her Husband, as ſhe may for a Defamation in the Spiritual Court, and recovers, and Penance enjoyned, & Expenſæ litis taxed, the Baron cannot diſcharge it; for the Penance is but to reſtore her to her Credit, and the Coſts are but depending thereupon, my Reports, 14 Jac. *Motam againſt Motam*, reſolved, per Curiam. 3 Bulſt. 264. Motteram v. Motteram S. C. and S. P. held accordingly, and therefore by the whole Court a Prohibition was denied.——Roll. Rep. 426. pl. 19. S. C. and the Court inclined accordingly, but adviſare vult; and it was ſaid that this Caſe is not like the Caſe of Stevens and Totte, becauſe there the Thing for which the Suit was viz. The Legacy was originally due to the Baron and Feme, and therefore the Releaſe of the Baron was a good Diſcharge, but here there was no Duty in the Baron originally.——See Tit. Prohibition, (Q) pl. 10. and the Notes there.

10. If A. promiſes B. a Feme ſole, that in Conſideration that ſhe will marry C. his Brother, that he will give B. 10 l. if ſhe ſurvives C. and after B. takes C. to Huſband accordingly; C. cannot after Diſcharge A. of this Promiſe, by his Releaſe to bind B. after his Death, becauſe the Promiſe ſtood in a Contingency during the Life of C. the Huſband. Hill. 6 El. [Jac.] B. R. *between* * *Belcher and Hudſon*, Rot. 132. adjudged, where the Baron releaſed all Demands; and adjudged, that it did not bar the Feme. This is cited pl. 16 Jac. 6. in † *Smith and Stafford's Caſe*, and this is cited, Hobart's Reports, Caſe 279. But there it is ſaid, that the Words will not extend to releaſe the Promiſe, without expreſs Words of Promiſe. * Yelv. 256. Trin. 7 Jac. B. R. the S. C. the Releaſe was of all Actions, Quarrels, Controverſies, Claims and Demands whatever, which he had or might have againſt the ſaid C. adjudged no Diſcharge; for though the Promiſe was preſent, yet the Execution was future, and ſuch as the Releaſor could have no Action upon; but if he had releaſed by expreſs Words all Promiſes, or all Actions and Quarrels which he or his Wife had or might have, then it was held that the Promiſe had been releaſed; for the Promiſe being a ſpecial Cauſe of Action, cannot be releaſed till it comes in Eſſe.——Brownl. 15. S. C. adjudged the Releaſe no Bar.——Cro. J. 222. pl. 2. S. C. and the Plea of the Releaſe adjudged ill.——S. C. cited Hob. 216. pl. 280. Hill. 15 Jac. in Caſe of Smith v. Stafford by Hobart Ch. J. as adjudged for the Plaintiff, becauſe none of the Words would reach it, but ſays the Caſe was compounded and ſo no Judgment was entered.——S. C. cited by Warburton J. Noy 16. in Caſe of Smith v. Stafford, as adjudged no Bar; but Serj Altham ſaid that it might well be releaſed by apt and ſpecial Words, tho' it was to take Effect by Contingency in futuro, and ſo Winch J. alſo thought.——S. C. cited Hutt. 17. as adjudged accordingly; but that Lord Hobart ſaid that if he had releaſed all Promiſes it would have diſcharged the Defendant.——S. C. cited Arg. Palm. 99.

11. If a Leaſe be made to Baron and Feme for their Lives, the Remainder to the Executors of the Survivor of them, and the Baron grants the Term, and dies; this will not bar the Feme ſurviving, becauſe the Feme had but a Poſſibility and no Intereſt. Co. Lit. 46. b. cites Hill. 17 El. B. R. Fol 344. S. P. cited by Popham to have happened upon a ſpecial Verdict in the County of Somerſet, about the 20 Eliz. and afterwards adjudged, that the Remainder being

being limited in the Caſe to the Survivor, the Wife ſurviving ſhould have it, becauſe there was nothing in either to grant over untill there was a Survivor. Poph. 5 ——S. P held accordingly by Popham Ch. J. and ſaid by him to have been reſolved as above. 4 Le. 185 pl 285. Mich. 29 Eliz C. B. Anon.—S. C. cited Hutt. 17 The *Baron after Marriage purchaſeda Term for Years to himſelf and Wife and the Survivor, and the Executors, Adminiſtrators and Aſſignees of ſuch Survivor for the Reſidue of the Term.* Afterwards he *mortgaged the Term without her joining*, proviſo to be void on Payment by the Husband or Wife, or the Executors or Adminiſtrators of either, and that until Default of Payment, the Husband, his Executors or Adminiſtrators ſhould quietly enjoy. The Maſter of the Rolls held this to be a *voluntary Conveyance, and* being only a Term for Years, it is always *in the Power of the Husband to forfeit or alien* and the Mortgage is an Alienation; for tho' if the Mortgage *Money* had been *paid before the Day*, the Mortgage would have been void, and *all Things would have been in ſtatu quo* ; yet being forfeited, the Equity of Redemption is become a Creature of Equity, and decreed it to be Aſſets to pay Creditors with whom he had contracted Debts 7 Years after the Mortgage. 2 Williams's Rep. 364. Trin. 1726. Watts v. Thomas.——See Tit. Grants (M) pl. 3. and the Notes there.

12. If a Feme who has a *Term* or Intereſt *as Executrix by Statute Merchant* takes Baron, the Baron may grant over the Intereſt without the Feme, and good in Aſſiſe. Br. Grants pl. 157. cites 24 E. 3. 63.

13. If one is *bound to a Baron and Feme in a Statute Merchant*, the Baron alone may make Deſeaſance, and it ſhall ſerve for both; per Opinionem. Br. Baron and Feme, pl. 24. cites 48 E. 3. 18.

14. If *Obligation* is made *to a Feme ſole*, and *ſhe takes Baron*, and the *Baron releaſes all Actions and dies*, the Feme ſhall be barred ; and if he does not releaſe and dies, the Feme ſhall have Action, and not the Executor of the Baron. Br. Baron and Feme, pl. 44. cites 7 H. 6. 2.

D 271. pl. 26. S. C. Harper and Dyer thought the Arrearages gone by the Acquittance, but Welch and Weſton contra, becauſe all the Arrears unleſs thoſe of the laſt Term were due to the Feme dum ſola fuit, and were not due to the Baron.——And. 14. pl. 30. S. C. adjudged that the Acquittance was a good Bar.——Bendl. 186. pl. 228. S. C. with the Pleadings, and adjudged that the Acquittance was good.

15. In ſecond Deliverance, the Defendant made Conuſance as Bayliff to P. and H. his Wife, and ſet forth that the *Plaintiff* being *ſeiſed of the Lands, granted* a yearly *Rent of* 10 *l. with a Clauſe of Diſtreſs, habendum to the ſaid H. for Life ; ſhe afterwards married the ſaid P. and for Rent Arrear, the Defendant made Conuſance at Lady-Day* 4 *&* 5. *P. & M.* The Plaintiff in his *Replication pleaded an Acquittance made the* 7 *Eliz. by P. (the Husband) of* 5 *l. of the ſaid Rent due at Mich. laſt paſt* ; adjudged a good Bar to the Conuſance. Mo. 87. pl. 219. Hill. 10 Eliz. Morton v. Hopkins.

Cro. E. 721. pl. 49. S. C. but S. P. does not appear.

16. An *Annuity* was granted to a Woman for Life, who takes Husband, and he by expreſs Words releaſed the Annuity ; but adjudg'd after divers Arguments, that the Releaſe cannot extinguiſh this Annuity to the Wife, it being for her Life, but that if ſhe ſurvives ſhe ſhall have it. Moor 522. pl. 689. Paſch. 40 Eliz. C. B. Thompſon v. Butler.

So where 'tis made payable *out of a Reverſion* expectant on an Eſtate for Life, the Husband may aſſigne it.

17. Baron may releaſe a *Legacy* left to the Wife payable 18 Months after, though the 18 Months are not expired, for he hath an Intereſt in it *before the Time of Payment* accrues. Per Montague Ch. J. 2 Roll. Rep. 134. Mich. 17 Jac. B. R. Anon.

G. Equ. R. 88. Mich. 1714 Atkins v. Dawbury.——If after Releaſe of the Legacy by the Baron, he and his Wife *ſues in Court Chriſtian* for the Legacy, the Executor ſhall not have *Prohibition*, becauſe the Temporal Judges cannot meddle with the Legacy, nor by Conſequence can they determine whether the Releaſe will extinguiſh it. Yelv. 173. cites it as adjudged, 29 Eliz.——*So* where a Legacy of 1000 *l.* charged upon Lands, was given to a Feme Infant *payable at* 25 Years of Age, who marries, and after attains that Age ; the Baron *during the Minority of the Feme, made an Aſſignment* thereof for a valuable Conſideration and held good, notwithſtanding the Contingency that then was with regard to her attaining 25. But were it not in Strictneſs to operate as an Aſſignment, yet it would be good as an Agreement, eſpecially being for a valuable Conſideration. Trin. 1731. 2 Williams's Rep. 602 608. D. of Chandos v. Talbot.

18. A. promiſes C. that if ſhe would marry B. *if he did not ſufficiently provide for her during Coverture, then he would leave her* 100*l. at his Death.* The Baron cannot releaſe this, during Coverture, by *Releaſe* of all Actions and Demands, becauſe it is executory, and in Contingency; but it may be relieved by a Releaſe of *all Promiſes*. Arg. 2 Roll Rep. 162. Paſch. 18 Jac. cites it as adjudged, and affirmed in Error, in Maſon's Caſe. Releaſe (U) pl. 22. cites Hill. 6 Jac. B. R. Beltcher v Hudſon, S. P. Hob. 216.

19. It was agreed, that if a *Woman do convey a Leaſe in Truſt for her Uſe*, and *afterwards marries*, that in ſuch Caſe it lies not in the Power of the Husband to diſpoſe of it; and if the Wife die, the Husband ſhall not have it, but the Executor of the Wife; and ſo it was ſaid it was reſolved in Chancery. Mar. 45. pl. 69. Trin. 15 Car. in Sir John St. John's Caſe.

20. Leaſes were *deviſed* to the Defendant by his eldeſt Brother, to be ſold for ſeveral Purpoſes; and amongſt others in Truſt, *that the Defendant ſhould purchaſe in his own Name an Annuity of* 80*l. per Ann. for the Life of the Plaintiff's Wife, and pay the ſame to her and her Aſſigns.* The Bill was to inforce the Payment of this Annuity. The Defendant inſiſted by Anſwer, that he had conſtantly paid the Annuity to the Plaintiff's Wife, *(from whom the Plaintiff lived apart)* and that the Bill was againſt her Conſent, and that it was the Intent of the Donor to be for her only Benefit, the Will being, That he ſhould buy in his own Name the Annuity in Truſt for the Plaintiff's Wife (who is the Defendant's Mother) and her Aſſigns; and ſo *inſiſted that the Plaintiff not inhabiting with her, he ought not to be put to pay the Annuity to him.* It appeared by Proofs, that *the Cauſe of Plaintiff's firſt abſenting himſelf from his Wife, was for fear of Debts, and* that *he had ſince ſolicited her by Letters to cohabit, but ſhe refuſed.* The Maſter of the Rolls declared, That in this Caſe the Husband was the Aſſignee of the Wife, and that there being *no negative Words by the Will to exclude the Husband* from the Annuity, he could not exclude him; and ſo decreed the Defendant to pay all the Arrears of the Annuity ſince the Bill exhibited, and the growing Annuity for the future, to the Plaintiff the Husband. Chan. Caſes, 194. Hill. 22 & 23 Car. 2. Dakins v. Beriſford.

21. The *Wife* having *aſſigned her Term in Truſt for herſelf before Marriage*, and then *the Husband*, *without the Truſtees* joining, *mortgages the Term.* The Husband died. The Mortgagee exhibits his Bill to have the Land convey'd to him, or that they ſhould redeem; and the Court diſmiſs'd the Plaintiff's Bill; for ſince Queen Elizabeth's Time, it has been the conſtant Practice in this Court to ſet aſide and fruſtrate all Incumbrances and Acts of the Husband upon the Truſt of the Wife's Term, and that he ſhall neither charge or grant it away; and it is the common Way of providing Jointures for a Woman, to convey a Term in Truſt for her upon Marriage, that it may be out of the Power and Reach of the Husband. Neither ſhall he forfeit it by Outlawry or Felony, if for Jointure, or in Purſuance of Articles of Marriage, or being the Wife's Term it is aſſigned before in Truſt, or if on other good Conſideration it be aſſigned. 2 Freem. Rep. 138. pl. 174. Doyly v. Perſall, cites 1 Inſt. 351. Chan. Caſes, 225. S. C. Mich. 25 Car. 2. by Ld. Keeper Finch, in totidem Verbis.——Where ſuch a Term in Truſt was convey'd for a Jointure on the Feme on Marriage, and afterwards the Husband died, and then the Widow married another Husband, who made a Jointure on her, without any Agreement that her firſt Jointure ſhould be thereby barr'd. Ld. C. Finch decreed, That a Sale by the after Husband of the Truſt-Term made by the former Husband was not good, and ſhould not bind; and a former Precedent in Point ſhewn. Chan. Caſes, 307, 308. Paſch. 30 Car. 2. Turner v. Bromfield ——But after Award on an Appeal to the Houſe of Lords, it was adjudged that the ſaid Term was well paſs'd away, and that the Husband might diſpoſe thereof; and my Ld Chancellor's Decree was thereupon reverſed; but it was agreed, that where a Term is aſſigned in Truſt for a Feme, by the Privity and Conſent of her Husband, the Husband, without Doubt, cannot intermeddle or diſpoſe of it. Vern. 7. pl 5. cites Mich 32 Car. 2. Sir Edward Turner's Caſe ——S. C. cited as decreed in the Houſe of Lords, that the Husband might diſpoſe of the Truſt of the Term; and ſays the Ld. Chancellor ſeemed to wonder at the Reſolution. Vern. 18. pl. 10. Mich. 1681. in Caſe of Pitt v Hunt.——S. C. cited accordingly, 2 Freem. Rep. 78. pl. 86. in Caſe of Hunt v. Pitt, S. C.

Chan. Caſes, 225 Mich. 25 Car. 2. S. C in totidem Verbis. 2 Chan. Caſes, 86. Paſch. 34 Car. 2. Anon. S. C. & S. P. agreed,

22. *But* if it be an *Aſſignment after Marriage by the Husband, in Truſt for the Wife*, that is voluntary, and fraudulent againſt a Purchaſer; and thus was the great Chequer-Chamber Caſe. 2 Freem. Rep. 138. pl 174. Doyly v. Perſall.

23. If a Feme has a *Truſt of a Term for Years*, and marries, the Huſband may alien it; but when a Term is ſettled for a Maintenance or Jointure for the Wife, it is otherwiſe; per Ld. Keeper Finch. Chan. Caſes, 266. Mich. 27 Car. 2. in Caſe of Bullock v. Knight.

where it is in Nature of a Jointure ——Ibid. 114. Trin. 34 Car. 2 S. C. but goes upon another Point. ——2 Freem. Rep. 82. pl. 88. S C. & S. P. admitted.——If a Husband makes a Leaſe for Years in Truſt for the Wife voluntary, and he ſells it, this may bind the Wife, becauſe of the Fraud; per Finch C. Chan. Caſes, 308. Paſch. 30 Car. 2. in Caſe of Lady Turner v. Bromfield.——S. P. by Ld Keeper Finch. Chan. Caſes, 225. Mich. 25 Car. 2. becauſe it is fraudulent againſt Purchaſers; and ſaid that this was the great Exchequer-Chamber Caſe.

24. *Feme ſole poſſeſs'd of a Term* for Years, *mortgaged it* to T. for 100 l. and afterwards, a Day or 2 *before Marriage, aſſigns her Intereſt to Truſtees in Truſt for herſelf for Life, and after for her Son by a former Husband*, and then *marries D. who was a Witneſs to the Truſt-Deed.* D. pays off the Mortgage, and takes an Aſſignment, and then ſurrenders his Leaſe to the Reverſioner, and takes a new Leaſe for the ſame Term, and dies. The Court held, that tho' the Eſtate in Law was wholly in the Mortgagee, and the Feme convey'd nothing but an Equity in Truſt, yet when the *Mortgagee aſſigns over to the Husband*, the Husband has it under the ſame Equity as the Mortgagee had, and is juſt in his Place, and no Act of the Husband can bar the Truſtees for the Feme and her Children of their Equity; and decreed the new Leaſe to be aſſign'd over to the Feme or her Truſtees, paying to the Husband's Executors the Mortgage-Money. 2 Freem. Rep. 29. pl. 32. Hill. 1677. Draper's Caſe.

Vern. 7. pl. 5. Sir Edward Turner's Caſe, Trin. 33 Car. 2. S. C. ſays this Decree was reverſed in the Houſe of Lords; but that it was agreed that where a Term is aſſigned in Truſt for a Feme, by the Privity and Conſent of the Baron, there without doubt the Husband cannot diſpoſe of it. —— S C. cited 2 Vern. 271. in pl. 255. Trin. 1692. Tudor v. Samyne, where the firſt Husband aſſign'd a Term for the ſeparate Uſe of the Wife, yet the Diſpoſal thereof by the 2d Husband was held good, tho' he made no Proviſion for her.

25. A *Term* was *convey'd* on Marriage *in Truſt* for the Wife, *by way of Jointure.* The *Baron* afterwards *dies*, and the *Feme marries a 2d Huſband, who ſettled a* Jointure of 200 *l. a Year on* her; *(whereas the firſt Jointure was of* 300 *l. a Year.)* The *2d Husband ſold the Wife's Jointure made by the firſt Husband.* Ld. Chancellor agreed, that if the Huſband make a Leaſe for Years in Truſt for the Wife *voluntary*, and he ſells, this may bind the Wife, becauſe of the Fraud; but where a Truſt is created for a Wife, as here in this Caſe, bona Fide, the Husband can in no wiſe bind the Wife, unleſs where ſhe is examined, as in a Fine, or in this Court, elſe no Man ſhall be able to provide for Wife or Children; and he had no Regard to Notice, or not, to the Purchaſer, tho' in the Cauſe, nor to the 2d Jointure; and decreed for the Plaintiff; and a former Precedent in Point was ſhewn. Chan. Caſes, 308. Paſch. 30 Car. 2. Turner v. Bromfield.

26. *Goods, which the Feme has as Executor*, the Baron may diſpoſe of, as well as Goods which ſhe has in her own Right. Jenk. 79. pl. 56.

27. *A. poſſeſs'd of a Term, deviſes it to his Wife for Life, Remainder to his Children unpreferr'd*, and *makes her Executrix.* A. dies; *ſhe aſſents to the Legacies*; afterwards ſhe *takes Husband*; he ſells the Term; the Wife dies; the Children unpreferr'd enter; their Entry is congeable. Jenk. 264. pl. 66.

28. A Husband may *releaſe Coſts* adjudged to the Wife in Spiritual Court, unleſs there be a Separation and *Alimony* allow'd. 1 Salk. 115. Chamberlain v. Hewſon.

29. If the Wife hath a *Choſe en Action in her own Right*, and an Action is brought by the Husband and Wife, and they declare Ad Damnum ipſorum, and they *get Judgment*, by this the Property is alter'd; but otherwiſe 'tis, if the Choſe en Action be *En Auter Droit*; per Holt Ch. J. Cumb. 311. Hill. 6 W. 3. B. R. in Caſe of Curry v. Stephens.

30. Where a Right or Duty may *by Poſſibility accrue to the Wife during Coverture*, the Baron may *releaſe it*; otherwiſe not; per Holt Ch. J. 1 Salk. 326. Hill. 11 W. 3. B. R. in Caſe of Gage or Grey v. Acton. He may releaſe his *Wife's Share of an Inteſtate's Eſtate.* See 10 Mod. 63. Arg. Mich. 10 Ann. B. R. Daeth & Baux.

31. A. made a Settlement, whereby he created a *Term for Years in Truſt to raiſe* 400 *l.* a-piece for his 2 Daughters, and one of them marries B. and he and his Wife brought a Bill, and had a *Decree to have the* 400 *l. raiſed* and paid; but before it was raiſed, *B. aſſigns the Benefit of this Decree* to one J. S. *in Truſt, for Payment of his Debts, and made him Executor*, and died, leaving his Wife and one Child unprovided for. The Creditors brought a Bill to have the Benefit of the ſaid Aſſignment; and tho' it was inſiſted upon, in Behalf of the Wife, that there was a *Difference between a Term in Truſt* to raiſe a Sum of Money for a Woman, *and a Truſt of the Term itſelf* for a Woman, yet the Maſter of the Rolls held, That this was a Term for Years, and not a Sum of Money, and therefore not to be diſtinguiſhed from **Sir Edward Turner's Caſe**, and muſt decree it, (tho' againſt his Conſcience) that there may be an Uniformity of Judgment. Trin. 1703. Ab. Equ. Caſes, 58. Walter v. Saunders.

32. A. deviſed the *Surplus of his perſonal Eſtate to* his Daughter, *the Wife of J. S. for her ſeparate Uſe, and makes her Executor.* It being deviſed to the Wife, and not to Truſtees; when it comes to her, whether it belongs to the Husband, or to the Wife for her ſeparate Uſe and Benefit, the Court reſerved for further Conſideration; but the Husband having given a Note, that the Wife ſhould enjoy a Mortgage, Part of the ſaid Eſtate, 'twas held that ſhe was well intitled both to the Principal and Intereſt. 2 Vern. 659. pl. 585. Trin. 1710. Harvey v. Harvey. Wms's Rep. 125. Trin. 1710. S. C.

33. A Man by his Will gives a *Legacy* of 300 l. to a Feme Covert *without creating any ſeparate Truſt of it for her Benefit*, and this Legacy was made *payable out of a Reverſion of Lands expectant on an Eſtate for Life*; the Husband ſometime after makes an Aſſignment of this Legacy to Truſtees, in Truſt for the Benefit of his Children, and after by his Will takes Notice again of the ſame Legacy, and deviſes it in like Manner for the Benefit of his Children, and makes his Wife Executrix, and dies; the Eſtate for Life drops. The Court decreed, that as the Husband had made a good Aſſignment of it in Equity, (tho' as a Choſe en Action it was not aſſignable at Law) that ſhe ſhould be anſwerable to the Children. Mich. 1714. Abr. Equ. Caſes 45, pl. 9. Atkins v. Dawbeny. G. Equ. Rep. 88. 89. Mich. 1 Geo. 1. in Canc. Atkins v Dawbury. S. C. and has the very ſame Words.

34. A *Mortgage in Fee* to the Wife the Husband alone cannot diſpoſe of, and therefore if the Husband without her joining, aſſigns ſuch Mortgage, and dies, the Eſtate, which is ſtill in the Wife, will carry along with it to her Repreſentatives the Money due thereon, but of a *Term* of Years, or the *Truſt of a Term*, he has the abſolute Power of, and may diſpoſe without her joining, and that even in Caſe of a *Lunatick*; *Feme married while in Committee's Hands*, and tho' the *Chancery had laid Hands on her Eſtate* to ſecure her a Settlement, yet the dying in the Life of the Husband, tho' no Settlement made, and he having aſſigned Chan. Prec. 416. Arg. & 418 cited per Ld. Cowper as the Caſe of Burnet v. Kinaſton.—G. Equ. Rep. 102. S. C. cited by Ld.

C. Cowper, and took the ſame Diverſity.

aſſigned it in her Life, it was held good; Per Cowper C. Ch. Prec. 418. Mich. 1715. in Caſe of Packer v. Windham.

(F. 2) In what Caſes, and by what Act, Things veſted in Truſtees for the Benefit of the Feme, or the Produce thereof, ſhall become the Property of the Baron.

1. IF a *Father makes a Leaſe in Truſt for Advancement of his Daughter* who marries, the Husband may clearly diſpoſe of this Term, and no Remedy at the Common Law for it; Per Williams J. to which the whole Court agreed. Bulſt. 118. Paſch. 9 Jac. obiter.

2. If a *Leaſe* be made *to the Husband to the Uſe of the Wife*, the Huſband may ſell it for a good Conſideration; Per Williams J. Bulſt. 118. Paſch. 9 Jac.

S. C. cited Hob. 3 Marg.

3. A *Feme ſole conveyed Leaſes to Truſtees, and after married J. S.* ſhe received the Rents, and bought Jewels with part, and part ſhe left in Money, and died. J. S. took Letters of Adminiſtration to her, and the Eccleſiaſtical Court inſiſted on his being accountable, and putting it into an Inventory; but per Cur. contra; becauſe they are the abſolute Property of J. S. but Things in Action he ſhall have as Adminiſtrator, and ſhall be accountable for them; and becauſe Part of the *Money being put out on Bonds in the Names of others to the Uſe of the Wife*, the Spiritual Court would have the Husband account for it, and a Prohibition being moved for, the Court differed; and it was held by thoſe that were againſt granting the Prohibition, that the *Monies received on the Truſt is in Law the Money of the Truſtees*, and that the Wife had no Remedy for it but in a Court of Equity, and ſo He ſhould have it as Adminiſtrator. The Reaſons of thoſe who were for granting a Prohibition were, becauſe *the Truſt was executed when ſhe had received the Money, and that by the Receipt the Husband had gained Property therein as Husband*, and therefore ſhould not be accountable for it. Mar. 44. pl. 69. Trin. 15 Car. Sir John St. John's Caſe.

4. *And* it was agreed, that if the *Truſtees conſent that the Wife ſhall receive the Money*, (as in the Caſe above the contrary does not appear) there the *Husband might gain the Property as Husband*; but becauſe the Court conceived that the Eccleſiaſtical Court had not Juriſdiction, a Prohibition was granted. Mar. 45. Trin. 15 Car. in Sir John St. John's Caſe.

(G) What ſhall be a *Diſpoſition.*

Br. Covenant, pl. 10. cites S. C. but S. P. exactly does not appear.

1. IF the Baron and Feme recovers a Term in a Writ of Covenant, after the Death of the Baron, the Feme ſhall have Execution. 47 Ed. 3. 12. b.

——Br. Baron and Feme, pl. 23. cites S. C. but S. P. does not exactly appear.——Fitzh. Joinder en Action, pl. 25. cites S. C. but S. P. does not exactly appear.

2. The

2. The Baron may forfeit the Land of the Feme. 7 H. 6. 2. b. and this shall bind the Feme. If the Wife be poſſeſſed of a Term for Years, and the Husband is outlawed or attainted, they are Gifts in Law. Co. Litt. 351. a.

3. So if it be extended for the Debt of the Husband, this will bind the Feme. 7 H. 6. 2. b. Co. Litt. 351. a. S. P. and in ſuch Caſe the Sheriff may ſell the Term during her Life.

4. If a Leaſe be made to Baron and Feme for Years, the Baron cannot deviſe the Term, for the Feme is in by Survivorſhip before the Deviſe takes Effect. Contra 2 H. 4. 19. b. Co. Litt. 351. a. S. P.

5. If the Baron hath a Term in the right of the Feme, and the Baron grants a Rent out thereof, and dies, the Feme ſhall hold it diſcharged; for ſhe comes paramount the Charge. * 7 H. 6. 1. b. † 9 H. 6. 52. * Br. Charge, pl. 41. cites S. C. —— Fitzh. Charge, pl. 1. cites S. C.

——(I) pl. 2. S. C. † Br. Charge, pl. 1. cites S. C. & S. P. accordingly.——Fitzh. Charge, pl. 2. cites S. C. & S. P. accordingly, by Paſton and Martin.——Co. Litt. 351. a. S. P. ——(I) pl. 2. S. C.

6. [So] If a Baron be poſſeſſed of a Term in the Right of the Feme, and Damages are recovered againſt him, Execution cannot be upon the Term of the Feme; for ſhe comes paramount. * 9 H. 6. 52. b. Contra † 7 H. 6. 2. *Br. Charge, pl. 1. cites S. C. but S. P. does not appear.—— Fitzh. Charge, pl. 2. cites S. C. but S. P. does not appear.——See (I) pl. 4. † Br. Charge, pl. 41. cites S. C. but S. P. does not appear.——Fitzh. Charge, pl. 1. cites S. C. but S. P. does not appear.

7. But otherwiſe it is if it be extended thereupon, or upon a Recognizance in the Life of the Baron. 9 H. 6. 52. b. Br. Charge, pl. 1. cites S. C. but S. P. does not appear. ——Fitzh. Charge, pl. 2. cites S. C. but S. P. does not appear.

8. If for the Debt of the Baron a Term, of which the Baron is poſſeſſed in the right of the Feme, be extended, and after the Baron dies, the Feme ſhall have the Reſidue, after the Extent incurred. 7 H. 6. 2. B. Charge, pl. 12. & 41. cites S. C. but S. P. does not appear. ——Fitzh. Charge, pl. 1. cites S. C. but S.P. does not appear.

9. If the Baron grants the Herbage or Peſture of this Land, which he holds with his Feme for Years, and dies, the Grantee ſhall have the Herbage or Peſture. 9 H. 6. 52.

10. If the Baron grants Part of the Term, of which he is poſſeſſed in the Right of the Feme, and dies, the Feme ſhall have the Reverſion; for this is not diſpoſed of. Perkins, S. 834. D. 9 El. 264. 40. admitted. * Co. Lit. 46. b. S. P. agreed by Manwood, and it ſhall only be an Alteration of what was granted. Cro. E. 33. in pl. 16. Trin. 26 Eliz. B. R. * S. C. cited Arg. 2 Lev. 100.——S. C. cited in a Nota. 2 Vern. 63. at the End of pl. 55.

11. But if the Baron reſerves a Rent upon the Grant, ſhe ſhall not have it, becauſe ſhe comes Paramount the Reſervation. Co. Lit. 46. b. But the Executor of the Baron ſhall have the Rent, contra Perkins, Sect. 834. S. P. per Periam. Cro. E. 279. pl. 5. Paſch. 34 Eliz. B. R. in Loftus's Caſe ——For the Rent is not incident to the Reverſion, becauſe ſhe was no Party to the Leaſe. Co. Litt. 46. b.——S. C. cited Arg. 2 Lev. 100.——S. P. in a Nota, 2 Vern. 63. at the End of pl. 55. cites Co. Litt. 46. b.

The Wife shall have it as annex'd to the Reversion or Term which she had; per Periam; but the Reporter says Quære; for the other Justices delivered no Opinion. Cro. E. 279. pl. 5. Pasch. 34 Eliz. B. R. in Loftus's Case.——See (C. a) Blaxton v. Heath.

12. If the Baron grants the Lands which he hath in Lease in the Right of the Feme, except Part, the Feme shall have this Part so excepted; for this is not disposed of. D. 9 El. 264. 4. admitted.

Cro. E. 28. pl. 2. Mich. 34 & 35 Eliz. Grute v. Locroft, S. C. adjudged; but reports it as a Jointenancy in the Baron and Feme——S. C. cited Mo. 395. pl. 514 in a Nota there, as adjudged that the Lease was good.——S. C. cited by Gawdy J. as adjudged accordingly. 1 Rep. 155. a.

13. If the Baron, possessed of a Term for Years in the Right of his Feme, makes a Lease for Part of the Years, to commence after his Death, and dies, this is a good Lease against the Feme; but she shall have the Reversion, and not the Executor of the Baron. Popham's Reports, 4. adjudged.

14. If a Feme, possessed of a Term, takes Husband, and they grant the Term upon Condition, and re-enter for the Condition broke, the Feme shall have the Term again.

Hob. 3. pl. 5. Young v. Radford, S. C. but not exactly S. P.—— Brownl. 129. S. C. but S. P. exactly does not appear.——See (H) pl. 11. S. C.

15. So if a Feme possessed of a Term takes Husband, and they grant the Term upon Condition, if their Executors or Administrators pay 10 l. to re-enter, and after the Baron pays the 10 l. this is not any Disposition, but they shall be possessed in the Right of the Feme; for tho' he paid the Money to redeem it, yet perhaps he received the Money when it was mortgaged. P. 12 Jac. B. between *Radford and Young*, per Curiam.

Fol. 345.

16. If a Baron possessed of a Term in the Right of his Wife, grants it to J. S. if he lives so long, and dies, the Feme shall have this Possibility of a Reversion, if J. S. dies within the Term, and not the Executors of the Baron. Pasch. 12 Jac. B. per two Justices.

17. If a Baron possessed of a Term in the Right of his Feme, grants it over upon Condition that the Grantee shall pay 10 l. to his Executors, the Baron dies, the Condition is broke, the Executors of the Baron enter, the Feme shall not have the Term; for this was a Disposition of the Term, all the Interest being granted over. Co. Lit. 46. b.

Roll Rep. 359. pl. 11. S. C. and by Coke Ch. J. the Feme shall have it after the Death of the Baron.—— 3 Bulst. 164. S. P. by Coke Ch. J. and says that the Husband, after such Recovery, shall have it in statu quo.

18. If Baron and Feme are ejected of a Term in the Right of the Feme, and the Baron recovers in an Ejectment brought by him in his own Name only, this is an Alteration of the Term, and vests it in the Baron. Co. Lit. 46. b.

19. If a Feme *Executrix* takes Baron, and the *Baron releases to the Creditor all Actions generally*, this extends to all his proper Actions, and to the Actions which the Feme has of her own, or as Executrix. Br. Baron and Feme, pl. 80. cites 39 H. 6. 15.

20. A *Release* by the Husband *of all Demands*, will release a Debt due to the Wife, because the Husband only could demand it. *But* a Release *of all Actions* will not release it. Arg. 10 Mod. 165. cites 21 H. 7. 29. b.

21. If Baron has a *Term* in Right of his Wife, and he is *outlawed* or *attainted*, they are Gifts in Law. Co. Litt. 351. a.

22. If

22. If Baron has a Term in Right of the Wife as Executor, and he * *purchaſes the Reverſion*, the Term is extinct as to the Feme, if ſhe ſurvives; but in reſpect of all Strangers ſhe ſhall make Account, as Aſſets in her Hands. Held by all the Juſtices. Mo. 54. pl. 157. Paſch. 5 Eliz. Dal. 52. pl. 25. S. C. held accordingly. * Becauſe the Husband has done an Act which deſtroys the Term, viz. the Purchaſe. But *intermarrying with him in Reverſion* does not extinguiſh the Term; for the Husband has not thereby done an Act to deſtroy the Term; but the Marriage is the *Act of Law*; per Manwood J. Godb. 2. pl. 2. Paſch. 17 Eliz. C. B.

23. *Leſſee for Years aſſigned the Term to the Wife of the Leſſor and a Stranger*; and afterwards the *Leſſor bargained and ſold the Land for Money by Deed inrolled.* The *Stranger died*; the Wife claim'd to have the Reſidue of the Term not expired. Whether by Bargain and Sale the Term of the Wife was extinct or not, was the Queſtion: It was ſaid it was not; but contrary if the Husband had made a *Feoffment in Fee.* The Caſe was not reſolved. Mo. 171. pl. 304. Mich. 26 & 27 Eliz. Anon.

24. Husband and Wife, *Jointenants* during the Coverture *for ſixty Years.* The *Husband let all the Lands for* 70 *Years, to begin immediately after his Death*, and died; the *Wife ſurvived.* It was adjudged a good Leaſe; for there is a good Term created in Intereſt, tho' not in Poſſeſſion; and the Husband having an Intereſt to diſpoſe of in his Life, he might diſpoſe of all his Term, and it ſhould bind the Wife. Cro. E. 287. pl. 2. Mich. 34 & 35 Eliz. B. R. * Grute v. Locroft. Poph. 4. pl. 3. Anon. S. C. that the Leaſe ſhall bind the Wife for ſo much as the Grant is of.—— Ibid. 97.

S. P. cited as adjudged accordingly. * S. C. cited 1 Rep. 155. a. as of a Demiſe for 70 Years by one that had a Leaſe for 90 Years, and that the Grant was good; but nothing ſaid of its being made by the Baron, but that the Leaſe was made to the Baron and Feme; and that the Reaſon why it was good was becauſe he demiſed all his Land, habend' after the Death of the Leſſor for 70 Years; ſo that there was ſufficient Certainty. But had he granted ſo much of his Term as ſhould be Arrear at the Time of his Death, this would be uncertain, and not good; and this Diverſity put by Gawdy J. was agreed by Popham and the whole Court.——Mo. 395. pl. 514. cites S. C. that the Baron and Feme were Jointenants for 99 Years, if they or either of them ſhould ſo long live, and that the Baron demiſed the Land for 70 Years, to commence after his Death, and died, living the Feme; and adjudged a good Leaſe againſt the Feme who ſurvived.

25. *Leaſe* was made *to Baron and Feme* for Years, who enter; the *Leſſor* afterwards *infeoffs the Baron*, who died ſeiſed. The *Feme ſurvives* and claims the Term, and betwixt the Feme and the Heir of the Baron, the Debate was whether the Term was extinguiſhed; And it was held per totam Curiam, That by the Acceptance of the Feoffment, the Baron hath ſurrender'd the Term, and it is extinguiſhed. *But if the Conveyance had been by Bargain and Sale inrolled, or by Fine*, it had been otherwiſe; and it was adjudged for the Plaintiff. Cro. E. 912. pl. 24. Mich. 43 and 45 Eliz. Downing v. Seymour.

26. The Baron had a *Term* in Right of his Wife, and only *took a Covenant for further Aſſurance*, and 'twas adjudged that that alter'd the Property. Cited Vern. R. 396. pl. 366. Paſch. 1686. as the Caſe of Nordon v. Levett. 2 Jo. 88. Norden v. Levett is not S. P.—— 2 Lev. 189. S. C. is not S. P.

S. P.——Freem. Rep. 442. pl. 398. S. C. is not S. P.

27. If Baron * *grants a Rent-charge out of a Term* which he has in Right of his Wife, that does not alter the Property; but if he makes a *Demiſe of* the Term itſelf, though but for a Fort-night, that will alter the Property. Arg. Vern. 396. in pl. 366. Paſch. 1686. * Co. Lit. 351.

28. Baron *aſſigns to Truſtees Goods which his Wife has, as Executrix*, in Truſt for ſuch Uſes as he by Deed or Will ſhould appoint. This alters the Property of the Eſtate. 2 Vern. 287. pl. 275. Paſch. 1693. Aſhfield v. Aſhfield.

29. A

29. A Diſpoſition by the Husband *by Will of a Mortgage* of the Wife's, is not good; for the Intereſt he had is ſpent, and ſhe is in by Survivorſhip before the Will can take Place. Arg. Ch. Prec. 120. Trin. 1700. in Caſe of Burnett v. Kinaſton.

The *Wife was no Party* to the Articles, and ſoon after died without Iſſue, and decreed for the Adminiſtrator De Bonis non of the Wife, Ch. Prec. 118. S. C.—S. C. cited Arg. G. Equ. Rep. 72. & Ibid. 102. by the Lord Chancellor, Trin. 1 Geo.——S. C. cited Arg. 2 Vern. 502 in pl. 451.——S. C. cited by Mr. Vernon, Chan. Prec. 416.——2 Freem. Rep. 239. pl. 310. S. C. and the Lord Keeper being of Opinion, that the Property of the Money was not altered by the Covenant, the Bill was diſmiſſed.——S. C. cited Arg. Chan. Prec. 419. and ibid 418. by Ld. C. Cowper.——G. Equ. Rep. 101. S. C. cited Arg. & ibid. 102. by the Lord Chancellor.

30. A *Portion* was *ſecured by a Mortgage in Fee.* The Baron after Marriage *aſſigns his Intereſt to Truſtees*, and by Articles the Money was to be called in to purchaſe Land to the Uſe of Husband and Wife, and their Iſſue; Remainder in Fee to the Husband; the Husband died. Per Cur. The Baron had not abſolute Power over the Mortgage, but being as a *Choſe en Action*, he had only a Right to reduce it into a Poſſeſſion, and not having ſo done in his Life-time, his Aſſignee ſtood but in his Place, and could only have the Baron's Power, which was to *reduce it into Poſſeſſion in his Life-time*; and not having ſo done, it ſurvived to the Wife notwithſtanding the Articles, and muſt go to her Adminiſtrator. 2 Vern. 401. pl. 371. Mich. 1700. Burnet v. Kinaſton.

31. The Wife had a *Term*, the Baron made an *Underleaſe for ten Years*, and upon *borrowing Money of Leſſee*, *covenanted to grant him another Leaſe after the End of the ten Years*, and to continue during the Time he had any Right, but died before he made ſuch Leaſe; 'twas decreed to be a good Diſpoſition of his Term in Equity. 9 Mod. 42. Trin. 9 Geo. 1. Steed v. Cragh at the Rolls.

(H) What Things the Baron ſhall have after the Death of the Feme.

*F. N. B. 121. (C) S. P. becauſe it was a Duty in him during the Marriage, and the Engliſh Edition cites S. C.——Co. Lit. 162. b. in the End of the Explanation of the Statute of 32 H. 8. cap. 37.——Co. Lit. 351. a. S. P.——An *Annuity* was granted *to a Feme ſole* for Life, who afterwards married; Arrears incur, and the Wife dies, whereby the Annuity determines; adjudged, that the Husband ſhall have an Action of Debt at the Common Law, becauſe an Annuity is more than a Thing in Action, and may be granted over. Ow. 3. Paſch. 26 Eliz. Anon.

1. If a Feme having a Rent for Life takes Baron and dies, the Baron ſhall have the Arrearages incurred during the Coverture. * 10 H. 6. 11, 12. Co. 4. Dgnel 51.

Co. Lit. 162. b. 351. a. 2. But by the Common Law, he ſhall not have the Arrears incurred before the Coverture. Co. 4. Dgnel 51.

Co. Lit. 162. b. 351. b.— 3. But this is aided by 32 H. 8. Co. 4. Dgnel 51.

See the Expoſition of this Statute 32 H. 8. cap. 37. S. 3. at Tit. Rent (S. b.) Fol. 544.

See (H. a.) pl. 1. S. C. 4. If a Feme leaſes for Years, rendering Rent, and after takes Husband, and dies; the Baron ſhall have the Arrearages incurred during the Coverture. 10 H. 6. 11.

5. If a Feme Seignioreſs takes Baron, the Rent incurs, and hath Iſſue and dies, by which the Baron is Tenant by the Curteſy of the Seigniory, he ſhall have the ſaid Arrears incurred during the Coverture. Kell. incerti Temporis 118. b.

6. If

6. If Baron and Feme, in the Right of the Feme, be ſeiſed of an Advowſon and the Church becomes void, and after the Feme dies, yet the Baron ſhall preſent to this Church; for this cannot be granted over, yet it is not meerly a Thing in Action. Co. Lit. 120. Co. Litt. 351. a. in ſuch Caſe he may have a Quare Impedit in his own Name, as ſome hold. ——But if the Church had fallen void before the Marriage, it was merely in Action before the Marriage, and therefore the Husband ſhould not have it although he ſurvive her. Co. Litt. 351. b.——*B. and his Wife brought a Quare Impedit* againſt H. and made Title to preſent to the Church in the Right of his Wife, and after the Iſſue joined, and *before the Venire Facias the Wife died*; and the Plaintiff ſhewed, that *himſelf had took out a Venire Facias in his own Name*; and Winch. was of Opinion that the Writ was not abated, becauſe this was a Chattel veſted in the Husband during the Life of the Wife. Winch. 73. Paſch. 22 Jac. C. B. Blunt & al' v. Hutchinſon.

7. But if a Man be bound to a Feme covert, and ſhe dies, the Baron ſhall not have this Obligation without Adminiſtration purchaſed; becauſe it is a Thing in Action. Co. Lit. 120.

8. If the Baron be poſſeſſed of a Leaſe for Years of Land, in the Right of the Feme, and after the Feme dies, the Intereſt of the Leaſe is preſently, by Law, veſted in the Husband, and he ſhall have it, and not the Adminiſtrator of the Feme. * D. 8 Eliz. 251. 90. per Curiam adjudged, Com. *Wroteſly and Adams*, 192. b. Curia, b. Co. Lit. 46. b. * Hauchett's Caſe.—— G. Equ. Rep. 234. S. P. in the Time of Geo. 1. in the Exchequer in Ireland, in Caſe of Barnwell & al' v. Ruſſell & al' ——Vaugh. 185. Vaughan Ch. J. cites S. C. viz. a Copyholder in Fee ſurrenders to the Lord, ad Intentionem that the Lord ſhould grant it back to him for Term of Life, the Remainder to his Wife, till his Son comes to 21, Remainder to the Son in Tail, Remainder to the Wife for Life. The Husband died; the Lord at his Court granted the Land to the Wife till the Son's full Age; the Remainders ut ſupra. The Wife marries, and dies inteſtate; the Husband held in in the Land; the Wife's Adminiſtrator, and to whom the Lord had granted the Land, during the Minority of the Son, enters upon the Husband. This Entry was adjudged unlawful, becauſe it was the Wife's Term; but otherwiſe it had been, if the Wife had been but a Guardian, or next Friend of this Land.

9. So if the Baron be poſſeſſed of a Ward in the Right of the Feme, and the Feme dies, the Intereſt of the Ward is caſt upon the Husband, and he ſhall have it without taking out Adminiſtration.

10. The ſame Law is of the Ward of Land.

Chattels real, as Leaſes for Years, Wardſhips &c. are not given to the Husband abſolutely (as all *Chattels perſonal* are) by the Inter-marriage, but conditionally, if the Husband happen to ſurvive her, and he has Power to alien them at his Pleaſure; but in the mean Time the Husband is poſſeſſed of the Chattels reals in her Right. Co. Litt. 299. b. 300.——All Chattels perſonal *in Poſſeſſion in her own Right*, are given to the Husband abſolutely by the Marriage, whether the Husband ſurvives the Wife or not. Co. Litt. 251. b.

Chattels real conſiſting meerly in Action, the Husband ſhall not have by the Inter-marriage, unleſs he *recovers them in the Life of the Wife*, albeit he ſurvive the Wife, As a Writ of *Right of Ward*, a *Valore Maritagii*, a *Forfeiture of Marriage*, and the like, whereunto the Wife was intitled before the Marriage. Co. Litt. 351. a.

But *Chattels real* being *of a mix'd Nature*, viz. *partly in Poſſeſſion, and partly in Action which happen during the Coverture*, the Husband ſhall have by the Inter-marriage if he ſurvive his Wife, albeit he reduces them not into Poſſeſſion in her Life-time; but if the Wife ſurvives him, ſhe ſhall have them. *As* if the Husband be ſeiſed of *Rent-Service, Charge, or Seck*, in the Right of his Wife, and the Rent becomes due, during the Coverture the Wife dies, the Husband ſhall have the Arrearages; but if the Wife ſurvive the Husband, ſhe ſhall have them, and not the Executors of the Husband. Co. Litt. 351. a.

11. If a Feme poſſeſſed of a Leaſe for Years takes Husband, and they join in a Grant of the Term upon Condition, That if they, their Executors, or Adminiſtrators, pay 10 l. by ſuch a Day, it ſhall be lawful for them to re-enter, and after the Feme dies, and the Baron pays the 10 l. and enters, and dies, his Executors ſhall have the Term, and not the Adminiſtrator of the Feme; becauſe the Intereſt of the Term ſurvived to the Husband. Paſch. 12 Jac. B. between *Young and Radford*, adjudged. Hob. Reports 4. Hob 3. pl. 5. Radford v. Young, S. C. adjudged —— Brownl. 129. S. C. adjudged accordingly.—— 4 Le. 185. pl. 285. Mich. 29 Eliz. C. B. Anon cites 20 Eliz. on a ſpecial Verdict before Popham Ch. J. but the ſame was not reſolved —— (G) 15 S. C.

* Fol. 346.

12. If the Baron be poſſeſſed of a Ward in the Right of the Feme, as (*) Guardian in Socage, and the Feme dies, the Baron ſhall not have it; for it belongs to the Prochein Amy. D. 8 El. 251. 90. Com. *Osburn againſt Carden and Joye*, 294.

Cro. E. 466. (bis) pl. 15. Hill. 38 Eliz. B. R. Wytham v. Waterhouſe,

13. If a Term for Years be granted in Truſt to the Uſe of a Feme Covert, the Baron ſhall not have this Truſt after the Death of the Feme. Paſch. 10 Jac. B. per Coke, to be adjudged in *Waterhouſe's Caſe*.

S. C. the Defendant took Adminiſtration of the Plaintiff's Wife's Goods, and the Plaintiff ſued the Defendant in Chancery to have this Term; but it was there decreed, by Advice of all the Juſtices of England, that neither the Term nor the Uſe thereof appertained to the Plaintiff.——Toth. 155. S. C. held accordingly.——Co. Litt. 351. a. S. P. and cites S. C. reſolved by the Juſtices; For it conſiſted in Privity.——Poph. 106. Arthur Johnſon's Caſe, S. C. reports the Term granted by her former Husband to her two Brothers in Truſt for her, and adjudged for her Brothers the Adminiſtrators againſt her ſecond Husband.——4 Inſt. 87. cites S. C. as referred by the Chancery to the Judges, and by them reſolved accordingly.——S. P. agreed accordingly, Mar. 45. pl. 69. Trin. 15 Car. in St John's Caſe.——S. C. cited accordingly All. 15. Trin. 22 Car. B. R. but Roll ſaid, that it had been ſince reſolved, that the Husband ſhould have it in that Caſe.

14. If *Tenant in Dower takes a ſecond Baron*, and *they two leaſe the Land which ſhe had to her Dower* of the Dowment of her firſt Baron *for Years, rendring Rent, and dies*, the ſecond Baron ſhall have that which was *Arrear in the Time of the Wife*, and not the Heir; for he is a Stranger to the Leaſe, and by the Death of the Tenant in Dower the Leaſe is void. Br. Rents, pl. 10. cites 14 H. 6. 26.

15. If Baron be poſſeſſed of a *Term for* 20 *Years* in Right of his Wife, *and he makes a Leaſe for* 10 *Years, rendring Rent to him, his Executors, and Aſſigns*, and dies, tho' the Wife ſurvives, ſhe ſhall not have the Rent, becauſe ſhe comes in paramonnt the Leaſe. 4 Le. 185. pl. 285. Mich. 29 Eliz. cites it as reſolved by Popham Ch. J. on a ſpecial Verdict in the County of Somerſet, 20 Eliz. Anon.

If a Feme ſole aſſigns a Leaſe in Truſt, and after takes Husband, and dies, the Adminiſtrator of the Feme ſhall have this Term.

16. *A Truſt of Leaſe for Years* for a Wife does not, after the Wife's Death, go to the Husband in Equity, as it was reſolved. Jenk. 245. in pl. 30. Lane 113. cited by Tanfield as decreed in Chancery, with the Opinion of the Judges in Denny's Caſe.——If a Man marries a Feme who is the Ceſty que Truſt of a Term, if ſhe dies the Truſt will not ſurvive to the Husband, but ſhall go to the Executor or Adminiſtrator of the Wife; and this was ſaid to be Witham's Caſe, and that is the Difference where the Wife has an Eſtate in Law in a Term, and where ſhe has only a Truſt. 2 Freem. Rep. 62. pl. 70. Mich. 1680. Hunt v. Baker.

17. *Two Femes Jointenants of a Leaſe for Years*, one of them takes Husband and dies, yet the Term ſhall ſurvive; for tho' all Chattels real are given to the Husband if he ſurvive, yet the Survivor between Jointenants is the elder Title, and after the Marriage the Feme continued ſole poſſeſſed; for if the Husband die the Wife ſhall have it, and not the Executors of the Husband; but otherwiſe of perſonal Goods. Co. Litt. 185. b.

G. Equ. Rep. 234. in Tempore Geo. 1. S. P. in the Exchequer in Ireland, in Caſe of Barnwell & al' v. Ruſſel & al' and cites S. C.

18. If a *Feme ſole be poſſeſſed of a Chattel real*, and be thereof *diſpoſſeſſed*, and then takes Husband, and the Wife dies, and the Husband ſurvives, this Right is not only given to the Husband by the Inter-marriage, but the Executors or Adminiſtrators of the Wife ſhall have it; ſo it is if the Wife have but a *Poſſibility*. Co. Litt. 351. a.

19. If the Wife be poſſeſſed of *Chattels real in auter droit*, as Executrix or Adminiſtratrix, or as Guardian in Socage &c. and ſhe intermarries, the Law makes no Gift of them to the Husband, altho' he ſurvived her. Co. Litt. 351. a.

20. If

20. If a *Woman grants a Term to her own Uſe*, and takes Husband, and dies, the Husband ſurviving ſhall not have this Truſt, but the Executors or Adminiſtrators of the Wife; for it *conſiſts in Privity*, and ſo it has been reſolved by the Juſtices. Co. Litt. 351. a.

21. If Husband dies *before he ſeiſes an Eſtray* which happened in a Manor of the Feme's, ſhe ſhall have it; becauſe there is no Property before Seiſure. Co. Litt. 351. b. (m)

22. Goods which a Feme has *as Executrix* remain in and to her if her Husband die, and if ſhe herſelf die her Husband ſhall not have them, unleſs he be his Wife's Executor, and ſo Executor to the firſt Teſtator; for they were Hers in Auter Droit, viz. as ſhe repreſented the Perſon of the Teſtator. Went. Off Ex. 86, 87.

Or *unleſs ſome Alteration be of the Property.* Went. Off. Ex. 206, 207.

23. A *Bond* was given *to a Feme ſole, who takes Baron, and dies*, J. S. took out Letters of Adminiſtration to the Feme, and brought an Action of Debt upon this Bond; the Obligor pleaded, that by the Marriage the Debt became due to the Baron. But the Court ſaid, that it did not; for it was a Thing in Action, and therefore the Plea is not good. Sty. 205. Hill. 1649. B. R. Cowley v. Locton.

No *Debts due to the Wife dum ſola* ſhall go to the Husband by Virtue of the Intermarriage, if *ſhe dies before they are recovered*, but her Adminiſtrator will be intitled to them, which may be the Husband, but then he has a Right only as Adminiſtrator, and the Reaſon is, becauſe ſuch Debts, before they are recovered, are only *Choſes en Action*. Agreed. 3 Mod. 186. Hill. 3 Jac. 2. B. R. in Caſe of Obrian v. Ram.

24. *A Sum of Money was provided by Settlement of Lands for raiſing Daughters Portions.* One of them marries, and dies before her Portion paid. The Husband takes out Adminiſtration. This Adminiſtration is pro forma only; for here he had a Right to the Money, as a Portion or Proviſion for his Wife. Chan. Caſes, 169. Trin. 22 Car. 2. Hurſt v. Goddard.

25. *Legacy* deviſed to a Daughter *to be paid out of Lands mortgaged* to the Father, which Mortgage was *forfeited in Teſtator's Life*. She married the Plaintiff, and died. The Husband takes out Adminiſtration, and the Legacy was decreed to him. Fin. R. 91. Hill. 25 Car. 2. Clerk v. Knight & Baker.

26. If a Perſon dies *inteſtate* poſſeſſed of Goods, and a *Feme Covert and another are next of Kin*, and *Adminiſtration is granted to the other only*, and the Feme dies within the Year, before any Diſtribution; yet the Baron by taking Adminiſtration to his Feme ſhall be intitled to her Share, it being an Intereſt veſted in her upon the Death of the Inteſtate. Carth. 51. Trin. 1 W. & M. in B. R. Brown v. Farndell.

(I) What *Charge of the Baron* ſhall bind the Feme.

1. IF a Baron ſeiſed for Life, or in Fee, in the Right of the Feme, grants a Rent, and dies, the Feme ſhall hold it diſcharged. 9 H. 6. 52. Curia. See (G) pl. 5. and the Notes there.

2. So if the Baron poſſeſſed for Years in the Right of the Feme, grants a Rent, and dies, the Feme ſhall hold it diſcharged. * 9 H. 6. 52. For ſhe comes Paramount the Charge. ‡ 7 H. 6. 1. * Br. Charge, pl. 1. cites S. C & S. P. —Fitzh. Charge, pl. 1. ibid. cites S. C. accordingly.——(F) pl. 5 S. C. ‡ Br. Charge, pl. 41. and in pl. 1. cites S. C. held accordingly; for by his dying without altering the Property, it remains to the Feme in the ſame State as before.——Fitzh. Charge, pl. 1. cites S. C——(G) pl. 5 S. C.

If *Feme has a Leaſe for Years, and takes Baron*, the *Baron may ſurrender* or forfeit the Leaſe, becauſe it is only a Chattle, and *yet he cannot charge it*; and yet to the King it may be charged. Br. Forfeiture de Terres, pl. 69. cites 7 H. 6. 1.

If

If a Man be poſſeſs'd of certain Lands for *Term of Years*, in the Right of his Wife, and *grants a Rent-charge*, and dies, the Wife ſhall avoid the Charge; but if the Husband had ſurvived, the Charge is good during the Term. Co. Litt. 184. b.

See (G) pl. 6. 3. **If Baron and Feme are** Tenants for Life, **and the** Baron acknowledges a Recognizance, **the Feme ſhall hold it diſcharged after the Death of the Baron.** 8 R. 2. Aid del Roy, 114.

If the Huſband be poſſeſs'd of a *Term for Years* in Right of his Wife, it may be *ſold on a Fi. Fa.* and yet it is not actually transferr'd to the Husband by the Inter-marriage; per Parker Ch. J. Trin. 1714. Wms.'s Rep. 258. in Caſe of Miles v. Williams. —See (G) pl. 6.

4. **If the Baron poſſeſs'd of a** Term **in the Right of his Feme,** is condemn'd in a Judgment, **or acknowledges a Statute,** and dies, **this ſhall** not **be** extended **upon the Feme.** 9 H. 6. 52. b.

Prerogative (E) pl. 5. S. C.

5. **If the Baron be** indebted to the King, **and** purchaſes Lands for Years to him and his Wife, **and dies, this Land ſhall be put in Execution for the ſaid Debt, becauſe the Baron had Power to diſpoſe of the ſaid Term.** 50 Aſſ. 5. adjudged, Co. 8. Sir *Gerard Fleetwood*, 5. [171.] **Quære of this; for the Execution does not relate to a Chattel.**

6. Baron cannot prejudice the Wife for her *Franktenement* or *Inheritance*. If ſhe is intitled to Dower of the Lands of her firſt Baron, and her 2d Baron *accepts for Dower leſs than a 3d Part*; after the Death of the 2d Baron ſhe may wave it, and have her full third Part. Jenk. 79. pl. 56. cites 32 E. 1. Fitzh. Dower 121.

7. Where the *Baron is indebted to the King*, and *he and his Feme purchaſe* Land *for* 60 *Years*, and *he dies*, the Feme ſhall be charged. Br. Jointenants, pl. 30. cites 50 Aſſ. 5.

8. *And yet if A. be indebted* to the King, *and A. and B. purchaſe jointly in Fee*, and *A. dies*, and B. ſurvives, he ſhall not be charged. Note the Diverſity; for the other is only a *Chattel*, all which the Baron may alien without his Feme. Br. Jointenants, pl. 30. cites 50 Aſſ. 5.

9. *Baron made a Leaſe* of the Wife's Lands, and the Leſſee being *ignorant* of the defeaſible Title, *built* upon the Land, and was at great Charge therein. The Baron died, and the Wife ſet aſide the Leaſe at Law; but was compell'd in Equity to yield a *Recompence* for the Building and bettering the Land; for it was worth ſo much the more to her. Chan. Rep. 5. in the **Earl of Oxford's Caſe**, Arg. cites it as appearing by a Judgment-Roll of 34 H. 6. of the Caſe of Peterſon v. Hickman.

See Tit. Diſclaimer (C)

10. An *Avowry* is made upon the Husband and Wife, where the *Wife is the Tenant*. In this Caſe no *Diſclaimer* lies; for the Wife cannot be examined in this Caſe; and the Husband's Diſclaimer ſhall not hurt the Wife for her Freehold or Inheritance any more than his *Confeſſion* ſhall. Jenk. 143. pl. 97. cites 14 H. 4. 18.

11. Baron alone aliens the Land of the Wife by *Fine with Proclamations*, and dies. Five Years expire after his Death without Action or Entry of the Wife. 'Tis a Bar for ever to the Wife and her Heirs. D. 72. b. pl. 3. Mich. 6 E. 6. Anon.

12. Baron alone makes a *Leaſe of the Wife's Land*, and dies. The Leaſe, as to the Poſſeſſion, remains in full Force till ſhe avoids it by her Entry; but *as to the Right*, it determined by the Death of the Huſband. Arg. 3 Bulſt. 272. cites Pl. C. 65. b. [but it ſhould be 137. b. 6 E. 6.] in Browning and Beeſton's Caſe; and cites 9 H. 6. 43. and 28 H. 8. Dyer, Fol. 28. [b. 29. a.]

13. In *Debt on Bond for Performance of Covenants* in an Indenture between the Defendant and A. his Wife of the one Part, and the Plaintiff of the other Part. The Jury found *the Husband ſealed the Deed, but not the Wife*; the Juſtices held that if the Husband had ſealed and delivered

delivered it *in the Name of the Wife*, it had been the Deed of the Wife during the Life of the Husband; and if they by Indenture had bargained and ſold Land of the Wife rendring Rent, it had been a good Deed of the Wife, becauſe ſhe might have afterwards accepted the Rent, and made the Deed good. Cro. E. 769. pl. 12. Trin. 42 Eliz. B. R. Shipwith v. Steed.

14. *Husband deviſed his Land to his Wife during the Minority of his Son* and dies. He has only a poſthumous Son. By the Will the Wife has *Power to make Leaſes*, to raiſe Money to pay Debts &c. She enters and takes the Profits and marries a ſecond Husband; he lives ſome Years and takes the Profits, and dies. She *leaſed* ſome Part according to the Will, and continued taking the Profits of the reſt. The *Son comes to* 21, *and proves a Revocation of the Will*, and prays his Mother may account. Ordered that ſhe *account for all the Profits* that herſelf or her Husband took; for ſhe ſhall be ſaid to take them as Guardian till 14, and after as Bailiff, and was to anſwer what her Husband took as in a Devaſtavit. And the Wife having *no Notice* of the Revocation, had *paid Legacies according to the Will* which were charged on the Lands. Thoſe were ordered to be allowed, but as for the Leaſes, tho' for Fines and full Rents, the Court would not make them good, becauſe ſhe could not ſet or leaſe Lands. Chan. Caſes, 126. Paſch. 21. Car. 2. Hele v. Stowell.

15. If *Feme Executrix ſurvives*, ſhe ſhall be *charged for Damages recovered upon a Devaſtavit againſt her and her Baron, for Waſte committed by the Baron* during the Coverture, *but* ſhe ſhall *not* be charged *for Coſts* recovered againſt the Baron *de Bonis propriis*; and Judgment accordingly. 2 Lev. 161. Hill. 27 & 28. Car. 2. B. R. Horſey v. Daniel.

16. Deviſe of 800 *l. to be inveſted in Land for the Benefit of the Wife of J. S.* for her Life, and afterwards to her Children, and the Intereſt of the Money to go in the mean Time to ſuch Perſon as would be intitled to receive the Profits. J. S. the *Husband becomes Bankrupt.* Per Cur. This not being a Truſt created by the Husband, nor any Thing carved out of his Eſtate, but given by a Relation of the Wife's, and intended for her Maintenance; 'tis not liable to the Creditors of the Husband, and decreed the *Intereſt to be paid to the Truſtee* to be laid out in Land and ſettled according to the Will. 2 Vern. R. 96. Vandenanker v. Desborough.

17. A Feme had 1000 *l.* and *it was agreed by Marriage-Articles, that* 700 *l. of it ſhould go to pay his Debts.* The Husband after Marriage, *without the Wife, aſſigned the* 300 *l. likewiſe to Creditors*, and decreed ſo much to be paid as was really due to them, and the Reſidue, if any, to be put out for her Benefit. Chan. Prec. 325. Hill. 1711. Povey v. Brown, Amhurſt & al'.

18. If a *Bill of Exchange* be *made to the Feme dum ſola*, the Huſband may aſſign it, and the Aſſignee ſhall bring the Action in his own Name. Per Parker Ch. J. Wms's. Rep. 255. Trin. 1714. in Caſe of Miles v. Williams. Her Huſband is the proper Perſon to aſſign the Note.

Per Parker Ch. J. 10 Mod. 246. in S. C.

19. No *Agreement of the Husband to part with the Wife's Inheritance*, ſhall bind the Wife, or be carried into Execution. MS. Tab. Feb. 9. 1721. Bryan v. Wolley.

20. If the *Wife had recovered a Judgment at Law, and Elegit thereupon*, the *Husband would have had a Power to aſſign that Intereſt of the Wife, for or without Conſideration &c. in Truſt for himſelf or as he pleaſed*; ſo by Parity of Reaſon, the *Wife having a Decree of a Court of Equity for her Demand, and to hold and enjoy till Satisfaction &c. the Husband has*

the ſame Right and Power to diſpoſe of this equitable Intereſt of the Wife, as he would in Caſe of a Demand recovered at Law &c. and though after Marriage the Husband is to uſe the Wife's Name in the Proceedings in Equity in this and the like Caſes, whereas he need not at Law, that makes no Difference in the Thing, or in the Right, but in the Form and Manner of Proceeding &c. Per. Ld. Hardwick MS. Rep. Feb. 26. 1734. in the Caſe of Paſchall v. Ld. Carteret & al'.

(K) What Things the Feme may *do without* the Baron.

Br. Tender pl 32. cites S. C. ſays that ſhe *did requeſt*, and *they refuſed*, and the Baron and Feme entered, and good.

1. IF a Feme ſole makes a Feoffment upon Condition to re-infeoff her at what Time ſhe will, and after takes Husband, ſhe may require the Feoffee to re-infeoff her without her Husband, and if the Feoffee does not do it, the Condition is broke. 35 Aſſ. 11. adjudged.

Brooks ſays, and ſo ſee *a good Requeſt by a Feme* Covert *without her Baron*, for the Conditions are ſtrict as it ſeems.——Br. Conditions, pl. 117. cites S. C.——Br. Coverture, pl. 42. cites S. C.——Br. Feoffments, pl. 31. cites S C.——Br. Remitter, pl. 45. cites S. C.——2 Brownl. 69 in Caſe of Portington v. Rogers, Arg. cites S. C. contra, viz. that ſhe cannot make Requeſt after Coverture; but ibid. 140. 141. Arg. in S. C. ſays that the Requeſt is good after Marriage, and cites 25 Aſſ. 11. [but is miſprinted for 35 Aſſ. 11.]

2. *Nor ſhe cannot reſtrain the Livery of her Baron of the Land of the Feme.* Br. Coverture, pl. 76. cites H. 21. E. 3. 6.

3. If *Land is given to a Feme upon Condition to ſell*, and to diſtribute the Money &c. for the Soul of the Feoffor, and *ſhe takes Baron*, and the *Baron and Feme ſell* and diſtribute the Money, and the Baron dies, the Feme ſhall not have Cui in Vita nor Subpœna; for the Sale is good according to the Condition. And per Brooke J. the *Feme may ſell to any except to her Baron*; and this *by Deed, not by Fine.* Br. Cui in Vita, pl. 16. cites 34 E. 3.

4. The Feme *cannot waive her Intereſt gained by* the *Diſſeiſin* during the Life of the Baron. Br. Aſſiſe, pl. 330. cites 35 Aſſ. 5.

5. Feme Covert *ſhall not be Executrix, without the Aſſent* of her Baron. Br. ibid. cites Hill. 2. H. 7. 15.

6. Feme Covert *Executrix* may give Acquittance on Receipt of a Debt by herſelf without the Baron; all the Juſtices ſaid that ſo it ſeems. And. 117. in pl. 164. Hill. 22 Eliz.

Note, That a *Sale or Gift* to a Feme Covert, or a Sale of the Goods of the Baron by a Feme Covert is good, if the Baron agrees, or does not diſagree; per Cur. Br. Contract, pl. 3. cites 27 H. 8. 25.

7. A Feme Covert may *do Things* in Law, if the *Baron agrees* to it. Kelw. 163. a. pl. 4. Mich. 3 H. 8. but without ſuch Aſſent, ſhe cannot make, create or *limit Uſe of Land.* And. 164. pl. 209. Mich. 29 & 30 Eliz. in Caſe of Colgate v. Blythe, alias Kenn's Caſe.

8. *Tenant for Life, Remainder to* his Daughter and Heir apparent, who was *a Feme Covert*, in Fee. The *Father made a Feoffment* in Fee *with Warranty*, and afterwards levied a Fine with Warranty to certain Uſes, and died. The Daughter for herſelf, and in the Name of her Husband, and by his Conſent, *enter'd* within the Year, *and claim'd* the Inheritance. The Juſtices held, that the Entry by the Wife alone, without

without her Husband, he agreeing to it, was good; and that the Warranty deſcending upon her during the Coverture, did not bind her, becauſe her Entry was lawful. Cro. Eliz. 72. pl. 28. Mich. 29 & 30 Eliz. B. R. Ards v. Simpſon.

9. *Aſſent* by the Wife of T. to F. *to enter into the Houſe* of T. the Huſband, and take Goods which were there of A.'s, who had ſold them to F. is no Juſtification in Treſpaſs brought by the Husband againſt F. Per 3 Juſtices, contra Gawdy J. Cro. E. 245. pl. 5. Mich. 33 & 34 Eliz. B. R. Tailor v. Fiſher. 3 Le. 266. pl. 358. S.C. and the Plea was held not good.

10. Feme Covert cannot make a * *Letter of Attorney* to deliver a Leaſe upon the Land. Brownl. 134. Paſch. 44 Eliz. Wilſon v. Rich. Yelv. 1. S. C. and Brownl. ſeems only a Tranſlation of Yelv ——2 Brownl. 248. Paſch. 9 Jac. B. R. Plomer v. Hockhead, S. P. —But if the Declaration is of a Leaſe by the Husband only, 'tis good. Noy 133. Plummer v. Hocket, S C.—See Gardiner v. Norman.

* In *Debt* Baron and Feme continues till Exigent. Baron appears, but will not ſuffer her to appear. Per Cur. the *Wife may make Attorney to prevent being waived.* D. 271. b. Marg. pl. 27. cites Paſch. 42 Eliz. C. B.

11. She cannot *take an Executorſhip upon her* without the Conſent of her Husband at the Common Law; tho' otherwiſe perhaps by the Spiritual Law. But if the Will be proved, and Execution committed to the Wife, tho' againſt her Husband's Mind and Conſent, it ſeems that it will ſtand; and the Husband and Wife being after ſued, they cannot ſay that ſhe never was Executor, and he doubted whether her *adminiſtring* without the Husband's Privity and Aſſent, *tho' the Will be not proved*, do not conclude her Husband as well as herſelf from ſaying after in any Suit againſt them, that ſhe neither was Executor, nor did ever adminiſter as Executor; yet perhaps ſuch Adminiſtration by the Wife againſt the Husband's Conſent, will, as againſt him, be a void Act; and if *ſhe, being made Executrix during Coverture, refuſes, but yet the Huſband will adminiſter*, ſhe is bound during his Life, tho' after his Death ſhe may refuſe. See Went. Off. Executor, 202. to 205. See 2 H. 7. 15. b. pl. 23.

12. Husband and Wife ſeiſed of Lands in Right of the Wife, *levied a Fine* to the Uſe of themſelves for their Lives, and after to the Uſe of the Heirs of the Wife; *Proviſo*, that it ſhall and may be lawful to and for the Husband and Wife, at any Time during their Lives, *to make Leaſes for 21 Years or 3 Lives*, the Wife being Covert made a Leaſe for 21 Years. Adjudged a good Leaſe againſt the Husband, tho' made when ſhe was a Feme Covert, and by her alone, by reaſon of the Proviſo. Godb. 327. pl. 419. Paſch. 21 Jac. B. R. Anon.

13. *Lands* were *deviſed* by the Baron *to his Feme, to diſpoſe at her Will and Pleaſure, and to give it to which of his Sons ſhe ſhould pleaſe.* She marries another Husband. Adjudged that the Feme, notwithſtanding the Coverture, might *execute the Power*; for the Son is in by the Deviſor. Noy 80. Daniel v. Upton. Jo. 137. pl. 3. Trin. 2 Car. B. R. Daniel v. Ubley, S. C. adjudged accordingly.—Lat 9. 39. & 134. Daniel v. Upley, S. C. adjudged accordingly; and ibid. 10 Arg. it is ſaid that this Power is collateral to the Eſtate.

Deviſe of an Annuity to a Feme ſole for Life, with Power to grant an Annuity to any Perſon ſhe ſhould name, and after ſhe marries, yet this Power continues in her, and is not transferr'd to the Huſband, and by her Nomination ſhe does not any ways charge the Lands by virtue of any *Intereſt ariſing from her*, but that is done by the Will of the Teſtator. Fin. Rep. 346. Paſch. 30 Car. 2. Gibbons v. Moulton.

14. If Land was *deviſed to the Feme, on Condition to convey it* to J. S. there ſhe has Intereſt conditional, and to ſave the Condition ſhe may convey it during Coverture; ſo *Feoffment* to a Feme Covert, *upon Condition to enfeoff J. S.* Admitted. Jo. 138. pl. 3. Trin. 2 Car. B. R. in Caſe of Daniel v. Ubley.

15. If

But if she is Feoffee *upon Condition* to convey it over, she shall be bound by her Feoffment, because she was but an *Instrument.*

15. If *Feoffment* be made *to a Feme Covert upon Trust, and Confidence to convey it to J. S.* Per Jones J. she cannot make Feoffment; for the Estate was absolutely in the Feme, not subject to the Condition, but in Trust and Confidence; so that without the Barons joining with her in a Fine, her Feoffment is void; and if 'twas by Fine, 'tis voidable by the Baron; but Doderidge and Whitlock J. were of Opinion, that in that Case a Conveyance by her was good. Quære. Jo. 138. Trin. 2 Car. B. R. in Case of Daniel v. Ubley.

Arg. 2 Roll Rep. 68. cites 11 H. 7. 3.—Arg. 2 Roll Rep. 175. cites 34 E. 3. Cui in Vita.

A Feoffment with *Letter of Attorney to the Wife to make Livery*, is good; but then she must make Livery *in the Name of her Husband.* Arg. Godb. 389. cites Perk. S. 196. 199.

Nor can she dispose of it from the Husband without his Concurrence, and such Claimant ought to set forth by what Act or Deed he claims it, and her Administrator ought to be made a Party; and so it was ruled upon Demurrer. Fin. Rep. 387. Trin. 30 Car. 2. Wall v. Eastmead & Hakes.

16. A *Receipt* given by the Wife alone for a *Legacy* bequeath'd to her, is not a sufficient Discharge against the Husband. Vern. 261. pl. 255. Mich. 1684. Palmer v. Trevor.

Ld. Raym. Rep. 224. S. C. accordingly.

17. If Feme Covert *purchases Lands* without Consent of the Baron, he may have *Trover for the Money.* Cumb. 450. Ruled at Guildhall, Trin. 9 W. 3. in Case of Garbrand v. Allen.

18. Feme Covert may *plead* alone in a *Criminal* Matter; As if she was attainted of *Felony*, she may plead a *Pardon*; per Holt. Farr. 82. Mich. 1 Ann. B. R.

(L) What Things they both may do to *charge the Feme* after the Death of the Husband.

So in Trespass. See Tit. Execution (T) pl. 2. cites 47 E. 3. 10.

1. If a Recovery be in an Assise for Disseisin against them, Execution shall be against the Feme after the Death of her Husband, as well for the Damages as for the Principal. 39 H. 6. 45.

2. If the Baron and Feme have the same Occupation, and the Baron dies, the Feme shall be charged by the Statute of Glouceſter, for the Occupation, in an Assise or Trespass. 39 H. 6. 45.

Mod. 66. pl. 14. S. C. & S. P. agreed accordingly by the Counsel for the Defendant, but insisted on a Fault in the Pleadings.——Ibid. 291. pl. 37. S. C. & S. P. agreed by the Counsel of both Sides, and also by the Court.——Sid. 466. pl. 2. S. C. and in a Nota at the End says, it seems to be admitted by all that Action of Covenant lies upon the Conceſſit in the Fine without a Deed. Quod nota.——2 Saund. 177. S. C. held accordingly, that Covenant lay against the Feme.

3. Baron and Feme levied a *Fine sur Conceſſit* of Lands *with Warranty* to W. The Baron died. W. is ejected. The Court held, that Covenant lies against the Feme upon this Warranty in the Fine by her, tho' she was Covert at the Time of the Fine levied. Lev. 301. Mich. 22 Car. 2. C. B. Wootton v. Hale.

(L. 2) Bound by her own Act. By Relation.

1. IF Feme ſole *commands J. N. to make an Obligation in her Name*, and before the Execution of it ſhe takes Baron, and after it is executed, it ſhall bind her; for ſhe had Power at the Time of the Command. Quære. Br. Coverture, pl. 50. cites 14 E. 4. 2.

2. Tho' the *Deed* of a Feme Covert could not be binding, yet being *relative to a Fine*, it gives an Efficacy and Operation to the Deed, and is as concluſive as if ſhe were a Feme ſole; Per Holt Ch. J. in delivering the Opinion of the Court. 12 Mod. 161. Hill. 9 W. 3. Jones v. Morley.

(M) What Things a *Woman may do alone to charge* her Husband.

1. THE Baron, in an Account, ſhall not be charged by the Receipt of his Feme, unleſs it came to his uſe. 43 Ed. 3. 23. Fitzh. Account, pl. 28. cites S. C.

2. Per Cur. *Gift of Goods of the Baron made by Feme Covert* is good, if the Baron agrees to it, or *if he does not diſagree*, yet it ſuffices, and therefore the Gift was to the Feme Covert; Quod Nota. Br. Done, pl. 4. cites 27. H. 8. 26.

3. *Debt* was brought *by the Husband upon a Leaſe made by the Feme dum ſola.* After Marriage that *Feme received the Rent of the Leſſee, who had no Notice of the Coverture*, (by any thing which appeared) nor was there any Countermand of the Payment thereof to the Feme. It was reſolved, that this Payment was as no Payment, but the Baron may well demand and recover it again. Cro. J. 617. (bis) pl. 7. Mich. 19 Jac. B. R. Tracy v. Dutton. Palm 206. S. C. and Ibid. 210. it was reſolved by 3 Juſtices; Doderidge being in the Parliament, that the Payment to the Feme was void in Law; and by Ley Ch. J. that Notice of the Marriage was not neceſſary.

4. The Wife *received Money due on a Bond entered into by one to her Huſband.* The Husband got Judgment on the Bond; but becauſe ſhe uſually received and paid Money for him, it was ordered that he acknowledge Satisfaction thereupon. Chan. Caſes 38. Mich. 15 Car. 2. by the Maſter of the Rolls. Seabourne v. Blackſtone. 2 Freem. Rep. 178. pl. 240. S. C. in totidem Verbis.

5. The *Wife of A. receives* 10 *l. to the Uſe of A.* and *this comes to the Uſe of her Husband in a convenient or neceſſary Way*; altho' the Husband did not command it, or conſent afterwards, he is liable to this Debt, and the *Count ſhall be of a Receipt by the Hands of the Husband*; ſuch manner of Count will ſerve in Debt in this Caſe. The Reaſon is, the Wife's Contract is void, and it ought not to be alleged in the Count, but the Count ought to be as above; by the Juſtices of both Benches. Jenk. 4. pl. 5.

(M. 2) In what Cases she may take by Grant.

1. IF an *Estate* be made to a Man's Wife *De novo*, it is not necessary to aver his Assent; for it *vests till he dissents*; but where the Wife had an Estate before, an Assent is necessary, because it cannotbe devested by her Acceptance of a new Estate, unless he assent to the latter Estate; Per Hobart Ch. J. Hob. 204. pl. 257. Trin. 14 Jac. at the End of the Case of Swain v. Holman.

2. Debt upon a penal Bill, by which the Defendant *promised K. a Feme sole, that as soon as a Grant should be made to him of such an Office, he would execute a Bond to her for Payment of 50 l. per Annum to her, during the joint Lives of her and the said Defendant.* The Office was granted to him, and she being afterwards married, her Husband and she brought this Action, setting forth this Matter &c. but that he had not sealed a Bond to her dum sola, nor to the Husband and her jointly after the Marriage &c. Upon Demurrer the Defendant had Judgment, for tho' it was averred, that he had not sealed the Bond to the Wife whilst sole, nor to the Plaintiffs after the Marriage, yet it was not said that he had not sealed to Her after the Marriage, and this Exception was held good per tot. Cur. Lutw. 413. Hill. 3 & 4 Jac. 2. Tonstall v. Williamson.

(N) What Things a Woman *may do without her Husband*, [or may be avoided by him.]

1. IF a Feme Covert levies a Fine, this will bar her, if her Husband does not avoid it, during the Coverture. * Co. 10. 43. 18 H. 6. 27. † 17 Ass. 17.

* Trin. 11 Jac. in Mary Portington's Case.—† Br. Coverture, pl. 77. cites S. C. and if the Baron dies she shall not avoid it in Scire Facias.———Br. Fines levied, pl. 75. cites S. C.———Fitzh. Estoppel, pl. 135. cites S. C. and Trin. 17 E. 3. 52.———7 Rep 8. a. b. S. P. accordingly per Cur. cites S. C.———See Tit. Fines (T) per totum.

2. But if he avoids it, she and her Heirs shall have it. Co. 10. 43. * 17 Ass. 17.

* Br. Fines levied, pl. 75. cites S. C.
——Br. Coverture, pl. 77. cites S. C.———Fitzh. Estoppel, pl. 135. cites S. C.———7 Rep. 8. a. b. S. P. per Cur. Mich. 28 & 29 Eliz. in the Court of Wards, in the Earl of Bedford's Case, and the Conusee shall not have the Land; for by the Entry of the Baron the entire Estate of the Conusee is defeated, and the antient Estate of the Feme re-vested in her, and the Baron seised of the intire Estate as in Right of his Wife, and says, that with this agrees 17 E. 3. 52. b. 17 Ass. 17. 7 H. 4. 23. 2 R. 3. 20 9 H. 6. 33.——Hob 225. Hobart Ch. J. says, Note a Conflict of two Laws of Nature and Equity, as it were, but the one is predominant; and yet the Law of the Land for Necessity's sake of Commerce and the like, by a Law of Policy, makes bold with the Law of Nature in a special kind, and therefore allows a Fine levied by the Husband and the Wife; because she is examined of her free Will judicially by an authentical Person, trusted by the Law, and by the King's Writ, and so taken in a sort as a sole Woman, as also when she comes in by Receipt; but this being but a Fiction of Law, must not be extended beyond that, that the Law has granted as a Privilege. Nay more, if a Woman covert levy a Fine alone, as if she were sole, this shall bind her for the Reason before given, that she shall not be received to say she was covert, tho' her Husband shall, and may enter and restore the Land to himself and his Wife both.

3. Quære,

3. Quære, if a Feme Covert ſuffers a common Recovery, if this binds the Feme after the Death of the Husband, if he does not avoid it during Coverture. Fol. 347.

4. If a Feme covert appears to an Action, and after is outlawed, her Husband and ſhe may reverſe it; becauſe it was without her Husband. 18 Ed. 4. 4. Br. Error, pl. 173. cites S. C. Br. Joinder en Action, pl. 88. cites S. C. that they ought to join to reverſe it; becauſe Feme covert cannot ſue without her Baron.

5. If a Man makes a *Feme Covert his Executrix, and deviſes the Reverſion to be ſold by her*, ſhe cannot make a Deed, and yet her Sale is good without Deed without any Attornment, nor can ſhe levy a Fine; and the Reaſon ſeems to be, inaſmuch as *when the Sale is made it paſſes by the Teſtament, and not by the Sale.* Br. Deviſe, pl. 12. cites 19 H. 6. 23.

6. A *Feme Covert bought Goods for* 10 *l.* the *Baron paid* the 10 l. *and took the Goods*; the Vendor brought Treſpaſs; Per Yaxeley, the Sale is void, by reaſon that ſhe who bought is a Feme Covert. But per Rede, the Buying by her is good, becauſe her Baron agreed to it. Fineux contra; for a Feme Covert *cannot do a Thing* which may turn to the *Prejudice* of her Baron, and *contra* of that which is *for his Advantage*; for if I *give Goods* to a Feme Covert, it is good if the Baron agrees; but if a Feme Covert buys a Thing in a Market it is void; for it may be a Charge to the Baron; but ſhe may buy a Thing *to my Uſe*, and I after agree to it. Br. Contract, pl. 19. cites 21 H. 7. 40. ** S. P. Br. Contract, pl. 41. cites 20 H. 6. 22.

7. *And* if I *command* my *Feme to buy Things neceſſary*, and ſhe buys it, this ſhall bind me by the *general Command*, *tho' I did not expreſs* to her *what Things* are neceſſary. Br. Contract, pl. 19. cites 21 H. 7. 40. S. P. Br. Contract, pl. 41. cites 20 H. 6. 22.

8. *And* if my Feme buys a Thing *for my Houſhold*, *as Bread* &c. and *I have no Knowledge of it*, there, tho' it was expended in my Houſe, I ſhall not be thereof charged. Quod Nota bene. Ibid. S. P. per Fineux Ch. J. Br. Contract, pl. 41. cites Trin. 14 H. 7.

9. Baron and Feme levied a *Fine of the Wife's Lands to the Uſe of themſelves for their Lives*, *Remainder to the Heirs of the Wife*, with a *Proviſo for the Husband and Wife, at any Time during their Lives, to make Leaſes for* 21 *Years*, *or* 3 *Lives* &c. The *Wife* during the Coverture, *made a Leaſe for* 21 *Years*; and it was adjudged a good Leaſe againſt the Huſband, (though made by her alone while ſhe was Covert) by Reaſon of this Proviſo. Godb. 327. pl. 419. Paſch. 21 Jac. B. R. Anon.

10. The *Baron* being gone *beyond Sea*, the *Feme levies a Fine of her Lands*; the *Baron returns and enters into Part.* The Queſtion was, whether this had avoided the whole Fine? And held that it had; for what Act ſoever he doth in diſaffirmance of the Fine, ſhall avoid it. Freem. Rep. 396. pl. 515. Trin. 1675. Mayo v. Combes. 3 Keb. 477. S. C. adjudg'd.

(N. 2) What Act of the Wife's ſhall be good with the Husband's joining.

1. A Feme Covert is of a Capacity to *purchaſe* of others, *without the Conſent of her Husband*, but her Husband may diſagree thereto, and deveſt the whole Eſtate; but if he *neither agrees nor diſagrees*, the Purchaſe is good. But after his Death, though her Huſband agreed thereunto, yet ſhe may (without any Cauſe to be alleged) waive

waive the ſame, and ſo may her Heirs alſo, if after the Deceaſe of her Husband ſhe herſelf agreed not thereunto. Co. Litt. 3. a. at the Top.

2. *Warrant of Attorney* by Baron and Feme *to deliver a Leaſe* upon the Land, is merely void as to the Wife. Yelv. 1. Paſch. 44 Eliz. B. R. Wilſon v. Riche.

But a Letter of Attorney by them both, *to receive a Legacy bequeathed to the Wife* is good, becauſe the Letter of Attorney of the Husband alone is ſufficient. Goldb. 159. pl. 91. Hill. 43 Eliz. Huntley v. Griffith.

3. If a Limitation be, that if a Ring be tender'd by a Woman, that the Land ſhall remain to her, ſhe takes a Husband, *ſhe and the Husband tender the Ring*; this is a ſufficient Tender, and ſhall be intended the Act of the Wife. Arg. 2. Brownl. 67. Paſch. 9 Jac. C. B. in the Caſe of Portington.

4. A *Bond* was conditioned *to pay* 50 *l. to the Plaintiff*; Memorandum, It is *agreed* before Sealing &c. *that the Wife may diſpoſe of the* 50 *l. in her Life-time to whom ſhe will, to be paid by the Plaintiff* accordingly, he being only Truſtee of the Wife in the ſaid Obligation. In Action againſt the *Husband* after the Wife's Death, the Defendant *pleads that ſhe with his Conſent made her Will, and thereby bequeathed* 30 *l. of the ſaid* 50 *l. to divers Perſons, and the reſt to him, and made him Executor*, and after died, and ſo diſpoſed of the ſaid 50 *l.* in her Life. On Demurrer to this Plea, Judgment was given for the Plaintiff, for the 50 *l.* ought to be paid to the Plaintiff, notwithſtanding the Diſpoſal. 2. Jo. 216. Trin. 34 Car. 2. B. R. Blunt v. Collins.

5. Where a Legacy is given to a Feme Covert, on *Condition to releaſe* her Intereſt in Lands, ſhe muſt releaſe by Fine. 9 Mod. 79. 10 Geo. Acherley v. Vernon.

(N. 3) Acting as a Sole in other Caſes than as Feme Sole Merchant.

Chan. Caſes 50. S. C. at the Rolls, ſays that there appeared ſome probable Evidence that the Husband was not dead; and ſo an Injunction was granted, and a Trial at Law directed.

1. FEME *as Adminiſtrator to her Husband*, brought an Action. The Defendant brings a Bill, ſuggeſting that the Husband is not Dead but conceals himſelf, and pending the Suit in Equity, the Feme got Judgment at Law, but the Court granted an Injunction, and directed an *Iſſue* at Law to try whether the Husband was *dead or not*. N. Ch. R. 93. 16 Car. 2. Scott v. Reyner.

2. A Feme Covert who lived by herſelf and *acted as a Feme ſole*, gave a *Warrant of Attorney to confeſs a Judgment* &c. and afterwards moved to ſet aſide the Judgment, becauſe ſhe was Covert; but the Court would not relieve her, but put her to her Writ of Error. 1 Salk. 400. pl. 5. Mich. 10 W. 3. B. R. Anon.

3. A Woman living ſeparate from her Husband and *paſſing for a Widow, was applied to by B. to lend* him 100 l. *on a Mortgage*. She *told him that ſhe had only* 50 *l. of her own, but that ſhe could get* 50 *l. more* of a young Woman, *which ſhe did*, and acquainted B. thereof, and *ordered the Mortgage to be made to herſelf* by a different Name from that of her Husband, *and gave* the young Woman *a Bond for Payment of the* 50 *l.* and Intereſt, but by another different Name. B. made ſeveral Payments of the Intereſt to the Wife, but knew nothing of the Marriage.

The

The *Husband having Notice of the Mortgage, gets that and all the Writings into his Cuſtody.* On Diſcovery of the Marriage, a Bill was brought by the Perſon that lent the 50 *l.* (and who in truth was Servant to the Wife at the Time) either to charge the Money on the Mortgage or upon the Perſon of the Husband. The Wife by her Anſwer diſcloſed all this Matter, and B by his Anſwer, and likewiſe on his Examination as a Witneſs, declared that the Wife had told him that the young Woman (the now Plaintiff) was the Perſon that advanced the 50 *l.* The Court agreed clearly, That the Wife ſhall never be admitted by Anſwer or otherwiſe, as Evidence to charge the Husband. But the Maſter of the Rolls ſaid that this was perfectly a new Caſe; for here ſhe tranſacted the Affair with B. and the Plaintiff as a Feme [Sole,] and neither of them knew, or had Notice of the Marriage; and the *Huſband* himſelf (as was proved in the Cauſe on ſome other Occaſions) *had given into the Concealment of the Marriage*, and therefore the Court did allow of her Evidence, as it was ſupported by what B. ſaid, and thought upon the Whole the Evidence of the Wife ſufficient to prove 50 *l.* Part of this Money, to be the Plaintiff's, not conſidered as a Wife, but as ſhe tranſacted and appeared throughout as a Feme Sole, and therefore decreed to the Plaintiff the 50 *l.* with Coſts. Equ. Abr. 226. 227. pl. 15. Hill. 1719. Rutter v. Baldwin.

4. Where a Feme *has reſerved the Power of her own Eſtate*, and gave a Note for Payment of a Debt of the Baron's out of her own ſeparate Eſtate, to prevent an Execution of his Goods; ſhe is to be conſidered as a Feme Sole, and ſhe ſhall be bound. Ch. Prec. 328. pl. 249. Hill. 1711. Bell v. Hyde. Gilb. Equ. Rep. 83. S. C. in totidem Verbis.

(O) What Things a Woman may be *ſaid to do with* her Husband.

1. IF they are Diſſeiſors, **the Feme** cannot take the Profits with her Husband, **but the Baron alone in his own Right, and the Right of his Feme.** 39 H. 6. 44. Curia. For it is but as a Chattel, which is the Baron's only. Br. Parnour &c. pl. 15. cites S. C.——Br. Maintenance de Brief, pl. 31. cites S. C.——Br. Parnour, pl. 24. cites 4 E. 4. 30. S. P. by Danby & al'.——But tho' Feme Covert cannot take the Profits, yet the alledging the Profits to be taken by the Baron for him and his Wife, was awarded good. Br. Parnour &c. pl. 9. cites 22 H. 6. 35.——Ibid. pl. 15. S. P.——See Tit. Diſſeiſin, (D) (E) (F) (G).

2. **If Baron and Feme** leaſe for Years the Land of the Feme, **this is the Leaſe of both.** 7 H. 4. 15. Br. Baron and Feme, pl. 31. cites S. C. but S. P. does not appear.——Fitzh. Briefe, pl. 227. cites S. C. but S. P. does not appear.

(O. 2) Actions by Baron for criminal Converſation with the Feme, and Pleadings.

1. LICENCE *by Husband* to the Wife to lie with another Man, cannot be pleaded in Bar to an Action of Treſpaſs by the Husband, nor that ſhe was a *notorious lewd Woman*; but theſe Matters

may be given in Mitigation of Damages. 12 Mod. 232. Mich. 10 W. 3. Coot v. Berty.

2 Salk. 552. pl. 15. Gallizard v. Rigault, S. C. & S. P. by Holt Ch. J.

2. If *Adultery* be committed with another Man's Wife *without any Force, but by her own Conſent*, the Husband may have Aſſault and Battery, and lay it Vi & Armis; and yet they ſhall in that Caſe puniſh him below for that very Offence; for an Indictment will not lie for ſuch an Aſſault and Battery; neither ſhall the Husband and Wife join in an Action at Common Law, and therefore they proceed below either civilly, that is, to divorce them, or criminally, becauſe they were not criminally proſecuted above; and the true Action for the Husband in ſuch Caſe is a *Special Action, Quia the Defendant Uxorem rapuit*, and not to lay it Per quod Conſortium amiſit; per Holt Ch. J. and per Cur. accordingly; for that the Offence is not merely ſpiritual. 7 Mod. 81. Mich. 1 Ann. B. R. in Caſe of Rigault v. Galliſard.

(P) What *Things done* by Baron and Feme *ſhall bind* the Feme.

In Aſſiſe of Novel Diſſeiſin againſt

1. **Where the Feme is examined by Writ, ſhe ſhall be bound, elſe not. Co. 10. 43.**

ſeveral, one anſwered as Tenant of the Tenements, and vouch'd to Warranty a Man and his Wife who were named in the Writ, and were ready to have warranted. Herle ſaid that the Feme in this Caſe cannot be received to warrant, unleſs ſhe be examined, and we have no Warrant to examine her; whereupon he bid the Tenant to anſwer, and ſo he did. Paſch. 5 E. 3. b. pl. 11.——None can examine a Feme Covert without Writ. 2 Inſt 673.

See Tit. Fines (T)

2. **Baron and Feme** levy a Fine; **this will bar the Feme. 18 Ed. 4. 12.**

Sid. 11. pl. 7. Mich. 12 Car. 2. C. B. it was ſaid by the Ser-

3. **If Baron and Feme** ſuffer a common Recovery, **this binds the Feme; for ſhe is examined in this. Co. 10. 43. † 23 H. 8. S. 37. Com. *Eyer and Snow*, 515.**

jeants, that Feme Covert was not to be privately examined upon ſuffering a Common Recovery, tho' ſhe muſt be on a Fine. But Bridgman Ch. J. ſaid that the Law is, that ſhe ſhould be privately examined in both Caſes; and tho' your Practice has been as you ſay, (and ſo was the * Opinion of Roll Ch. J.) yet it is good to be adviſed, that the Want thereof may be corrected; but however the Feme was permitted to ſuffer the Common Recovery without private Examination.——Sid. 322. pl. 14. Mich. 18 & 19 Car. 2. B. R. at the End of the Caſe, in a Nota of the Reporter, is a Quære How a Feme Covert can be barr'd unleſs by Fine, becauſe ſhe is not examined upon a Common Recovery.——And 5 Mod. 210. Paſch. 8 W. 3. in Caſe of Stokes v. Oliver, it is ſaid that it may be a Queſtion whether a Feme Covert can be barr'd by any Act of her own beſides a Fine, becauſe ſhe is not examined upon a Common Recovery.

On all Recoveries there was a Writ to examine Feme Coverts, and the firſt Mention of ſuch Examination is 43 E. 3. 18. but now it is wholly diſuſed in Common Recoveries, tho' it ſtill remains in Fines. Pig of Recov. 66.

† This ſeems to intend Br. Recovery in Value, pl. 27. which cites 23 H. 8.

* Sty 320. Hill. 1651. S. P. by Roll Ch. J. in Caſe of Lockoe v. Palfryman.

It ſhall not be inroll'd, becauſe it is not the Deed of the Feme.

4. **Baron and Feme** acknowledge a Deed to be inroll'd; **this does not bind the Feme, becauſe ſhe is not examined by Writ. Co. 10. 43.**

Br. Coverture, pl. 47. cites 7 E. 4. 5.——Br. Faits inroll'd, pl. 11. cites S. C.——Fitzh. Eſtoppel, pl. 68. cites S. C.——Br. Faits inroll'd, pl. 14. cites 29 H. 8. that Deed of Baron and Feme ſhall not be inroll'd in C. B. but for the Baron only, and not for the Feme, by reaſon of the Coverture; nor ſhall ſhe be bound with her Baron in Statute-Merchant &c.—— But if Baron and Feme make a Deed inroll'd of Land in London, and acknowledge before the Recorder and an Alderman, and the Feme is examined,

examined, this ſhall bind as a Fine at Common Law by the Cuſtom, and not only as a Deed. 15. cites S. C.——Br. N. C. pl. 109. cites S. C. and 7 E. 4. 5. and 32 H. 8. 171.——See 2 Inſt. 673. S. P. Ibid. pl.

5. If the *Baron and Feme* are *bound in an Obligation* of 100 l. *for a Releaſe made to them of the Land de jure Uxoris*, and the Baron dies, this Obligation ſhall bind the Feme, becauſe it was made for her Releaſe, *which is a Benefit to her*; per Belknap. Quære; for it was not adjudg'd. Br. Baron and Feme, pl. 77. cites 44 E. 3. 33. Br. Obligation, pl. 74. cites S. C. —Br. Coverture, pl. 76. cites S. C. but adds no Quære.

6. If a Man *leaſes to Baron and Feme* for Years rendering Rent, and dies, the Feme ſhall be bound by it; contrary of other collateral Covenant. Br. Baron and Feme, pl. 78. cites 45 E. 3. 11. S. P. Br. Covenant, pl. 6.

7. *Quid Juris clamat by Baron and Feme* againſt *Tenant for Life*, upon Fine levied of the Reverſion, who came and *ſaid, that ſaving to him the Advantage of his Deed of Leaſe, which he ſhew'd forth, which was without Impeachment of Waſte, he is ready to attorn*; and the Advantage to him was ſuffer'd, and all enter'd in the Roll, notwithſtanding that the Feme Plaintiff was Covert; but this was in a manner *by Agreement*, and *not by expreſs Rule*. Br. Coverture, pl. 10. cites 45 E. 3. 11.

8. *Leaſe* made *by Baron and Feme* ſhall be ſaid the Leaſe of both, till the Feme diſagrees, which ſhe cannot do in the Life of the Baron, and Waſte lies by both. Br. Agreement, pl. 6. cites 3 H. 6. 53.

9. A Man was *infeoffed to the Uſe of a Feme ſole*, who takes an Huſband. They both for Money ſell the Land *to B.* who pays it to the Wife, and *ſhe and her Husband do pray the Feoffee to make Eſtate to B.* Afterwards her Husband dies. Now, by the Chancellor and all the Juſtices, ſhe ſhall have Aid againſt the firſt Feoffee by Subpœna, to ſatisfy her for the Land; and if the 2d Feoffee were Conuſant, a Subpœna ſhall be againſt him for the Land; for all that the Wife did during her Coverture (as they ſaid) *ſhall be taken to be done for fear of the Husband.* Cary's Rep. 18, 19. cites 7 E. 4 14. Subpœna, Fitzh. 6. Br. Conſcience &c. pl. 13. cites S. C —— Br. Feoffment al Uſes, pl. 41. cites S. C.

10. Husband and Wife, *ſeiſed of Lands to them and the Heirs of the Husband. He covenanted*, in Conſideration of 20 l. that *he and his Wife would ſuffer a Recovery thereof* by Writ of Right, according to the Cuſtom of London, which is as binding as a Fine at Common Law, and that it ſhould be to the *Uſe of the Recoverors, untill they* (the Baron and Feme) *had made a good and ſufficient Leaſe for* 40 *Years &c. and after to the Uſe of the Husband and Wife, and to the Heirs of the Feme.* The *Leaſe was made* accordingly, and afterwards the *Husband died.* All the Judges were of Opinion, that the Wife ſhall not avoid this Leaſe, becauſe her former Eſtate was gone and extinguiſhed by the Recovery; and Judgment accordingly; and the Reporter ſays that all the Juſtices of B. R. were of the ſame Opinion. Dyer 290. a. pl. 61. Trin. 12 Eliz. Luſher v. Banbong. S. C. cited per Cur. 2 Rep. 57. b. —Jenk 225 pl. 17. S. C.

11. Fine by E. to the Uſe of himſelf for Life, *Remainder to his Wife that ſhould be at the Time of Death, for Life*; Remainder to the Son of E. in Tail. E. took to Wife A. A *Fine* levied by E. and A. his Wife, who afterwards ſurvived him, and other Uſes declared, is *no Bar* to her, becauſe it was uncertain who would be the Perſon; but had the *Perſon been certain*, there perhaps, notwithſtanding it was but a Poſſibility, it might have been a Bar; per Walmſley J. Cro. E. 826. pl. 31. Paſch. 41 Eliz. C. B. Wells v. Fenton. Mo. 634. pl. 869. S. C. ſays that Warburton, Walmſley, & tota Curia held, that ſhe was barr'd by Eſtoppel; but that Anderſon and Kingſmill held, that the Fine had extinguiſh'd the Uſes by Prevention.——Pl. C. 562. b. 563. Arg.

12. A. having 3 Daughters, B. C. and D. intails his Land upon them. Afterwards C. married, and being a Feme Covert, *agreed with Conſent of her*

her Husband to take 1000 *l. in Conſideration of Extinguiſhment of her Right as Coheir.* The Judges by their Certificate held it to be no Bar to her. Toth. 162. cites Trin. 7 Jac. Dockwray v. Pool.

13. A *ſingle Woman did agree* to have a Moiety of Land, *and after Marriage ſubſcribed* her Name with her Husband to a latter Agreement, tho' Feme Covert. Decreed in 10 Jac. Lib. B. 25. or 250. Toth. 160. Randall v. Tynny.

14. M. a Feme, before her Marriage with A. *convey'd Lands to Truſtees with A.'s Privity, in Truſt, to pay the Rents and Profits to her ſole and ſeparate Uſe for her Life; and after to ſuch Uſes as ſhe, whether Sole or Covert, ſhould by her laſt Will limit and appoint; and for want of ſuch Appointment, then to her own right Heirs for ever.* After the Marriage A. mortgaged the Land to the Plaintiff for 500 Years, to ſecure 1000 l. A. and M. join in a Fine, and both declared the Uſes to be to the Plaintiff for ſecuring his Principal and Intereſt, the Remainder to the right Heirs of A. M. inſiſted that ſhe was compell'd by Dureſs to join in the Fine, and that the Mortgage was fictitious only, and in Truſt for A. in order to defraud her; and it was argued that this was a *naked Power* without any Intereſt, and ſo could not be barr'd by the Fine; but Ld. Chancellor e contra, and decreed the Truſtees to convey to the Plaintiff, but without Prejudice to any future Bill that may be brought for Diſcovery of the Fraud or Force. Caſes in Equ. in Ld. Talbot's Time, 41. Mich. 1734. Penne v. Peacock.

(P. 2) Incumbrances by them of the Eſtate &c. of the Feme.

1. A Feme Covert *by Dureſs* joins in a *Leaſe* with her Husband, ſhe ſhall be bound by it; Per Manwood J. 3 Le. 72. pl. 110. Hill. 20 Eliz.

2. Baron and Feme ſeiſed in the Right of the Feme, *mortgaged* by Deed for 300 l. and covenanted to levy a *Fine for further Aſſurance*, and if the Baron and Feme, or either of them, or their Heirs, Executors, &c. did pay &c. then the ſaid *Fine to enure to the Baron and Feme, and the Survivor*, and after to the *right Heirs of the Baron.* A Fine was levied, and the Monies not paid at the Time, but borrowed more Money, and by Deed confirmed the Mortgage for the further Sum. The Baron died; his Heir, an Infant, decreed the Feme to pay one third, and the Infant Heir two thirds. Chan. Rep. 218. 13 Car. 2. Rowell v. Walley.

3. A. *promiſes to leave his Wife* 400 *l. if* ſhe will join in Sale of her Lands, and let him have the Money to trade with. She joins, and ſix Months after he gives Bond to a Stranger to pay his Wife 300 l. after his Death; Per Hale Ch. J. this Bond is not fraudulent againſt Creditors. 2 Lev. 148. Mich. 27 Car. 2. B. R. Clerk v. Nettleſhip.

4. Jointreſs paying off a Mortgage was decreed *to hold over* till ſhe or her Executor be ſatisfied, and Intereſt to be allowed her. Chan. Caſes 271. Hill. 27 & 28 Car. 2. Corniſh v. Mew.

Vern. 41. pl. 40. Reaſon v. Sacheverell, S. C. decreed accordingly.

5. A. and his Wife ſeiſed of Lands in the Right of the Wife by Fine and Deed, *mortgages* them for 340 l. which was not paid at the Day, but 200 l. *part was paid* afterward, and then A. *borrowed other Money* of the ſame Mortgagee. The Payment of the 200 l. was indorſed on the Mortgage Deed. The Wife, in Preſence of A. made Account of what was due on the firſt and ſecond Loan, for both, by Agreement, were

were to be on Security of the Mortgage. The Wife died, but *no Fine levied on the ſecond Loan*, and therefore objected, that neither the Wife's nor A's Conſent ſhould bind the Heir; but Finch C. contra; for the Mortgagee has good Title in Law, and as much Equity to the Money as the Heir has to the Land. 2 Chan. Caſes 98. Paſch. 34 Car. 2. Rauſon v. Sacheverell.

6. Where the Wife *joined in a Fine* ſur conceſſit of her *Jointure*, being Houſes burnt down in the Fire of London, in order to a *Mortgage* or Security to raiſe 1500l. to rebuild them, it is not an abſolute Departure with her Intereſt; but there is a *reſulting Truſt* for her when the Security or Mortgage is paid, to have her Eſtate again as if it had been a Mortgage on Condition, and the Money paid at the Day. 2 Chan. Caſes 98. Paſch 34 Car. 2. Brond v. Brond, and ibid. 161. Hill. 35 & 36 Car. 2. Broad v. Broad.

A Deed was made between the Conuſee and the Husband, wherein the Husband covenants to pay the Mortgage-Money, viz. 1500l. with Intereſt, and the Equity of Redemption is limited to the Husband and his Heirs, but *the Wife is no Party to the Deed.* The Husband lays out 3000l. in Building, and dies. Ld. Nottingham had decreed the Redemption to the Wife, and now North, Keeper, of the ſame Opinion; becauſe ſhe was no Party to the Deed, which was for 99 Years if the Husband lived ſo long, and ſhe being a *Jointreſs*, there reſts a Reverſion in her which naturally attracts the Redemption; and had the Cauſe come originally before him, he would have decreed it clear to the Wife, the Husband having covenanted to pay the Money. Vern 213. pl. 211. Hill. 35 & 36 Car. 2. S. C. by the Name of Brend v. Brend. ——This Fine did not deſtrop her Jointure, but *only enur'd to a particular Purpoſe* to raiſe this Term, and ſhe ſhall have the Rent, and it ſhall not be ſubject to the Debts or Charges made ſince her Jointure, the levying thereof being upon an Agreement, that ſhe ſhould have her Jointure out of the reſerved Rent of the Houſes. Mich. 1 Jac. 2. B. R. Skin. 238. pl. 2. Anon. ſeems to be S. C.—— Fin. Rep. 254. Brend v. Brend, is not the S. C.

7. The Husband gave a voluntary Bond after Marriage to make a Jointure of ſuch Value on his Wife. The Husband accordingly makes a *Jointure*. The Wife gives up the Bond. The Jointure is *evicted*. The Jointure ſhall be made good out of the Husband's perſonal Eſtate, there being no Creditors in the Caſe, and the Delivery up of the Bond by a Feme Covert could no ways bind her Intereſt. Vern. 427. pl. 402. Hill. 1686. Beard v. Nuthall.

8. A Feme Covert agrees to ſell *her Inheritance*, ſo as ſhe might have 200l. of the Money ſecured to her. The Land is ſold, and the Money put out in a Truſtee's Name accordingly, this Money ſhall not be liable to the *Husband's Debts*, nor ſhall any *Promiſe by the Wife* to that Purpoſe, ſubſequent to the firſt original Agreement, be obliging in that Behalf, 2 Vern. 64, 65. pl. 58. Trin. 1688. Rutland v. Molineux.

9. *Feme joins with Baron in a Mortgage of her own Inheritance* to raiſe Money to buy a Place for the Baron; Baron covenants in the Mortgage to pay the Money (4500l.) and on Payment thereof by Proviſo the Term is to ceaſe. The Mortgage is afterwards *aſſigned*, and the Proviſo is, that on Payment by them, or either of them, the *Term to be aſſigned, as they or either of them ſhall direct*. Baron, ſoon after the Mortgage, promiſed his Wife to apply the Profits of his Place to pay it off. *Baron pays it off, and takes an Aſſignment in Truſt for himſelf, and deviſed it to a ſecond Wife.* The Son and Heir of the Baron, and firſt Wife, brings a Bill to have the Mortgage aſſigned to him. Denied Relief in Canc. but on Payment of Principal, Intereſt, and Coſts. But in Dom. Procer. decreed the Mortgage to be aſſigned to the Heir. 2 Vern. R. 437. pl. 402. Paſch. 1702. Earl of Huntington v. Counteſs of Huntington.

S. C cited per Ld. C. Cowper. Wms's Rep. 265, 266. Mich. 1714. in Caſe of Tate v. Auſtin.——MS. Tab. Tit. Mortgage (D) cites S. C.——S. C. cited G. Equ. Rep. 68, 69. by Ld Chancellor, Paſch. 9 Ann.

10. Baron and Feme *mortgaged* his Wife's Eſtate, and Baron *covenants to pay* the Money, but the *Equity of Redemption* was reſerved *to them and their Heirs*. Baron died, and made J. S. Executor; Per Cur. the Baron having had the Money is, in Equity, the Debtor, and the Land is to be conſidered but as additional Security, and ſo decreed it according

to the Judgment in Dom. Proc. in the Caſe of Ld. and Lady Huntington 2 Vern. 604. pl. 542. Hill. 1707. Pocock v. Lee.

In this Caſe the Husband *by his Will gave ſeveral Charities* out of his perſonal Eſtate and died indebted by ſimple Contract The Aſſets were not ſufficient to pay all. Ld. C. Cowper held this Mortgage to be a Debt of the Husband's, and that the Wife, by conſenting to charge the Land with it, does not make it leſs his Debt than it was before; but decreed, that all other Debts ſhould be preferred to this, and that this be preferred before Legacies, tho' to a Charity. Wms's Rep. Mich. 1714. S. C.

11. The Wife joined with her Husband in a Fine to raiſe 400 *l. to equip him as an Officer* of the Army. The Husband dies. Per Cur. this muſt be taken to be a Debt due from the Husband, and to be paid out of his perſonal Eſtate if he be able; but all other Debts ſhall be paid firſt. 2 Vern. 689. pl. 614. Mich. 1714. Tate v. Auſtin.

(Q) What *Actions* the Baron may have alone, *without his Feme*, yet in the Right of his Feme.

Br. Baron and Feme, pl. 57. cites S. C. for nothing is to be recovered but Damages only.——Br. Action ſur le Statute, pl. 17. cites 38 H. 6. 4. S. C. & S. P. accordingly; but Brooke ſays Quære, whether he may upon the Statute of 8 H. 6. and ſays, it ſeems that he may, becauſe he ſhall recover nothing but Damages in the one Caſe nor in the other, and not any Land, and therefore it is all one, as it ſeems. ——Thel. Dig. 30. lib. 2. cap. 5. S. 17. cites S. C. to which agrees the Opinion of Paſch. 4 E. 4. 14.

1. THE Baron may have an Action alone upon 5 R. 2. for entering into the Land of the Feme. 38 H. 6. 3. adjudged.

* Br. Quare Impedit, pl. S. cites S. C. that in Qua. Imp. the Plaintiff counted that A. was ſeiſed of the Advowſon as of Fee, and he took A. to Wife, and the Church voided, and he preſented in Jure of A. and had Iſſue, and A died, and the Church voided again, and he preſented; and per Cur. becauſe the *ſecond Preſentment is not alleged in Jure Uxoris*, therefore ill; whereupon he amended his Count. Brooke ſays, Quære Librum.——Fitzh. Quare Impedit, pl. 85. cites S. C. and Judgment was prayed of the Count, becauſe he did not declare that he and his Wife preſented, but only that he in Jure Uxoris preſented, whereas the Preſentation ought to have been by both; For had ſhe been alive, he ought to ſue in both their Names, and ſo was the Opinion of the Court, and thereupon he amended his Count. But Fitzherbert ſays Quære; For that it has been adjudged, that he ſhall have Action alone &c. —— Fitzh. Joinder en Action, pl. 13. cites S. C. ſays, he ought to join the Feme in the Action, otherwiſe the Writ is not good, and that ſo was the Opinion of the whole Court.

2. He ſhall have a Quare Impedit alone. 38 H. 6. 3. b. agreed. Contra * 28 H. 6. 8.

The Baron may have Quare Impedit without his Feme; For it is in a Manner Perſonal. Br. Parnour &c. pl. 24. cites 4 E. 4. 30.

In Quare Impedit the Feme may join. Her. 144 Trin. 5 Car. C. B. per Hutton, and yet the Avoidance goes on to the Executors of the Baron. —— Litt. 285. S. P. by Hutton. ——Roll. Rep. 359 pl. 11. Paſch. 14 Jac. B. R. per Coke Ch. J.——They ſhall join in Qua. Imp. per tot Cur. Bulſt. 110. Paſch. 9 Jac.

If a *next Avoidance* be *granted to Baron and Feme*, the Baron ſhall have Action alone; Per Hutton and Yelverton, (abſentibus aliis) Litt. Rep. 13. Hill. 2 Car. in C. B. obiter.——And ſee ibid. 375. Arg. ——S. P. Br. Baron and Feme. pl. 28. cites 50 E. 3. 13. becauſe *nothing is to be recovered but the Preſentment, and not the Advowſon*; But per Holt, Aſſiſe of *Darrein Preſentment* ſhall be brought by both; For this is a *mix'd Action*, and the *Advowſon ſhall be recovered*; but in Quare Impedit, the Preſentation or Damages. —— S. P. becauſe the Writ to the Biſhop againſt him ſhall not bind the Feme who is not Party, and alſo it is aided by the Statute of Weſtminſter. Br. Quare Impedit, pl. 41. cites 50 E. 3. 13.

A Writ of *Quare Impedit* was brought *by the Baron alone, where he had the Advowſon in Right of his Feme*, and adjudged a good Writ. Thel. Dig. 29. Lib. 2. cap. 5. S. 12. cites Trin. 50 E. 3. 13. and that ſo it was adjudged, Mich. 14 H. 4. 12. where it was ſaid by Thirning, that they ought to join in *Writ of Right of Advowſon*, and in *Aſſiſe of Darrein Preſentment*; and that the Opinion of the Court was, Trin. 28 H. 6. 9. that they ought to join in Quare Impedit alſo, and ſays, ſee 7 H. 7. 2 —— The Husband alone may have Quare Impedit; Per Dyer. Ow. 82. Paſch. 4 & 5 P. & M. —— 2 Bulſt. 14. S. P. accordingly, per Cur. Mich. 10 Jac

3. So

3. So in Treſpaſs for taking Charters of the Inheritance of the Feme. * 38 H. 6. 4. ‡ 8 H. 5. 9. b. adjudged. * Br. Baron and Feme, pl. 57. cites 38 H. 6. 3. [b. 4. a. S. P. obiter.] ‡ Fitzh. Brief, pl. 890. cites S. C. the Writ was awarded good, tho' brought only by the Baron ——Thel. Dig. 29. Lib. 2. S. 16. cites Hill. 8 H. 5. 9. and ibid. S. 17. cites 38 H. 6. 4. S. P. ſo agreed by Fortescue.——See (R) pl. 1. and the Notes there.

4. So in a Writ of Forger of falſe Deeds of the Inheritance of the Feme. 38 H. 6. 4. Dubitatur. Br. Baron and Feme, pl. 57. cites 38 H. 6. 3. but S. P. does not appear there, tho' in the Year-Book 38 H. 6. 4. a. in pl. 9. which begins in fol. 3. b. the S. P. is aſſerted and denied ——Thel. Dig. 30. Lib. 2. cap. 5. S. 18. cites S. C. that it was ſaid, that they ſhall join in Writ of Forger of falſe Deeds.

5. In all Caſes where the Feme ſhall not have the Thing when it is removed, neither alone to herſelf, nor jointly with her Husband, but the Baron only ſhall have it, there the Baron alone, without his Feme, ſhall have an Action to recover it, as in the Caſes aforeſaid.

6. The Baron ſhall have Treſpaſs alone for a Treſpaſs upon the Land of his Feme. * 38 H. 6. 3. b. 7 Ed. 4. 6. Treſpaſs lies well by the Baron alone, of *chaſing in the Chaſe which he has in Right of his Wife*, without naming the Wife; for *nothing ſhall be recovered but Damages*, and the Releaſe of the Baron is good Bar. Br. Joinder in Action, pl. 7. cites 43 E. 3. 8 and concordat the ſame Year, Fol. 14. For the Baron may releaſe alone. Br. Joinder in Action, pl. 7.——Thel Dig 29. Lib. 2. cap. 5. S. 14. cites S. C. and ſays that ſo it was adjudged the ſame Year, Fol. 16 and 26 *de Domo fracta & Maeremio inde capto*, which he had in Jure Uxoris, that the Action was well brought by the Baron alone.——Br. Baron and Feme, pl. 16. cites S. C. accordingly.

Action of Treſpaſs Quare Clauſum fregit was brought by Baron and Feme, and Pollexfen Ch. J. held that the Feme could not be joined, though it was her Land. But Ventris J. e contra; for this Action will ſurvive, and they have Election either to join or to bring it alone. Adjornatur. 2 Vent. 195. Trin. 2 W. & M. in C. B. Bright v. Addy.

* Br. Baron and Feme, pl. 57. cites S. C.—— ——The Feme ſhall not join, for Damages ſhall be recovered in Lieu of Profits. Het. 114. by Yelverton, cites 4 E. 4 ——Litt. Rep. 285. S. C. cited by Yelverton.——In Treſpaſs they may ſever; Per Cur. Bulſt. 21. Paſch. 8 Jac. Anon.

Of *Treſpaſs* done *in the Land of the Feme*, the Baron may have Treſpaſs alone; for if he releaſes, or recovers, and dies, the Feme ſhall not have Action. Per Finch. Br. Baron and Feme, pl. 22. cites 47 E. 3. 9.——Br. Baron and Feme, pl. 50. cites 15 E. 4. 9. S. P.

Treſpaſs may be brought by Baron and Feme, *that he broke the Cloſe of the Feme dum ſola fuit*. Br. Baron and Feme, pl. 69 cites 21 H. 6. 30.——The Baron may have Treſpaſs without his Feme; for it is in a manner Perſonal. Br. Parnor de Profits, pl. 24. cites 4 E. 4 30.—— ——In Treſpaſs *Quare Clauſum fregit* they ought to join, by the clear Opinion of the whole Court; ſo that it ſhall be intended here, that they are Jointenants, and Judgment accordingly. Bulſt. 110. Paſch. 9 Jac. Maynard v. Tow.

7. The Baron alone may have a Decies tantum for taking Money in an Aſſiſe brought by him and his Wife. 40 Ed. 3. 33. b. adjudged. Nota, This is a popular Action. But otherways it is e contra. And ſo he ſhall, where he and his Wife had brought a *Cui in Vita*. Quod Nota bene. Br. Joinder in Action, pl. 19. cites 7 H. 4. 2——Br. Baron and Feme, pl. 30. cites S. C. & S. P. accordingly.—— Thel. Dig. 29. Lib. 2. cap 5 S. 11. cites Trin. 40 E. 3. 33. S. P. and ſays that ſuch Writ was abated, Paſch. 43 E. 3. 16. 35. which was brought by the Baron and Feme; and that Writ brought by the Baron alone was adjudg'd good. Mich. 7 H. 4. 2——Br. Baron and Feme, pl. 17. cites 43 E. 3. 16. S. P.

8. Where the *Baron* himſelf *demiſes the Land for Years*, which he has in Right of his Feme, he may maintain Action of *Waſte without his Feme*; becauſe his Leſſee cannot diſable the Eſtate of his Leſſor. Thel. Dig. 30. Lib. 2. cap. 5. S. 31. cites 4 E. 3. It. Darby, Brief 747. But where the Baron and Feme make a *Leaſe for Years of the Land of the Feme*, the *Baron alone may have* Writ of *Debt for the Arrearages of the Rent* &c. Thel. Dig. 30. Lib. 2. cap. 5. S. 25. cites Paſch. 7 E. 4. 6.

9. For a *Battery* of the Feme *before the Coverture*, they ſhall both join in the Action; but Quære of a Battery after the Coverture. Br. Joinder in Action, pl. 54. cites 22 Aſſ. 87.

10. He

10. He who is *ſeiſed of a Seigniory* of Homage, Fealty, Eſcuage, Rent, and Suit of Court *in Jure Uxoris, may avow the Taking* of the Diſtreſs *for all thoſe Services, except Homage, in his own Name, without naming his Feme*, though he has no Iſſue by her. Br. Diſtreſs, pl. 33. cites 27 Aſſ. 51.

Br. Petition, pl. 17. cites S. C. accordingly.——Br. Chattels, pl. 26. S. P. and cites S C. and ſays that therefore it is a Chattel veſted in the Baron in Jure proprio.

11. *Petition* may be made *by the Baron alone, where he is in the Land, by Reaſon of a Statute Merchant made to his Feme when ſhe was Sole*, and they both may join if they will, but the Suit is good by him alone becauſe the Thing is only a Chattel real, which the Baron may give or forfeit; Quod Nota. Br. Joinder in Action, pl. 61. cites 37 Aſſ. 11.

12. Upon *a Contract made by the Baron and Feme*, they cannot join in Action of Debt, notwithſtanding that it be *for the Land of the Feme ſole*. Thel. Dig. 30. Lib. 2. cap. 5. S. 23. cites Trin. 48 E. 3. 18.

Br Joinder in Action, pl. 21. cites S. C. And ſo it ſeems, that during the Life of the Baron it ſhall be ſaid the Leaſe of both.

13. In *Waſte*, if the *Baron and Feme* ſeiſed in Jure Uxoris *leaſe for Years*, the Baron and Feme ought to join in Waſte, for otherwiſe the Writ ſhall abate. Br. Baron and Feme, pl. 31. cites 7 H. 4. 15.

* They ſhall join. Thel. Dig. Lib. 2. cap. 5. S. 28. cites S. C. and ſays it appears ſo by the Opinion there.——Where a *perſonal Tort* is done *to the Wife*, the Baron and Feme ought to join in Actions as for Battery &c. Per Coke Ch. J. Roll Rep. 360. in pl. 11. Paſch. 14 Jac. B. R.——S. P. accordingly, by Richardſon Ch. J. becauſe the Feme ſhall have the Action if ſhe ſurvive. Litt. Rep. 285. Trin. 5 Car. C. B.——He may have Action alone *for beating his Wife*. 8 Mod. 26. Hill. 7 Geo. 1. Read v. Marſhall.

14. The Baron and Feme may join in Appeal of *Rape of the Feme*, for he cannot have it without the Feme. Br. Baron and Feme, pl. 34. cites * 8 H. 4. 21. per. Cur. But ſee elſewhere the Baron brought the Appeal alone. 1 H. 6. 1. 11 H. 4. 13. and 10 H. 4. Fitzh. Corone, 128.

15. Where the *Baron and Feme had recovered Damages in Writ of Coſtnage*, the Baron alone without his Feme, was received to maintain Writ of Debt for the Damages. Thel. Dig. 30. Lib. 2. cap. 5. S. 22. cites Hill. 16 H. 6. Brief, 939.

Caſe in Nature of *Conſpiracy* was brought by Husband and Wife againſt J. S. for that he falſely and maliciouſly *impoſed upon them the Crime of Felony*, and laboured to indict them; it was held that the Action was not well brought, becauſe they cannot join to the Tort done to the Baron. But if it had been for Conſpiracy to indict the Wife, they might join well enough, and three Juſtices were of that Opinion; but Crooke J. e contra. Jo. 440. pl. 7. Trin. 15 Car. B. R.—Cro. C. 553. pl. 8. Dalby v. Dorthall, S. C. Berkley J. held that it was a ſeveral Wrong, and therefore they could not join; but Crooke J. e contra, becauſe it was grounded upon one intire Record by which both were prejudiced, and they may join if they will, or the Husband only may have the Action for it, that he was damnified; wherefore cæteris abſentibus, adjornatur.——Mar. 47. pl. 75. Trin. 15 Car. Anon. S. P. and ſeems to be S. C. and Crooke J. was of Opinion as above, but the whole Court was againſt him.

16. The Baron may have *Conſpiracy* and the like without his Feme, for it is in a manner Perſonal. Br. Parnor de Profits, pl. 24. cites 4 E. 4. 30.

17. *Upon Bailment* made *by them two before the Coverture*, they cannot join. Thel. Dig. 30. Lib. 2. cap. 5. S. 26. cites Mich. 8 E. 4. 16.

18. *Bill of Attachment* was brought *by the Warden of the Fleet, by Name of J. N. Warden of the Fleet*, and it is good, *notwithſtanding* he be Warden *in Jure Uxoris* &c. and his Feme ſhall not be named with him in Action perſonal; for when the Court commands him to do his Office

Office &c. they don't say Warden of the Fleet in Jure Uxoris, but only Warden of the Fleet. Br. Bille, pl. 16. cites 9 E. 4. 40.

19. *Rescous* was brought by the Baron and Feme, *of Rescous made by the Lord in Right of his Feme*; and it was argued that the Baron alone ought to have the Action, and awarded that the Action is well brought in Name of both quod Nota. And per Littleton, it is well brought also in the Name of the Baron only. Br. Baron and Feme, pl. 50 cites 15 E. 4. 9. Br. Joinder en Action, pl. 36. cites S. C. ——— S. P. by Dyer, Pasch. 4 & 5 P. & M. Ow. 82.

——The *Husband distrained for Arrears of Rent due to the Wife dum sola*; Rescous was made. Husband alone may bring this Action, or may join his Wife if he please; but for a *Debt due to the Wife dum sola*, they must both join in the Action. Moor 422. pl. 584. Mich. 37 & 38 Eliz. Fenner v. Plasket. ———Cro. E 459. (bis) pl. 3. S. C. adjudged; for it is a Tort done to the Baron, for which he may sue alone or join her with him, because it arises on a Duty due to her before the Coverture, but it is at his Election.

20. Where an *Obligation* is made *to a Woman who takes Husband*, the Wife ought to join with the Husband in the Action; but *if the Obligation be took from the Husband*, He alone shall have the Action for the Obligation, because he may dispose of it. Litt. Rep. 375. Arg. cites 7 H. 7. [but I do not observe that Point any where in that Year.] Het. 160. Arg. S. P.

21. Baron brought an Action for the Battery of his Wife, *Per quod negotia sua infecta remanserunt*, and had Judgment to recover. Cro. J. 502. pl. 11. says a Precedent was shewn in 28 Eliz. B. R. Cholmley's Case. 4 Le. 88. pl. 187. Pasch. 28 Eliz. C. B. Cholmley v. Conge, seems to be S. C. and is of an Action brought by the Husband of a Battery done to the Wife, and the Plaintiff had Judgment; but nothing is mentioned of the Per quod negotia &c ———Cro. J. 502. pl. 11. says that another Precedent was cited to be in the Exchequer in Doplit's Case, that such an Action was adjudg'd good.

22. Where the *Feme is Administratrix*, the Suit must be in both their Names, and they shall be named Administrators; for by the Intermarriage the Husband hath Authority to intermeddle with the Goods as well as the Wife; but in the Declaration *all the Special Matter must be set forth*; per Wray Ch. J. and so some said is the Book of Entries, that Both of them shall be named Administrators. Godb. 40. pl. 44. Hill. 28 Eliz. B. R. Prideaux's Case. An Action by Baron and Feme against the Defendant, for Goods taken out of their Possession. The Wife was

Administratrix. Mr. Raymond moved in Arrest of Judgment, because having been in their Possession, the Wife should not be joined, and naming her Executrix might have been left out of the Case; and cited a Case 10 *W.* 3. where the Wife was *Executrix*, and the Defendant promised the Husband that if he would forbear, he would pay; and the Wife was not joined in that Case. Per Powell J. in the Case of Baron and Feme, 'tis certain the Law does give the Goods of the Wife to the Husband, but not when she is Administratrix, because she has them *in auter Droit*, and the Husband here cannot bring an Action on the Judgment. Judgment for the Plaintiff. 11 Mod. 177. pl. 2. Trin. 7 Ann. B. R. Thomson v. Pinchell.

23. In Action *for Goods which the Feme has as Executrix*, they must join, to the End that the Damages thereby recovered may accrue to her as Executrix in lieu of the Goods. Went. Off. Ex. 207. So also must be a *Replevin* for those Goods in both their Names. Went. Off. Executor, 207.

24. In Battery the Plaintiff declared, that on such a Day the Defendant assaulted and *beat his Wife*. This *Action was brought by the Husband after the Death of his Wife*, and it being a personal Wrong, is dead with the Person; and if she had been living, the Husband alone could not have the Action, because Damages must be given for the Tort offered to the Body of his Wife. Quod fuit concessum. Yelv. 89. Trin. 4 Jac. B. R. Higgins v. Butcher. Brownl. 205. Huggins v. Butcher, S. C. but seems only a Translation of Yelv. —Noy 18. Higgins's Case, S. C.

& S. P per Cur. as to the Action being gone; and by Tanfield, had she been living, she ought to have joined in the Action ——Where the Wife dies of the Battery, the Baron cannot have Action on the

the Caſe, becauſe it is criminal, and of an higher Nature. Freem. Rep. 224. pl. 231. Paſch. 167[illegible]. C. B. Smith v. Sykes.——And it was urged by Serj. Barrel, that if a Man beats a Feme Covert, the Husband and Wife ought to join; and if the Husband dies, it ſhall ſurvive to the Wife; but that the Action ſhall not ſurvive to the Husband if the Wife dies, and he cited 37 H. 6. 7. But Curia adviſare vult.

Litt. Rep. 284, 285. Trin. 5 Car. C. B. Coſtrell v. Moore, the Husband and

25. A Feme Sole had *Right of Common* for her Life, and marries B. who being hinder'd in taking the Common, brings Action in his own Name, without naming his Wife. The Court held the Action well brought, it being only to recover Damages. 2 Bulſt. 14. Mich. 10 Jac. Baker's Caſe.

Wife joined in the Action; and after Verdict for the Plaintiff it was moved in Arreſt, that they could not join in the Action; and Richardſon Ch J. thought they could not join, becauſe the Wife could not have the Damages if ſhe ſurvive; and Yelverton was of the ſame Opinion.——Het. 143. S. C. in totidem Verbis.

Cro. J. 521. pl. 5. Hill. 16 Jac. B. R. the S. C. but S. P. does not appear. —Godb. 276. pl. 391. S. C. but S. P. does not appear.——

26. The Queen leaſed a Houſe to C. who *covenanted for himſelf and his Executors and Aſſigns to repair*, and leave the Houſe repaired. Afterwards the Queen *granted the Reverſion to B. the Plaintiff and his Wife, and to the Heirs of B. in Fee*; and for not repairing, B. alone brought Covenant. Reſolved, that the Action being perſonal, and Damages only recoverable, the *Husband may alone have the Action, or join the Wife* with him. Cro. J. 399. pl. 6. Paſch. 14 Jac. B. R. Bret v. Cumberland.

Poph. 196. S. C. but S. P. does not appear.——3 Bulſt. 163. S. C. and the whole Court were clear of Opinion (except Haughton) that the Action was well brought by the Husband alone, and Judgment accordingly. And by Coke Ch. J. and Doderidge, he might have joined her with him if he would. ——Roll Rep. 359. pl. 11. S. C. ſays it was held by Coke, Doderidge, and Haughton, that the Husband alone may have the Action without the Wife; for what the Baron alone may diſcharge or diſpoſe of, he may alone recover without joining his Wife in the Action.

2 Roll Rep. 51. Guy v. Luſy, S. C. but reports it only as for a Treſpaſs done to the Feme, and Judgment for the Plaintiff.

27. Treſpaſs of Aſſault, and *wounding of the Plaintiff*, *nec-non* of aſſaulting and *beating the Plaintiff's Wife*, per quod conſortium Uxoris ſuæ amiſit for 3 Days. Found againſt the Defendant in both. It was moved that the Husband ought not to join the Battery of his Wife with the Battery of himſelf; but reſolved that the Action was well brought; for it is not brought in reſpect of the Harm done to the Wife, but for the Husband's particular Loſs, that he loſt the Company of his Wife, which is only a Damage to himſelf. Cro. J. 501. pl. 11. Mich. 16 Jac. B. R. Guy v. Liveſey.

Cro. C. 89. 90. pl. 12. Mich. 3 Car. in Cam. Scac. Young v. Pridd, S. P. & S. C. cited as adjudg'd, and affirm'd in Error, and ſo it was in this Caſe by all the Juſtices and Barons; and this Verdict and Judgment do not bar the Wife to have an Action after the Death of her Husband for the Battery, or ſhe may join with her Husband in another Action. ——Action was brought by Baron and Feme for Battery of the Feme, per quod Conſortium amiſit, and held good; and ſays that a like Judgment was affirm'd in the Exchequer-Chamber. Jo. 440. pl. 7. Trin. 15 Car. B. R. Anon.

28. The Husband brought an Action, for that the Defendant made an *Aſſault on his Wife, & illam verberavit*, and her *ſimul cum one Gown &c. abduxit* &c. *& detinuit* &c. *for five Years, per quod conſortium nec-non conſilium & auxilium in rebus domeſticis amiſit*, quæ habere debuiſſet. The Plaintiff had a Verdict and 300 l. Damages; and upon Error in the Exchequer-Chamber, it was objected that the Action could not be maintained by the Husband alone, for the Wrong done to his Wife; but all the Juſtices and Barons held, if it had been only brought for an Injury done to her, the Baron ought to join his Wife with him; but here it was for a Loſs and Injury done to the Husband, in depriving him of the Company and Aſſiſtance of his Wife, and all is concluded with the Per quod &c. which extends to all before, and therefore the Judgment was affirmed. Cro. J. 538. Trin. 17 Jac. 1. B. R. Hide v. Seyſſor.

29. Caſe was brought by Baron and Feme, for *Words ſpoke of the Feme*; and Judgment was given in C. B. that the Husband and Wife ſhould recover. This was aſſign'd for Error in B. R. becauſe the Baron only is to have the Damages, and the Judgment ought to be, That the Husband alone ſhould recover; but Judgment was affirm'd by the Opinion of the whole Court. Godb. 369. pl. 459. Hill. 2 Car. B. R. Litfield v. Melherſe.

Baron alone ſhall have Action for *Words ſpoke of the Wife*, where they are only actionable in reſpect of collateral Damages. Sid. 346. pl. 11. Mich. 19 Car. 2. B. R. Anon.——An Action of Slander was brought by Baron and Feme for *Words ſpoken of the Wife, per quod the Husband loſt his Trade*; and it was held, that if the Words would maintain an Action without the Special Damage, then they ſhould have Judgment; but if the Words were not actionable without the Special Damage, then it was ill; for the Wife ought not to be joined. Cited by Holt Ch. J. as a Caſe which he remember'd. 2 Ld. Raym. Rep. 1032. Hill. 2 Ann. in Caſe of Ruſſel v. Corne.——Gould J. ſaid he remember'd the ſame Caſe, Ibid.

30. If an *Award* be made, *That 7 l. ſhall be paid to Feme Covert, and 13 l. to the Baron*, the Baron alone ſhall have Action for all the Money, becauſe it is a Thing which comes after the Coverture; per Hutton & Yelverton J. abſentibus aliis. Litt. Rep. 13. Hill. 2 Car. C. B.

31. Baron and Feme brought Debt, and *recover'd* 200 *l. and* 70 *l. Damages*. The Wife died. Upon praying Execution for the Husband, the Court inclined it ſhould not ſurvive, but that Adminiſtration ought to be committed of it as a Choſe en Action. But afterwards they agreed that he might take Execution; and that *by the Judgment it became his own Debt, due to him in his own Right*, and he took out Scire Facias accordingly. Mod. 179. pl. 12. Paſch. 26 Car. 2. C. B. Miles's Caſe. 6 W. & M. in C. B. in the Caſe of Howell v. Maine.

S. P. cited by Powell J. to have been adjudged, and ſeems to intend S. C. See 3 Lev. 403. Mich.

32. If a *Bond* be given *to Baron and Feme*, the Husband ſhall bring the Action alone, and this ſhall be look'd upon as a Refuſal as to her; Per the Chief Juſtice, who ſaid he remember'd this as an Authority in an old Book. 2 Mod. 217. Paſch. 29 Car. 2. C. B.

S. P. per Hutton and Yelverton J. The Baron may have Action alone, or may join with the Feme. Litt. Rep. 13. Hill. 2 Car. C. B.——The Baron may have Action alone, per Coke Ch. J. to which Doderidge and Haughton agreed. Roll Rep. 359. pl. 11.

33. Debt by the Baron alone upon a *Bond to the Feme during the Coverture*, condition'd to pay Money to the Feme; and after divers Arguments the whole Court gave Judgment for the Plaintiff. 3 Lev. 403. Mich. 6 W. & M. in C. B. Howell v. Maine.

If a Bond-Debt be due to the Wife, the Husband may ſue alone without joining the Wife; per Cur. Vern. 396. pl. 366. Paſch. 1686.——See (T) 48 E. 3. 12.

34. *Trover* brought by the Husband *for Money paid by the Plaintiff's Wife* to the Defendant, *for Land convey'd* by the Defendant *to the Plaintiff's Wife by Bargain and Sale, without the Husband's Knowledge*. And per Holt Ch. J. if Articles of Agreement are made by a Feme Covert, by Order and Appointment of her Husband, and the Money is paid by the Wife in Purſuance of ſuch Agreement; or if the Husband (tho' not privy at the Time of the Purchaſe) *afterwards conſents to it*, the Property of the Money is alter'd, and the Husband cannot maintain Trover; but if he is not privy to ſuch Purchaſe, nor agrees to it, Trover will lie for him againſt the Vendor who receives his Money of his Wife. Ld. Raym. Rep. 224. Paſch. 9 W. 3. at Guildhall. Gabrand v. Allen.

Comb. 452. S. C.

35. Husband of Feme *Executrix* gives a new Day to a Debtor of Teſtator's. The Debtor makes a *new Promiſe to the Husband*; the Husband may bring the Action without joining the Wife, but he muſt aver the Life

The Wife could not be joined in this Action, for

ſhe was no Party to the Agreement

Life of the Wife. 1 Salk. 117. pl. 8. Mich. 10 W. 3. B. R. Yard v. Ellard.

or Contract between her Husband and Defendant, and they would have been nonſuited if they had joined; for a Promiſe to the Husband is not a Promiſe to Husband and Wife. Carth. 463. S. C. and as an Authority in Point was cited Yelv. 84. Lea v. Mimme.——12 Mod. 207. S. C. it is a ſpecial Promiſe made to the Husband, to whom the Payment is only to be made, and the Recovery on this Promiſe muſt be only to him in his own Right, which Promiſe does not alter the Debt, becauſe it is not of a higher Nature, but is a ſort of collateral Security, and the Money recovered on this Promiſe is no part of the perſonal Eſtate of the Teſtator; for if the Husband dies, his Executor ſhall have Execution thereof, but yet when it is recovered it is a Devaſtavit in the Husband, ſo far as he recovers.

36. If Husband and Wife *jointly ſue for Debt due to Wife before Marriage*, and Husband dies, and Wife continues the Suit, the Money, when recovered, ſhall not be Aſſets to Executors of Husband; Per Holt. 12 Mod. 346. Mich. 11 W. 3. Anon.

(R) [In what Actions they] ought to join.

Br. Baron and Feme, pl. 57. cites 38 H. 6. 3. S. C.——

1. **Baron and Feme muſt join** in Detinue for Charters **concerning the Inheritance of the Feme, (for the Feme ſhall have them again when they are recovered) 38 H. 6. 4. agreed.**

See (Q) pl. 3. S. C.——Thel. Dig. 30. Lib. 2. cap. 5. cites S. C.——*So* of Charters concerning their joint Poſſeſſions. Br. Baron and Feme, pl. 74. cites 38 H. 6. 25 ——*Upon Trover* the Baron and Feme ſhall join in Detinue of Charters belonging to both; *but upon Bailment* of Charters made *by the Baron alone*, he alone ſhall have the Action; Note the Diverſity. Br. Baron and Feme, pl. 57. cites 38 H. 6. 25.

* S. C. cited Arg. Litt. Rep. 375. —

2. **In an** Avowry for Rent **in the Right of the Feme, they ought to join.** * 15 Ed. 4. 10. ‡ 4 H. 6. 14.

‡ Br. Avowry, pl. 70. cites S. C.——See (S) pl. 2. S. C.——Fitzh. Avowry, pl. 8. cites S. C.—— But where Baron and Feme ſeiſed in Jure Uxoris *make Leaſe for Years, rendring Rent*, they may join in Action of Debt, or the Baron may have *Debt* alone if he will. Br. Joinder in Action, pl. 65. cites 7 E. 4. 6.——See Tit. Avowry (N) pl. 1, 2, 3, 4. and the Notes there.

For a Debt due to the Feme dum ſola, the Baron and Feme muſt join in Action. Mo. 422. pl. 584. Mich. 37 & 38 Eliz. in Caſe of Fenner v. Plasket.——The Husband alone brought Debt on a Bond made to the Feme dum ſola, and the Court held it ill; for if Cauſe of Action ariſe before Coverture, tho' it be but Treſpaſs where Damages only are recoverable, they muſt join. Keb. 440. pl. 32. Hill. 14 & 15 Car. 2. B. R. Hardy v. Robinſon.——Litt. Rep. 375. Arg. cites 7 H. 7. as to the Obligation, and 22 R. 2. Brief 933. as to Treſpaſs, accordingly.

3. **They ought to join in Actions [for Things] due to the Feme before Coverture.**

Bond was given *to a Feme ſole* conditioned to pay ſo much to her on a Day certain. Afterwards ſhe married the Plaintiff, who brought Debt on the Bond; and Judgment was given for the Plaintiff. 3 Salk. 54. pl. 7. Powell v. Maine.——10 Mod. 163. Arg. ſays, that the Husband cannot ſue alone upon a Bond given to the Wife dum ſola.——Ow. 82. Paſch. 4 & 5 P. & M. Arg. ſays, that ſhe ſhall join; but if a Right of Action accrues after Marriage, ſhe ſhall not.

4. Where the *Baron and Feme loſe by Default the Land tail'd to the Feme*, they ſhall have the *Quod ei deforceat* jointly, notwithſtanding that the Baron had nothing but in Right of his Feme. Thel. Dig. 30. lib. 2. cap. 5. S. 33. cites Hill. 5 E. 3. 175. and that ſo agrees Mich. 29 E. 3. 61. where ſhe loſt by Default before the Coverture. But ſays the contrary was adjudged 4 E. 3. 153. but contra Legem.

5. *Aſſiſe againſt ſeveral; one pleaded Jointenancy with his Feme by Deed* &c. not named, to which the other *ſaid, that he who pleaded Jointenan-*

cy

ey had nothing the Day of the Writ purchaſed, but another was Tenant, which the other could not deny, and therefore the Aſſiſe was awarded without making the Feme Party; Quod Nota. Br. Jointenancy, pl. 32. cites 12 Aſſ. 37.

6. Where the *Baron and Feme have the Reverſion to them, and to the Heirs of the Baron*, they ſhall join in Writ of *Waſte*. Thel. Dig. 30. Lib. 2. cap. 5. S. 30. cites Hill. 17 E. 3. 17.

7. Champerty was brought *by the Baron alone*, for that the *Defendant maintained J. N. againſt the Plaintiff in Aſſiſe, by which the now Plaintiff and his Feme, Tenants in Aſſiſe, loſt the Land, to the Damage of* 1000 *Marks*, and awarded good for the Baron alone without his Feme. Br. Champerty, pl. 2. cites 47 E. 3. 9. Br. Baron and Feme, pl. 22. cites S. C. accordingly; for nothing is to be recovered but only Damages.——2 Inſt. 563. S. P. and cites S. C.

8. Where the *Baron and Feme leaſe the Land of the Feme* for Years, they ought to join in Writ of *Waſte*. Thel. Dig. 30. Lib. 2. cap. 5. S. 32. cites Hill. 7 H. 4. Brief 227. Ibid. S. 20. S. P. cites 3 H. 6. 54. 5 E. 3. 213. 14 H. 3. Brief 282. 10 E. 3. 525. 18 E. 3. 54.

9. If Fine is levied to Feme Covert, yet ſhe and her Baron ought to join in *Quid Juris clamat*; Quod Nota. Br. Baron and Feme, pl. 67. cites 11 H. 4. 7.

10. *Quid Juris clamat* was abated, becauſe it was brought *by Feme covert, without naming the Baron*, notwithſtanding that the Fine was levied to her when ſhe was ſole; Quod Nota. Br. Coverture, pl. 16. cites 11 H. 4. 7. Br Coverture, pl. 61. cites S. C. ibid. pl. 76. cites S. C. ——Br. Quid Juris clamat, pl. 23. cites S. C.

11. Aſſiſe of Darrein Preſentment is not maintainable *by the Baron alone in Jure Uxoris, without naming the Feme with him*; contrary of Quare Impedit. Br. Darrein Preſentment, pl. 3. cites 14 H. 4. 12. Br. Joinder en Action, pl. 94. cites S. C. accordingly.

12. One who is *Warden of the Fleet in Right of his Feme* ſhall have Bill of *Treſpaſs* by the Privilege of the Place, without naming his Feme. Thel. Dig. 30. Lib. 2. cap. 5. S. 32. cites Mich. 9 E. 4. 43.

13. Action *againſt a Feme covert* who appeared to it, becauſe ſhe did not know if her *Baron (being beyond Sea)* was alive or not, and was condemned upon Plea. The *Baron came back*; they ſhall have Writ of Error, and ſhew the Matter aforeſaid, and it lies well; by all the Juſtices. Br. Error, pl. 173. cites 18 E. 4. 4. If *a Feme covert* be *condemned without her Baron*, both ſhall have Writ of Error. Br. Baron and Feme, pl. 62. cites 18 E. 4.* 3. 4. a. pl. 20. ——It was agreed clearly, that if Proceſs be ſued againſt Feme covert as againſt Feme ſole, ſhe cannot avoid it by Writ of Error, and cites 18 E. 4. 4. 24 E. 3. 24. Error, 10. 22 H. 6. 31. 17 Aſſ. 17. 5 E. 3. Per quæ Servitia 16. 20 or 21 E. 3. in Quid Juris clamat, fol. 10. A Feme covert brings a *Writ of Error* of a Judgment againſt herſelf had during Coverture, and the Judgment was affirmed, becauſe ſhe might have pleaded it to the Action; otherwiſe if the Husband had joined in the Writ of Error. Cumb. 332. Trin. 7 W. 3. B. R. Strike v. Dikes.

* This is miſprinted, and ſhould be

14. *And if ſhe be outlaw'd*, they ſhall join in Writ of Error, otherwiſe it cannot be reverſed, and if he will not join, this is a Divorce of a Shrew. Br. Error, pl. 173. cites 18 E. 4. 4. Br Joinder in Action, pl. 88. cites S. C.

15. It was adjudged that Baron and Feme ſhall join *in Ejectione firmæ* Thel. Dig. 29. Lib. 2. cap. 5. S. 13. cites Paſch. 21 E. 4. 35. which agrees with Paſch. 7 E. 4. 6. & Mich. 7 H. 7. 2. in Quare ejecit infra terminum. *In Ejectione firmæ* the Feme may join. Het. 44. Per Hitcham, Trin. 5 Car. C. B.—— Litt. Rep. 285. S. P. per Hitcham.——Roll Rep 359 Paſch. 14 Jac. Br. Coke Ch. J. the Baron may have this Action alone.

16. The *Baron and Feme Executrix* to another, ſhall join *in Writ of Treſpaſs of the Goods of the Teſtator taken* during the Coverture; per Littleton. Thel. Dig. 30. Lib. 2. cap. 5. S. 29. cites Paſch. 21 E. 4. 5.

Bendl. 29. pl. 42. cites S. C. & S. P. accordingly. ——S. C. cited by Ventris J. 2 Vent. 195. Trin. 2 & 3 W. & M. in C. B.

17. The Baron ſhall not have *Action upon the Statute of* 8 *H.* 6. of the Title of the Feme without naming her; for the Words are Expulit & Diſſeiſivit. Mo. 5. pl. 15. in a Nota, cites it as reſolved, 5 E. 6. Lane v. Andrews.

18. *Writ of Meſne* ſhall be brought by the Baron and Feme, *ſuppoſing that both were diſtrain'd*, and yet Feme has no Property in Chattels, but *the Action is real.* Br. Coverture, pl. 65. cites F. N. B. in the Additions there.

19. It was held by the Court, that if a *Diſſeiſin* be made *upon the Huſband and Wife*, in the Lands of the Wife, that in an Action brought for to recover the Lands again, the Husband and Wife are to join, but in an Action of Treſpaſs they may ſever. Bulſt. 21. Paſch. 8 Jac. Anon.

20. If a Man *promiſes to give* 100 l. *to the Wife of J. S.* they ought, per Curiam, to join in Action for Recovery of this. Bulſt. 21. Paſch. 8 Jac. Anon.

If Baron and Feme make a *Leaſe reſerving Rent*, the Baron alone ſhall have the Action for the Rent arrear; per Hutton & Yelverton J. abſentibus aliis.

21. If a *Leaſe* be made *by Husband and Wife*, of the Land of the Wife, rendring Rent, in an *Action for Rent* behind, they are both of them to join; per Fleming Ch. J. Yelverton J. ſaid that in the laſt Caſe they need to join, and ſo is Markam's Opinion in 7 E. 4. Fol. 7. b. that in ſuch a Caſe where the Husband alone brings the Action for Rent behind, it was never queſtioned, but that this Action by the Husband alone was well brought, but where the ſame hath been brought in both their Names, it has been queſtioned, whether this was good or not. Bulſt. 21. Paſch. 8 Jac. Anon.

Litt. Rep. 13. Hill. 2 Car. C. B. ——Of a Rent running in the Wife's Right after Marriage, ſhe need not join in Suit. Chan. Caſes 41. Trin. 14 Car. 2. obiter, in Caſe of Clerk v. Lord Angier.—— N. Chan. Rep. 78. Clerk v. Lord Angleſey, S. C. & S. P.

Roll. Rep. 360. pl. 11. S. P. accordingly in S. C.

22. Action of *Waſte in Tenuit* brought in the Right of the Wife, muſt be brought by both, yet he recovers only Damages; per Haughton J. but per Coke and Doderidge, this is becauſe it favours of the *Realty*, and the Locum vaſtatum is there alſo to be recovered, and therefore they are to join. 3 Bulſt. 165. Paſch. 14 Jac.

Roll. Rep. 359. pl. 11. S. P. by Coke Ch. J. in S. C.

23. *That which the Husband may diſcharge alone*, and *of which he may make Diſpoſition to his own Uſe*, he may have an Action in his own Name for the Recovery thereof, without joining his Wife with him; per Doderidge J. to which Coke Ch. J. agreed, and ſaid it was a true and a good Ground. 3 Bulſt. 164. Paſch. 14 Jac.

So where the *Baron was beyond Sea.* Toth. Popham.

24. A *Bill preferred* without the Privity of her Husband, allowed. Toth. 158. cites Mich. 14 Jac. Lady St. John v. Englefield. 159. cites 31 and 32 Eliz. Farewell v. Curſon.——Ibid. 160. cites 11 Car. Portman v.

Litt. Rep. 374. Trin. 6 Car. C. B. the S. C. and adjornatur.

25. Advowſon deſcended to B. an Infant and her Mother preſented to an Avoidance. The Clerk was inſtituted and inducted. B. afterwards came to full Age and married D. the Plaintiff, and the Church became void again; and the Bailiffs &c. of D. without any Title, preſented W. and the Church being ſo full, D. the Husband alone brought *Quare Impedit.* The Court agreed that the Husband in this Caſe might have preſented, and then upon Diſturbance he only ſhould have Action; but

but in this Case the *Church was full before the Presentation*; sed Adjournatur. Het. 159. Hill. 5 Car. C. B. Wollaston Dixy v. the Bailiffs &c. of Derby.

26. A Feme Covert cannot sue unless there be a *Severance*. Toth. 161. cites Tr. 15 Car. Roe v. Lady Newburgh.

27. In *Assumpsit by J. S.* against B. *on a Promise to him by B. that if he would marry E. his Daughter, he would give her* as much as he gave to any other of his Children except J. Though this Promise was before the Marriage, yet Hide J. doubted if J. S. and E. ought not to join in this Action. Sid. 25. pl. 6. Hill. 12 Car. 2. C. B. Shipston v. Booler.

28. A *Legacy* was devis'd to a *Feme then under Coverture*, the Husband exhibited his Bill without his Wife, and upon Demurrer held not good; for of *Things merely in Action* belonging to a Wife, as a *Bond* &c. she must be join'd. N. Ch. R. 78. Mich. 13 Car. 2. Clerk v. Ld. Anglesey. Chan. Cases 41 Clark v. Ld. Angier, 3 July, 14 Car 2. S. C. in totidem Verbis, but adds, that if the Husband alone should sue the Bond and be nonsuited or dismissed, that will not conclude the Case; but if he dies before Judgment or Decree, the Wife cannot revive the Suit.——2 Freem. Rep. 160. pl. 207. S. C. in totidem Verbis.

29. If *Cause of Action arises to the Feme before Coverture*, tho' it be but *Trespass, in which Damages only are recoverable*, the Baron and Feme must join; per Cur. obiter. Keb. 440. pl. 32. Hill. 14 and 15 Car. 2. B. R. in Case of Hardy v. Robinson.

30. *Where the Action, if not discharged, shall survive to the Wife*, in such Case the Baron and Feme must both join. 2 Mod. 269. Mich. 29 Car. 2. C. B. Froldick v. Sterling. Freem. Rep. 236. pl. 247. Mich. 1677. S. C. & S. P. by North Ch. J.

31. By the Rules of the Spiritual Court a Feme Covert may sue alone in every one of the following Cases, viz. when she is *Executrix* or *Administratrix*, or *Legatee* or *Legatory*, on *defaming* or *defamed*; per Dr. Pinfold. 10 Mod. 64. Mich. 10 Ann. B. R. in Case of D'Aeth and Baux. *And* per Parker Ch. J. the *Reason of the Difference* between the Common Law and the Civil Law is this, that in the Spiritual Court, tho' the Husband be not named, he may *come in pro Interesse suo*, and make Defence himself, should the Wife desert the Cause. 10 Mod. 264. Mich. 1 Geo. 1. B. R. in Case of Clerk and Lee.

32. Cases of Coverture are not to be extended to the *Queen*; for she is of that Dignity in Law, that she may sue in her own Name; for she has a separate Property distinct from the King her Husband, and the Subject may have Remedy against her without applying to the King; for he being employed about the Ardua Regni, is not to be interrupted by any Thing that does not immediately relate to himself. G. Hist. of C. B. 198, 199. Co. Litt. 133. a. S. P.

(S) * May. [Ought to join.]

Fol. 348.

1. Baron and Feme assign Auditors to the Receiver of the Feme before Coverture, and he is found in Arrears, they ought to join in Debt thereupon; for the Debt was before Coverture, and is only put in certain by the Auditors. 15 Ed. 4. 9.

* The Pleas here in Roll belong to the Title of (R) and should be [In what Cases they ought to join.]——Gouldsb. 160. pl. 91. Arg. cites 16 E. 4. 8. S. P. and so it should be, viz. Mich. 16 E. 4 8. a. b. pl. 4. and the Book of 15 E. 4. 9. is upon a Refcous brought by Baron and Feme; and the Mistake in Roll, as to citing 15 E. 4. may in some measure be owing to the Year-Book in

in pag. S. of 16 E. 4. being misprinted 15 E. 4.——Br. Baron and Feme, pl. 60 cites 16 E. 4. S. S P. ——L. married a Feme, to whom Monies were owing dum sola. L. and the Debtor came to Account for the Money, and being found in Arrear, promised L. to pay him the Money due at a certain Day, and for Non-payment L. brought an Indebitatus Assumpsit on Account. Per Glyn Ch. J. the Nature of the Debt is not changed by the Account, no more than the Accounting with an Executor; but a Special Promise may alter the Debt. Here is a Promise made to L. the Husband, and he has brought the Action as if the Defendant was indebted to him, yet he is not indebted to him generally, but Sub Modo, viz. in Jure Uxoris. And he said that there is another Point in the Case, and he conceived that here is Cause of Action; but whether it be applicable to make it a Special Debt, is the Question. But this Matter being moved on a Writ of Error, and the Writ of Error being naught, the Writ was ordered to be quash'd. Sty. 472, 473. Mich. 1655. B. R. Conye v. Laws.

Br. Avowry, pl. 70. cites S. C. accordingly, and so for the Rent due after Coverture; and the same Law of a Conusance by the Bailiff.——Fitzh. Avowry, pl. 6. cites S. C.——See (R) pl. 2. S. C.——A. seised in Fee granted a Rent-charge to M. his Daughter. The Rent being arrear, M. married P. and afterwards P. distrain'd, and avow'd for the Rent so arrear, supposing in the Avowry that the same was arrear, and not paid to the said P. and his Wife. It was moved that it was ill, because it appears it cannot be due to P. but only to M. dum sola fuit; but held to be only Matter of Form and Surplusage; and tho' he does not say Adhuc a retro existit, it is well enough in Substance; and Judgment affirmed. Cro J. 282. pl. 3. Trin. 9 Jac. B. R. Bowles v. Poor.

2. If a Rent be due to a Feme before Coverture, as Tenant in Dower, she and her Husband ought to join in an Avowry. 4 H. 6. 14.

3. Where a Man is *seised in Jure Uxoris in a Seigniory, of Homage, Fealty, Escuage, Rent, and Suit of Court*, and *has no Issue* by his Feme, yet he may distrain *for all the Services, unless* for *Homage*. Br. Avowry, pl. 85. cites 27 Ass. 51.

4. Where *Trespass* is brought *against Baron and Feme*, and the Plaintiff *recovers*, the *Baron alone shall not have Attaint*; for it shall be brought according to the Record. Br. Baron and Feme, pl. 22. cites 47 E. 3. 9. per Tank. & Finch.

5. *Ravishment of Ward* may be brought *by Baron and Feme*, per Judicium; for it is a *Chattel real*, which the Feme may have by Survivorship, and not the Executors of the Baron. *Contra of Chattel personal*. Br. Ravishment, pl. 15. cites 14 H. 4. 24.

6. If an *Action accrues before Marriage*, As where a Bond is made to her before Marriage, she shall join with her Husband in an Action upon the Bond; but if a Right to an Action doth accrue *after Marriage*, there she shall not join. Arg. Ow. 82. Pasch. 4 & 5 P. & M. in C. B.

7. *Debt* was brought *by the Husband alone for Debt, Damages, and Costs recovered by him and his Wife* now living, and because the Wife was not joined in this Action the Defendant demurr'd; but adjudged for the Plaintiff without Argument, that the Action well lay. Cro. E. 844. pl. 28. Trin. 43 Eliz. in Cam. Scacc. Butler v. Delt.

Cro. J. 205. pl. 10. Hill. 5 Jac. S. C. and Judgment was affirm'd.——S. C. cited Sid. 25. pl. 6. by the Ch. J. as adjudged that the Action ought to be brought by Both——2 Sid. 128. Hill. 1658. Newdigate J. said he remember'd a Case where the same Point was adjudged accordingly.——But where the Action is on a general Indeb. Ass. on a *Promise imply'd in Law*, as for *Periwig-makers Work done by the Wife*, the Law here implies no Promise to the Wife; for she is a Servant to the Baron, who is at the Charge of Materials to carry on the Work, and so the Law implies the Promise only to him. Carth. 251. Mich. 4 W. & M. in B. R. Buckley & Ux. v. Collier.——4 Mod. 156. S. C. The Court held the Declaration not good, the Action being brought for

8. *Assumpsit* by Husband and Wife, on a Promise to the Wife after the Coverture, that *in Consideration the Wife would cure him of such a Wound, he would pay her* 10*l.* After Judgment for the Plaintiffs, Error was brought, and assigned that the Husband alone should have brought the Action, it being a personal Duty accrued during the Coverture; sed non allocatur, it being grounded on a Promise to the Wife, and on a Matter arising on her Skill, and to be perform'd by her, and so she is the Cause of the Action, and shall survive to the Feme, and Judgment affirmed. Cro. J. 77. pl. 7. Trin. 3 Jac. B. R. Brailsford v. Buckingham.

for a Perſonal Thing, which would not ſurvive; and in Perſonal Actions the Law is clear that they cannot join.—3 Salk. 63. pl. 3. S. C. that ſhe ought not to be joined in this Action with her Husband, unleſs *an expreſs Promiſe* had been made to her to pay the Money.—1 Salk. 114. pl. 2. S. C. and the Plaintiff relied principally upon Burchet's Caſe; but per Cur. Burchet's Caſe differs; for there was an expreſs Promiſe to the Wife, and to that the *Husband aſſented by bringing an Action thereupon*, whereas here is nothing but a Promiſe in Law, and that muſt be to the Husband, who muſt have the Fruits of his Wife's Labour, for which he may have a Quantum Meruit; and the Advantage of her Work ſhall not ſurvive to the Wife, but goes to the Executors of the Husband; for if ſhe dies, her Debts fall upon him, and therefore ſo ſhall the Profits of her Trade to his Executors; and Judgment for the Defendant.

9. Treſpaſs by Husband and Wife for *beating the Wife, and taking his Goods.* It was found for the Plaintiff *as to the Beating*, and *for the Defendant as to the Reſidue.* It was moved in Arreſt of Judgment, that the Action was not well brought quoad the Goods, and that the Severance by the Verdict did not cure it; and Judgment was ſtay'd, no one appearing on the other Side. Lev. 3. Mich. 12 Car. 2. B. R. Talbot v. Bacon.

Treſpaſs brought by the Husband and Wife, for the *Battery of the Wife, and taking from her an Apron and Pinner.*

It was moved in Arreſt, that 'tis *not alleged in whom the Property was*; for it cannot be in the Wife, and it may be in a Stranger, and then the Husband hath no Cauſe of Action; and if they were the Goods of the Husband, then the Wife ought not to be joined in the Action, but the Husband is to bring the Action alone; and ſo it was held per Cur. and the Judgment ſtay'd. 2 Lev. 20. Mich. 23 Car. 2. B.R. Dunwell & Ux. v. Marſhal.——2 Keb. 813. pl. 18. S.C. and Judgment ſtay'd per Cur. unleſs there had been ſeveral Pleas, or ſeveral Damages.

They cannot join in Treſpaſs for *Battery of the Wife*, and *taking the Baron's Goods*; and notwithſtanding the Words of the Regiſter, 105, are expreſs as Words can make a Caſe, yet the Opinion of the whole Court was according to the conſtant Tenor of the more modern Authorities, that they cannot join. Show. 345. Hill. 3 W. & M. Meacock v. Farmer.——Comb. 144. Mich. 3 W. & M. in B. R. in Caſe of Baker v. Barber, the Regiſter, 150. was cited to the ſame Purpoſe; but the Court held that it was not Law.

Treſpaſs was brought by the Baron alone for *breaking his Houſe, and beating and wounding his Wife, and impriſoning of her for 3 Hours*; and alſo for detaining the Poſſeſſion of the Houſe, and for menacing his Wife and Servants, *per quod negotia ſua infecta remanſerunt.* Cited by Gould J. 2 Ld. Raym. Rep. 1032. as a Caſe in B. R. Paſch. 7 W. 3. who ſaid that he moved in Arreſt of Judgment, that for ſome of theſe Wrongs, as the Beating and Impriſoning the Wife, the Wife ought to be joined; but Judgment was given for the Plaintiff by Eyre and Rokeby, dubitante Holt; for they held that the Per quod went thro' the whole Count.

Action by Baron for *entring his Houſe, taking away his Goods, and beating his Wife.* 'Twas urged that Bearing the Wife was laid only to aggravate Damages, and the Court ſeemed to be of that Opinion. 8 Mod. 342. Hill. 11 Geo. 1. Read v. Marſhall.

10. In Trover and Converſion by Husband and Wife, the *Trover* is ſuppoſed to be *before the Marriage, and the Converſion after.* Hyde Ch. J. and Keeling were of Opinion, that the Action ought to be brought by the Husband alone, becauſe 'tis the Converſion which is the Cauſe of Action, and this is ſubſequent to the Marriage; but Windham and Twiſden J. held clearly that it was well brought; for the *Difference is between Actions* which *affirm a Property*, As Replevin, Detinue &c. for ſuch ought to be brought in the Name of the Baron only, and Actions which *diſaffirm* Property, As Treſpaſs, Trover &c. For thoſe ought to be brought in both their Names, becauſe they are founded upon the Tort done before the Coverture. Sid. 172. pl. 2. Hill. 15 & 16 Car. 2. B.R. Powes & Ux. v. Marſhall.

11. Aſſumpſit by the Husband, in which he declared that the Defendant being *indebted to his Wife dum ſola, ſhe being an Executrix*, he promiſed to pay &c. and farther declared upon an Inſimul Computaſſet with himſelf, and promiſed &c. After Verdict it was moved that the Wife ought to be joined, becauſe the Debt was due to the Feme dum ſola. The Judgment was ſtay'd, becauſe in all Caſes, ſo *long as the firſt Contract or Specialty made to the Wife dum ſola continues, ſhe muſt be joined*; for if ſhe dies, the Husband cannot ſue for it but as Adminiſtrator to her. Sid. 299. pl. 4. Mich. 18 Car. 2. B. R. Tirrell v. Bennett.

Freem Rep. 236. pl. 247. S. C. Judgment was ſtay'd till moved by the other Side.

12. Caſe &c. by the Husband alone, in which he declared, that he and in the Right of his Wife, was ſeiſed of a Meſſuage and a Bakehouſe, and that the Defendant had *built an Houſe of Office ſo near* the Bakehouſe, *that the Walls of his Houſe was ruinous, and the Air ſo unwholſome, that he loſt his Cuſtomers.* It was moved in Arreſt of Judgment, that the Wife ought to join in this Action; for where ſhe may maintain an Action, if ſhe ſurvive her Husband, for a Tort done in his Life-time, and where ſhe may alſo recover Damages, in ſuch Caſes ſhe muſt join. Per Curiam, *where the Action, if not diſcharged, will ſurvive to her, ſhe muſt join*; but if ſhe had joined in the principal Caſe, it would have been hard to have maintained the Action, becauſe *intire Damages* were given; but for loſing the Cuſtom to his Bakehouſe he alone ought to bring the Action. 2 Mod. 269. Mich. 29 Car. 2. C. B. Froſdike v. Sterling.

(T) In what Actions they *may* join.

Br. Baron and Feme, pl. 50. cites 15 E. 4. 9. S. C.——

1. WHERE the Feme, after the Death of the Baron, is to have the Action to puniſh the Tort done in the Life of the Husband, there the Baron and Feme may join. 15 Ed. 4. 10.

See the Caſe of Froſdike v. Sterling at (R)

Br. Baron and Feme, pl. 50. cites S. C ——

2. Baron and Feme may join in a Writ of Reſcous, where the Baron claims the Seigniory in the Right of the Feme. 15 Ed. 4. 9. b. adjudged.

Br. Joinder en Action, pl. 36. cites S. C.——See [Q.] pl. 8.

Br Baron and Feme, pl. 50. cites

3. If a Stranger cuts Trees upon the Land of the Feme, they may join. 15 Ed. 4. 9. b.

S. C. but S. P. does not fully appear as to the cutting of Trees, but only ſays Treſpaſs on the Land of the Feme.——Br. Joinder en Action, pl. 36. cites S. C. accordingly.——Br. Baron and Feme, pl. 41. cites 14 H. 4. 12. and mentions cutting Trees expreſsly.

A Writ of *Treſpaſs of Trees cut and Land dug* brought by the Baron alone where he had the Land in Right of his Feme was abated. Thel. Dig. 29. Lib. 2. cap. 5. S. 15. cites Paſch. 21 R. 2. Brief 933. but ſays the Opinion of Huſſey Mich. 7. H. 7. 2. was, that in ſuch Caſe they may join in Treſpaſs of Trees cut.— S. C. cited Litt. Rep. 375. that ſhe ought to join, becauſe the Trees, and ſo of Houſes pulled down upon the Land of the Feme, are Parcel of the Inheritance; but for cutting or ſpoiling Graſs, which is but a temporary Profit, the Baron alone ſhall have the Action.

4. They may join in an Action upon 5 R. 2. for the Land of the Feme, admitted. 8 Ed. 4. 2. b.

Cro. C. 503. pl. 4. S. C. but S. P. does not appear. ——Ibid. 505. pl. 7. S. C. & S. P. held accordingly by all the Court, abſente Bramſton, and Judgment for the Defendant.

5. If A. by Indenture conveys Land to B. in Fee, and covenants with him, his Heirs, and Aſſigns, to make any other Aſſurance thereof upon Requeſt for the better ſettling thereof upon B. his Heirs, and Aſſigns, and after B. conveys it to C. in Fee, who conveys to D. and his Wife, and the Heirs of D. and after D. requires A. to make another Aſſurance, according to the Covenant, and he refuſes it, the Baron alone, without his Feme, cannot have an Action of Covenant againſt A. as Aſſignee of B. becauſe he and his Wife are Aſſignees, and therefore ought to join in the Action. P. 14 Car. B. R. between *Midlemore and Goodale*, per Curiam, adjudged upon a Demurrer. Intratur. H. 12 Car. Rot. 223.

——Jo. 406. pl 4. S.C. & S. P. reſolved accordingly.

6. Where

6. Where *Diſtreſs* was *taken upon the Land*, which the Baron held in Right *of his Feme*, a Writ of *Replevin* was maintained brought *by the Baron and the Feme*, notwithſtanding that the Chattels belong to the Baron alone. Thel. Dig. 29. Lib. 2. cap. 5. S. 2. cites Hill. 2 E. 2. Replevin 42.

7. But a Writ of Treſpaſs was abated *Treſpaſs done to the Baron and Feme*, becauſe the Feme cannot recover Damages for the Treſpaſs done to the Baron. Thel. Dig. 29. Lib. 2. cap. 5. S. 4. cites 3 E. 3. It. North. Brief 137.

8 *Præcipe quod reddat* againſt Baron and Feme; he *made Default*, and [ſhe] *was received*, and *pleaded*, *and loſt by Verdict*; the Baron and Feme joined in Attaint, and well, notwithſtanding his Default, and that he was not Party to the Iſſue. Br. Coverture, pl. 36. cites 16 Aſſ. 5. Br. Joinder in Action, pl. 52. cites S. C.

9. Writ of Treſpaſs was maintained by the Baron and Feme of the *eldeſt Son of the Feme taken and carried away*. Thel. Dig. 29. Lib. 2. cap. 5. S. 7. cites Mich. 30 E. 3. Brief 300.

10. Baron and Feme ſhall not join *in Replevin*, becauſe the *Feme cannot have Property* in Goods during Coverture; *Quære* of Goods which ſhe has *as Executrix*; for there it ſeems that they ſhall join. Br. Baron and Feme, pl. 85. cites 33 E. 3. and Fitzh. Replegiare 43. S. P. Br. Replevin, pl. 56. cites 11 E. 2. and Fitzh. Return de avers, pl. 31.——The Baron and Feme ſhall join in Replevin *of Goods of the Feme taken dum ſola* fuit. Br. Baron and Feme, pl. 85. cites Fitzh. Recaption 31.

11. If *Feme Tenant by Statute-Merchant is ouſted*, after which *ſhe takes Baron*, the Baron alone may have the Suit, and they may join if they will; for the Thing is only a *Chattel real*, which the Baron alone may give or forfeit. Br. Baron and Feme, pl. 59. cites 39 Aſſ. 11.

12. Baron and Feme may have Debt upon an *Obligation made to them*, and may join in Action. Br. Dette, pl. 224. cites 43 E. 3. 10. For being made during Coverture, ſhe cannot diſagree to it during the Coverture. Br. Agreement, pl. 7. cites S. C. and 3 H. 6. 37. Fitzh. Brief 19. accordingly.——They may join. Br. Baron and Feme, pl. 55. cites 39 E. 3. 5.

A Writ of *Debt* was adjudged good, brought by Baron and Feme, *upon an Obligation made to them two during the Coverture* Thel. Dig. 30. Lib. 2. cap. 5. S. 21. cites Mich. 12 R. 2. Brief 639. And that ſo agrees Hill. 43 E. 3. 10. and Hill. 39 E. 2. 6 and 3 H. 6. 23. 37. and Mich. 16 E. 4 8. but ibid. S. 22. ſays the contrary is held by Finch, 48 E. 3. 12. —— Per Cur. they may well join in the Action, by which the Defendant was awarded to anſwer; and per Babb. the Baron alone might have brought the Action if he would. Quære inde. Br. Baron and Feme, pl. 2. cites 3 H. 6. 37.——Br. Baron and Feme, pl. 50. cites 15 E. 4. 9. by Piggot.

13. *Where nothing is to be recovered but Damages*, *the* Baron alone ſhall have the Action. Br. Baron and Feme, pl. 17. by Brooke. *As Decies tantum* was brought by the Baron and Feme, and becauſe the Feme was named, the Writ was abated; Quod Nota. Br. Baron and Feme, pl. 17. cites 43 E. 3. 16.

So where a *Leaſe* was made *to Husband and Wife of an antient Mill*, where the Inhabitants of ſuch Houſes uſed to grind their Corn, and *for not grinding they brought an Action* againſt them, it ſeems by a Note of the Reporter, at the End of the Caſe, that he thought the Action would not lie, being brought by the Husband and Wife both, and being *only to recover Damages*, *and not for the Term*. Hob. 189. pl. 233. Trin. 14 Jac. Harbin v. Green.

14. It was adjudged, that *Champerty* brought by the Baron alone *upon Aſſiſe which paſſed againſt him and his Feme* is good. Thel. Dig. 29. Lib. 2. cap. 5. S. 9. cites Mich. 47 E. 3 9. and 47 Aſſ. 5. and that it was ſaid, that it ſhould be good the one way or the other. Hill. 3 H. 4. 10. And it was held Mich. 20 H. 6. 1. that they may join in Writ of Maintenance done in Bill of freſh Force between the Baron and Feme and another. The Baron may have Maintenance without his Feme; for it is in a Manner Perſonal. Br. Parnor de Profits, pl. 24. cites 4 E. 4. 30.——Br. Baron and Feme, pl. 50. cites 15 E. 4 9. S. P.

15. *Covenant*

Br. Baron and Feme, pl. 23. cites S. C. & S. P. accordingly, and that the Feme ſurviving ſhall have the Term, if the Baron dies without demiſing it.———Thel. Dig. 30. Lib. 2. cap. 5. S. 19. cites S. C. but ſays it was held, Mich. 2 H. 4. 6. that one who holds a Manor in Right of his Feme, ſhould have Writ of Covenant for non Performance of divine Service in the Manor &c. alone without naming his Feme.

15. *Covenant* was brought by Baron and Feme, and counted that the *Defendant leaſed to them for Years, and after ouſted them* &c. and this awarded to be well brought, for if the Baron die, the Feme ſhall have the Term. Br. Covenant, pl. 10. cites 47 E. 3. 12.

See [Q.] Howell v. Maine.

16. If *Obligation* be *made to Alice, Feme of R. D.* it is good, and the Baron may releaſe it, and both may have Action, and if the Baron dies the Feme ſhall have the Action if the Baron has not releaſed. Br. Baron and Feme, pl. 24. cites 48 E. 3. 12. per Belknap.

Br. Dette, pl. 198. cites S. C.

17. Baron and Feme *ſold the Land of the Feme for* 20 *l.* and *levy'd a Fine accordingly*, and yet, per Wich, the Action of *Debt* ſhall be brought by the Baron alone, for it is his Grant alone, and if he dies his Executor ſhall have Action and not the Feme; Quære, for Finch was abſent, and the Reporter agreed with Wich. Br. Baron and Feme, pl. 25. cites 48 E. 3. 18.

It was held that the Baron alone without his Feme, ſhould not have Writ of *Raviſhment of Ward as Guardian in Socage*, where he has the Ward *by Reaſon of his Feme.* Thel. Dig. 29. Lib. 2. cap. 5. S. 8. cites Hill. 7 R. 2. Brief 634.

18. Writ of *Raviſhment of Ward* was maintained *for the Baron alone*, who had the Ward in Right of his Feme &c. Thel. Dig. 29. Lib. 2. cap. 5. S. 7. cites Trin. 48 E. 3. 20.

19. *And* a Writ of Raviſhment of Ward was maintained *for the Baron and Feme, where the Ward was granted to them two.* Thel. Dig. 29. Lib. 2. cap. 5. S. 7. cites Hill. 14 H. 4. 24.

The Baron and Feme ſhall join in Writ of *Intruſion of Ward.* Thel. Dig. 29. Lib. 2. cap. 5. S. 8. cites Mich. 22 R. 2. Brief 937.

The Baron alone brought *Raviſhment of Ward*, for a Ward he had in Right of his Feme, and the Writ was held good; but there it is ſaid, that otherwiſe it is in *Right of Ward*; but it is ſaid there (Quære) and at laſt it was agreed that the Action ſhould be allowed, but the ſureſt Way is to have both join. Ow. 83. cites 43 E. 1. Statham.

* As Treſpaſs of cutting his Trees, chaſing in his Warren, breaking his Houſe and the like. Br. Baron and Feme, pl. 64. cites 43 E. 3. 8. 16.

20. Where the *Releaſe of the Baron is a good Plea*, ſuch Actions may be brought by the * Baron only, and may be brought by the Baron and Feme alſo. Br. Baron and Feme, pl. 28. cites 50 E. 3. 13.

21. Writ of *Treſpaſs* was maintained by the Baron alone, where the *Tenure was of him and of his Feme.* Thel. Dig. 29. Lib. 2. cap. 5. S. 6. cites Hill. 6 R. 2. Brief 633. And that ſuch Writ was adjudged good brought by both, Mich. 15 E. 4. 9.

* The Goods upon the Premiſſes were carried away by the Diſſeiſor, 7. H. 6. 16. b. S. C. cited by Weſtbury J. and Cheine Ch. J. to the ſame Intent.———Fitzh. Judgment, pl. 70. cites S. C.———Br. Judgment, pl. 20. cites S. C.———Br. Damages, pl. 51. cites S. C———2 Inſt. 236. cites ſame Caſes, and ſays it is worthy of Obſervation.———Show. 346. cites S. P. and intends the S. C. but is much miſprinted.

22. *Baron and Feme were diſſeiſed and* * *robbed*, and *both join in Aſſiſe*, though the Goods of the Baron were carry'd away, and both recovered the Land and Damages, yet the Baron recovered for the Goods carry'd away alone; Br. Joinder in Action, pl. 98. cites 11 H. 4. 16.

Br. Waſte pl. 120. cites S. C. and ſays that Anno 7 H. 4. 15. becauſe the

23. *Waſte* by the Baron and Feme *of a Leaſe made by them during the Coverture.* Eller demanded Judgment of the Writ, becauſe Feme Covert cannot make a Leaſe; and yet becauſe ſhe may receive the Rent after the Death of the Baron, and make Avowry and Diſtrain &c. therefore the beſt Opinion was, that the Writ lies well; for it ſhall be ſaid the

the Leaſe of the Baron and Feme till the Baron be dead; for the Feme cannot agree nor diſagree in the Life of the Baron. Br. Baron and Feme, pl. 4. cites 3 H. 6. 53.

Baron alone brought the Action, and did not name the Feme, therefore the Writ was abated, Quod Nota.

24. *Maintenance* was brought *by the Baron and Feme, upon freſh Force of Land* which was *de Jure Uxoris*, and therefore the Feme may join by the beſt Opinion, by which the Defendant paſſed over, but not by any Award. Br. Baron and Feme, pl. 6. cites 20 H. 6. 1.

Br. Baron and Feme, pl. 15. cites S. C.—— Br. Joinder in Action, pl. 3. cites S. C.——It was held, that where the *Baron and Feme had brought* Action of *Debt*, that *they might join in Maintenance where the Judgment was to anſwer as to the Writ.* Thel. Dig. 29. Lib. 2. cap. 5. S. 10. cites Trin. 7 E. 4. 15.

25. Baron and Feme ſhall not have a Writ of *Treſpaſs of the Goods of the Feme taken before the Marriage, and of the Goods of the Baron taken after*; per Newton. Thel. Dig. 107. Lib. 10. cap. 15. S. 24. cites Hill. 21 H. 6. 33.

26. In Treſpaſs by Baron and Feme, of *Battery done to them both*, after Verdict found that both were beaten, the Writ abated as to the Battery of the Baron, and for the Battery of the Feme they recovered their Damages. Thel. Dig. 238. Lib. 16. cap. 10. S. 53. cites Hill. 9 E. 4. 54.

Thel. Dig. 29. Lib. 2. cap. 5. S. 5. cites S. C. and that ſo it appears, 22 Aſſ. 60 & 87; that the Baron and Feme may join in Treſpaſs of the Battery of the Feme.——Thel. Dig. 107. Lib. 10. cap. 15. S. 24. cites S. C. The Damages were ſeverally tax'd, and adjudg'd good as to the Battery of the Feme, but not of the Baron.

The Husband and Wife could not join in an Action of *Treſpaſs for beating them both*; but if the Verdict finds the Defendant Guilty as to beating the Wife, but as to the Husband, Not Guilty, this cures the Miſtake. 2 Vent. 29. Paſch. 28 Car. 2. C. B. Hocket v. Stegold.——2 Mod. 66. Hocket v. Stiddolph, S. C. held accordingly.

They may join in Action of *Aſſault and Battery of the Wife*; 11 Mod. 264. pl. 3. Hill. 8 Ann B. R. Todd & Ux. v. Redford.——S. P. Br. Treſpaſs, pl. 190. cites 9 E. 4. 51. *but* not for *Battery* of the *Baron*.——Br. Baron and Feme, pl. 54. cites 9 E. 4. 52. S. C. but the Baron of this ſhall have Action alone; and becauſe not, therefore the Writ was abated for this Part; Quod Nota.——Br. Brief, pl. 448. cites 9 E. 4. 51. S. C.——Br. Damages, pl. 85. cites S. C.

But per Powell J. they cannot join in ſuch Action *for beating both*, but it may be helped by *Verdict ſeparating the Damages*. 11 Mod. 265. in Caſe of Todd & Ux. v. Redford.—— S. P. Br. Treſpaſs, pl. 190. cites 9 E. 4. 51. S. P. Br. Damages, pl. 85. cites 9 E. 4. 51.

27. *Where the Feme after the Death of the Baron may have Action*, there they may join; Quod Nota. Br. Baron and Feme, pl. 50. cites 15 E. 4. 9. per Brooke.

As where an *Obligation* is made *to Baron and Feme*, both may have Action, and the Baron alone may have Action. Br. Baron and Feme, pl. 50. cites 15 E. 4. 9.—— *So* of *Treſpaſs* upon the Land of the Feme, *Maintenance*, and the like. Ibid.

28. *Debt* by Baron and Feme *of Arrears of Account*, and *accounted that the Defendant was Receiver to the Feme, when ſhe was Sole, to render Account, and* that the *Baron and Feme aſſigned Auditors after the Eſpouſals*, and was *found in Arrear &c.* and the joining of the Baron and Feme, good by the Opinion of the Court; for the Cauſe of Action commenc'd by the Feme, and the Aſſignment of the Auditors is *purſuant* and ariſing by the Feme. Br. Baron and Feme, pl. 60. cites 16 E. 4. 8.

See (S) pl. 1.

29. A Writ of Treſpaſs of *falſe Impriſonment* was maintained for the Baron and Feme, *of the Impriſonment of the Feme* &c. Thel. Dig. 29. Lib. 2. cap. 5. S. 3. cites Mich. 6 E. 3. 276. and that ſo agrees Hill. 43 E. 3. 3. and by the Baron alone, 22 E. 4. 44.

30. The Baron and Feme joined in *Detinue of Goods bailed by the Feme before the Coverture*. Thel. Dig. 30. Lib. 2. cap. 5. S. 26. cites Mich. 21 H. 7. 29.

31. B. the *Wife of A. gave to C.* 10*l.* in Conſideration that C. ſhould marry her Daughter. C. *promiſes the Wife* that if he did not marry the Daughter, *he would repay* the 10 l. C. did not marry the Daughter. A. and B. brought Action againſt C. and held good; for the Agreement of A. makes the Promiſe good to A. ab initio, and it being made to the Wife, they may join in the Action. Cro. E. 61. pl. 4. Mich. 29 & 30 Eliz. B. R. Pratt v. Taylor.

32. The Books agree, that for *Perſonal Things* they cannot join; but for *Perſonal Things in Action*, it is in the Husband's Election to join the Wife or not; per Gawdy, and Judgment accordingly. Cro. E. 133. pl. 10. Paſch. 31 Eliz. B. R. Arundel v. Short.

S. C. cited Cro. E. 608. pl. 9. and all the Juſtices were of the ſame Opinion.

33. If the Husband is ſeiſed or poſſeſſed of a *Rectory in Right of his Wife, or in Jointure with him*, they may join in an Action *for not ſetting out Tythes*. Adjudged and affirmed in Error. Moor 912. pl. 1289. Hill. 34 Eliz. B. R. Wentworth v. Criſpe.

A *Leaſe* was made *by Husband and Wife*, in which the *Leſſee covenanted with them to repair*. The Husband alone brought Covenant, Quod teneat ei Conventionem, according to the Form &c. of a certain Indenture made between him on the one Part, and the Defendant on the other Part. After Verdict it was moved in Arreſt of Judgment, becauſe of this Variance; but the Plaintiff had Judgment; for the Indenture being by both, it is therefore true that it was made by the Husband, and he may refuſe quoad her, and bring the Action alone. 2 Mod. 217. Paſch. 29 Car. 2. C. B. Beaver v. Lane.

34. Husband and Wife, ſeiſed of a Houſe and Lands in Right of the Wife, *made a Leaſe* thereof for 21 Years, and the *Leſſee covenanted* for himſelf, his Executors &c. *to build a Brick-Wall* upon Part of the Lands. The Leſſee afterwards aſſign'd his Term to B. who aſſign'd it to C. and the Husband and Wife joined in an *Action againſt* the Aſſignee of *the Aſſignee* of the Leſſee, for not building the Wall. Admitted per Cur. that the Action was well brought by both. 5 Rep. 16. Paſch. 35 Eliz. B. R. Spencer's Caſe, alias, Spencer v. Clark.

35. In *Trover and Converſion of a Deed of a Rent-charge, granted to the Wife dum ſola* ſuit, and that the Deed came to the Hands of the Defendant after the Coverture. It was ſaid by the Court, that the Action was well brought by them 2; for the Action ſhall ſurvive; for otherwiſe a grand Inconvenience would enſue to the Wife; for if the Huſband only ſhould recover, and after die, his Executors would have Execution for the Damages, and not the Wife; and Judgment was given accordingly. Noy 70. 39 Eliz. C. B. Ruſſel and his Wife's Caſe.

36. Baron and Feme cannot bring *Trover*, and *ſuppoſe the Poſſeſſion in them both*; for the Law, in Point of Ownerſhip, transfers all the Intereſt to the Baron; per tot. Cur. Yelv. 166. Mich. 7 Jac. B. R. in Caſe of Draper v. Fulks.

2 Bulſt. 80. S. C. adjudg'd accordingly. —Brownl. 226. S. C. adjudg'd.

37. In *Falſe Impriſonment*, reſolved if an Action be brought *againſt a Widow*, who is found guilty, and *before Judgment ſhe takes Husband*, the Capias ſhall be awarded againſt her, and not againſt her Husband; and for ſuch Impriſonment of the Wife upon the Capias, the Action will not lie for the Husband. Reſolved per tot. Cur. Cro. J. 323. pl. 1. Trin. 11 Jac. B. R. Doyley v. White.

Roll Rep. 52. pl. 23. Nooth v. Viatt, S. C. and the Action held to be well brought; and the Court ſeem'd to ſay (as the

38. A. *ſeiſed in Fee, and made a Leaſe* for Years *to W. the Defendant, and afterwards convey'd the Reverſion to N. the Plaintiff and his Wife in Fee.* W. attorn'd, the *Leaſe expired*, and the Husband alone brought Debt for *Rent arrear*. Haughton J. at firſt thought the Action ought to be brought by both, notwithſtanding the Term was ended; and ſaid it hath been agreed that if the Term had Continuance, he ought to have joined her with him; but afterwards he thought the Action well brought, and that there is no Difference where they are Aſſignees of the Reverſion, and where they are Leſſors, as to bringing Debt for the Rent;

Rent; and his ſuing alone, in this Caſe, is not in regard of his Eſtate with his Wife, but of the Thing to be recover'd by him, viz. the Rent, which he only is to have; and all the other Judges held the Action well brought, and Judgment for the Plaintiff. 2 Bulſt. 233, 234. Trin. 12 Jac. Nooth v. Wyard. Reporter ſays he underſtood them) that the Baron might have Action alone, tho' the Leaſe had been continuing; whereas in this Caſe the Term was ended; and tho' it was objected that he named himſelf Aſſignee, and that it appears that he and his Wife were Aſſignees, yet per Cur. the Plaintiff ſhall recover; for this is only Surpluſage, and ſo it was adjudged.——But 2 Bulſt. 234. Doderidge ſaid, that if he had brought the Action as Aſſignee, by an Aſſignment made to him alone, whereas the Reverſion was aſſigned to him and his Wife jointly, it had not been good; but the Action being brought generally by him alone, is good, and he ought not to ſhew himſelf to be Aſſignee.

39. J. S. and his Feme brought *Trover and Converſion*, and counted that they were the *Goods of the Feme dum ſola*, and that ſhe loſt them, and the Defendant found them; and afterwards they intermarried, and then the Defendant converted them. Adjudged againſt the Plaintiffs, becauſe, notwithſtanding the Trover of the Defendant, the Property continued in the Feme; and then by the Intermarriage the Property was in the Baron, and then the *Baron ought to have brought the Action alone*, without his Feme. Cited by Coke Ch. J. Roll Rep. 45. Trin. 12 Jac. B. R. as Shuttleworth's Caſe. S. C. cited by Coke Ch. J. 2 Bulſt. 204. accordingly.—S. P. and after a Verdict for the Plaintiff it was objected, that Trover being laid before the Marriage, and the Converſion after, they ought not to join in this Action; but the Husband alone ſhould have brought it, becauſe the Converſion is the Cauſe of Action. But per Cur. it is good with or without the Wife; for the Trover gave the Beginning of the Action to the Wife, though the Converſion is the compleating of the Cauſe of Action. 2 Lev. 107. Trin. 26 Car. 2. B. R. Blackburne v. Graves.——Mod. 120. pl. 22. S. C. but S. P. does not appear.——Vent. 260. pl. 261. Batmore v. Graves, S. C. & S. P. held accordingly, and Judgment for the Husband. ——3 Keb. 263. pl. 11. S. C. but S. P. does not appear.——Ibid. 329. pl. 24. Blackborough v. Graves, S. C. & S. P. adjudged for the Plaintiff.——S. C. cited 1 Salk. 114. pl. 1. ——S. C. cited Gilb. Equ. Rep. 100. Arg. ——S. C. cited Arg. Chan. Prec. 414.

40. Caſe by Husband and Wife, *for preſenting them in the Spiritual Court*, upon Oath, *for making Hay on Midſummer-Day in Time of Divine Service*, which was falſe. The Defendant juſtified that they did make Hay on that Day &c. The Iſſue was found for the Plaintiff. It was moved that the Husband and Wife cannot join in this Action; for the *falſe Oath againſt the Husband could not be ſo againſt the Wife*; but Coke Ch. J. ſaid that here it is well enough; but he doubted whether any Action lies for this at Common Law. Curia adviſare vult. Roll Rep. 108. pl. 48. Mich. 12 Jac. B. R. Anon. Cro. J. 355. pl. 11. Weald v. Peaſe, ſeems to be S. C. The Preſentment was for making Hay on a Sunday. The Court doubted whether the Action was maintainable, and therefore it was adjourned.

41. Treſpaſs of *Aſſault and Battery of the Plaintiff, nec-non of aſſaulting and beating the Plaintiff's Wife, per quod conſortium amiſit* Uxoris ſuæ *for 3 Days*. After Verdict for the Plaintiff as to both Points, it was moved in Arreſt of Judgment, That the Husband ought not to join the Battery of his Wife with that done to himſelf, but ought to join her in this Action; becauſe the Battery being done to her, ſhe ought to have the Damages if ſhe ſurvive the Husband; but per tot. Cur. the Action is well brought by the Husband alone; for 'tis not only for the Harm done to his Wife, but for his particular *Loſs of her Company for 3 Days*, which is only a Damage and Loſs to himſelf; and Judgment for the Plaintiff. Cro. J. 501. pl. 11. Mich. 16 Jac. B. R. Guy v. Liveſey. 2 Roll Rep. 51. Guy v. Luſy, S. C. adjudged for the Plaintiff.—Husband and Wife cannot join in Aſſault and Battery, *per quod conſortium amiſit*; for the *Per quod*, in ſuch Caſe, is the Giſt of the Action; per Powell J. 11 Mod 265. Hill. 8 Ann. B. R. in Caſe of Dodd v. Redford.

Action by the Baron alone, for Battery of the Feme per quod conſortium amiſit, was held good; and a like Judgment was affirmed in the Exchequer-Chamber. Jo. 440. pl. 7. Trin. 15 Car. B. R. Anon.

42. Aſſump-

2 Roll Rep. 237. S. C. adjornatur. —Ibid. 250. S. C. adjudged that the Action did not lie for both; and the Plaintiff's Counsel

42. Assumpsit by Baron and Feme. The *Defendant received of the Plaintiff's Money by the Hands of the Plaintiff's Wife.* The Defendant *promised unto them to pay it* at such a Day, and alleged the Breach for Non-payment, Ad Damnum eorum. After Verdict it was moved that the Promise was void, being for Monies of the Husband and Wife, and cannot be Ad Damnum eorum. It was answer'd, that it may for Monies due to the Wife dum sola &c. but it was held, that it shall not be so intended, unless it had been shewn; and Judgment for the Defendant. Cro. J. 644. pl. 6. Mich. 20 Jac. B. R. Abbot v. Blofield.

pray'd that Judgment be enter'd, in order to bring a new Action, and declare better; for he said that the Truth was, that the Promise was made to the Wife during Coverture; and so it seem'd to Doderidge J. that the Action might then be brought against both.

43. Baron and Feme brought *Escape*, whereas the *Baron alone arrested the Prisoner with a Latitat*, which he took out in his own Name only; and now in the Declaration on the Escape, he declares that he took out the Latitat *ea Intentione to charge the Prisoner on a Bond made to the Feme dum sola*; and held good by 3 Justices, absente the other. 2 Roll Rep. 312. Pasch. 21 Jac. B. R. Anon.

44. Where the *Life is not concerned*, As where Feme commits a Trespass, the Baron and Feme must be joined; but where it concerns Life, as in Case of *Felony* done by the Feme, the Appeal shall be against the Feme only. Jenk. 28. pl. 53.

Jo. 376. pl. 3. Tregonel v. Rives, S. C. and adjudged that the Action was well brought by the Baron only. —— S. C. cited by Glyn Ch. J. 2 Sid. 128. —— S. C. cited by Ventris J. 2 Vent. 195. — 2 Mod. 270. Arg. S. C. cited, and

45. The *Husband covenanted to stand seised &c. to the Use of himself and his Wife for their Lives, for her Jointure*, and after to his Son and Heir, *excepting the Timber Trees, saving that his Wife shall have the Strowds and Loppings*, and *died*, and the *Widow married again.* The Son and *Heir of the first Husband cut down five Oaks*, and the *second Husband and his Wife brought Case* against him, *setting forth, that they lost the Benefit of the Loppings.* After Verdict it was moved, among other Things, that the Action is brought by the Husband and Wife, whereas it ought to be brought by the Husband alone, because the Wrong was done to his Possession, and he alone might have released the Damages; but adjudged well brought by both; for he having the Land in Right of his Wife, she may join with him in the Suit for the Damages, and she shall have the Damages and the Action also if she survive her Husband. Cro. Car. 437, 438. pl. 7. Hill. 11 Car. B. R. Tregmiell v. Reeves.

says, that tho' the Wrong was done to his Possession, and he might have released, yet because there was also a Wrong to the Inheritance, they ought both to join. —— 4 Mod. 156. S. P. cited, and seems to intend S. C. that they may both join, and seems to be admitted by the Court.

See Tit. Actions (U) pl. 19. and (Z) pl. 12. Fawcet v. Childers contra.

46. A. promised B. the Wife of C. that if B. would procure C. to levy a Fine of such Lands, that he *would give the Wife a riding Suit.* Roll Ch. J. said it was adjudged, that the Baron and Feme cannot join in an Action for Breach of this Promise. Sty. 298. Mich. 1651. in the Case of Cotterel v. Theobalds.

47. A. promised B. that if B. would marry M. A's Sister, that he would make good a Legacy given to M. by her Father's Will, and would also *give to her* 40 *l.* at her Age of 18. This Promise was made to B. and for B's Benefit, and the sole Consideration arises from B's marrying M. and so the Action ought to be brought by B. only. Sti. 297. Mich. 1651. B. R. Cottrel v. Theobalds.

48. A. in Consideration of his Daughter's Diet, and being taught *Needle-work by the Wife*, and of a *Bond to be enter'd into by the Husband to J. S.* promises to give them so much; they may join. 2 Sid. 138. Hill. 1658. B. R. Fountain v. Smith.

49. A

49. A Man and his Wife, who kept a Victualing-Houſe, joined in an Action againſt the Defendant, for ſaying to her, *Thou art a Bawd to thine own Daughter*, per quod J. S. who *uſed to come to the Houſe, forbore &c. ad damnum ipſorum.* After a Verdict for the Plaintiff, the Judgment was ſtayed, becauſe the Words were not actionable but in reſpect of the ſpecial Loſs which is to the Husband only. Lev. 140. Mich. 16 Car. 2. B. R. Coleman & Ux. v. Harecourt. Keb. 733. pl. 10. S. C. but S. P. does not appear.——Ibid. 791. pl. 47. S. C. & S. P. held accordingly, and per Hyde, tho' it be found that they both kept the Houſe, yet the Wife does it only as Servant, and the Intereſt is only his; to which Twiſden agreed, and Judgment was ſtayed.

So ſaying of an Inn-keeper's Wife that ſhe was a Whore &c. and had a Baſtard by T. per quod he loſt his Cuſtom, ad Damnum ipſorum, was not good; for they ſhould not join in the per quod, and yet, the Words being actionable in themſelves, they might join in the Action; and Judgment was ſtayed. 2 Keb. 387. pl. 63. Trin. 20 Car. 2. B. R. Harwood v. Hardwick.

For *Words not actionable in themſelves, but* only in reſpect *of collateral Damage*, being ſpoke of the Wife, the Baron muſt bring Action alone, and if the Wife be joined with him, the Judgment will be arreſted for it, tho' after Verdict. Sid. 346. pl. 11. Mich. 19 Car. 2. B. R. Anon.

In Action for Words by Baron and Feme, after Verdict it was moved in Arreſt of Judgment, that the Concluſion was *ad Dampnum ipſorum*, and 3 Juſtices held the Concluſion of the Count to be well, which Wythens J. denied; for he ſaid, if an Inn keeper's Wife be called a Cheat, and the Houſe loſes the Trade, the Husband has an Injury by the Words ſpoke of his Wife, but the Declaration muſt not conclude ad Dampnum ipſorum. 3 Mod. 120. Hill. 2 & 3 Jac. 2. B. R. Baldwin v. Flower.

50. In Actions for *Torts that will ſurvive* to the Wife after the Death of the Baron, the Wife ſhall be joined, and in no other Caſe; Per Twiſden J. Sid. 224. pl. 14. Mich. 16 Car. 2. B. R. Stanton v. Hobart. The Action in the principal Caſe was for *Battery of the Feme, and tearing her Coat*, and was laid *ad Damnum ipſorum*, and therefore Judgment was ſtaid. Sid. 224. Staunton v. Hobart.

51. In Action of Battery by the Husband and Wife for *Impriſonment of the Wife till he had paid* 10*l.* Exception was taken that the Husband and Wife could not join; ſed non allocatur; and Judgment for the Plaintiff. 2 Keb. 230. pl. 4. Trin. 19 Car. 2. B. R. Brown v. Tripe.

52. Caſe by Husband and Wife againſt an Executor, upon a *Promiſe* by his Teſtator *after Coverture, in Conſideration of the Marriage had at his Requeſt, to pay* 8*l. per Annum to the Wife during the Coverture.* After a Verdict it was moved, that it ſhould have been brought by the Husband alone, becauſe the whole Benefit is to him, the Promiſe being made ſince the Marriage. Judgment was ſtay'd, but on moving it again it was adjudged, that it is in the Election of the Husband to bring the Action in his own Name, or to join his Wife. Allen 36, 37. Hill. 23 Car. B. R. Hilliard v. Hambridge. Sty. 9 Helliar's Caſe, S. C. Judgment was arreſted till the other Side ſhould ſhew Cauſe to the contrary.

53. *Trover* was brought by Baron and Feme *of* 100 *Load of Wood of the Feme*, and the *Converſion was laid after the Marriage.* It was moved, that ſhe ought not to have joined with her Husband in the Action. But the Court held, that in Regard the *Trover was laid to be before the Marriage*, which was the Inception of the Cauſe of Action, ſhe might be joined; and Hale ſaid the Husband might bring the Action *alone, or jointly* with his Wife; and the Plaintiff had Judgment. Vent. 260. Trin. 26 Car. 2. B. R. Batmore v. Graves.

54. It was held by Saunders Ch. J. that Baron and Feme ought not to join in Treſpaſs for an *Aſſault on the Feme*, if the ſame were *with her Conſent*; for where they join the Action ſurvives. Now here, if the Husband dies, the Wife cannot proceed, or begin de novo with this Action, becauſe it was with her own Conſent, and in ſuch Caſe there fore the Husband may, and ought to bring the Action alone upon his ſpecial Caſe; for tho' the Wife conſent, that will not excuſe the Defendant, for ſhe hath not Poteſtatem Corporis ſui; and Holt ſaid, that the very laſt Aſſiſes the Ld. Ch. Baron over-ruled him in that very Ex-

ception, and ſo ſaid Serjeant Jefferies, that the Ld. Hale had done; but the Ld. Ch. J. Vaughan did allow it, and always held they could not join. 2 Show. 255. pl. 262. Hill. 34 & 35 Car. 2. B. R. Rogers & Ux. v. Goddard.

55. Judgment in C. B in Treſpaſs by Husband and Wife *for taking away their Goods* was reverſed, becauſe the Wife ought not to join. 7 Mod. 105. Mich. 1 Annæ B. R. Wittingham v. Broderick.

56. *Caſe* by Husband and Wife *for maliciouſly inditting the Wife of a Riot*; the Husband counted that his Wife was of good Reputation, and that this was with Intent to leſſen it, and that he was put to great Charge. The Court held it no Scandal to be guilty of a Treſpaſs, and as to the other, they inclined, that the Husband alone ought to have brought the Action, becauſe he alone could be put to the Charges; but they delivered no Poſitive Opinion. 7 Mod. 104. Mich. 1 Ann. B. R. Harwood v. Parrot.

57. The Plaintiffs brought an Action of Aſſault and Battery for a *Battery committed on them both*; Judgment by Default, and a Writ of Inquiry was executed the 17th of May 1705. and intire Damages, viz. 7 l. 10 s. was given; and on the Return of the Writ of Inquiry Judgment was arreſted, becauſe the Wife cannot be joined in an Action with the Husband for a Battery on the Husband. 2 Ld. Raym. Rep. 1208. Mich. 4 Ann. Newton & Ux. v. Hatter.

58. Feme covert ſued ſingly *upon the Statute of Diſtributions*, and a Prohibition was moved for, becauſe it was a Property ſo veſted in the Husband that he might releaſe it; but the Court denied it, becauſe this was a *Choſe en Action which ſhall ſurvive to the Wife*, and the joining of the Husband would be only for Conformity; and that tho' the Spiritual Court ought to conform their Proceedings to the Rules of the Common Law, yet that is in *Matters of Subſtance, and not of Form*, as this moſt certainly was. 10 Mod. 63. Mich. 10 Ann. B. R. D'aeth and Baux.

59. Husband and Wife join in Action for *Money lent by him and his Wife by his Conſent*; Per Cur. the Wife ought not to be joined unleſs there had been an expreſs Promiſe made to her, or unleſs the Cauſe of Action did ariſe on *her Skill* or Knowledge. 8 Mod. 199. Mich. 10 Geo. 1. King v. Baſingham.

(T. 2) Actions &c. commenced by or againſt Feme ſole, who marries pending the Action &c.

1. IF *one of the Demandants takes Baron pending the Writ*, it ſhall abate for all. Thel. Dig. 185. Lib. 12. cap. 12. S. 2. cites Mich. 9 E. 3. 470. and 29 E. 3. 22. Contrary it was adjudged Mich. 12 E. 3. Brief 258.

2. In *Scire Facias by 2 Parceners*, the *one was ſummon'd and ſever'd*, and the Tenant *ſaid that ſhe who was ſever'd took Baron pending the Writ, and before the Severance*, by which all the Writ abated. Thel. Dig. 185. Lib. 12. cap. 12. S. 2. cites Paſch. 32 E. 3. Brief 292.

And *ſo* it ſhall be if it was *after the Severance*; per Cur. Thel. Dig. 185. Lib. 12. cap. 12. S. 2. cites Paſch. 32 E. 3. Brief 292. —— *But* it was adjudged that *if one* of the Demandants *who is ſever'd takes Baron after the laſt Continuance*, the Writ ſhall not abate. Thel. Dig. 185. Lib. 12. cap. 12 S. 2. cites Trin. 39 E. 3. 21. but adds Quære.

3. Writ ſhall not abate by the taking of Baron *after Verdict in Pais, and before the Day in Bank*, and Judgment. Thel. Dig. 185. Lib. 12. cap. 12. S. 5. cites Mich. 4 H. 4. 1.

4. *But* Gaſcoign ſaid that it has been a *great Queſtion, if a Feme Appellant who takes Baron after Judgment, and before Execution, may pray Execution.* Thel. Dig. 185. Lib. 12. cap. 12. S. 6. cites Hill. 11 H. 4. 48. but ſays that Huſſey and Brian were clearly of Opinion that ſhe might demand Execution in ſuch Caſe, notwithſtanding the Eſpouſals. Mich. 21 E. 4. 87.

5. Feme Covert, who was ſole the Day of the Writ purchaſed, *waged her Law of Non-ſummons* in Formedon, *without the Baron.* Br. Coverture, pl. 18. cites 12 H. 4. 24. Br. Ley Gager, pl. 32. cites S. C.

6. If it be pleaded, that the Feme Plaintiff has taken Baron pending &c. *ſhe may ſay that this Baron is now dead, or that Divorce is made, and that ſhe is now ſole.* Thel. Dig. 185. Lib. 12. cap. 12. S. 7. cites 9 H. 5. 1.

7. If a *Feme* is *contracted to a Man, and brings Action*, and *pending it ſhe is compell'd by the Spiritual Court to marry him*, yet her Writ ſhall abate. Br. Brief, pl. 158. cites 7 H. 6. 14, 15. per Straunge. Thel. Dig. 185. Lib. 12. cap. 12. S. 4. cites S. C. and Mich. 4 H. 4. 55.

8. Feme *Executrix made a Letter of Attorney to the Plaintiff*, to whom the Teſtator was indebted, *to recover and receive a Debt* due by A. to the Teſtator, *and then marries*; this is not any Countermand or Revocation of the Suit, and the Writ is not abated, but only abateable. 1 Le. 168. pl. 235. Mich. 30 & 31 Eliz. C. B. Lee v. Madox.

9. If a *Feme ſole* brings Treſpaſs, and *recovers*, and a Writ of *Enquiry of Damages is awarded*, and *before the Return* thereof the *Plaintiff takes Husband*, and after the *Writ*, and *Judgment given thereupon, without any Exceptions* taken by the Defendant, he ſhall not have Advantage of this in a Writ of Error, becauſe the Writ was only abateable by Plea. Roll Abr. Tit. Error, (M. b) pl. 2. Mich. 40, 41 Eliz. B. R. between Smith and Odyham, adjudged.

10. Feme, pending the Writ againſt her, takes Husband. This doth *not abate the Writ*; but the Recovery againſt her upon the firſt Writ is good. Agreed. *But* by Doderidge J. *if after the original Proceſs ſued, and before the Return ſhe takes Husband*, this ſhall abate the Writ. Quære. 2 Roll Rep. 53. Mich. 16 Jac. B. R. in Heydon and Miller's Caſe.

11. *After Imparlance* it was pleaded in Bar, That the *Plaintiff took Husband*; on which *Iſſue was taken by the Plaintiff*, to which the *Defendant demurr'd*; and by Twiſden, that's the beſt Way; for if it had been tried, it had been peremptory, but now only Reſpondeas Ouſter, which was agreed, Hyde abſente. Keb. 632. pl. 118. Mich. 15 Car. 2. B. R. Phillips v. Taylor.

12. If Feme ſole, Plaintiff, takes Husband, it muſt be *pleaded after the laſt Continuance*; for otherwiſe the Defendant depends on his firſt Plea, and waives the Benefit of this new Matter. G. Hiſt. C. B. 84. S. P. For the Husband which ſhe takes, is attached with the Action, and therefore muſt plead in Time; for *ſhe cannot by her own Act deſtroy another Man's Action*, neither can the Husband, unleſs he comes in Time; for the Action was well commenced. G. Hiſt of C. B. 199.

13. If an *Action* be brought *in an inferior Court againſt a Feme ſole*, and pending the Suit ſhe *intermarries*, and afterwards *removes the Cauſe by Habeas Corpus*, and the Plaintiff *declares againſt her as a Feme ſole*, ſhe may plead Coverture at the Time of the ſuing the Habeas Corpus, becauſe the *Proceedings are here De novo*, and the Court takes no Notice of what was precedent to the Habeas Corpus; but upon Motion, on the Return of the Habeas Corpus, the *Court will grant a Procedendo*; for tho' this be a Writ of Right, yet where it is to *abate a rightful Suit*, the Court 11 Mod. 142. pl. 14 Etherington v. Reynolds, S. C. The Court was inclined to give Judgment for the Defendant;

but as an Indulgence for the Equity of the Cauſe, it was adjourned to Hill. Term next.——1 Salk. 8. pl. 20. Mich. 6 Ann. B. R. Hethrington v. Reynolds, S. C. ruled accordingly.

Court may refuſe it, and the Bail below, to this Suit, which by this Contrivance he is ouſted of, and poſſibly by the ſame Means of the Debt. G. Hiſt. of C. B. 198.

(T. 3) Actions &c. by Baron and Feme *de Facto*, or one of them, in reſpect of the other.

1. IT was ſaid and held, that *in* Cui in Vita, or other *Action* to be *brought of the Feme's own Poſſeſſion, it is no Plea to ſay Ne unque accouple* &c. and ſhe ſhall demand Simul cum Viro ſuo who is her Baron in Fact, and in Poſſeſſion. Thel. Dig. 119. Lib. 11. cap. 2. S. 11. cites Mich. 50 E. 3. 19.

2. Where the Statute of 6 *R.* 2. *cap.* 6. is *where a Woman is raviſhed, the Husband &c. of ſuch Woman ſhall have the Suit* &c. this is ſtrict, and ſhall be *intended the Baron in Poſſeſſion, tho' there be good Cauſe of Divorce*; for he is her Husband till Divorce be had. Br. Parliament, pl. 89. cites 11 H. 4. 14.

3. *Contra where the Marriage is void*, for there he is not her Husband, and therefore there Ne unques Accouple in lawful Matrimony is no Plea by the beſt Opinion. Ibid.

4. *Contra in Appeal* by Feme *of the Death of her Husband, or in Dote petita*, for thoſe are by the Common Law. Ibid.

(T. 4) Of Judgments confeſſed by or to Feme Sole, who marries before Entry of them.

1. WARRANT of Attorney to confeſs Judgment to a Feme Sole, who married before Judgment entered, *whether it could now be entered, and How*, was the Queſtion. It was agreed it could not be entered for the Husband, for that is beyond the Authority given. The Courſe is to make Affidavit of the Debts not being ſatisfied, and now the Wife could not make ſuch Affidavit; for the Money might have been paid to the Husband, nor could the Husband's Affidavit ſerve, becauſe it might have been paid to the Wife before Marriage; but it ſeems the Point may be cleared by a *ſeveral Affidavit of each in his Time*; and Holt ſaid they had better *enter it in the Wife's Name as Feme Sole*, but nothing was done. 12 Mod. 383. Paſch. 12 W. 3. Reynolds v. Davis.

(U) Actions

(U) Actions *againſt* Baron and Feme. What may be againſt *both*.

1. If a Trover and Converſion of Goods be brought againſt Baron and Feme, in which it is ſuppoſed that they found the Goods and converted them to their own Uſe; this is not good, for preſently by the Converſion of the Feme, it is to the uſe of the Baron, and not to the uſe of the Feme. Tr. 8 Car. B. R. *between* * *Reames & Humphrys*, adjudged in Arreſt of Judgment. Intratur, Hill. 7 Car. Rot. 1202. and then was cited one † *Neves's Caſe*, where ſuch a Judgment was reverſed in Camera Scaccarii for this Error. * See Tit. Actions (L) pl. 7. S. C. and the Notes there. † Cro. J. 661. pl. 11. Berry v. Nevis in Cam. Scacc. Hill. 20 Eliz. S. C.

and Judgment in B. R. reverſed, but ſays it was ſhewn that this Judgment in B. R. paſſed Sub Silentio after Verdict without Exception.—Jo. 16. pl. 2 S. C and Judgment reverſed.—Palm. 343. Berry v. Nevis, S. C. and Judgment reverſed.——See Tit. Actions (L) pl. 7. S C. and the Notes there.

If *Feme Covert takes my Sheep and eats them*, or other Goods and converts them, *Trover* lies againſt the Baron and Feme, and I may ſuppoſe the Converſion in the Feme only viz the Tort, though they cannot bring Trover, and ſuppoſe the Converſion in both, Quod fuit conceſſum per tot. Cur. Yelv. 166. Mich. 7 Jac. B. R. in Caſe of Draper v. Fulks.——Mar. 60. pl. 94. Mich. 15 Car. in Caſe of Hodges v. Simpſon, it was ſaid by Jones J. that there may be a Converſion by the Wife to her own Uſe, as in the principal Caſe there, where the *Trover* was of *Barley*, if *ſhe bakes it into Bread and eats it herſelf*; and Bramſton Ch. J. ſaid that a Wife has a Capacity to take to her own Uſe; for there muſt neceſſarily be a Property in her before the Husband can take by Gift in Law, and therefore as to this Point the Caſe was adjorned.—Jo. 443. pl. 4. S. C adjudged for the Plaintiff——The laying the Converſion ad uſum ipſorum, though naughty, is made good by the Verdict. Mar. 82. pl. 134. Paſch. 17 Car. Anon.

An Action of *Trover* is brought againſt Baron and Feme, *for a Converſion during the Coverture by the Wife*. And it was ſaid by the Court, that it was good; for by Jones J. although a Feme Covert cannot make a Contract for Goods, nor be charged for them, yet ſhe may convert them &c. Noy. 79. Newman v Cheney.——Lat. 126. Paſch. 2 Car. S. C. Whitlock J. accorded. Crew Ch. J. ſpoke doubtfully, and Doderidge aſſented.

2. Writ of *Treſpaſs* lies againſt Baron and Feme. Thel. Dig. 45. Lib. 5. cap. 4. S. 9. cites Hill. 12 E. 3. Brief 670.

3. *Writ of Meſne* againſt Baron and Feme, *ſuppoſing that the Plaintiff held of them in Right of his Feme*, and *ſo ſuppoſing the Baron and Feme to be Meſnes, and not the Feme* &c. and held good. Thel. Dig. 116. Lib. 10. cap. 26. S. 17. cites Mich. 13 E. 3. Brief 642 & 13 R. 2.

4. A *Writ* upon the Statute of Labourers was maintained againſt the Baron and Feme, *upon Retainer of a Servant* made *by the Baron and Feme*. Thel. Dig. 45. Lib. 5. cap. 4. S. 15. cites Paſch. 29 E. 3. 35. Thel Dig. 116 Lib. 10 cap. 26. S. 12. cites S. C.

5. A Man ſhall not have Action of *Debt* againſt the Baron and Feme, *upon Contract made by them*. Thel. Dig. 45. Lib. 5. cap. 4 S. 12. cites Hill. 34 E. 3. Brief 923. & Paſch. 2 H. 4. 19.

6. Detinue *of* 10 *l. of Flax againſt Baron and Feme*, and *counted of Bailment to both to rebail* &c. to the Damage of five Marks, and becauſe it is the Detinue of the Baron only, therefore the Writ was abated. Br. Detinue de biens, pl. 22. cites 38 E. 3. 1.

7. Writ of Detinue does not lie *upon a Bailment* made *to the But* *Baron and Feme*. Thel. Dig. 45. Lib. 5. cap. 4. S. 10. cites Hill. 38 E. 3. 1. where the *Bailment* was *to the firſt Baron*, *and* the *coming to the Hands of the Feme as Executrix*; the Writ ought to be brought againſt her and her ſecond Baron jointly. Thel. Dig 45. Lib. 5. cap. 4 S. 10. cites Trin. 39 E. 3. 22.

8. It was held that Writ of *Conſpiracy* does not lie *againſt Baron and Feme and a third Perſon*, ſuppoſing that they conſpired &c. Thel. Dig. Nor againſt Baron and Feme. Thel.

Dig. 45. Lib. 5 cap. 4 S. 16. cites S. C.

Dig. 116. Lib. 10. cap. 26. S. 13. cites Hill. 38 E. 3. 3. but says that Morris durst not Demur thereupon. Pasch. 40 E. 3. 19.

9 If *Writings* are *bailed to a Feme Sole*, and *she takes Baron*, the Action is well brought against both, and shall not be compelled to bring it against the Baron alone. Br. Charters de terre, pl. 38. cites 39 E. 3. 17.

10. It was adjudged that Writ of *Covenant* does not lie against Baron and Feme, *upon Covenant made by them, by Deed indented.* Thel. Dig. 45. Lib. 5. cap. 4. S. 18. cites Mich. 45 E. 3. 11.

11. A Man shall not have Action *upon Obligation made by them two.* Thel. Dig. 45. Lib. 5. cap. 4. S. 12. cites Hill. 8. R. 2. Brief 930. and Hill. 43 E. 3. 10.

12. Writ of *Detinue* does not lie against Baron and Feme, *upon coming to their Possession by Trover.* Thel. Dig. 45. Lib. 5. cap. 4. S. 10. cites Mich. 13 R. 2. Brief 644.

13. If a Man *recovers by Assise against a Feme sole*, and after *she takes Baron*, he shall not have *Redisseisin* against the Baron and Feme. Thel. Dig. 45. Lib. 5. cap. 4. S. 22. cites Mich. 9 H. 4. 5.

14. Writ of *Trespass done by the Feme before the Marriage*, and Writ of *Account of Receipt made by her before the Marriage* lies against the Baron and Feme. Thel Dig. 45. Lib. 5. cap. 4. S. 24. cites Mich 4 E. 4. 26.

15. Debt lies of the *Rent upon a Lease made to the Baron and Feme*, and lies against both; so of Waste; for she cannot waive the Lease during the Life of her Baron. Br. Dette, pl. 217. cites 17 E. 4. 7.

Nov. 19. S. C. Judgment was arrested; for the Wife shall not be sued for the Debt of her Husband.

16 Debt against Husband and Wife for 3 l. 18 s. and counted *for* 39 *s. upon a Contract of the Wife dum sola*, and *for* 39 *s. more upon an insimul computassent* with the Husband. Upon Nil debet it was found for the Plaintiff, but Judgment was stay'd. Hob. 184. pl. 221. Revel v. Gray.

17. In *Case for Words* brought against Husband and Wife; the Jury *found the Husband Guilty, and the Wife Not.* The Court held the Declaration ill; for this cannot be a joint Speaking by Husband and Wife, and therefore they ought not to be joined in this Action; and there ought to be several Judgments and Damages if you recover, viz. one against the Husband, and another against the Wife; but here it is help'd by the Verdict, and the Judgment in Effect is but against one of the Defendants, and so Judgment was given for the Plaintiff. Sty. 349. Mich. 1652. B. R. Burchard v. Orchard.

18. *Case* was brought against Husband and Wife, *for retaining a Servant who departed without Licence.* At the End of the Case is a Nota, that no Notice was taken (the Judgment being given upon other Matter) that the Action was brought against the Baron and Feme, and Feme covert cannot make a Reteiner or Contract; but says, that perhaps the receiving and *keeping him without any Contract* is a Trespass, whereof a Feme Covert may be Guilty, sufficient to maintain this Action against her. 2 Lev. 63. Trin. 24 Car. 2. B. R. Fawcet v. Beaver.

3 Keb. 602. pl. 43. Hony v. Daniel S. C. and agreed that Feme Executrix is not chargeable for Mounson v

19. In *Debt* on Bond *against Baron and Feme Executors*; the Plaintiff *counted of a Devastavit* by them, but adjudged against the Plaintiff; because a Feme covert cannot waste during the Coverture, tho' the Wasting of the Baron shall charge her if she survives. 2 Lev. 145. Trin. 27 Car. 2. B. R. Horsey v. Daniel.

Waste by Baron and Feme.——Cro. C. 519. pl 20. Mich. 14 Car. B. R. in Case of Bourn, it was held, that if a Man marries a Feme Executrix, and wastes the Goods, it is a Devastavit in the Wife.

20. *Trespass* against Husband and Wife. Upon Not Guilty pleaded, Verdict for the Plaintiff. It was moved in Arrest, that the Wife could not

not be charged for the Treſpaſs of the Husband, no more than they can be charged for the Converſion of Goods ad Uſum ipſorum; but the Court over-ruled the Exception. Ld. Raym. Rep. 443. Paſch. 11 W. 3. White v. Eldridge.

21. *Covenant was brought* againſt Baron and Feme on a *Leaſe to the Feme dum ſola*, wherein ſhe covenanted to plant 20 Oaks every Year during the Term on the Premiſſes. It was objected, that the Wife ought not to be joined in the Action for Breach ſince the Coverture; ſed non allocatur; and Judgment pro Quer' and if the Wife had *aſſigned dum ſola*, the Action would lie againſt both jointly. 6 Mod. 239. Mich. 3 Ann. B. R. Anon.

(X) [Actions.] What *ought* [to be brought againſt both.]

1. DEBT for Rent upon a Leaſe for Years made to Baron and Feme **ought to be brought againſt both.** * 17 Ed. 4. 7. 2 H. 4. 19. b. **Dubitatur, whether it may be brought againſt the Feme.**

* Br. Baron and Feme, pl. 61. cites S. C. per Cur. and ſo of *Waſte* ——

S. P. Br. Baron and Feme, pl. 29. cites 3 H. 4. 1. per Thirn; for ſhe may agree after the Death of her Husband; but Hank contra; for if the Plaintiff recovers, and the Baron dies, Execution ſhall be of the Goods of the Feme; or it may be, that the Term ſhall be expired in the Life of the Baron, or that the Feme will refuſe after the Death of her Husband.

In *Debt for Arrearages of a Leaſe* for Term of Years, the *Plaintiff ſuppoſed, that he leaſed to the Defendant* 14 *Acres of Land.* The *Defendant ſaid, as to* 4 *Acres he did not leaſe, and as to the reſt, that the Plaintiff leaſed them to the Defendant, and to his Feme, who is in full Life not named* &c. Judgment of the Writ. But the Opinion of the Court was, that it was not a good way to plead ſo; for he *ought to acknowledge the Leaſe of* 10 *Acres to him and to his Feme*, with an *alſque hoc that he leaſed the* 14 *Acres Modo & Forma* &c. Thel. Dig. 172. Lib. 11 cap. 42 S. 22. cites Hill. 17 E. 4. 7.

Avowry *becauſe W. B. held certain Land, out of which* &c. *of one J. B. as of his Manor of F. by Homage, Fealty, and Eſcuage*, viz. ſo much &c. and *conveyed the Seigniory of the ſaid J. B. to the Defendant, and ſhewed How, and conveyed the Tenancy to the Plaintiff by Que Eſtate*, and for Homage of the Plaintiff he avowed &c. The *Plaintiff ſaid, that at the Time of the Diſtreſs, nor ever after, he had nothing in the Land, unleſs jointly with F. his Feme of the Feoffment of W. F. to them, and to their Heirs, which F. is alive, and ſo the Avowry ought to have been upon both.* Judgment of the Avowry; by which Catesby avowed upon the Baron and Feme. Br. Avowry, pl. 96. cites 7 E. 4. 27. —— Thel. Dig. 45 Lib. 5. cap. 4. S. 14. cites Trin. 26 E. 3. 64. where it is ſaid, that for Arrears of Rent reſerved on a Leaſe for Years made to Baron and Feme, Writ of Debt may be brought againſt the Baron alone, and alſo againſt both.

2. **But 43 Ed. 3. 11. b. is, that it lies againſt both**; becauſe it is for the Benefit of the Feme, **and ſo** * 3 H. 4. 1.

* Br. Debt, pl. 55. cites S. C. ——

Br. Baron and Feme, pl. 29. cites S. C. but the Reaſon is not given there.

3. **The ſame Law where it is brought** upon a Leaſe for Life **made to them, the Action ſhall be brought againſt both.** 3 H. 4. 1.

Br. Debt, pl. 55. cites S. C. ——

Br. Baron and Feme, pl. 29. cites S. C. but ſays Nothing as to the Leaſe for Life.

4. In Writ of *Dower* brought *againſt Guardian in Chivalry* the Defendant vouched to Warranty, and the *Vouchee* came and *ſaid, that he had nothing in the Ward unleſs by reaſon of his Feme not named* &c. and demanded Judgment of the Voucher, yet the Voucher was adjudged good. Thel. Dig. 44. Lib. 5. cap. 4. S. 4. cites 30 E. 1. Voucher 299.

So a Writ of Dower was adjudged good brought *againſt the Baron alone as Guardian*, *who had* nothing in the Ward but *only a joint Eſtate with his Feme.* Thel. Dig 45. Lib. 5. cap 4 S. 5. cites Mich. 2 E. 3. fol. 43 & 58.

Writ

Writ of Dower may be againſt the Baron alone who has the Ward in Jure Uxoris. Br. Voucher, pl. 143. cites 48 E. 3. 20. ——— Br. Baron and Feme, pl. 26. cites S. C. [but miſprinted 30. in the large Edition] and S. P. for there Voucher does not lie. ——— S. P. Br. Baron and Feme, pl. 22. cites 47 E. 3. 9.

In *Formedon* againſt A. who *ſaid, that one was ſeiſed and in-feoffed B. to the Uſe of D. Feme of A. and that he took the Profits in Right of his Feme, not named* &c. and held no Plea, per Brian. Thel. Dig. 45. Lib. 5. cap. 4. S. 26. cites Hill. 3 H. 7. 2. and ſays ſee the ſame Year, fol. 13. and Quære.

5. Writ of *Contra Formam Feoffamenti* brought *againſt the Baron alone who had nothing in the Seigniory unleſs with his Feme*, was abated. Thel. Dig. 45. Lib. 5. cap. 4. S. 7. cites Trin. 31 E. 1. Jointenancy 35.

6. Where one is *Guardian in Socage in Right of his Feme*, the *Writ of Account for the Time before the Marriage* ſhall be brought againſt the Baron and Feme, and *after the Marriage* againſt the Baron alone. Thel. Dig. 45. Lib. 5. cap. 4. S. 11. cites 8 E. 2. Itin' Kanc' Brief 847.

7. Writ of *Quare Impedit* may be maintain'd againſt the Baron alone, notwithſtanding that he claims the Advowſon in Right of his Feme. Thel. Dig. 45. Lib. 5. cap. 4. S. 13. cites it as the Opinion of Hill 7 E. 3. 302.

* It ſeems this ſhould be (Petentis.)——

8. Writ De *Setta ad Molendinum* is abateable for Jointenancy with his Feme, not named Ex parte * Tenentis. Thel. Dig. 45. Lib. 5. cap. 4. S. 8. cites Hill. 13 E. 3. Jointenancy 13.

Fitzh. Jointenancy, pl. 13. S. C. is that the Tenant pleaded Jointenancy with his Feme &c. and the Plaintiff maintained that he was ſole Tenant, and the others e contra. ——— In the like Action the Baron and Feme joined. Hob. 189. pl. 233. but at the End of the Caſe is a Nota, that there was no Mention that the Action was brought by the Husband and Wife both, being only to recover Damages.

In *Raviſhment* of Ward, *and Ejectment of Ward by Guardian in Socage*, it is no Plea for the Defendant to ſay, that he has nothing but only in Right of his Feme, not named. Thel. Dig. 45. Lib. 5. cap 4. S. 25. cites Hill. 26 E. 3. 65. Gard. 159.

9. Where the *Baron has the Ward of the Body in Right of his Feme*, Writ of Ward brought againſt the Baron, without naming the Feme, ſhall abate. Thel. Dig. 45. Lib. 5. cap. 4. S. 27. cites Trin. 14 E. 3. Brief 279.

The Baron alone, without the Feme, may have Writ of *Raviſhment of Ward*; but in * Action againſt them, Writ of Ward ſhall be againſt both, *by reaſon of the Voucher*. Br. Baron and Feme, pl. 26. cites 48 E. 3. 30. [20.] ——Br. Voucher, pl. 143. cites 48 E. 3. 20. & S. P. becauſe the Defendant in Writ of Ward may vouch his Grantor.

Ejectment of Ward may lie againſt the Baron alone who has the Ward in Right of his Feme, without naming his Feme. Thel. Dig. 45. Lib. 5. cap. 4. S. 20. cites Trin. 48 E. 3. 20.

Adjudged in *Writ of Ward* brought *againſt Baron alone*, Mich. 2 E. 3 42. and ſo agrees Mich. 18 E. 3. 37. that *Jointenancy with his Feme* is a good Plea in Abatement of Writ of Ward; and ſo agrees Trin. 14 E. 3. Brief 279. and 48 E. 3 20. But the Contrary is adjudged in Raviſhment of Ward, 26 E. 3. 65. by Guardian in Socage. Thel. Dig. 45 Lib. 5. cap. 4. S. 6.

* S. P. Br. Baron and Feme, pl. 22. cites 47 E. 3. 9.

Ibid. cites Mich. 45 E. 3. 11. and Mich. 3 H. 4. 1. It ought to be againſt both. Hill. 17 E. 4 7.

10. A Writ of *Debt for Arrearages of Rent-charge* was maintained againſt the Baron, he being Tenant of the Land charged in Right of his Feme, without naming his Feme, viz. For the Arrearages *incurr'd after the Coverture*; but otherwiſe it ſhould be for the Arrearages before the Marriage. Thel. Dig. 45. Lib. 5. cap. 4. S. 14. cites Trin. 26 E. 3. 64.

11. In *Aſſiſe* it was *found that the Baron and Feme enter'd claiming as the Right of the Feme, and that the Feme had not any Right, nor any of her Anceſtors*, yet the Writ was abated by the Not naming of the Feme. Thel. Dig. 45. Lib. 5. cap. 4. S. 17. cites 35 Aſſ. 5.

12. If

12. If a Man *bails Goods to a Feme ſole*, and ſhe *takes Baron*, Action of *Detinue* lies againſt both; quod nota. Br. Baron and Feme, pl. 56. cites 39 E. 3. 17. per Cur.

Of Goods bailed *to the Feme to deliver to her Baron, which ſhe does*, the Action ſhall be againſt the Baron only. Br. Bailment, pl. 10. cites 2 H. 4. 21.——In Caſe of Detainer by the Feme, the Action ſhall be againſt the Baron; per Cur. obiter. Le. 312. pl. 433. Trin. 32 Eliz. C. B.

13. In Recordare the Defendant *avow'd upon the Baron, in Right of A. his Wife, becauſe Land was given in Tail, rendring 20 l. Rent, and convey'd the Land to A. Feme of the Plaintiff, and for the Rent avow'd upon the Baron only*, and *he pray'd Aid of the Feme, and had it.* They came and pleaded in Abatement of the Avowry, becauſe it was not made upon the Feme, and becauſe he had Aid of her before, therefore he was ouſted of it, and the Feme was ouſted alſo, tho' ſhe did not come till now; quod nota. Brooke ſays, Quod miror! For it ſeems that the Avowry is erroneous by Matter apparent, which is Cauſe of Repleader, or to have Writ of Error at this Day. But ſee that *after Iſſue had, the Avowry for Homage may be made upon the Baron only*; but here is no Mention of any Iſſue. Br. Avowry, pl. 74. cites 39 E. 3. 15.

14. If a Man is *bound in a Statute-Merchant to Baron and Feme*, or to a Feme alone, who takes Baron, and the *Baron releaſes all Actions* and Executions, *Audita Querela* upon Execution ſued by the Baron and Feme, ſhall not be ſued againſt the Baron and Feme, but againſt the Baron only. Br. Joinder in Action, pl. 92. cites 48 E. 3. 12.

Br. Audita Querela, pl. 11. cites S. C.—— Br. Baron and Feme, pl. 24. cites S. C.

S. C. ——Br. Brief, pl. 80. cites S. C.

15. If a Man *marries a Feme who is in Debt*, the Writ of Debt ſhall be brought againſt both. Thel. Dig. 45. Lib. 5. cap. 4 S. 19. cites Mich. 49 E. 3. 25.

Keb. 281. pl. 84. Paſch. 14 Car. 2. B. R. Robinſon v Hardy, S. P. ruled accordingly ——Ibid. 440. pl. 32. Hill. 14 & 15 Car. 2. B. R. Hardy v. Robinſon, S. C. & S. P. held accordingly, and cites 3 Aſſ. 11.

A *Feme ſole is indebted*, and *marries*; ſhe and her Husband ſhall both be ſued for her Debts, living the Wife; but if ſhe dies, the Husband ſhall not be charged with her Debts afterwards, unleſs Judgment was had againſt him and his Wife during the Coverture; for then he ſhall be charged by ſuch Recovery after her Death. F. N. B. 120 (F)

Indebitatus for Money due from the Wife dum ſola, was brought againſt the Baron only, and therefore Judgment was ſtay'd; and after, by Prayer of the Plaintiff, reverſed for Expedition. Keb. 440. pl. 32. Hill. 14 & 15 Car. 2. B. R. Hardy v. Robinſon.

16. *Treſpaſs* for *not repairing* of certain *Banks*, by reaſon of certain Land which the Defendant has in D. &c. *by which the Land of the Plaintiff was ſurrounded*; and becauſe the *Defendant had nothing in the Land, by which* &c. *but in Right of his Wife* not named, the Writ was abated; for they ought to have been joined &c. Br. Baron and Feme, pl. 32. cites 7 H. 4. 31.

Thel. Dig. 45. Lib 5. cap. 4 S. 21. cites S. C.—— Br. Joinder in Action, pl. 23. cites S. C.

S. C.——Br. Action ſur le Caſe, pl. 36. cites S. C.

17. In *Detinue of Charters* by one, if it appears by the Count that *one of the Charters concerns the Inheritance of his Feme*, who is not named, the Writ ſhall not abate, but only for this Charter, by the Opinion of the Court. Quære; for this Exception goes only to the Writ; but if it had been to the Action, it had been clear. Thel. Dig. 238. Lib. 16. cap. 10. S. 50. cites Paſch. 38 H. 6. 29.

18. If a *Feme ſole diſſeiſes me, and makes a Feoffment to her Uſe, and takes Baron*, I ſhall have Aſſiſe againſt both, as Parnour in Jure Uxoris. Br. Parnour, pl. 22. cites 4 E. 4. 17.

So if Baron and Feme *make Diſſeiſin and Feoffment to their Uſe*, Aſſiſe lies againſt both, and the Parnancy is in both in Jure Uxoris Br. Parnor de Profits, pl. 22. cites 4 E. 4. 17.

So if a *Feme Leſſee for Life takes Baron*, and after *Leſſor confirms the Eſtate of the Baron* to have *for his Life*, by which the Baron has a Reverſion for Life, yet if *Waſte* be committed after, the Action lies againſt Baron and Feme, and this *Reverſion* is not any Impediment. 17 E. 3. 68. b.

19. Where a *Leaſe for Years* is made *to Baron and Feme, reſerving Rent*, the Writ of *Waſte* ſhall be brought againſt both. Thel. Dig. 45. Lib. 5. cap. 4. S. 23. cites Hill. 17 E. 4 7.

And *ſo* it ſhall be *if the Baron and Feme, before the Marriage, be Co-Heirs and Parceners, if Partition be not made before the Marriage.* Thel. Dig. 44. Lib. 5. cap. 4 S. 1.

20. *In every Writ where Inheritance or Franktenement is demanded, and alſo where Seiſin of Inheritance is to be recover'd, if the Baron be ſeiſed thereof in Right of his Feme, or jointly with his Feme, by Purchaſe made before Marriage or afterwards, the Writ ought always to be brought againſt both jointly.* Thel. Dig. 44. Lib. 5. cap. 4. S. 1.

And it is *ſo* alſo *if the Land deſcend to them in Parcenary after the Marriage.* Ibid.

But if they be *Tenants in Common at the Time of the Marriage, or* if Tenancy in Common *deſcends to them after* the Marriage, Theloall makes a Quære how the Writ ſhall be brought; and ſays it ſeems to him, that *one Writ* ought to be *againſt the Baron alone for the Moiety*, and *another againſt the Baron and Feme for the other Moiety.* Thel. Dig. 44 Lib. 5. cap 4 S. 2.

21. Debt againſt Baron and Feme, upon a *Contract for Silks* bought of the Plaintiff *by the Feme for her own Wearing*, and for the Money which the Feme agreed to pay for the ſame the Action was brought. Three Juſtices held, that ſuch Contract during Coverture would not bind the Husband; but admitting it would, yet the Feme ought not to be joined in the Writ. 4 Le. 42. pl. 113. Mich. 19 Eliz. C. B. The Earl of Derby's Caſe.

22. A *Leaſe* was made *to try a Title* of a Houſe, and the *Leſſee enters* into the Houſe, and the *Wife of* the ſaid former *Leſſee ouſts him and farms the Houſe*; and after the Husband came there, yet the Ejectione firmæ was brought againſt the Husband only, and well. Noy 48. Clements v. Caſſye.

23. The *Husband* being *ſeiſed of a Houſe in Right of his Wife for her Life*, they leaſed the ſame to the Defendant who burned the Houſe. The Husband brought an Action alone againſt the Defendant for *Waſte* done to the Houſe; after a Verdict, it was mov'd that he could not maintain this Action alone, becauſe the Wrong was done to the Eſtate which he had in Right of his Wife, and it might ſo happen that no Loſs or Injury might accrue to him, for no Action might be brought againſt him by the Leſſor in the Life-time of his Wife; and if ſo, then he is not chargeable, and it never can be brought againſt him alone, and therefore the Wife ought to be joined in the Action, but the Court doubted; & Adjournatur. Cro. Eliz. 461. (bis) pl. 12. Paſch. 38 E. B. R. Jeremy v. Lowgar.

24. *Trover* by Feme, *Converſion* by Husband and Wife; Per Cur. this Action ſounds in Treſpaſs and ſhall be brought againſt both, and not againſt the Husband only. Le. 312. pl. 433. Trin. 32 Eliz. C. B. Marſh's Caſe.

Noy. 136. Hill. 7. Jac. S. C. but ſtates it, that the Baron and Feme were Leſſees of the Perſonage, and ſays it was reſolved

25. A *Feme Sole* being *Proprietor of a Parſonage married*, and then the *Husband alone brought an Action upon the Statute 2 Ed. 6 for treble Damages* againſt a Pariſhinor *for taking away his Tithes* after he had ſet them out. Whether the Husband may ſue alone the Court would adviſe; for though he may ſue alone for perſonal Things, yet where the Statute ſaith the Proprietor ſhall have the Action for the not ſetting forth &c. the Husband is not intended to be the Proprietor, but the Wife, and therefore ſhe ought to join. 2 Brownl. 9. Mich. 8 Jac. Ford v. Pomeroy.

that the Husband and Wife ought to have joined in the Action, becauſe it *is not for a Thing in Poſſeſſion*; and if the Husband dies, the Wife ſhall have the Damages and not the Executor of the Baron.

S. P. Where the Baron was poſſeſſed in Right of his Wife, and ſhe being joined with him in the Action

Action, it was objected that the Tithes being perſonal Chattels which belong'd to the Baron only, ſhe ought not to be joined; ſed non allocatur; for the Feme being Termor, the Baron is poſſeſſed of them in her Right, and the Action is given to the Proprietor or Farmer &c. and ſo the Action is well brought in both their Names and Judgment for the Plaintiff; and afterwards Error was brought and aſſigned in the Point of Law, and the Judgment was affirmed. Cro E. 608. pl. 9 & 613. pl. 1 Trin. 40 Eliz. B. R. Beadle v. Sherman.———13 Rep 47, 48. S. C. held accordingly. ——— Mo. 912. pl. 1288. S. C. and that it lies for the Baron alone.———Jenk. 279. pl. 2. S. C. adjudged and affirmed in Error.—— S. C. cited 2 Inſt. 250. ——S. P. Arg. 2. Mod. 270.

It was adjudged per tot. Cur. (abſente Richardſon) that where Baron and Feme brought Debt upon the Statute 2 E. 6. for not ſetting out Tithes, whereof the Baron and Feme were Proprietors, that the Action well lay; but when they bring other Actions of Tithes ſet out from the 9 Parts being Tithes ariſing from Lands in a Rectory which appertains to them; the Feme in ſuch Caſes ought not to join with her Baron. Jo. 325 pl. 5. Mich. 9 Car. B. R. Anon.

26. A *Promiſe* is *made by Baron and Feme, on a Conſideration paid to them for Diſcharge of an Annuity payable to the Feme* during her Life. The Wife dies; an Action is brought againſt the Baron, and counted of theſe Promiſes by the Husband and Wife and ſets forth a Breach; it was moved that the Action lies not, for that the Promiſe of a Feme Covert is void; but by Ley Ch. J. and Doderidge, the Feme being dead the Action lies, and the naming her Promiſe is void, but otherwiſe if ſhe had been alive; and Ley ſaid that if Demurrer had been join'd upon it, it had been ill, but not now after Verdict. Palm. 312, 313. Mich. 12 Jac. B. R. Rilley v. Stafford.

27. *Caſe for negligent keeping the Fire*, by which the Houſe of the Plaintiff was burnt, lies only againſt the Patrem Familiæ, and not againſt the Wife by the Cuſtom of the Realm. See Actions (B) pl. 7. Mich. 1 Car. Shelly v. Burr.

28. Caſe &c. upon an Inſimul Computaſſet, and alſo upon an Indebitatus Aſſumpſit for Wares bought by the Defendant; upon non Aſſumpſit pleaded, the Jury found that the *Wife dum Sole was indebted* to the Plaintiff *for Wares ſold* &c. and that *after her Marriage with the Defendant, he and his Wife accompted with the Plaintiff for the Money due, and upon the Accompt 9 l. 13 s. was found due to the Plaintiff, which the Defendant promiſed to pay*; in arguing this ſpecial Verdict, it was inſiſted for the Plaintiff that the Debt of the Wife is the Debt of the Husband, and he is to be charged in the Debet and Detinet, and that by this Accompt with the Husband he has made his proper Debt, and the Jury having found an expreſs Promiſe of the Husband, he may be charged alone; but it was anſwered that the *Accompt does not alter the Nature of the Debt, but only reduces it to a Certainty*, and that this Verdict does not warrant the ſecond Promiſe, which was for Wares bought by the Defendant, whereas the Jury find they were bought by the Wife dum ſola, and they conclude to both Promiſes, ſo that if either of them be not made good by the Verdict it is againſt the Plaintiff; and to all this Roll agreed, and Judgment was given againſt the Plaintiff. All. 72, 73. Trin. 24. Car. B. R. Drue v. Thorn.

29. If Baron be ſeiſed of Land in Right of his Wife charged with a *Rent-charge*, the Action for the *Rent arrear* ſhall be brought againſt the Baron only by Reaſon of *his taking the Profits*, for the Rent is the Profits of the Land. 11 Mod. 169. pl. 6. Paſch. 7 Ann. B. R. in Caſe of Billingſworth v. Spearman. The Action is brought againſt him as Tertenant, and not in Reſpect of the Eſtate, and if he lets the Land out again, the under Leſſee is chargeable in an Action for his Rent-charge. Holt's Rep. 106. S. C.———1 Salk. 297. pl 6. S. C. (tho' miſprinted as 7 W. 3. inſtead of 7 Ann.) but S. P. does not appear.

(Y) What

(Y) What Things a Woman may make *good* after the Death of her Husband, and how, and e contra.

Fol. 249.

Br Obligation, pl. 35. cites 4 H. 6, 5. S. C. & S. P. by Cockain, and that the Feme bringing an Action of Debt thereupon as Executrix to her Baron is a Waiver, but Brooke says Quære.——Fitzh. Debt, pl. 24. cites S. C. accordingly by Cockain.——Br. Baron and Feme, pl. 70. cites S. C. and the Feme may waive it.

1. If an Obligation be made to Baron and Feme, the Feme may refuse it after the Death of her Husband. 4 H. 6. 6. 9 Jac. B. adjudged, and by such Waiver this is made an Obligation to the Baron only.

Br. Refceit, pl. 150. cites S. C. & S. P. —Fitzh. Refceit, pl. 61. cites S. C. and 13 H 6. S. P.

2. If Baron and Feme join in a Leafe for Life of the Lands of the Feme rendring Rent, the Feme may make it good by Agreement after the Death of her Husband. 10 H. 6. 24. b. and shall have the Rent.

Fitzh. Refceit, pl. 61. cites S. C. & S. P. accordingly.———Br. Refceit, pl. 150. cites S. C. but S. P. does not appear.

3. The same Law, if they join in a Leafe for Years. 10 H. 6. 24. b.

Palm. 365. S. C. accordingly.

4. *Husband and Wife were Tenants in Special Tail,* Remainder *to T. S.* Remainder *over.* The *Husband made a Feoffment to Uses, and died,* and after his Death the *Widow levied a Fine.* Resolved by all the Justices, absente Ley Ch. J. that here was a Discontinuance made by the Baron, and that the Fine of the Feme, before Entry by her, has strengthen'd the Discontinuance, so that now she cannot enter to be remitted; for the Words of the Statute of * H. 8. are, That the Fine &c. of the Baron shall not be any Discontinuance, but that the Feme may enter; yet it is a Discontinuance till Entry, as Doderidge J. said. 2 Roll Rep. 311. Pasch. 21 Jac. B. R. Moor's Case.

* 32 H. 8. cap. 32. S. 6.

(Z) For what *Things* created *during the Coverture*, the Feme shall be *charged* after the Death of her Husband, by her Agreement or Disagreement.

1. If Baron and Feme accept a Fine rendring Rent, if she agrees to the Estate after the Death of the Baron, she shall be charg'd with the Rent. 50 Ed. 3. 9. b.

Both these Places cited are the S. C. * Br. Baron and Feme, pl. 29. cites S. C. but S. P. does not appear.———Br. Debt, pl. 55. cites S. C. but S. P. does not fully appear.

2. If a Leafe for Years be made to Baron and Feme rendring Rent, if after the Death of the Baron the Feme agrees to the Leafe, Debt lies against her for all the Arrearages incurr'd in the Life of the Baron. 2 H. 4. 19. b. * 3 H. 4. 1.

Br. Baron and Feme, pl. 29. cites 3 H. 4. 1. [and which is part of the S. C.] that after the Death of her Husband she may agree to the Leafe.

3. But after the Death of the Baron she may disagree to the Leafe. 2 H. 4. 19. b.

4. If

4. If *Baron alicns the Land of his Feme, and dies*, and the *Feme accepts Part in Dower*, this is a good Bar in Cui in Vita. Br. Cui in Vita, pl. 15. cites 10 E. 3.

If Baron aliens the Right of his Feme, and the Baron dies, and the *Alienee assigns the third Part of the Land* alien'd *to the Feme in Dower, without Deed*, she is remitted, and not barr'd nor concluded. Contra if it be by Deed or by Record. Br. ibid. cites 17 Ass. 3.

5. Of all *Reservations* &c. *depending upon the Land leased to Baron and Feme by Indenture*, there the Feme shall be bound if she agrees to the Lease. *Contrary* of *Collateral Covenant* or *Obligation* in the same Indenture, to bind them in a *Sum in Gross*. Br. Coverture, pl. 11. cites 45 E. 3. 11.

As Re-entry, and * doubling the Rent for Non-payment, or a Fine Nomine Pœnæ, which are reserved upon the Lease; but a Grant to distrain in other Land, or a Covenant charging the Person, and not the Land leased, As to oblige themselves in 20 l. for Non-payment of the Rent, or to give such Surety as the Counsel of Lessor should devise, shall not bind her; and for that Reason the Writ was abated. Br. Covenant, pl. 6. [but neither of the Editions cites any Book]——Br. Obligation, pl. 14. cites 45 E. 3. 11. that of a Bond for a Sum in Gross, in the same Deed, she shall not be charged.

Lease to Husband and Wife; *they covenant* to do no Waste, or repair &c. The Husband dies; the Wife survives, and holds in. If the *Wife commits Waste*, or not repairs the House, no Action lies against the Wife; but to such a Lease she is tied to pay the Rent, or perform a Condition made by the Part of the Lessor, but not the Covenants of the Lessee. Brownl. 31. cites 28 H. 8.——She is punishable for Waste done during the Coverture. Arg. 2 Brownl. 71. Portington's Case.——She is liable to *Repairs*, and to a *Nomine Pœnæ*, for Non-payment of Rent at the Day, according to the Covenants in the Lease. Arg. 2 Roll Rep. 63, 64. cites 45 E. 3. 11.

* 2 Roll Rep. 63. Arg. cites 45 E. 3. 11. S. P. and that so she shall be bound, if she had covenanted to *repair the Houses*.

6. Cui in Vita, *supposing that the Tenant had not Entry unless by her Baron*, Cui ipsa in Vita contradicere non potuit. *Port. said the Baron and this his Feme gave the Land to T. N. in Tail, rendring Fealty and a Rose; the Baron died, and the Feme distrain'd him for the same Services, by which T. did to her Fealty, and paid the Rose, which she accepted*; Judgment si Actio; and the Opinion of the Court was, that this is a good Bar, by which she took Issue that she did not accept the Rose post mortem Viri, prist; and the others e contra. Br. Barre, pl. 27. cites 21 H. 6. 24.

Br. Cui in Vita, pl. 20. cites S. C.

7. If a Man *leases for Life to Baron and Feme*, and the *Baron does Waste and dies*, if *she occupies the Land* she shall answer for the Waste of her Baron. *Contra if she waives* the Possession, and does not occupy it. Br. Barre, pl. 27. cites 21 H. 6. 24. per Ascu. J.

Br. Waiver de Choses, pl. 10. cites S. C.—— See Tit. Waste, (R) pl. 3, 4, 5, 9. and the Notes there.

8. If the *Baron and Feme make Exchange, he dies, and she enters* and occupies, this is a Bar to her; *contra if she waives* it, and does not occupy. Br. Barre, pl. 27. cites 21 H. 6. 24. per Newton.

S. P. Br. Cui in Vita, pl. 13. cites 16 E. 4. 8.—— If Baron and Feme, seised in Jure Uxoris, make an Exchange, and the Baron dies, and the Feme agrees to the Exchange, she shall be bound thereby. Br. Eschange, pl. 9. cites 9 H. 6. 52.——Such Exchange is good, if the Feme will agree to it after the Death of the Baron; per Keble. Kelw. 10. a. Hill. 12 H. 7.

9. If the *Baron alone, seised in Jure Uxoris, leases for Life*, and the *Baron dies*, the *Feme shall not have Action of Waste*; for she was not Party to the Lease; per Paston. And hence it follows, that the Feme *by the Acceptance of the Rent*, where she was not Party to the Lease, shall not be bound, *if it was* upon a *Lease for Years*, but *may enter*; *but* if it be a Lease *for Life*, *she is put to a Cui in Vita*; but there such Acceptance, where she was not Party to the Lease, is no Bar. Note the Diversity. Br. Barre, pl. 27. cites 21 H. 6. 24.

If *Baron and Feme lease Land for Life*, it is her Lease for the Time; for *by the Receipt of the Rent after the Death of the Husband, the Lease is affirm'd.* Br. Receipt, pl. 70. cites 24 E. 3. 18.——S. P. per Keble Kelw. 10. a. Hill.

Hill 12 H. 7. obiter ——But if the Leaſe be made by the Baron only, and he dies, and ſhe accepts the Rent, ſuch Acceptance ſhall not bind her; for ſhe was not privy &c. Br. Cui in Vita, pl. 1. cites 26 H. 8. 2.——Br. Acceptance, pl. 1. cites S. C.

If a Husband and Wife make a Leaſe for Years, and ſhe accepts the Rent after his Death, ſhe ſhall be liable to a Covenant. Agreed by Counſel on both Sides, and by the Court. Mod. 291. pl. 37. Trin. 29 Car. 2. B. R. in Caſe of Wootton v. Hele.

S. P. admitted, 2 And. 42 pl. 28. Hill. 38 Eliz. in Caſe of Marſh v. Curtis.

10. Where *Baron and Feme join in a Leaſe* of the Land of the Feme, *rendring Rent*, and the *Baron dies*, and after the *Feme accepts the Rent*, ſhe ſhall be bound; *contra where* the *Baron alone* makes a Gift, or Leaſe reſerving Rent, and he dies, the Feme accepts the Rent, there this ſhall not bind her; per Chocke. Note a Diverſity, quod nullus contradixit. Br. Acceptance, pl. 6. cites 15 E. 4. 18.

But if the Baron and Feme make a *Feoffment rendring Rent*, and the *Feme accepts this Rent*, this ſhall bind her in Cui in Vita. Ibid.——Br. Acceptance, pl. 1. cites S. C.

11. If the *Baron and Feme ſell the Land of the Feme*, and make a Feoffment, and the *Vendee by the ſame Indenture covenants to pay an Annuity of* 10 l. to them *during their Lives*, the *Baron dies*, the *Feme accepts* the 10 *l.* this is no Bar in Cui in Vita; for *this is by Covenant* &c. and *not as Reſervation* or Rent. Br. Cui in Vita, pl. 1. cites 26 H. 8. 2.

Contra where the *Baron alone makes the Feoffment with Reſervation*, and the Feme accepts the Rent, this ſhall not bind her; for ſhe was not privy &c. Note a Diverſity. Ibid.——Br. Acceptance, pl. 1. cites S. C.

S. C. cited Arg. 2 Roll Rep. 132.—It was held per Cur. that by the Acceptance of the 2d Baron ſhe is concluded during the Term.

12. *Husband and Wife* by Indenture, *made a Leaſe for Years rendring Rent*; the *Leſſee enter'd*, and the *Husband died before the Day of Payment*, *and ſhe before ſuch Day married a ſecond Husband*, *who accepted the Rent at the Day and afterwards died.* It was held by three Judges, that the Wife having by Marriage reſigned to her Husband her Power which ſhe had of avoiding the Term, and his Acceptance of the Rent had made the Leaſe good; but Brook J. e contra; the Reporter ſays, Ideo Quære. D. 159. a. pl. 36. Paſch. 4 & 5 P. & M. Anon.

D. 159. Marg. pl. 36. cites Paſch. 22 Eliz. Rot. 1587.

4 Le. 5. pl. 22. Mich. 29 Eliz. B. R. the S. C. but S P. does not appear.

13. If *Feme Covert and another*, *at her Requeſt*, *are bound in a Bond for the Debt of the Feme*, and after her Husband's Death *ſhe promiſes to ſave the other harmleſs* againſt the *Bond*, ſhe is not bound. Godb. 138. pl. 164. Mich. 27 Eliz. B. R. reſolved per tot. Cur. in Caſe of Barton v. Edmonds.

——3 Le. 164. pl. 215. Edmonds's Caſe, S. C. but S. P. does not appear.

14. A *Decree* was made *on the Conſent of a Feme Covert in Court*, on her being there examined by Finch C. and giving her Conſent in Court, *tho' no Party to the Bill.* 2 Chan. Caſes, 101. Paſch. 34 Car. 2. Paget v. Paget.

15. Where a Feme Covert *agrees to join in a Fine* with her Husband, or to make a *Surrender*, though the Husband dies before it is done, Chancery will compel her to perform the Agreement. 2 Vern. 61. pl. 52. Paſch. 1688. Baker v. Child.

16. Baron and Feme agreed to an *Incloſure*. She was bound by it, even as to her Jointure; per Cur. 2 Vern. 225. in pl. 206. Paſch. 1691. cites Lady Widdrington's Caſe.

Chan. Caſes, 253. 255. Hill. 26 & 27 Car 2. Maynard v. Moſely, S. C where the Court held, that tho' the Feme is not bound by her Agreement during Coverture, yet if, when a Widow,

17. *Proviſion* was made for the Wife an Infant, by the Husband *in lieu of her Jointure* by Articles *during Coverture*; after the Death of the Husband ſhe enters on 46 l. per Ann. Part thereof only, and was thereby held bound to perform the whole Articles. 2 Vern. 225. pl. 206. Paſch. 1691. cited per Cur. as Sir Edward Moſeley's Caſe.

Widow, ſhe acts according to ſuch Agreement, ſhe is bound by it.——S. P. but when her acting, when a Widow, may be indifferently apply'd either to her former Intereſt or to her Agreement, ſhe ſhall not be bound by it. 2 Chan. Caſes, 26. Paſch. 32 Car. 2. Thomas v. Lane.——If ſhe had a Title prior to her Agreement, ſhe ſhall not be bound by her Entry. Ibid. 27.

18. In Bill for Fees &c. The Plaintiff was *Solicitor imploy'd in a Suit by the Husband and Wife, for a Term of Years in the Right of his Wife*, but the *Husband died and left no Aſſets*, and the Bill was to have a Satisfaction out of this Term ſo recovered and enjoy'd at this Time by the Wife. Ld. Chan. ſaid it is ſtrong Equity, that the Plaintiff ſhould have a Satisfaction out of this Term ſo recovered by his Coſts and Pains, ſince the Wife has the Benefit of it, and conſented to it; and *decreed that the Plaintiff have a Satisfaction of his Demands againſt the Defendant out of the Profits of this Term*; and that he be examined upon Interrogatories what he hath received, and the Defendant to pay the Coſts of this Suit. MS. Rep. Paſch. 2 Geo. Canc. Sharſton v. Hipſley.

19. Baron, in Right of his Wife, *was ſeiſed in Fee of a Share in the New River Water*, and they *both joined in a Mortgage by Leaſe for* 1000 *Years by Deed without Fine*, reſerving a Pepper-Corn Rent. The Baron died, and ſhe when a Widow received the Profits, and *paid the Intereſt*. The Mortgagee brought his Bill to foreclose the Feme, and inſiſted, that her Payment of the Intereſt while a Widow affirmed the Leaſe. But the Maſter of the Rolls held, that this being the Inheritance of the Feme, there ought to have been a Fine; that if there had been a *Rent reſerved*, her Acceptance of it would have affirmed the Leaſe, but that here is No Acceptance, and the Leaſe is of an *incorporeal Thing*, out of which Rent could not well be reſerved; wherefore the *Leaſe expiring by the Death of the Husband*, the Mortgage is alſo thereby determined, and nothing remaining to foreclose, and this being admitted on both Sides, and appearing upon the Opening, his Honour diſmiſſed the Bill, but without Coſts. 2 Wms's Rep. 127. Paſch. 1723. Drybutter v. Bartholomew.

20. Plaintiff prayed Injunction to ſtay Defendant's Proceedings at Law upon this Caſe. Duke Hamilton brought an *Ejectment in his own and his Wife's Name, for certain Lands that deſcended to the Dutcheſs during the Coverture, and employed the now Defendant as his Attorney*. The Duke died, pending the Suit, and the Dutcheſs continued Mr. Incledon, Attorney, to proſecute the Suit, and now he has brought his Action for all the Money expended in that Suit, as well in the Duke's Time as in the Dutcheſs's againſt the Dutcheſs, and has recovered a Verdict at Law. It was argued, 1ſt. That it is Matter of Account. 2dly, That he has, by his Anſwer, ſubmitted to the Judgment of the Court, whether the Dutcheſs ought not to pay it, and therefore he ought to ſtay till the Court has determined it. He inſiſts, that the Suit did not abate, and therefore that it is ſtill the ſame Retainer, but the Retainer is perſonally to the Duke, and cannot affect the Dutcheſs, but is a Charge upon the Adminiſtrator. He admits Money received from the Dutcheſs, but would apply that to diſcharge what was due in the Duke's Time, but it is a Maxim, that what Money is paid ſhall be applied according to the Intent of the Payer. It was argued e contra, that there was no Admiſſion of new Retainer, but only ſays he proceeded upon her Requeſt. He denies that he was ordered to keep a ſeparate Account. 2dly, They admit that there is no Aſſets of the Duke's to pay it. As to the Objection whether the Dutcheſs or the Adminiſtrator be chargeable, is proper Defence at Law, and ſo was that Matter, How the Payments were to be applied. They moved for a new Trial, and theſe Matters were inſiſted upon, and it was denied by the whole Court of Common Pleas. It is objected, that this is Matter of Account. MS. Rep. Dutcheſs of Hamilton v. Incledon, in the Exchequer.

count, and the ſame may be ſaid of every Attorney's Bill, but the Law has provided another Remedy, viz. to have it taxed. As to ſubmitting to the Judgment of the Court, that is only whether the Dutcheſs is chargeable, which is more proper for a Court of Law than Equity, and it has been determined in the Common-Pleas. This Verdict cannot be ſet aſide upon this Bill, and then there is no Uſe of an Injunction.

Lord Ch. B. ſaid, That this is not brought to be relieved againſt the Verdict, but againſt the Action. In Actions that ſound in Damages, if the Party makes Defence at Law, he cannot afterwards have Relief in Equity. The only Queſtion is, Whether at Law he can recover this againſt the Dutcheſs? This is proper to be determined at Law, and it has been there debated and determined. If the Judge who tried the Cauſe had been miſtaken in his Opinion, you would have had a new Trial. The Dutcheſs has the Benefit of what was done before the Duke's Death. We are not now determining the Cauſe, but only whether we ſhall ſtop their Proceedings, and I think we ought not to ſtop them. All Attornies Bills are Matters of Account, and the proper Method is to have them tax'd, and he does not ſubmit to Account.

B. Price went away before the Court gave their Opinions, but told his Brethren, he was of Opinion againſt an Injunction. Baron Mountague ſaid, that if this was the Caſe of a common Tradeſman who delivered Goods after the Husband's Death, he could not recover what was due before, or ſuppoſe the Dutcheſs had never employed Mr. Incledon after the Duke's Death, then he could not have recovered againſt her, and deſiring him to go on is a ſeparate Contract. This is a Charge all in her own Right, and he having recovered more than is confeſſed to be due in her Time, he has recovered ſo much wrongfully, and therefore in Conſcience ought to ſtay Execution. B. Page thought there ought not to be an Injunction; it is often a good Rule, that when more is recovered than ought to be, this Court will ſtay Proceedings at Law. If there has been Dealings which cannot be diſcovered at the Trial, it is proper for to be examined in a Court of Equity, but here is nothing in this Caſe but what was proper for a Defence at Law. But here is no Diſpute whether paid or received, but only who is chargeable, and this has been determined by the Ch. J. of the Common Pleas, and agreed to by the whole Court; for otherwiſe a new Trial would have been granted, and ſhall we condemn their Judgment upon a Motion? As to the Queſtion whether ſhe is chargeable, ſuppoſe it had been a Suit upon a Bond made to the Dutcheſs before Marriage, would not that ſurvive to her, and ſhe have the Benefit, then ought not ſhe in Conſcience to pay the Charges? She by her Act has made it her Debt; it was commenced for their joint Benefit. Suppoſe the Duke had bought a Piece of Silk for a Gown for the Dutcheſs and ſent it to the Makers, muſt not ſhe pay for the making before ſhe can have it, yet it was originally the Duke's Debt. He has ſubmitted only to the ſtating of it in his Anſwer. No Injunction was granted.

(Z. 2) Feme bound by Laches or Forfeitures during the Coverture, or what Act of the Baron ſhall forfeit the Eſtate of the Feme.

And Brooke ſays, ſo ſee that ſhe may

1. IN Aſſiſe, if a Man *leaſes to Baron and Feme*, and the *Baron aliens in Fee*, the *Leſſor may enter* and recover by Aſſiſe if he be ouſted, not-

notwithſtanding that the Feme *may have Cui in Vita after the Death of her Husband.* Br. Cui in Vita, pl. 9. cites 11 Aſſ. 11. have Cui in Vita, notwithſtanding

the Alienation and the Entry; for the Title of Entry is given by the Law for the Alienation only, and the Title of the Feme is by the Demiſe before * Notice. Br. Cui in Vita, pl. 9. cites 11 Aſſ. 11. —— * All the Editions are ſo, viz. (Notice) but it ſeems it ſhould be (Nota.)

It appears by Judgment in Aſſiſe, that where *Baron and Feme are Tenants for Life*, the Remainder to A. in Tail, and the *Baron aliens in Tail*, and A. has Iſſue and dies; the Iſſue may *enter for the Alienation to his Diſinheritance*, notwithſtanding that the Feme covert be alive, for *ſhe ſhall have Cui in Vita after the Death of her Husband.* Br. Cui in Vita, pl. 10. cites 43 Aſſ. 17.

2. *If* Feme Tenant for Life takes *Baron*, who *aliens in Fee*, and he in the Reverſion enters, and the Baron dies, the Feme ſhall re-have the Land. Br. Baron and Feme, pl. 86. cites 29 Aſſ. 43. Br. Forfeiture de Terres, pl. 35. cites S. C. and that ſhe ſhall

have it by Petition if it be in the Hands of the King, and by Cui in Vita where it remains in the Hands of him in Reverſion.

3. If the *Baron claims Fee in Quid juris clamat*, or *diſclaims in Avowry*, by which the Lord recovers in the Quid juris clamat, the Feme has no Remedy. Br. Baron and Feme, pl. 79. cites 9 H. 6. 52. per Martin. This ſhall bind the Feme in whoſe Right the Baron

held the Land. Br. Coverture, in pl. 76. cites S. C. by Martin.

4. If a Man *infeoffs a Feme upon Condition*, or leaſes to her, rendring Rent, with a Condition of Re-entry, and *ſhe takes Baron, who breaks the Condition*, and the Feoffor or Leſſor enters, the Feme ſhall be bound Br. Coverture, pl. 5. cites 20 H. 6. 28. It was agreed, that if *Lands are given to Feme ſole on Condition*, and ſhe

takes Baron, who breaks the Condition, the Feme ſhall be bound. Mo. 92. pl. 229. Trin 20 Eliz. Anon. —— If a Feoffment be made, reſerving a Rent, and if not paid in a Month the Rent to be doubled, and the Feoffee dies, and the Land deſcends to a Feme covert, and the Rent is not paid within the Time, the Forfeiture ſhall take Place, tho' otherwiſe in Caſe of an Infant; for the Statute of Merton, cap. 5. of Non current Uſuræ, &c. does not extend to a Feme covert. Co. Litt. 246. b.

5. If *Feme Tenant for Life takes Baron*, and *they are impleaded*, and *pray Aid of a Stranger*, and the *Baron dies*, he in the Reverſion cannot enter; for this is the Act of the Baron. Br. Baron and Feme, pl. 86. cites 15 E. 4. 29.

6. If a *Leaſe for Life* is made *to A.* the *Remainder to a Feme ſole for Years*, and *they inter-marry*, and Waſte is committed, and the Leſſor brings an Action of Waſte, he ſhall recover as well the Eſtate for Years as for Life; Per Dyer Ch. J. 2 Le. 7. in pl. 7. 16 Eliz. C. B.

7. Feoffment to the Uſe of a Feme for Life ſhe being ſole at the time, Remainder to the right Heirs of their two Bodies begotten, Remainder to the right Heirs of the Feoffor in Fee. They inter-marry. Baron having Tenants at Will in the ſame Land, deviſed the Reverſion in Fee to his Wife, *ita quod ſhe ſhall pay* his Debts and Legacies, *and perform his laſt Will*, and by the ſame Will deviſed that his Tenants ſhall have his Tenements for Life and dies; Feme takes other *Baron*, who *outſts the Tenants at Will*, this is no Forfeiture of the Remainder. Mo. 92. pl. 229. Trin. 20 Eliz. Anon. But if the Will had been on Condition, *that his laſt Will ſhould be performed*, it would have been otherwiſe. Mo. 92. pl. 229. Trin. 20 Eliz. Anon.

8. A. *deviſed Land to his Wife during the Minority of his Son, upon Condition that ſhe ſhall not do Waſte* during the Minority of his ſaid Son, and dies; *the Wife takes a Husband*; the *Husband commits Waſte*; Per tot. Cur. it is no Breach of the Condition. 2 Le. 35. pl. 46. Hill. 33 Eliz. C. B. Cobb v. Prior. Lat 20. cites S. C. —— 2 Le. 48. pl. 62 S. C. in totidem Verbis.

D. 159 a. Marg. pl. 36. cites S. C. and ſays, that this Diverſity was vouched by Noy Attorney-General in Lent Reading, 1632.

9. *A. Tenant for Life*, Remainder in *Fee to M. a Feme Covert. A. levied a Fine.* The *Baron died. M. took a ſecond Baron. A. died. 5 Years paſs.* The ſecond Baron dies. M. is barr'd, and not remedied by 32 H. 8. cap. 28. In this Caſe a *Diverſity* was taken *between a Warranty and Right to the Land*; As to the *Warranty the Feme cannot be conuſant thereof* to avoid it, and therefore ſhe does not ſubmit her Aſſent to her Baron, and in ſuch Caſe the Laches of the Baron ſhall not prejudice her; but otherwiſe it is of *Right to the Land* which is manifeſt, and therefore the Neglect of the ſecond Baron ſhall prejudice her; but notwithſtanding this Diverſity it wrs adjudged, that the Feme ſhall be bound in this Caſe. D. 72. b. Marg. pl. 3. cites 43 Eliz. Wheddone v. Wentworth.

10. If a *Feme* be *infeoffed*, either *before or after Marriage, reſerving a Rent, and for Default of Payment a Re-entry*; in that Caſe, the Laches of the Baron ſhall diſinherit the Wife for ever. Co. Litt. 246. b.

Theſe Words are general, but are particularly to be underſtood, viz when the *Wrong* was *done to the Wife during the Coverture*;

11. If *Husband and Wife*, as *in Right of the Wife, have Title* and Right to enter into Lands which another hath in Fee, or in Fee-tail, and ſuch Tenant dies ſeiſed &c. in ſuch Caſe the Entry of the Husband is taken away upon the Heir which is in by Deſcent; but if the Husband die, then the Wife may well enter upon the Iſſue which is in by Deſcent; for that no Laches of the Husband ſhall turn the Wife, or her Heirs, to any Prejudice nor Loſs in ſuch Caſe, but that the Wife and her Heirs may well enter where ſuch Deſcent is caſt during the Coverture. Litt. Sect. 403.

for if a *Feme ſole* be *ſeiſed* of Land *in Fee, and is diſſeiſed, and then takes Husband*, in this Caſe the Husband and Wife, as in the Right of the Wife, have Right to enter, and yet *the dying ſeiſed of the Diſſeiſor* in that Caſe ſhall *take away the Entry of the Wife after the Death of the Husband*, and the Reaſon is as well for that ſhe herſelf, when ſhe was ſole, might have entred and re-continued the Poſſeſſion, as alſo it ſhall be accounted her Folly that ſhe would take ſuch a Husband which would not enter before the Deſcent. Co. Litt. 246 a ——*But* there *if the Woman were within Age at the Time of her taking of Husband*, then the dying ſhall not, after the Deceaſe of her Husband, take away her Entry, becauſe no Folly can be accounted in her, for that ſhe was within Age when ſhe took Husband, and after Coverture ſhe cannot enter without her Husband, all which is implied in the ſaid &c. Co. Litt. 246. b.

Per Doderidge J. in ſome Caſes the Heir is bound, and in ſome he is not. If *Feme Copyholder takes Baron, who makes a Leaſe for Years*, this binds the Wife for ever; but *if ſhe was married when the Copyhold came to her* it is otherwiſe.

12. *Feme Copyholder* takes Baron; Baron makes a Leaſe for Years, and dies, and the Wife dies. Whether the Forfeiture continues againſt the Heir of the Feme? Chamberlaine J. puts a Difference between *Condition collateral* as this, and *cutting Trees*; this does not bind the Feme after the Deceaſe of the Baron, but if Baron forfeits for ‡ *Non-payment of Rent* it is otherwiſe; and Doderidge J. put the Caſe, that if the *Leſſor recovers againſt the Baron in* ‖ *Waſte*, and Baron dies, the Feme ſhall not avoid it; but if the Baron *makes Feoffment*, and the Feoffee enters, and the Baron dies, the Feme ſhall avoid it; but if the Baron commits Forfeiture for Non-payment of Rent, the Feme ſhall not avoid it if the *Lord enters in the Life of the Baron*, but if not it is otherwiſe. 2 Roll Rep. 344. Trin. 21 Jac. B. R. in Caſe of Savern, alias Saben v. Smith.

2 Roll Rep. 361. S. C. Savin, alias Sabin v. Smith.——2 Roll. Rep. 372. S. C. Judgment for the Heir of the Feme Niſi &c.——Palm. 383. S. C. the Forfeiture does not bind the Feme, and Judgment accordingly, niſi &c.—— * Cro. C 7. S. C. adjudg'd that it ſhould not bind, and affirmed in Error as to that Point, but other Errors being aſſigned the Court would adviſe.——By Death of Baron the Forfeiture is purged. Godb. 344. in pl. 438. S. C. adjornatur.

‡ If the Husband denies to pay the Rent, *or to do Suit at Court*, theſe are preſent Forfeitures which ſhall bind the Wife, for they are Things that the Lord muſt of *Neceſſity* have, but a Leaſe is no great Prejudice to the Lord, and it is good to adviſe of it. Cro. E. 149. pl. 18. Mich. 31 & 32 Eliz. b. R. Hedd v. Chaloner. —— Le 146. pl. 204. S C. but S. P does not appear. ‖ 4 Rep. 27. Clifton v. Molineux —— Said by two Juſtices to have been adjudged a Forfeiture to bind the Wife. Cro. E. in Caſe of Hedd v. Chaloner.

13. *Feme Covert* is *Heir to a Copyholder*, and there are three Proclamations made, and ſhe and her Husband *do not come in*, the Lord ſhall ſeize, and it is a Forfeiture during the Coverture; Per Holt Ch. J. Show. 88. 1 W. & M. obiter.

(Z. 3) Forfeited what. By Crimes of either.

1. A Man *infeoff'd Baron and Feme in Fee*, the *Baron was found Guilty of Felony*, and it was agreed that the *Feme* by ſurviving of the Baron *ſhould have the Entirety*, notwithſtanding the Attainder; for upon Purchaſe during the Coverture, there are no Moieties between the Baron and Feme, and therefore ſhe ſhall have all by the Survivor. Br. Forfeiture de Terres, pl. 28. cites 4 Aſſ. 4.

Br. Aſſiſe, pl. 114. cites S. C. —— Br Reſeiſer, pl. 16. cites Br. S. C. but S. P. as to the Wife's having the Land by ſurviving the Baron, does not appear.

2. *A. Covenants* with B. by Deed, *in Conſideration of the Marriage of the Daughter of A.* with the Son of B. *and* 100 *l.* paid, *to ſtand ſeiſed to the Uſe of the ſaid Daughter for* her *Life*, and afterwards *to the Heirs of her Body by her Husband begotten*. This Conveyance was made 31 H. 8. afterwards the *Husband commits Murder*, is attainted and executed. The Wife has an Eſtate Tail by this Conveyance, and the Uſe is well raiſed without Inrollment, for it is not raiſed for the Conſideration of Money only, as the Statute of 27 H. 8. of Inrollment ſpeaks. This Eſtate is not forfeited, but preſerved in the Caſe of Murder and Felony, by the Statute of Weſtm. 2. and for Treaſon alſo in this Caſe; for the Statute of 26 H. 8. cap. 13. which gives a Forfeiture of Eſtates Tail to the King for *Treaſon*, is where he who commits it has an Eſtate of Inheritance, but in this Caſe the Husband has no Eſtate of Inheritance, the Wife alone has; By all the Judges of England. Jenk. 203. pl. 27.

3. If the *Wife* be *attainted of Felony*, the Lord by Eſcheat ſhall enter and put out the Husband; otherwiſe it is, if the Felony be committed *after Iſſue* had. Co. Litt. 351. a.

4. A *Wife kills her Husband*, the *Husband's Goods* are forfeited. Jenk. 65. pl. 22.

5. A *Husband and Wife are Jointenants* for a Term of Years; the *Husband is felo de ſe, or* ſuppoſe *the Wife* be, the ſaid Term is forfeited. Jenk. 65. pl. 22.

6. The *Husband has a Term for Years, ſo has the Wife*; the Forfeiture of the Husband forfeits his own and his Wife's Term. The ſame Law as to the Forfeiture of the Wife concerning her Term. Jenk. 65. pl. 22.

7. *Tenant in Tail general makes* a *Feoffment* to the Uſe of *himſelf and his Wife and the Heirs of their two Bodies*, he *has Iſſue* by the ſaid Wife. After the 27 H. 8. of Uſes in the 28 H. 8. the Husband *commits Treaſon* 29 H. 8. he is attainted and Executed. The *Wife ſurvives* him; ſhe is Tenant in Tail; for ſhe was neither the Offender nor Heir to him. The Wife dies. The Rights of the firſt Tail and the ſecond Tail are forfeited for this Treaſon, by the Statute of 26 H. 8. cap. 13. By all the Judges of England. Jenk. 268. pl. 21.

Hob. 334. to 348. 13 Jac. Sheffield v. Ratcliffe. — Jo. 69 to 82. pl. 6 Paſch. 1 Car in the Exchequer Chamber. — Palm. 351 to 358 Hill. 20 Jac. Ld. Sheffield's Caſe, S. C. argued in the Exchequer —— Godb. 300 to 326. pl. 417. S. C. in Cam. Scacc. —— Het. 150. S. C. argued.

8. If

8. If the *Husband and Wife have an Eſtate Tail*, and the *Husband is attainted of Treaſon*, the Land is forfeited. [But it ſeems here, that if the Wife has an Eſtate Tail, and the Husband is attainted of Treaſon, the Land is not forfeited.] Jenk. 203. pl. 27.

(A. a) What Things a Feme ſhall *have* after the Death of her Baron. What *Actions*.

Br. Treſpaſs, pl. 340 & 341. cites S. C. but S. P. does not appear in either.———Palm. 313. Mich. 20 Jac. B R. in Caſe of Peters v. Roſe, S. C. cited per Cur. & 7 E. 4.

1. A Feme ſhall have Treſpaſs after the Death of her Baron, for Trees cut upon her Land during the Coverture. 18 Ed. 4. 15. 39 H. 6. 45.

Br. Baron and Feme, pl 14. cites S. C.———Fitzh. Briefe, pl. 561. cites S. C. & S. P. by Finch.———See Br. Chattels, pl. 3. cites 14 H. 4. 24.

2. The Feme ſhall have Raviſhment of Ward by Survivorſhip, where the Ward was joint to Baron and Feme. 43 Ed. 3. 10.

Br. Baron and Feme, pl. 14. cites S. C. for it is Chattel real.———Fitzh. Briefe, pl. 561. cites S. C. & S. P. by Finch.

3. So ſhe ſhall have an Ejectment of Ward by Survivorſhip. 43 Ed. 3. 10.

4. If a Baron pulls down a Houſe which he hath in the Right of the Feme, and gives away the Timber, the Feme ſhall not have an Action for this after the Death of her Baron. 43 E. 3. 26. b.

S P. And that the Feme was reſtored to the Damages loſt and to the Advowſon, and recovered other Damages by the Attaint, becauſe if the firſt Damages had not been levy'd of the Goods of the Baron, they ſhould have been levied of the Goods of the Feme who was Party to the Judgment; and therefore *the Attaint furviv'd as well for the Damages as for the Principal.* Ibid pl. 46. cites 46 Aſſ. 8.

5. Where *Baron and Feme loſe in Quare Impedit*, and the *Baron dies*, the *Feme ſhall have the Attaint and not the Executors*, notwithſtanding that it was averred that the Damages were paid of the Goods of the firſt Baron, Quod Nota. Br. Jointenants, pl. 7. cites 46 E. 3 23.

6. In *Waſte*, if the *Baron and Feme*, ſeiſed in Jure Uxoris, *leaſe for Years*, the Baron dies, and the Feme brings Waſte, this Action lies well; for this Leaſe is not void, and now the bringing the Action affirms the Writ good. Br. Baron and Feme, pl. 48. cites 22 H. 4. 24.

Br. Bailment, pl. 1. cites S. C. but is that though the Bailment is void between the Baron and the Bailee, yet it is good between the Feme and the Bailee if the Baron dies and the Feme ſurvives, Quod Nota [And ſo is the Year Book.]

7. If *a Feme Covert bails a Deed*, and the *Baron dies*, the Feme ſhall have Writ of Detinue; for though the Bailment be void between the Baron and his Feme, it is good between the Feme and the Bailee now. Br. Detinue de Biens, pl. 5. cites 3 H. 6. 50.

8. In *Treſpaſs by Feme of Charters taken*, the *Defendant pleaded a Releaſe of the Baron, who is dead*, and a good Plea; for the Action was once extinct. Quære in *Detinue of Charters* by her. Br. Treſpaſs, pl. 405. cites 39 H. 6. 15.

If the Husband has an Advowſon

9. If a Man brings a *Quare Impedit* for an Advowſon which he hath in Right of his Wife, and hath Judgment to recover, and dies, the Wife

Wife ſhall *preſent*, and not the Executors of the Husband; per Stamford. Owen 82. Paſch. 4 & 5 P. & M. in C. B. Anon. in Right of his Wife, and the Church becomes void, and the Husband dies, the Executors ſhall have the Preſentation; per Anderſon Ch. J. Goldsb. 37. in pl. 10. Mich. 29 Eliz.

10. Promiſe was made to a Feme Covert, in Conſideration *ſhe would cure ſuch a Wound, to pay her* 10*l.* If Baron dies, ſuch an Action ſhall ſurvive to the Wife. Cro. J. 77. pl. 7. Trin. 3 Jac. B. R. Braſhford v. Buckingham.

11. *Judgment by Baron and Feme*, in Action brought by them both for Debt due to the Wife before Coverture. The Baron dies. The Wife ſhall have *Execution*, and not the Executor of the Husband. Chan. Rep. 235. 14 Car. certified by Hide J. and the Court confirm'd his Opinion in Caſe of Nanney v. Martin. Chan. Caſes, 27. S. C. & S. P. certified and confirmed by the Ld. Chancellor.

——2 Freem. Rep. 172. pl. 223. S. C. & S. P. accordingly.

12. *Caſe for Words by Husband and Wife againſt the Defendants Huſband and Wife*, and *pending the Action the Defendant's Husband died*, and the *Widow married again*. The Court inclined that the Writ ſhall abate, becauſe the Defendant by her Marriage had changed her Name; but took Time to adviſe. Style 138. Mich. 24 Car. B. R. White v. Harwood.

13. In Debt upon *Bond*, condition'd *to leave his Wife* 80*l.* *at his Death*, in caſe ſhe ſhould ſurvive, *ſo that ſhe might peaceably enjoy it to her own Uſe.* The *Defendant pleaded, that the Husband made his Wife Executrix, and left Goods to the Value of* 100*l.* *and by his Will deviſed that ſhe ſhould pay herſelf.* Upon a Demurrer the Plaintiff had Judgment, becauſe the Husband at his Death might leave Debts of an higher Nature, As Judgments &c. ſo as ſhe could not pay herſelf, and perhaps his Eſtate might be ſo incumber'd, that it would be better for her to renounce the Executrixſhip, and permit Adminiſtration to be granted to another, againſt whom to bring Debt on the Bond, as ſhe has done. 3 Lev. 218. Trin. 1 Jac. 2. C. B. Thomaſin v. Wood. 3 Salk. 65. pl. 9. S. C.

14. At Law an *interlocutory Judgment Quod Computet*, upon an Account brought by Husband and Wife againſt her Receiver, and the Husband dies, the Wife, and not the Executors of the Husband, ſhall purſue the Account; Per the Maſter of the Rolls. Gibb. 149. Mich. 4 Geo. 2. in Canc. in Caſe of Nightingale v. Lockman.

(B. a) What *Perſonal* Things [*ſhall ſurvive to the Feme.*]

1. IF an Obligation be made to Baron and Feme, the Feme ſhall have it by Survivorſhip. * 43 Ed. 3. 10. † 4 H. 6. 6. H. 5 Jac. B. 6. adjudged upon Demurrer, Tr. 10 Car. in Cam. Scacc. between *Spark and Fairemaner*, adjudged in a Writ of Error. Fitzh. Brief, pl. 561. cites S. C—— Br. Baron and Feme, pl. 14 cites S. C. † Br. Obligation, pl. 55. cites S. C——Fitzh. Debt, pl. 24. cites S. C.

2. So the Feme ſhall have a Recognizance by Survivorſhip. 43 Ed. 3. 10. 43 Fitzh. Brief, pl. 561. cites S. C. & S. P. by Finch.

Fitzh. Brief, 561. cites S. C.

3. But if Goods are given to Baron and Feme, the Feme shall not have them by Survivorship, but the Executor. 43 Ed. 3. 10.

4. If one is bound to a Baron and Feme in a *Statute-Merchant*, and the Baron dies, the Statute shall survive to the Feme, and she shall have Execution, (if the Baron had not made a Releaſe) and not the Executor of the Baron. Br. Baron and Feme, pl. 24. cites 48 E. 3. 12.

5. *Chattels Perſonal, which veſt in the Baron and Feme*, ſhall not ſurvive to the Feme. Br. Chattels, pl. 3. cites 14 H. 4. 24.

And she may bring an Action after the Death of the Baron

6. *Treſpaſs is done to the Inheritance of the Wife*; tho' the *Damages recovered* in an Action are not real, yet the Wife ſhall have them if the Husband dies before Execution; per 2 Juſtices. Owen 83. Paſch. 4 & 5 P. & M. in C. B. Anon.

for Treſpaſs done during the Coverture, and Damages ſhall go with the Action. 2 Roll Rep. 265. Mich. 20 Jac. B. R. Peters v. Roſe Edmonds.——Palm. 313. Peters v. Roſe, S. C. in Error, and Judgment affirmed.

D. 331. a. pl. 21. S. C. Anon. adjudged.—And. 22. pl. 45. S. C. adjudged.—

7. A. by Will gives *all the Reſidue* of his Goods to M. his Wife, whom he makes his ſole *Executrix*, to pay his Debts &c. M. after takes C. for her Husband, who makes Executors and dies. The Wife ſhall have the Goods; for ſhe took them as Executrix, and not as Deviſee. Mo. 98. pl. 242. Mich. 15 & 16 Eliz. Hunks v. Alborough.

Bendl. 219. pl. 252. S. C. adjudged, and the Pleadings.

But if he dies without any Diſagreement to his Wife's

8. A *Bond* was conditioned *to pay* 100 *l. to Baron and Feme.* Payment to the Husband alone is a good Plea, without naming the Wife. Goldsb. 73. pl. 16. Mich. 29 & 30 Eliz. May v. Johnſon.

Right in it, the Right to the Bond is in them both, and in caſe of his Death ſhall ſurvive to the Wife; per Ld. C. King. 2 Wms.'s Rep. 497. Mich. 1728. in Caſe of Copping v. - - - -

9. If the Baron makes a *Letter of Attorney to receive a Bond Debt* of the Wife's; if J. S. receives it, the Husband alone ſhall have an Account; Per Popham Ch. J. to which Fenner J. agreed. Goldsb. 160. in pl. 91. Hill. 43 Eliz. in Caſe of Huntley v. Griffith.

And the Baron may either ſue the Bond in his own

10. A perſonal Duty being a *Choſe en Action*, As a Bond to Baron and Feme, may well *lie in Jointure between a Baron and his Feme*, but otherwiſe of other perſonal Things; adjudged. Noy 149. Norton v. Glover.

Name, or join his Wife with him; ſaid per Cur. to be the better Opinion. Sty. 9. Paſch. 23 Car. Heliar's Caſe.

11. If an *Eſtray* comes into the Manor of the Wife, and the *Baron dies before Seiſure*, the Wife ſhall have it; for Seiſure gives the Property. Co. Litt. 351. b.

Cro. C. 345. in Caſe of Ld Haſtings v. Douglaſs.

12. Perſonal Goods of which the Feme has *Property*, are given to the Husband by the Marriage; but not ſuch, of which ſhe has a *bare Poſſeſſion*, as Goods bailed to her, or found by her, or which ſhe has as Executrix; but the Action of Detinue muſt be brought againſt them both. Co. Litt. 351. b.

But otherwiſe 'tis a Choſe en Action not veſted in the Husband,

13. *Legacy* of 10 l. was left to a Feme Covert, *payable* 18 *Months after* the Death of the Deviſor. Teſtator dies. The Husband may *Releaſe* it before the Time of Payment. Per Montague Ch. J. 2 Roll Rep. 134. Mich. 17 Jac. B. R. Anon.

and ſhall ſurvive. Arg. Gibb. 206. cites Mo. 452 pl 618. Goldsb 159. pl. 91.

14. By the Civil Law, an Acquittance by the Husband for a *Legacy* to the Wife is not ſufficient without the Wife's joining, but it is otherwiſe by our Law; and a Prohibition was granted. Hutt. 22. Mich. 16 Jac. Conisby's Caſe. Hob. 247. pl. 314. Mich. 16 Jac. Watts v. Conisby, S. C. & S. P.

ſeems to be admitted.——Het. 132. S. C. Hill. 4 Car. C. B. but ſeems only taken from Hob.

15. The *Benefit of a Decree for Baron and Feme* belongs to the Feme, and not to the Executors of the Baron; certified by Hyde J. and confirmed by the Court. Chan. Caſes 27. Mich. 15 Car. 2. Nanney v. Martin. Chan. Rep. 233. S. C. decreed accordingly.—2 Freem. Rep. 172. pl. 223. S. C. held accordingly.

16. The Portion of *an Orphan in the Chamber of London*, if the Husband die without altering the Property, ſhall go to the Feme; decreed by Ld. K. Bridgman, aſſiſted by Turſden and Wilde J. Chan. Caſes 181. Trin. 22 Car. 2. Pheaſant v. Pheaſant. 2 Vent. 343. S. C decreed accordingly, for it is a Choſe en Action, and not barely a Depoſitum.——3 Ch. Rep. 69 Pheaſant v. Pheaſant is not the S. P.

A. on his Son's Marriage with B. in Conſideration of 1200 l. paid, and of 1200 l. more due to B. by the Chamber of London, ſettles a *Jointure on her* of 240 l. per Ann. The Son dies. The Father by Bill claims the 1200 l. in the Chamber of London, as a Purchaſor, by making the Settlement; but the Son having done nothing to alter the Property, the Bill was diſmiſſed. Ch. Prec. 209. pl. 171. Mich. 1702. Rudyard v. Neirin.——S. C. cited 2 Vern 503.——2 Freem. Rep. 262. pl. 331. S. C. decreed accordingly. But the Reporter ſays that moſt of the Bar differed from the Lord Keeper in Opinion.

17. A *Bond to the Wife dum ſola* was by Marriage Articles to be paid to the Baron after 12 Months, and *he to purchaſe Land with it and ſettle* it on himſelf and Wife, and the Heirs of their two Bodies; Remainder to the Heirs of the Baron. They had Iſſue a Daughter. The Huſband dies, and the Daughter dies. The *Bond unalter'd* being a Choſe en Action ſurviv'd to the Wife, and was not liable at Law to Bond-Creditors, nor was the Intereſt due thereon. Cited 2 Vern. 55. as the Caſe of Lawrence v. Beverley. 2 Keb. 841. pl. 78. Mich. 23 Car. 2. Lawrence v. Beverleigh. S. C. adjudg'd.—S. C cited Nelſ. Ch. Rep. 165, 166.——

2 Vern. 58. cited per Maſter of the Rolls, and ſays the like Judgment has ſince been given in the Caſe of Whitwick v. Jermin.

18. A. and B. an only Daughter and Child, married to C. A. in 1656. made a nuncupative Will, and *bequeathed all his Eſtate to B and C.* The Court was of Opinion that ſince *B. and C.* had *took out Adminiſtration with the Will annex'd, as univerſal Legatees*; that the ſame was a ſufficient *Aſſent* to the Bequeſt, and thereby the *whole Eſtate of A. veſted in C. except Debts unreceived* and Choſes en Action, and was ſubject to the Will of A. That the Debts of A. unpaid at the Death of C. ſhall be in the firſt Place paid out of the Choſes en Action which did *ſurvive to B.* as Adminiſtratrix to A. That as to *Merchandize brought to England after the Death of A. and C.* in a Ship of which A. had an eighth Part, and which B. claim'd as ſurviving Adminiſtratrix, ſince the ſame remained *in Specie without Alteration*, they were in the ſame Condition with the other Goods of A. which did veſt in C. by his Bequeſt, and do not belong to B. but are to be diſpos'd according to A.'s Will, to purchaſe Lands for the Benefit of D. Fin. Rep. 370. Trin. 30 Car. 2. Gundry v. Brown.

19. *Money in Truſtees Hands* for the Benefit of a Feme Covert was decreed to the Wife, and not to the Executors of the Baron, he having made no particular Diſpoſition of it. Vern. 161. pl. 150. Paſch. 1683. Twiſden v. Wiſe.

20. *Bond*.

20. *In Debt on a Bond made to a Feme Covert during Coverture*, and by her Husband's Conſent, the Defendant pleads, that the Husband made him his Executor. It was held no good Plea; and 'twas ſaid that perhaps the Reaſon why he made him his Executor, was his giving that Bond. 2 Show. 247. pl. 249. Mich. 34 Car. 2. B. R. Checkley v. Cheekley.

If *Baron alone brings Debt on a Bond of the Wife's and recovers Judgment*, this alters

21. If there be a *Bond Debt* due to the Wife, the Husband may ſue alone without joining his Wife, but if the *Wife be joined in the Action*, and Judgment is recovered, the *Judgment* will ſurvive to the Wife, but not being join'd, the Intereſt does veſt by the Judgment in the Huſband, and will go to his Executors; Per Ld. Ch. Jefferies. Vern. 396. pl. 366. Paſch. 1686. in Caſe of Oglander v. Baſton.

the Nature of the Security and makes it the Baron's, for by this the Debt is turned into *Rem adjudicatam*, and is no longer a Choſe en Action; Arg. ſaid it had been ſo adjudg'd lately in B. R. Yet Ld. Cowper ſeem'd to think that ſuch a Judgment would not carry it to the Huſband's Repreſentatives againſt the Wife ſurviving. Ch. Prec. 415. Trin. 1 Geo. in Canc. in Caſe of Packer v. Windham.——G. Equ. Rep. 100. S. P. in S. C. in totidem Verbis.

22. *Wife's Portion, conſiſting of Choſes en Action* unaltered, and Lands of Inheritance ſhall ſurvive to her, notwithſtanding before the Marriage the Baron made a *Jointure* adequate to her Portion, and Ld. Jefferies diſmiſſed the Bill which was brought by the Creditors of the Baron to make them *Aſſets*. 2 Vern. 68. pl. 63. Trin. 1688. Liſter v. Liſter & al'.

23. A. by Will gives B. his Daughter 400 *l. and deviſed Lands to her till* his Son C. ſhould pay her this 400 l.——B. marries D. D.'s Father covenants to ſettle Lands of 100 l. per Ann. and C. the Brother covenants to pay the 400 l. to D. and on Payment the Lands deviſed to the Daughter were to be diſcharged of this 400l.——D. dies.——Decreed that the 400 l. ſhould go to B. The Lords Commiſſioners thought it ſtill continued a Charge on the Land, and as a *Choſe en Action* ſurviv'd to the Wife, though it was agreed that the Husband during the Coverture might have releaſed or diſcharged it. 2 Vern. 190. pl. 173. Mich. 1690. Bowman v. Corie.

24. By a Settlement made on the Marriage, the Baron and Feme were made *Jointenants for their Lives*. The *Baron dies, leaving the Land ſown with Corn*. The Queſtion was, whether the Emblements on the Land ſettled ſhould go to the Wife, or to the Executors of the Huſband, becauſe in the Caſe of Strangers they would ſurvive; but in the Caſe of Husband and Wife, Ld. Roll was of Opinion they ſhould go to the Executors of the Husband. The Court propoſed to each to take a Moiety, which was agreed to. 2 Vern. 322. pl. 311. Mich. 1694. Rowney's Caſe.

Decreed by the Maſter of the Rolls; and on Appeal to the Ld. Chancellor Somers,

25. A *Jointure was made in Conſideration of* 100 *l. Portion*, whereas the Wife had 150 *l. more* in her Brother's Hands. The Baron died. Decreed the Rolls, and confirmed on Appeal, that the 150 *l. ſhould ſurvive* to the Wife. 2 Vern. 502. Arg. cites it as the Caſe of Cleeland v. Cleeland.

he was of Opinion, that unleſs there was an Agreement that the Husband ſhould have the other 150 l. it will ſurvive to the Wife; but if the Settlement had been *in Conſideration of the whole Portion*, and had been equivalent to it, that would have *amounted to an Agreement* that the Husband ſhould have it. Chan. Prec. 63. pl. 58. Mich. 1696. Cleland v. Cleland.

26. Husband alone might bring Debt for *Portion promiſed to him with his Wife*, and though *Land* had been *ſettled* by Husband upon Wife *in Conſideration of her Fortune*, of which this Debt was Part, yet he having *not recovered it during Coverture*, the Wife ſhould recover it to her own Uſe. And though it was pretended that there was a *Recovery in Huſband's* Time, and that they would *prove by the Sheriff, who had a Writ of Execu-*

Execution, yet they having not *the Judgment on which* the Execution was, it was ruled they could not give that in Evidence; Per Holt. 12 Mod. 346. Mich. 11 & 12 W. 3. Anon.

27. If the Husband *aſſigns a Bond of the Wife's for a valuable Conſideration*, this will not bind the Wife if ſhe ſurvives; for ſhe claims Paramount; per Ld. Keeper Wright. Ch. Prec. 121. Trin. 1700. in Caſe of Burnet and Kinaſton. Ld. Keeper Wright ſaid, that perhaps an *Agreement to aſſign* might be otherwiſe, but he thought it would not. Ibid. ——S. C. cited 2 Vern. 502.

28. A Man marries a *Woman intitled to a Mortgage in Fee*, and *after Marriage aſſigns his Intereſt* in the Mortgage *to Truſtees, to call in the Money, and lay it out in Land, to be ſettled upon the Husband and Wife, and their Iſſue, Remainder to the Heirs of the Husband.* The Husband dies without Iſſue, and after the Wife dies. This Mortgage is as a *Choſe en Action*, and the Wife ſurviving, it ſhall go to her Executor, and not to the Executor of her Husband. 2 Vern. 401. pl. 371. Mich. 1700. Burnett v. Kinnaſton. The *Wife was not Party* to the Articles. Chan. Prec. 118. S. C —— Nor was there any *Conſideration*; per Ld. K. Wright.

Chan. Prec. 121. S. C.——S. C. cited Arg. Ch Prec. 416. and ſays the Reaſon was, that the Husband could transfer only the ſame Right that himſelf had.——Cowper C. ſaid, that *being a Mortgage in Fee, the Husband could not diſpoſe of it without the Wife*, and the Eſtate in her gave her a Right to the Money. Ibid. 418.——But where there were Articles before Marriage, by which the Husband was to diſincumber his Eſtate within 6 Months, (within which Time ſhe died) and for every 100 l. to ſettle 10 l. per Ann. tho' the Eſtate was but 70 l. per Ann. and the Fortune ſecured on Land was 1250 l. yet Ld. Harcourt decreed the 1250 l. (the Husband and Wife being dead) to the Adminiſtrator of the Husband, he being a Purchaſor by the Agreement, and having made ſome Progreſs in diſcharging the Eſtate. Ch. Prec. 312. Meredith v. Wynn.——Abr. Equ. Caſes, 70. S. C.

29. A *Mortgage for* 1300 *l. taken in a Truſtee's Name*, was decreed to the Executors of the Baron; per Wright K. who ſaid, that in all Caſes where the Baron makes *an equivalent Settlement*, it ſhall be intended he was to have the Portion. The Wife ſhall not have her Jointure and Fortune both, and the rather in this Caſe becauſe a Truſt, and the Baron could not come at it, ſo as to alter the Property, without the Aſſiſtance of this Court; and the Widow was condemn'd in Coſts. 2 Vern. 501. pl. 451. Trin. 1705. Blois and Martin, Executors of Ld. Hereford, v. Lady Hereford. 2 Freem. Rep. 282. pl. 353. Paſch. 1705. Norbone's Caſe, S. P. and ſeems to be S. C. and the Court held accordingly; and it was ſaid that this Caſe was the ſtronger, becauſe it might be a Queſtion whether this was a Choſe en Action; for being once Money in the Guardian's Hands, the Maſter of the Rolls was of Opinion, that it was not in the Power of the Grandmother, who was the Guardian, to turn it into a Choſe en Action, no more than a Guardian or Truſtee can turn Money into Land, ſo as to make it go to the Heir inſtead of the Executor.——See Ch. Prec. 414. Arg. S. P.

A Settlement made by the Baron, purſuant to an Agreement before Marriage, intitles him to the Wife's Fortune, tho' ſtanding out upon *Bonds and other Securities*; for hereby he becomes a Purchaſor, eſpecially if ſuch Settlement was made in Conſideration of that Fortune. Arg. ſaid that it had been ſeveral Times ſettled in Chancery. Gilb. Equ. Rep. 100. Trin. 1 Geo. in Caſe of Parker v. Windham.——Chan. Prec. 414. Arg. S. P.

30. If *Husband lends Money in his and his Wife's Name* on Mortgages and Bonds, and dies, the Wife is intitled to this by Survivorſhip, if there are Aſſets ſufficient without this Money to pay Debts; for ſhe is in the Nature of a *Joint-purchaſer*; per Harcourt K. 2 Vern. Rep. 683. pl. 608. Trin. 1712. Chriſt's Hoſpital v. Budgin & Ux'.

31. An *Aſſignment by the Baron of Choſes en Action* of the Feme's is not ſufficient to prevent its ſurviving to the Feme, in caſe ſhe ſurvives the Baron; for they are not aſſignable by Law; per Ld. C. Cowper. Ch. Prec. 419. Mich. 1715. Packer v. Windham. G. Equ. R. 103. S C. & S P. in totidem Verbis.

32. *Bond-Debtor to the Feme becomes Bankrupt.* The *Husband pays Contribution-Money*, and dies before the Diſtribution. Feme ſurvives; but dies before Diſtribution. Per Cowper C. Notwithſtanding the

Baron's paying the Contribution-Money, the Property was not alter'd, but the Debt remains a *Choſe en Action*, and ſurvived to the Wife; but directed the Feme's Executors to repay the Baron's Executors the Contribution-Money. 2 Vern. Rep. 707. pl. 629. Mich. 1715. Anon.

33. The Baron *may releaſe a Choſe en Action* belonging to the Wife. Arg. Ch. Prec. 414. Mich. 1715.

34. If *Truſtees pay the Wife's Fortune to the Baron*, ſhe can have no Remedy. Arg. Ch. Prec 414. Mich. 1715.

35. Feme *before Marriage ſaved* 350 *l. out of her Maintenance*-Money, which was in her Brother's Hands. The *Brother gave a Bond for it to the Baron*; but the Steward proving that the *Baron ſaid his Wife ſhould have the* 350 *l.* and that it ſhould be placed out for her Benefit; and having alſo, a little before his Death, ſaid *he gave it to his Wife*, and 3 Perſons preſent wrote it down, and atteſted it as Witneſſes, tho' not by Baron's Direction, or with his Knowledge; and tho' the Baron after made two Codicils, and in one of them deviſed ſeveral Things to the Wife, but took no Notice of the 350 l. or the Bond for it, yet Cowper C. decreed it to the Wife, not as a Gift from the Baron, but *as declared and intended originally for her ſeparate Uſe.* 2 Vern. Rep. 748. pl. 654. Hill. 1716. The Earl of Shaftsbury v. Counteſs of Shaftsbury.

It was anſwer'd, that there was an actual Agreement previous to the Marriage, that

36. A *Settlement was made by the Husband in Conſideration of a Security which the Wife had for* 3000 *l.* and it was held that it ſhould go to the Husband's Executors, the Wife having ſurvived him, tho' it was objected that no Aſſignment was made of it to him. L. P. Conv. 395. cites it as decreed by Ld. Cowper, 1716. Stanhope v. Thackher.

the Husband ſhould have the Portion; per Reynolds Ch. B. Ibid. 396.——Chan. Prec. 435. pl. 284. Trin. 1716. S. C. but S. P. does not appear.

37. Husband and Wife, having Iſſue one Daughter, *join in a Conveyance of the Wife's Lands*, and *agree that* 600 *l. Part of the Purchaſe-Money, ſhould be ſettled* in Manner following, viz. 30 *l. a Year, the Intereſt thereof to be paid the Husband during his Life*, and *after his Death to his Wife for Life, and after* their Deaths the Intereſt to be paid *to ſuch Daughter or Daughters as ſhall be begotten between them, till* they ſhall attain *their reſpective Ages of* 21, *or be married, and then the principal Sum to ſuch Daughter* or Daughters; *but in caſe there ſhall be no Daughter, then to the Survivor of the Husband or Wife. A. married the Daughter, and* in Conſideration of this 600 *l. made a Settlement* on her. The *Daughter died in the Life-time of her Father and Mother*, and ſoon after *the Mother died without Iſſue.* The Husband of the Daughter is intitled to it, as her Adminiſtrator. Chan. Prec. 489. pl. 304. Paſch. 1718. Hewitt v. Ireland.

38. The *Baron, on Marriage* of a Citizen of London's Daughter, *made a conſiderable Settlement* on her, *and ſurrender'd Copyholds, and gave her by his Will.* Her Father died, whereby ſhe became intitled, by the Cuſtom of the City, to Part of his Perſonal Eſtate, for Payment whereof *ſeveral ſpecifick Securities of Stocks were transferr'd to him and her jointly.* He afterwards *increaſed her Jointure conſiderably, but never alter'd his Will.* Per Ld. Chancellor, the Stocks undoubtedly belonged to the Husband; but a Husband may purchaſe to himſelf and his Wife, and here he takes to himſelf and his Wife, which is the ſame Thing. There is a conſiderable Acceſſion of Fortune to the Husband; and as this came by her, it would be very hard by Equity to take from her what the Law gives her; and ſo ordered ſo much of the Bill as ſought to make the Stocks in their joint Names the Eſtate of the Husband, to be diſmiſs'd. Select Caſes in Chan. in Ld. King's Time, 48, 49. 11 Geo. 1. Lannoy v. Lannoy.

39. A. *Tenant for Life, with Power to make a Jointure* of 100 l. a Year for every 1000 l. on his Marriage with M. with whom he received 8000 l. made a Jointure of 800 l. a Year, and *covenanted to make a further additional Jointure of* 100 *l. a Year, for every* 1000 *l.* which he ſhould receive, or be intitled to by Virtue of M's Father's or Mother's Will. A. died without Iſſue, at which Time *M. was intitled to one half of a Moiety of the Surplus of her Father's perſonal Eſtate.* Upon a Bill by the Creditors of A. to ſubject M's Share of the Moiety to the Payment of Debts, and upon a Bill by M. that in ſuch Caſe ſhe may have a further Jointure in Proportion to ſuch Share to be made by the next in Remainder, Ld. Chancellor King thought, that this could not be looked upon as bringing any further Portion to A. and that it was not reaſonable that A's Creditors ſhould have any Benefit of the Reſidue of M's Fortune if ever that ſhould be recovered, in regard ſhe *cannot have any Recompence in Conſideration thereof, purſuant to the Articles for parting with it*, and therefore decreed that ſhe keep Overplus of her Eſtate to herſelf, without having any additional Jointure, the Remainderman not being bound or affected by A's Covenant any further than warranted by the original Power. 2 Wms's. Rep. (648.) pl. 205. Mich. 1731. Holt v. Holt.—— And Gibſon v. Holt.

40. A. upon his Marriage with M. gave a *Bond to Truſtees, reciting, That by the Marriage he ſhould be greatly advanced in Riches to the Value of about* 500 *l. agreed to pay M.* 10 *l. a Year to her ſeparate Uſe, and that ſhe might diſpoſe of* 100 *l. by Will in his Life-time, and if ſhe ſurvives him, he is to leave her* 200 *l. and all her wearing Apparel, Plate &c.* Part of her Fortune conſiſted of a Bond entred into her by J. S. before her Marriage with A. They intermarried. A. died, the Bond from J. S. being unpaid; but A. before his Death made a Will, and B. his reſiduary Legatee. Then M. dies. Ld. C. Talbot decreed this Bond to the Repreſentative of A. and not of M. and ſaid, that Moſt of the Caſes where Choſes en Action have been decreed to the Husband's Repreſentative, (he dying in the Life-time of the Wife) have gone upon the Reaſon of *Equality*, there being a Settlement made by the Husband on his Wife, whereby *he became a Purchaſor of her Fortune*; and therefore on the one Hand, as ſhe was to have the Proviſion made by the Settlement, ſo on the other Hand he ſhould have her whole Portion; that in the principal Caſe the Wife was tied up by the Agreement, and ſo barr'd herſelf of the Chance of Survivorſhip, which ſhe would otherwiſe have had by Law, and that the Husband's Departure from the abſolute Right which by Law he had over the whole is of itſelf a ſufficient Conſideration. Caſes in Equ. in Ld. Talbot's Time 168. Hill. 1735. Adams v. Cole.

41. *Legacy* of 200 l. left to a Feme covert by her Father, *to buy ſomething to remember him withal* was ordered to be paid, after the Husband's Death, out of his perſonal Eſtate, (tho' he had laid it out in a Piece of Plate, and had bequeathed all his Plate to her) but without Intereſt. 9 Mod. 68. 70. 79. Mich. 10 Geo. Acherley v. Vernon. In this Caſe the Teſtator gave another Legacy of 50 l. to the Husband, and made him one of the Executors, ſo that taking all the *Circumſtances together*, it muſt be intended that the Teſtator plainly intended this as a Legacy to the *ſeparate Uſe of* his Daughter, tho' he did not uſe the very Words, and it was decreed accordingly. 10 Mod. 518. 531. S. C.

42. On a *Bill by Baron and Feme to redeem a Mortgage of the Wife's Eſtate*, the Defendant put in a *Plea*, which was *over-ruled, for which* 5 *l. Coſts is given to the Plaintiff* of Courſe. The Baron died. Ld. C. King for ſome time doubted; but afterwards taking it to be as a joint Judgment for a Sum certain, determined that it did ſurvive to the Wife. 2 Wms's. Rep. 496. pl. 158. Mich. 1728. Coppin v. .....

43. When

43. When the Baron gets Poſſeſſion of the Wife's *Portion*, Chancery will not take it from him, but a *Security for it* ſurvives to the Wife; Per Attorney-General, who ſaid it was ſo laid down per Cowper C. in the Caſe of Parker v. Windham. The Maſter of the Rolls ſaid, that in the Caſe of Parker v. Windham, the Payment which was to a Maſter in Chancery was, as to a *ſpecial Committee*, *the Wife being Lunatick*, and ſo veſted it in the Husband. Gibb. 148, 149. Mich. 4 Geo. 2. in Caſe of Nightingale v. Lockman.

44. Bill for a *Legacy of* 60 *l. deviſed to her by Will of* Joſ. Mills, 1715. *when ſhe ſhould attain the Age of* 21; *ſhe attained that Age* 14 Feb. 1734. *but before had married one Brotherow, who was dead*, and the Bill was againſt the Defendant as *Executor of the Teſtator*, who *denied Aſſets*; but it was objected, the Executor or Adminiſtrator of the Husband ought to have been a Party, for the Right veſted in the Husband, who might releaſe it; ſed non allocatur; for *the Husband dying before the Legacy was payable, it was in the Nature of a Choſe en Action, which would ſurvive to the Wife*, and although the Husband might poſſibly have releaſed it, yet that ſhall not be preſumed; and if it had been ſo, the Defendant, to whom the Releaſe muſt be given, might make it appear. Comyns's Rep. 725. pl. 280. Paſch. 13 Geo. 2. Brotherow v. Hood in Scacc.

(C. a) [What] Things *real* [ſhall ſurvive to the Wife.]

Br. Baron and Feme, pl. 14. cites S. C. ——— Fitzh. Brief, pl. 561. cites S. C. & S. P. by Finch.

1. If a Leaſe for Years be made to Baron and Feme, the Feme ſhall have it by Survivorſhip. 43 Ed. 3. 10.

Br. Baron and Feme, pl. 14. cites S. C. for this is a Chattel real. ——— Fitzh. Brief, pl. 561. cites S. C. ——— Br. Chattels, pl. 3. cites 14 H. 4. 24 S. P. but that contrary it is of Chattels perſonal veſted in both.

2. The ſame Law of a Ward. 43 Ed. 3. 10.

3. If *a Villein and his Feme purchaſe jointly*, and the Lord enters, and the Villein dies, the Feme or his Heir collateral ſhall re-have the whole Land; for there are no Moieties between them. Br. Parliament, pl. 43. cites 40 Aſſ. 7.

4. *Term of the Wife was extended on a Statute of the Husband* who died, the Wife ſhall have the Reſidue of the Term, and avoid the Extent as to her Term. Arg. 3 Le. 156. cites it as held by Goddard and Strange. 7 H. 6. 2.

5. *Tenant in Dower made a Leaſe for Years*, reſerving Rent, and took Baron. The *Rent was arrear*. The *Baron dies*. It was agreed per tot. Cur. that his Executors ſhall have the Rent. Mo. 7. pl. 25. Mich. 3 E. 6. Anon.

2 Lev. 100. Arg. cites Co. Litt. 46. b. S. C. ——— 2 Vern. 63. at the End of pl. 55. cites Co. Litt. 46. b. S. P.

6. Baron poſſeſſed of a *Term* in Right of his Wife *grants Parcel of it to another*, yet after the Deceaſe of the Baron the Feme ſhall have the Reſidue of the Term that was not granted, and it ſhall be only an Alteration of what was granted; Per Manwood J. Cro. E. 33 pl. 16. Trin. 26 Eliz. B. R. in Sym's Caſe.

Cro. E. 287. pl. 2. Grute v. Locroft,

7. Baron ſeiſed of a Term in Right of his Wife, makes a *Leaſe for Years, to begin after his Death*; he died, and the Wife ſurvived him, the

the Leaſe is good for the Term, and after the Leaſe is ended the Wife ſhall have the Reſidue. Poph. 4. Mich. 34 & 35 Eliz. B. R. Anon. ſeems to be S. C. but there it is that the Baron and Feme were *Jointenants of a Term*, during Coverture, for 60 Years. The *Baron grants a Leaſe, to commence after his Death*, for 70 Years, and dies. This ſhall exclude the Wife; for here a good Term was veſted in Intereſt, tho' not in Poſſeſſion, and is not like a Man's granting his Term to commence after his Death.———Poph. 97. S. P. cited to be ſo adjudged, and alſo decreed good in Chancery.———S. C. cited Mo. 395. pl. 514. in a Nota there, as adjudged that the Leaſe was good.———S. C. cited by Gawdy J. as adjudged accordingly. 1 Rep. 155. a.

8. Baron and Feme were *Jointenants of a Term*, and the *Baron took a new Leaſe*, this is a Surrender of the Eſtate of the Feme but only during Coverture. Mo. 636, 637. pl. 876. Trin. 43 Eliz. C. B. Mellow v. May. *Leſſor infeoffed the Baron*, who died ſeiſed, the Wife ſurviving; Per tot. Cur. the Acceptance of the Feoffment by the Baron was a Surrender of the Term, and it is extinguiſhed; but if the Conveyance had been by *Bargain and Sale inrolled, or by Fine*, it had been otherwiſe. Cro. E. 912. pl. 24. Mich. 44 & 45 Eliz. B. R. Downing v. Seymour.

9. Baron ſeiſed of a *Term* in Right of his Wife *grants a Rent-charge* and dies, ſhe ſhall avoid the Charge, tho' if he ſurvived it ſhould be good during the Term. Co. Litt. 184. b. Pl. C. 418. b. —9 H. 6. 52.

10. The *Husband poſſeſſed of a Term for 20 Years in the Right of his Wife made a Leaſe of 10 Years rendring Rent to him, his Executors and Aſſigns, and died.* Per Crooke J. his Executors ſhall have the Rent and not the Wife, for 'tis a ſpecial Reſervation, and ſhe comes in Paramount; to which Haughton J. agreed, and ſaid that the Rent is incident to him who hath the Reverſion, and that is the Executor of the Husband; and Hobart Ch. J. of C. B. being demanded his Opinion by Montague Ch. J. agreed that the Wife ſhould not have it. Poph. 145. Trin. 16 Jac. B. R. Blaxton v. Heath. Godb. 279. pl. 396. S. C. ſays that Haughton and Crook J. (Doderidge J. being abſent) held contra Montague Ch. J. that the Rent was gone; but that it was agreed by them all that the Executors of the Husband ſhould not have it; but Montague held that the Wife ſhould have it. And if the Husband in this Caſe had granted over the Reverſion, his Grantee ſhould not have the Rent; but Montague Ch. J. ſaid that in that Caſe, the Wife in Chancery might be relieved for the Rent —S. P. by Periam J. but the Wife ſhall have the Reſidue of the Term; but the other Juſtices delivered no Opinion. Cro. E. 279. pl. 5. Paſch. 34 Eliz. B. R. Loſtus's Caſe.———4 Le. 185. pl. 285. Mich. 29 Eliz. by Popham Ch. J.———For the Rent is not incident to the Reverſion, becauſe ſhe was no Party to the Leaſe. Co. Litt. 46 b.———2 Lev. 100. Arg. cites Co. Litt. 46 b.———2 Vern. 63. in a Nota at the End of pl. 55. cites Co. Litt. 46. b. S. P.———A Man has a *Term* in Right of his Wife, and *leaſes Part* of it, reſerving a Rent; the Wife ſurviving ſhall *not have the Rent*; Arg. and admitted by the other Side. Vent. 259. in Marg. cites Co. Litt. 46. b.

11. A * *real Chattel* ſurvives to the Wife in Law, but not the *Truſt of* ſuch a real Chattel. 3 Ch. R. 37. Paſch. 21 Car. 2. in the Exchequer, in Caſe of Attorney General v. Sands. N. Ch. R. 133. cites Co. Litt. 69 ——* Br. Chattels, pl. 3. cites 14 H. 4. 24.

(D. a) [What Things] Real [ſhall ſurvive to the Feme.]

Fol. 350.

1. If a Feme ſeiſed of a Rent Service takes Husband, and after the Husband dies, the Feme ſhall have the Arrearages incurred during the Coverture. 15 Ed. 4. 10. Co. Litt. 351. a. at the Bottom, S. P.

2. If a Feme leaſes for Life reſerving Rent, and after takes Huſband; after the Death of the Baron, the Feme ſhall have the Arrearages incurred during the Coverture, and not the Executors of

the Baron, because this issues out of the Freehold. 11 R. 2. Account 49.

Grant of a *Rent to Baron and Feme for their Lives.* The Baron dies, the

3. [So] If Baron and Feme are seised of a Rent-service for their Lives, Rent incurs, and after the Baron dies, the Feme shall have the Arrearages incurred during the Coverture. 29 Ed. 3. 40. adjudged.

Rent being arrear. The Wife shall have the Arrears, and so shall her Administrator if she dies. Cro. E. 791. pl. 34. Mich. 42 & 43 Eliz. C. B. Temple v. Temple.

A *Widow as Administratrix* to her Husband, *brought* an Action of *Debt for Arrears of Rent incurred in the Life-time of her Husband, which Rent was granted jointly to the Baron and Feme*; adjudged, that the Arrearages belonged to her in Jure suo Proprio, and not as Administratrix to her Husband; therefore the *declaring as Administratrix was Surplusage.* Mo. 887. pl. 1248. Mich. 15 Jac. 1. Dembyn v. Brown. ——Hob. 208. pl. 262. Brown v. Dunnery, S. C. & S. P. per Hobart Ch. J.——Brownl. 171. Brown v. Dunri, S. C. & S. P. adjudged.

4. [So] If Baron and Feme leases for Years rendring Rent. If the Feme after the Death of the Baron agrees to the Lease, she shall have the Arrearages incurred during the Coverture. 7 Ed. 4. 7. b.

5. [So] If a Feme leases for Years reserving a Rent, and after takes Baron and dies, the Feme shall have the Arrearages incurred during the Coverture, and not the Executor of the Baron.

F. N. B. 121. (C) in the new Notes there (e) cites S. C. that A. was Lessee for the Life of a Feme Covert rendring Rent, and B.

6. [But] If a Feme leases for Life reserving Rent, and takes Husband; and during the Coverture, a Receiver receives the Rent of the Lessee, (it does not appear by whom he was made Receiver, but it seems to be intended that he received it for the Baron and Feme) and after the Baron dies. The Executors of the Baron shall have the Writ of Account against the Receiver, and not the Feme, for this was a Chattel and Duty in the Baron by the Receipt. 11 R. 2. Account 49. adjudged.

receives the Rent as Receiver. The Husband dies. The Wife shall have Account against B. and not against the Executors of the Husband; Aliter as it seem'd to Babington &c. if the Receit had been of a personal Duty.

7. If the Ward of the Body and Land of another be granted to Baron and Feme jointly, and the Baron dies during the Non-age, the Feme shall have the Ward. 2 Ed. 3. 42. pur Mutt.

S. C. cited 2 Lutw. 1156.

8. If a Rent-charge be granted to A. a Feme, and to B. for Years, and they intermarry, and after Arrearages incur, and after the Baron dies, the Feme shall have the Residue of the Rent, and also the Arrearages in a Writ of Annuity, because they participate of the Nature of the Principal, and the Executors of the Baron shall not have the Arrearages. Mich. 22 Jac. B. R. between *Carew and Burgoyne*, per Curiam, upon a Demurrer, which Intratur Trin. 18. Jac. Rot. 1187. Vide 12 R. 2. Breve 639.

S. P. cited by Popham Ch. J. Cro. E. 580. to have been adjudged in 15 Eliz. for it was uncertain in whom it should vest, and was

9. Lands were demised *to the Husband and Wife for their Lives*, Remainder *to the Survivour of them for so many Years.* The *Husband granted over the Term for Years, and died.* Adjudged, that the Wife should have the Term, because there was nothing in the one or the other to grant over untill their was a Survivor; and if the Wife had died after the Grant, the Husband surviving should have the Term against his own Grant. Cited by Popham Ch. J. Poph. 5. as a Case which happened on a special Verdict in the County of Somerset about 20 Eliz.

not yet in Esse, and therefore the Baron could either [neither] release, grant or surrender it; but says, that if he had made a Feoffment, that might perhaps have destroy'd the Possibility.

(E. a) In what Cases the *Act of* the *Feme* during Coverture, shall *charge the Baron.*

1. If a Feme Covert borrows of a Man Money, and with it cloaths herself better than doth belong to her Estate; though this comes to the use of the Baron, because his Feme of Necessity ought to be cloathed, yet because it is beyond the Degree, the Baron is not chargeable with it. 11 H. 6. 30. b. S. C. cited by Hale Ch. B. Sid. 114. Pasch. 15 Car. 2. in the Case of Manby v. Scot.

2. So if a Monk of an Abby will borrow and build the Abby, and do more Things than the Abby can well bear, the Abby shall not be charged with this, though it comes to the use of the House. 11 H. 6. 30. b. Fitzh. Debt, pl. 168. cites S. C.

3. But otherways, if a Monk borrows and employs it for the necessary Use of the House, it will charge the House, Dubitatur, 11 H. 6. 30. 12 H. 6. 5. Fitzh. Debt, pl. 168 cites Trin. 4 E. 2. S P.

4. If a Feme buys a Thing of another, this will not charge the Husband, unless it comes to the Use of the Husband. 20 H. 6. 21. b. 22. Fitzh. Debt, pl. 41. cites S. C. & S. P. by Newton.

—If a Feme buys any Thing, and it is found by Special Verdict that it was spent in the Houshold &c. yet the Baron shall not be charged for it; but this is good Evidence for the Jury to find that the Baron assumpsit, tho' it is not binding Evidence. Resolved by 7 Judges in the Exchequer-Chamber. Sid. 120. Pasch. 15 Car. 2. in Case of Manby v. Scott.

5. So if it comes to the use of the Husband, if the Contract was not to the Use of the Husband. 20 H. 6. 22. Fitzh. Debt, pl. 41. cites S. C. & S P.

by Newton.——— Feme Covert cannot make any *Contract to charge her Baron, without Assent precedent or subsequent, express or implied*; per Foster Ch. J and Windham J. They did not deny but that, as Circumstances might be, an express or implied Assent of the Baron may appear to the Jury, so as the Contract of the Feme may be the Contract of the Baron; As if the *Goods come to his Use*, or that he *appears well contented with the Use of them.* Lev. 5. 6. Mich. 12 Car. 2. B. R. in Case of Manby v. Scott.

6. But if the Contract was to the Use of the Husband, and it came to the Use of the Husband, it will charge him. 20 H. 6. 22. Fitzh. Debt, pl. 41. cites S. C. & S P.

by Newton. But Fitzh. says, Quære well of this Diversity &c. as if he commanded the Wife to buy &c.

7. If a Woman buys Things for her necessary Apparel without the Consent of her Husband, yet her Husband shall be bound to pay it. M. 13 Jac. B. Sir *Thomas Gardiner's Case*, per Curiam.

8. But otherwise it is, if it be not necessary; per Curiam, in the said Case of *Gardiner*. Vide D. 6. 7. El. 234. 17.

9. If a Feme Covert be a common Taverner, and sells Wine, and a Man delivers several Tuns of Wine to her to sell without the Assent of the Baron, the Baron is not chargeable for this in an Account. 13 R. 2. Account 50. (It seems to be intended, that she was a common Taverner, without the Assent of her Husband.)

10. If the Baron takes a Distress, and puts it in the Pound, and the Owner comes to the Pound, and there finds the Wife, the Baron being absent, and tenders to the Wife Pledges, and prays a Deliverance, and the Feme delivers it to him, this will be a good Discharge for the Owner in a Parco Fracto brought against him. 30 Ed. 3. 23. S. C. cited 3 Le. 267. pl. 358.

11. In

The Feoffment of a Feme Covert is void. Br. Feoffment de Terre, pl. 48. cites 18 E. 4. 27.

11. In Aſſiſe the *Baron and Feme are Tenants in Tail.* The *Baron goes out of the Country*, and the *Feme infeoffs J. S.* Per tot. Cur. This is a *Diſſeiſin* to the Baron, and therefore a void Feoffment. Br. Feoffment de Terre, pl. 23. cites 9 Aſſ. p. 20.

12. If a *Woman ſeals a Bond in her Husband's Preſence, and he* ſtands by and *does not gainſay*, it ſhall bind him; per the Maſter of the Rolls. 2 Freem. Rep. 215. pl. 288. cites a Caſe in Time of H. 8.

13. If a *Sale* be *in a Market-Overt by a Feme Covert, (unleſs* it be *for ſuch Things as ſhe uſually trades for*, or that it is by the Conſent of her Husband) if the Buyer knows her to be a Feme Covert, the Sale is not binding. 2 Inſt. 713.

S. C. cited by Bridgman Ch. J. Sid. 124. Paſch. 15 Car. 2. in Cam. Scacc. in the Caſe of Manby v. Scott; and ſays the Doubt of Dyer is only upon the Payment of the Taylor, *whether this amounted to a Conſent*; ſo that without ſuch Conſent the Book is clear, that the Defendant ſhould not be charged.——Hutt. 107. but miſpaged, viz. 106. S. C. cited Arg. but by a wrong Name.

14. The Wife, without her Husband's Aſſent, *bought Velvets and Silks* of W. for her Apparel. W. had Notice that ſhe was a Feme Covert. The *Husband paid the Taylor for the making* them, and alſo of other Garments made for the Baron himſelf; and then the Taylor requeſted the Money for W. for the Goods, but the Baron refuſed to pay it. Upon this Evidence the Defendant offer'd to demur; but the Jury was charged, and the Plaintiff at their coming back was nonſuited. The Jury affirm'd that they would have given their Verdict againſt the Plaintiff; but Dyer ſaid, that at the Niſi Prius he much doubted thereof. D. 234. b. pl. 17. Mich. 6 & 7 Eliz. at Guildhall. Wheeler v. Poines.

Le. 122. pl. 166. Trin. 30 Eliz. Havithlome v. Harvey, S. C. adjudg'd accordingly.

15. A *Feme Covert* was *ſerved with Proceſs as a Witneſs*, and tender'd her Charges, and *ſhe appeared not.* After Verdict it was moved in Arreſt, that ſhe is not within the *Statute of 5 Eliz. cap. 9.* and the Tender of the Charges ought to be made to her Husband; for the Charge lies upon him. But it was anſwer'd, that the Action is not brought for the Damages ſuſtained by her Non-appearance, but for the 10l. given by the Statute; and that a Feme Covert is within the Statute; for ſhe may be the ſole Witneſs; and that ſhe is the Perſon puniſhable for not coming, and therefore the Tender is to be made to her; and Judgment for the Plaintiff. Cro. E. 130. pl. 3. Paſch. 31 Eliz. B. R. Havithbury v. Harvy.

16. In Caſe of *Detainer by the Wife*, Action ſhall be againſt the Huſband. Le. 312. pl. 433. Trin. 32 Eliz. C. B. Marſh's Caſe.

17. Baron ſhall never be charged for the Act or Default of the Wife, but when he is *made Party to the Action, and Judgment* given *againſt him and his Wife*; As for Debt or Scandal by the Wife, or for Treſpaſs done by her &c. there Action of Debt upon the Caſe, Treſpaſs &c. ſhall be brought againſt the Baron and Feme, and the Baron ſhall plead &c. and ſhall be Party to the Judgment; but if Feme Covert be *indicted* of Treſpaſs, Riot, or other Wrong, the Wife ſhall anſwer, and be Party to the Judgment only, and therefore the *Fine* put on the Wife ſhall not be levied on the Baron; per Cur. 11 Rep. 61. b. Mich. 12 Jac. in Dr. Foſter's Caſe.

11 Mod. 253. in Mrs. Pool's Caſe.

18. If a Feme Covert *commits a Riot*, the Husband ſhall not be chargeable for it. Arg. 3 Bulſt. 87. Mich. 13 Jac.

19. If the Wife ſpeaks *ſlanderous Words*, the Husband ſhall anſwer for them. Arg. 3 Bulſt. 87. Mich. 13 Jac.

20. A *Contract* made with a Feme covert is good. 27 H. 8. 26. in Tatam's Caſe; and it ſhall be ſaid the Contract of the Husband. 30 E. 3. 9. A *Sale* by Feme covert is good, and he ſhall declare that he himſelf ſold this; Per Coke Ch. J. 3 Buls. 90. Mich. 13 Jac.

21. If a Feme covert *commits a Treſpaſs*, the Baron ſhall be puniſh'd for it; Per Twiſden J. ſaid that this is allowed by our Law. Sid. 113. Paſch. 15 Car. 2. in Cam. Scacc. Arg.

22. The Defendant's Lady *bought ſeveral Goods* of the Plaintiff, a Mercer, *and Defendant paid him for them*; afterwards *ſhe parts from her Husband, and takes up more Goods before the Plaintiff had Notice of her leaving her Husband.* In an Action againſt the Husband, it was ruled by Ch. J. North, at Guildhall, that the Husband was liable, the Plaintiff having no Notice of their parting, and the Husband having formerly paid for what his Wife had taken up, induced the Plaintiff to truſt her again; but if ſhe had taken up Goods of a Stranger after ſhe was parted from her Husband, it ſeemed that he would not have been liable; Ex relatione Serj. Rawlins. Freem. Rep. 248, 249. pl. 267. Hill. 1677. Hinton v. Sir John Hudſon.

23. Several Goods were deviſed to A. Feme of B. for Life, and after her Deceaſe to the Lord Paget; in this Caſe, tho' A. was parted from B. and there had been great Suits for Alimony, and *Feme during Separation had waſted theſe Goods*, yet Lord Keeper thought it reaſonable that the Husband ſhould be charged for this Converſion of the Feme, the Lord Paget's Title being paramount the Feme, and not under her. Vern. 143. pl. 136. Hill. 1682. Ld. Paget v. Read.

24. A *Wife trades by her Husband's Conſent*, and gives Bills for Money, *and he receives the Profit.* The *Wife borrowed* 100 *l. and died*, and a Bill was brought againſt the Husband for the Money. An *Iſſue was* directed to try, *whether the Money was borrowed for carrying on the Trade*; for if it was the Husband ſhould be decreed to pay it. 2 Freem. Rep. 215. pl. 281. Paſch. 1697. by the Maſter of the Rolls, Bowyer v. Peake.

25. *Feme covert purchaſes Lands* without the Conſent of her Husband, he may have *Trover for the Money*; but if ſhe buys Land, or any thing elſe, purſuant to an Authority given by him, he cannot avoid it afterwards, tho' he might countermand it before; but if ſhe buys *Neceſſaries for herſelf*, Houſe, and Family, tho' without her Husband's Privity, yet he ſhall be bound; becauſe by Preſumption of Law ſhe underſtands as well how to purchaſe them as her Husband does; at Guildhall. Cumb. 450. Trin. 9 W. 3 Garbrand v. Allen.

Ld. Raym. Rep. 224. S. C. & S. P. accordingly, by Holt Ch. J. but he held, that if the Husband, (tho' not privy at the time) afterwards conſents to it, the Property of the Money is altered, and he cannot bring Trover; but otherwiſe if he is neither privy nor conſenting.

26. Wife's Contract is not binding where the Husband *expreſsly gives Warning* before-hand. 1 Salk. 118. pl. 10. Paſch. 2 Ann. coram Holt Ch. J. at Niſi Prius at Guildhall, Ethrington v. Parrot.

27. If Baron and Feme cohabit, and *Feme deals ſeparately*, her Contracts ſhall charge the Husband; for *Cohabitation* is ſufficient Evidence of Notice; Per Holt Ch. J. 6 Mod. 162. Paſch. 3 Ann. B. R. Langford v. Tyler.

1 Salk 113. pl. 2. S. C. at Niſi Prius at Guildhall.

(E. a. 2) Baron. Chargeable; for what Debts of Feme, contracted before Marriage.

1. IF a *Feme bound in Debt takes Baron*, he ſhall be charged during the Life of the Feme, but not after her Death, becauſe ceſſante Cauſa ceſſabit effectus. Br. Baron and Feme, pl. 27. cites 49 E. 3. 23.

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

The *Husband made a Will, and his Wife Executrix, and died indebted, leaving Aſſets, which ſhe poſſeſſed herſelf of, and waſted, and then married a ſecond Husband*; Per Coke Ch. J. tho' no Aſſets came to the Hands of the Baron, yet he is chargeable for the Waſte done by his Wife before the Coverture. Roll Rep. 268, 269. pl. 44. Mich. 13 Jac. B. R. in Caſe of Lumley v. Hutton.

3. A. married a Feme, *Executrix, ſubject to a Devaſtavit*; if A. have not ſufficient to ſatisfy, himſelf ſhall be impriſoned for the Debt. Cary's Rep. 34. Trin. 1 Jac.

A. makes his Wife Executrix; ſhe takes a ſecond Husband. It was decreed, that ſhe ſhould be anſwerable for ſo much of the former Husband's perſonal Eſtate as ſhe had poſſeſſed, and that tho' he *took it as a Portion* with the Widow, and this is in Favour of the Heir, tho' there were no Creditors concerned, but was only to have the perſonal Eſtate applied in eaſe of the Real. 2 Vern. 61. pl. 53. Paſch. 1688, Batchilor v. Bean.

4. In Debt againſt Baron and Feme, as Adminiſtratrix to her firſt Husband, Judgment being given againſt them, the Sheriff returned Nulla bona &c. of the Inteſtate, whereupon another Fi. Fa. was brought againſt them, that if it be found that they devaſtaverunt Bona & ſi conſtare poterit, tunc Fi. Fa. and the Sheriff *returned, that they had no Goods of the Inteſtate in their Hands, but that the Wife had Goods to the Value of* 100 *l. which ſhe had waſted during her Widowhood, and that the Husband had not waſted any of them*, & ſi devaſtaverunt according to the Writ, the Jury pray the Diſcretion of the Court. It was argued, that this was a Devaſtavit in Both; and the Court held, that the Return of what was found by the Jury was good enough, and Judgment for the Plaintiff. Cro. C. 603. pl. 7. Hill. 16 Car. B. R. Kings v. Hilton.

During the Coverture. Ibid. 189. —Per Wms. J. Bulſt. 137. cites it as adjudged in the Caſe of Grubb v. Johnſon.

5. It was admitted on all Sides, that if a *Feme ſole is indebted* and *marries*, an Action will lie againſt Husband and Wife, and he is liable to the Payment of her Debts. 3 Mod. 186. Hill. 3 Jac. 2. B. R. in Caſe of Obrian v. Ram.

——Feme ſole *gives Warrant of Attorney*, and then marries, you may file a Bill, and enter *Judgment againſt both*. Show. 91. Hill. 1 W. & M.

6. A. marries B. an *Adminiſtratrix*; *B. had waſted* great part of the Eſtate before the Marriage. After the Marriage a Suit is brought againſt them for a Diſtribution, according to the Act of Parliament, and a Decree is had for that Purpoſe, and then *the Wife dies*; Per Lds. Commiſſioners, the Husband is not to be charged further than what came to his or his Wife's Hands after Marriage. 2 Vern. 118. pl. 117. Mich. 1689. Sanderſon v. Crouch.

For what came to her Hands before Marriage with the ſecond Husband he is to ſatisfy ſo far as he has Eſtate of hers.

Chan. Prec. 255, 256. pl. 208 Paſch. 1706. Powell v. Bell. —— And ibid. 256. Mr. Vernon ſaid, that it had been ſeveral times held, that where a Man marries a Woman without ſtipulating for any particular Fortune, or making any Settlement, if after the Death of his Wife Debts of hers appear, the Husband (not being a Purchaſor in ſuch Caſe) ſhall be anſwerable for the Debts of the Wife in Equity, ſo far as he had any Money or other perſonal Eſtate of hers. —— In ſuch Caſe he ſhall be liable to make it good, even at Law, *during the Coverture*, but not after, whatever Fortune he had with her; but in Equity he may if he has any *ſpecifick Aſſets of her Teſtator's after her Death*; ſo if he has any thing merely in her Right, ſo far he ſhall be liable for Waſte before Marriage; but for the Fortune at large of the Wife it was never yet carried ſo far as to charge the Husband on Account thereof after her Death, eſpecially where the Husband was a Purchaſor of the Wife's Fortune for a valuable Conſideration, by making a Settlement on her; Per Mr. Vernon, Arg. Chan. Prec. 432, 433. Hill. 1715.

7. Feme *dum ſola gives Bond*; if the Husband dies his Executor is not chargeable with this Debt. Arg. 10 Mod. 161. Trin. 12 Ann.

8. A *Freeman of London having Iſſue 2 Daughters, deviſes* 6000 *l. a-piece to them*, and makes his *Wife Executrix*. *By an Eſtimate* it appeared that *his Perſonal Eſtate* at his Death *was* 18000 *l.* to 6000 l. of which the Widow being intitled, A. her 2d Husband, in Conſideration thereof, ſettled a Jointure of 600 l. per Ann. Afterwards *a Loſs of* 12000 *l. befell the Freeman's Eſtate*; and tho' the Wife was dead, and it was urged that the 2d Husband was a Purchaſer of her Fortune, yet 'twas decreed that the Daughters ſhould have a proportionable Recompence out of the 6000 l. For where he takes Notice in the Articles that the 6000 l. he has with his Wife, who was Executrix of her former Husband, was Part of her firſt Husband's Perſonal Eſtate, *upon an Account open and unliquidated*, he comes in as a Purchaſer thereof, ſubject and liable to an Account; that is, as ſo much as upon the Account might be coming to her; and beſides having taken collateral Security that her Share ſhould amount to the 6000 l. he ſhall be *liable to a Loſs befalling the Perſonal Eſtate afterwards, as far as the Wife's Proportion* amounts to, (tho' ſhe is dead) together with her 2 Daughters-in-Law, who were each intitled to a 3d Part by the Cuſtom of London; per Cowper C. Chan. Prec. 431. Hill. 1715. Paget v. Hoskins.

9. Where a Man marries a *Widow Executrix* &c. her Evidence ſhall not be allow'd to charge her 2d Husband with more than ſhe can prove to have actually come to her Hands. Agreed per Cur. Abr. Equ. Caſes, 227. Hill. 1719.

(E. a. 3) Baron chargeable for what Debts of the Feme contracted before Marriage, after her Death.

1. WHERE the *Feme dies*, the *Baron ſhall be diſcharged of the Debt of the Feme dum ſola* ſuit; for Ceſſante Cauſa ceſſabit Effectus. Br. Dette, pl. 48. cites 49 E. 3. 25.

Br. Baron and Feme, pl. 27. cites S. C. and there Hammond ſaid that if *Obligation be made to a Feme Sole, who takes Baron* and after ſhe dies, the Baron ſhall have the Action, and by Conſequence ſhall be charged of the Debt of his Feme after her Death; but Perſy ſaid you ſpeak openly againſt the Law; to which ſeveral agreed

It

It was agreed that Debts of the Wife *before Coverture* ſhall not charge the Husband, *unleſs recovered in her Life-time*; ſo if a Judgment be had againſt a Feme ſole, and ſhe marries, and afterwards dies, the Husband is not chargeable. 3 Mod. 186. Hill. 3 Jac. 2. B. R. in Caſe of Obrian v. Ram.——— Arg. 10 Mod. 163.

If the Feme dum ſola gives Bond, and marries, and dies, the Baron is not liable. Arg. 10 Mod. 161.

Ow. 153. Smith v. Jones, S. C. adjudg'd for the Defendant.——Yelv. 184. S. C. adjudged againſt the Plaintiff,

2. A. *bequeath'd* 7 *l. to the Plaintiff, and made his Wife Executrix*, and died. *She married* the *Defendant, who had divers Goods of the Teſtator's* in his Hands, and in Conſideration the Plaintiff would forbear to ſue him he promiſed to pay it. The Defendant pleaded that his Wife was dead before the Promiſe ſuppoſed to be made; and adjudged for the Defendant; for the Feme being dead, he is not chargeable; and as to Goods in his Hands, he is liable to the Executor or Adminiſtrator for them. Cro. J. 257. pl. 16. Mich. 8 Jac. B. R. Smith v. Johns.

that the Defendant is not chargeable with the Legacy; for he is neither Executor nor privy to the Will; and tho' he had Poſſeſſion of the Goods, yet inaſmuch as he came to them lawfully by the Intermarriage with the Executrix, he has by her Death only a bare Cuſtody of the Goods, for which he ſhall not be charged either in Court Chriſtian or at Common Law, unleſs he had converted them to his own Uſe after his Wife's Death; but the Plaintiff might compel the Defendant to deliver the Goods to the Ordinary, or to take out Letters of Adminiſtration, to the Intent to ſue him in Court Chriſtian for the Legacy.——Bulſt. 44, 45, S. C. adjudged for the Defendant. Fleming Ch. J. admitted that he might be ſued in the Spiritual Court for thoſe Goods; but ſaid that he had a good Anſwer to plead there in Bar, viz. that he is ready to reſtore them to the Adminiſtrator; and this will be a good Plea, in regard they came to him by his Wife.

A. appointed his perſonal Eſtate to be ſold, and limited the *Money to M.* his Siſter *for Life, Remainder over, and made M. Executrix, who married J. S. and dies.* A Bill is brought againſt J. S. to account for the perſonal Eſtate which came to the Hands of M. It is not proved in the Cauſe, that the ſame came to the Defendant's Hands, nor is he the Repreſentative of M. Per Ld. C. King, here is no Foundation for this Bill againſt Defendant. The Prayer of the Bill is to have an Account of the perſonal Eſtate that came to M.'s Hands, who was Executrix, which can be granted againſt none but againſt her Executor or Adminiſtrator. How far there might be a Foundation for ſuch Bill againſt Defendant, if the *Teſtator's perſonal Eſtate were proved to have come to his Hands*, he thought not neceſſary to determine in the principal Caſe, which went off upon other Points. Gibb. 68. Trin. 2 & 3 Geo. 2. in Canc. Green v. Redd.

3. It has been held, that where a Man married a *Woman Trader*, who died, and at her Death was *indebted* to ſeveral Perſons *for Wares* which ſhe had bought of them, and which were by her *in Specie at* the Time of *her Death, and came to the Hands of her Husband*, that tho' a Bill be brought againſt him, he may either pay for thoſe Goods, or let the Perſon have them again; yet he may inſiſt that he is neither Executor nor Adminiſtrator to his Wife, and therefore not liable to her Debts, and that all her Goods belong to him by Law. Ruled upon Demurrer. Abr. Equ. Caſes, 60. Trin. 1700. Blackmore v. Ley. But Quære.

4. *Judgment* was obtained *againſt a Feme ſole.* She *marries*; then the Plaintiff ſues a *Scire Facias againſt Husband and Wife*, and has a *Judgment* Quod habeat Executionem againſt them. Then the *Wife dies*, and the Plaintiff ſues a *Scire Facias againſt the Husband*, and has Judgment Quod habeat Executionem againſt him; and reſolved to be well, upon a Writ of Error out of Ireland. Cited by Holt Ch. J. as the Caſe of Obrian v. Ram. 2 Ld. Raym. Rep. 1050. Mich. 3 Ann.

5. *A. married a Feme ſole Trader*, and *ſhe dies indebted.* It was inſiſted, that tho' the Husband in ſuch Caſes be not liable at Law to the Debts, yet he ought to be ſo in Equity; but Ld. C. Parker ſaid, that this was a Queſtion with him; for the Husband runs a Hazard in being liable to the Debts, much beyond the Wife's Perſonal Eſtate; and that, in Recompence for ſuch Hazard, he is intitled to the Whole of the Perſonal Eſtate, tho' exceeding the Debts, and diſcharged therefrom, and indeed is intitled to the ſame upon the very Marriage. Wms's Rep. 466. 469. pl. 132. Trin. 1718. in Caſe of the Earl of Thomond v. the Earl of Suffolk.

6. *M.*

6. *M. was indebted to A.* her Mother *in* 2000 *l. by Bond*, and then *A. by Will deviſed this* 2000 *l. to J. S.* Afterwards *M. married, and ſurvived her Husband, and* afterwards *married W. R. who had with her ſeveral Jewels, and a Rent-charge of* 1500 *l. a Year.* About 10 *Years after this laſt Marriage M. died*, and then *A. died, without having ever put the Bond in Suit.* Ld. C. Parker held, that if W. R. had been Executor or Adminiſtrator of his Wife, or Executor of his own Wrong, he had been liable at Law as far as he had Aſſets; but he appears not to the Court in any of theſe Capacities; and that, for aught appears, A. purpoſely omitted recovering Judgment againſt him; that the Husband, during the Coverture, is anſwerable for the Wife's Debts, tho' he has nothing with her; and on the other hand, *if he has received a Perſonal Eſtate with his Wife, and happens not to be ſued during the Coverture, he is not liable*; and in the principal Caſe the Jointure enjoy'd by W. R. might have determined the next Moment after Marriage; and as to the Demand from W. R. of his ſaid Wife's Debt, his Lordſhip diſmiſs'd the Bill with Coſts. Wms.'s Rep. 461. pl. 132. Trin. 1718. The Earl of Thomond v. Earl of Suſſolk. Wms.'s Rep. 470. at the Bottom is a Note, that agreeable to this Reſolution, and on the Authority thereof, it was determined in Lincoln's-Inn-Hall, March 8, 1735. per Ld. Talbot, in Caſe of Heard v. Stamford.—The Caſe was; M. a Feme gave *a Promiſſory Note for* 50 *l. and then married A. the Defendant, who had ready Money with her, and likewiſe Choſes en Action, ſome of which he received in her Life-time, and the reſt he took as Adminiſtrator to her.* Upon a Bill for Payment of this Note the Defendant inſiſted, that ſuch Part of her Fortune as was not reduced into Poſſeſſion by him during the Coverture, and which he received after her Death as Adminiſtrator, was not near ſufficient to pay her Debts, and had already paid more than that amounted to. Ld. C. Talbot decreed an Account of what the Husband had received ſince his Wife's Death, as Adminiſtrator to her; and that he ſhould be liable to ſo much only; but as to any further Demand againſt her, he diſmiſs'd the Bill; and ſaid, that the *Marriage is no Gift in Law of the Goods which ſhe has en Auter Droit*; and that upon this Reaſon only are founded all the Caſes, where a ſurviving Husband has been charged with the Wife's Debts after her Death. Caſes in Equ. in Ld. Talbot's Time, 173. Hill. 1735. Heard v. Stanford.

7. A *Woman entered into a Bond, and after married*, having brought her Husband a very conſiderable Fortune. The *Husband conſtantly paid the Intereſt of the Bond during the Life of the Wife.* Now a Bill is brought againſt the Husband for the Payment of the Bond, and * 1 Chan. Caſes, 295. was cited; and that having paid the Intereſt, was a taking the Debt upon himſelf. But the Bill was diſmiſs'd, tho' without Coſts. Select Caſes in Chan. in Ld. King's Time, 19. Trin. 11 Geo. Jordon v. Foley. * See Freeman v. Goodham.

(E. a. 4) Baron chargeable for what Debts &c. of the Feme contracted during Marriage.

1. WIFE of A. *receives* 10 *l. to the Uſe* of A. and this comes to the Profit of A. in a convenient and neceſſary Way, tho' it was without A.'s Order or Conſent after, yet A. is liable to this Debt, and Count ſhall be of a Receipt by the Hands of the Baron. Jenk. 4. pl. 5.

2. A *Feme Covert bought Tobacco*, and the Husband was ſued for it, tho' he had made *Proclamation that no Man ſhould truſt her*, and *no Proof* was *that it came to the Husband's Uſe, or that the Wife did uſe to buy and ſell for the Husband*; and it was ruled, that it ſhall be intended ſhe did ſo as his Servant; and the Judge took this Difference, where *particular Notice* is given not to truſt the Wife, there, if the Party, to whom ſuch Notice is, do truſt her, it is at his Peril; but not ſo upon this *general Notice by the Proclamation* aboveſaid; and in this Caſe it was proved ſhe had formerly bought and ſold, but not lately. Clayt. 125, 126. pl. 223. March 1647. before Germin J. Watſon's Caſe. If the Wife tells her Husband that ſhe will buy ſuch a Thing which is neceſſary, and the Husband tells her that he will not allow it, and *forbids the Tradeſman* to give his Wife Credit for it, and afterwards the Wife takes up that Thing of the ſame Tradeſman

Tradesman upon Credit given her by him, the Husband is not liable. It is sufficient for the Husband to give *general Notice* that People do not give Credit to his Wife. Ld. Raym. Rep. 444, 445. says it was so ruled at Exeter Lent-Assises by Holt Ch. J. 10 W. 3. in Case of Longworthy v. Hockmore.

3. If the *Baron is beyond Sea* in any Voyage, *and during his Absence the Wife buys Necessaries*, this is good Evidence for a Jury to find that the Baron assumpsit. Sid. 127. Pasch. 15 Car. 2. in Cam. Scacc. in Case of Manby v. Scott.

4. *But* such Evidence is only presumptive, and not *conclusive Evidence*, and therefore the Jury in such Case finding it specially, the Court cannot give Judgment against the Baron; for their being Necessaries, and the Employment, with the Residue of the *Special Circumstances*, is not but Matter of Evidence, upon which the Jury should proceed to ascertain the Fact, whether the Baron promised or not. Sid. 127. in Case of Manby v. Scott.

5. *And* the Baron might contradict such presumptive Evidence by other Proofs; As that he *gave her ready Money* to buy &c. Sid. 127. in Case of Manby v. Scott.

6. The *Father devised Legacies to his Children*, and made the *Mother Executrix*. She married again and *died*. The Infants brought a Bill against their Father-in-Law, to have an *Account of the personal Estate* of the Father; but decreed, that not being call'd to Account in the Life-time of their Mother, he was not responsible now. Fin. Rep. 95. Hill. 25 Car. 2. Gratwick v. Freeman.

7. If the Wife *pawns her Cloaths* for Money, and afterwards *borrows Money to redeem them*, the Husband is not chargeable unless he were consenting, or that the first Sum came to his Use. 2 Show. 283. pl. 276. Hill. 34 & 35 Car. 2. B. R. Anon.

8. In Case brought for *Wares sold and delivered* by the Plaintiff, *to the Wife* of *the Defendant*, Non Assumpsit was pleaded, and upon Evidence it appeared that the Goods were *Silver Fringes and Laces* for a Petticoat and Side-Saddle, and that they were all delivered within the Compass of four Months, and that they *amounted to* 94 *l.* and that Part of them were delivered *to a Carrier* for the Wife of the Defendant, by the Order of Mrs. Rider, *upon a Letter of the Wife* to Mr. Rider, and that the other Part were delivered upon a Letter of the Wife to the Plaintiff; and that the Laces *were worn and used by the Wife in the View of the Defendant, and* that the Wife at that Time *lived with the Defendant* in the same House. For the Defendant insisted, that long Time before the Delivery of these Goods, there was a Difference between him and his Wife, and that they for the Space of *two or three Years had not lived together, and* that the *Wife declared* to the Defendant that she would charge him with 500 l. in one Term, and would have him in a Goal in the next, and all this before the Goods were delivered; and that for many Years the *Wife had an Allowance for Cloaths viz.* 50 *l. per Ann.* and no Evidence was given that she had any Occasion to have these Clothes so as they could appear to be necessary. And *the same Day another Action was tried for Velvet and Tissues of* 3 *l. per Yard, to the Value of* 80 *l.* and Treby Ch. J. directed, that if the Jury found the *Plaintiff innocent of the Design of the Wife to ruin the Husband, and delivered the Laces &c. as Goods fit for the Wife*, and upon the Credit of the Husband *without Notice of the Difference between* them, that the Husband shall be obliged to pay the Plaintiff, for it is Part of his Promise of Marriage to feed and cloath her; and though she had an *Allowance*, this *was secret*, and of which the Plaintiff had not Notice; but if the Plaintiff had Notice of the Differences between the Husband and Wife, and sold them only to enable the Wife to ruin the Husband, then the Defendant would not be chargeable, and though the Husband be chargeable heretofore, yet *after such a solemn*

ſolemn Trial and their Differences made ſo publick, he held that the Husband ſhall not be chargeable; and likewiſe if the Plaintiff was not Privy to their Differences but delivered the Goods innocently, yet if the Goods were *not ſuitable to the Quality* of the Wife, the Defendant ſhould not be chargeable; and if *Part be only ſuitable*, he ſhould be charged for that Part only. Upon this Direction the Jury being of Gentlemen, found generally for the Plaintiff for his whole Damages. Skin. 348. pl. 18. Paſch. 5 W. & M. in B. R. Morton & Withens.

9. Debt againſt Husband for the *Lodging* of his Wife, and *proof* only made that he *formerly* cohabited with her *and owned her as his Wife*, and held ſufficient to charge him, but that he might diſcharge himſelf by giving *Elopement in Evidence*; for they that will Truſt a Wife after ſhe has eloped, do it at their Peril. 12 Mod. 372. Paſch. 12 W. 3. Car v. King.

10. While they *cohabit* the Husband ſhall anſwer all Contracts of the Wife for *Neceſſaries*; for his Aſſent ſhall be preſumed to all Neceſſary Contracts upon the Account of Cohabiting, unleſs the Contrary appear; Per Holt Ch. J. at Guild-Hall. 1 Salk. 118. Paſch. 2 Ann. Etherington v. Parrot. Though ſhe be ever ſo lew'd; for he took her for better for worſe. 1 Salk. 119. pl. 13. Paſch. 3 Ann. Robinſon v. Greenold. ——6 Mod. 171. S. C. and S. P. by Holt Ch. J. accordingly; and the Caſe was, that the Husband diſcovering his Wife to be a very lew'd Woman went from her, and ſhe after having lived ſeveral Years with an Adulterer, was received into the Plaintiff's Houſe, who entertained her as the Husband's Wife, and afterwards brought an Indebitatus Aſſumpſit againſt the Husband for Lodging and Dieting his Wife.

11. If a Wife takes up Clothes, as Silk &c. and *Pawns them before made into Clothes*, the Husband ſhall not pay for them becauſe they never came to his Uſe, otherwiſe if made up and worn, and then pawn'd; Per Holt Ch. J. at Guild-Hall. 1 Salk. 118. pl. 10. Paſch. 2 Ann. Etherington v. Parrot. The Husband ſhall Anſwer for *Neceſſaries*, according to the Degree and Quality of the Husband; but if a Man *lends a married Woman Money to buy Neceſſaries* and ſhe does ſo, he has no Remedy againſt the Husband, but Equity will ſuffer the Lender to *ſtand in the Place of the Tradeſmen* of whom ſuch Neceſſaries were bought; Per Maſter of the Rolls. Ch. Prec. 502. pl. 312. Mich. 1718 Ann.

12. If Baron * *turns away* his Wife, he gives her Credit wherever ſhe goes and muſt pay for Neceſſaries for her; but if *ſhe* † *runs away* from her Husband, he ſhall not be bound by any Contract ſhe makes; Per Holt Ch. J. 1 Salk. 118. pl. 10. Paſch. 2 Ann. Etherington v. Parrot. * In ſuch Caſe he muſt ſend Credit with her for *reaſonable Expences*; Per Holt Ch. J. 12 Mod. 245. in Caſe of Todd v. Stokes.——S. P. held accordingly by Holt Ch. J. Holt's Rep. 104. pl. 13. Paſch. 5 Ann. in Caſe of James v. Warren.

† When ſuch Separation *becomes Notorious*, the Husband is not liable unleſs he takes her again. 1 Salk. 119. pl. 13. Paſch. 3 Ann. by Holt Ch. J. in Caſe of Robinſon v. Greenold.

So if *Baron goes away from her*; Per Holt Ch. J. 1 Salk. 119. Robinſon v. Greenhold.——*And leaves her not ſufficient to maintain herſelf*; Per Holt Ch. J. Holt's Rep. 104. in Caſe of James v. Warren.——But if he turns away his Wife or leaves her, and before ſhe takes up any Thing the Husband propoſes to maintain her at home, (though yet he will not lie in Bed with her) yet if after ſuch Offer or Propoſal made and refuſed, any Money was diſburſed for the Wife, this will be at the Peril of the Perſon ſo diſburſing, unleſs the Jury are of Opinion that ſuch offer was deceitful and fraudulent. For a Wife is to be maintained by her Husband, where and how he thinks fit according to his Ability. Holt's Rep. 104. pl. 13. Paſch. 5 Ann. James v. Warren.

13. If a Woman be found *Guilty of a Battery and fined*, the Huſband ſhall not be liable, per Cur. 11 Mod. 253. pl. 3. Mich. 8 Ann. B. R. in Mrs. Pool's Caſe.

14. A *Feme*, who *had the foul Diſtemper given her by her Husband* twice, left him, and *borrowed* 30 *l. of W. R. to pay Doctors and Apothecaries, and for Neceſſaries*. It was ſaid by the Maſter of the Rolls, that admitting the Wife cannot at Law borrow Money, though for Neceſſaries, ſo as to bind the Husband, yet this Money being *applied to the Uſe of the Wife* Ch. Prec. 502. pl. 312. Anon. Mich. 1718. ſeems to be S. C.

for

for her Cure and Neceſſaries, the Plaintiff who lent this Money, muſt in Equity ſtand in the Place of the Perſons who found and provided ſuch Neceſſaries for her. And therefore as ſuch Perſons would be Creditors of the Husband, ſo W. R. ſhall ſtand in their Place and be a Creditor alſo; and his Honour directed the Truſtees (to whom the Husband then deceaſed had deviſed Lands for Payment of all his Debts) to pay W. R. his Money and likewiſe his *Coſts*. Wms.'s Rep. 482. Mich. 1718. Harris v. Lee.

15. If a married *Woman comes into a Shop to buy Goods*, and the Owner not being willing to truſt her becauſe ſhe is under Coverture, a *third Perſon coming by undertakes for the Payment*. The Court thought it clear that the Owner cannot come upon the Husband for the Payment. Barnard. Rep. in B. R. Mich. 2 Geo. 2. in Caſe of Garnum v. Bennet.

How far the Contract of the Feme ſhall bind the Baron. See Lev. 4. Sid. 109. to 131. Mod. 124. to 144. and in abundance of Places in 1 Keb. the Caſe of Manby v. Scott.

(E. a. 5) Second Baron. Where chargeable.

1. A. Acknowledged a Statute and died Inteſtate, and upon an Extent 'twas returned Mortuus. A new Extent was iſſued, upon which was returned, that the Widow *Adminiſtratrix had ſold the Goods* of the Deceaſed; whereupon the Extent iſſues of the Goods of the ſecond Baron. Mo. 761. pl. 1056. Trin. 3. Jac. in Chancery, Heyward's Caſe.

2. A. *ſettled Lands* on Truſtees after his Death *for the Payment of his Debts*, and the Truſtees not at all acting, his *Wife* after his Death *enters and takes the Profits*. Then *ſhe marries* again, and *her Husband continued to take the Profits* during his Life as ſhe did before. *He dies*, and *ſhe again received the Profits* and after *married the Defendant, who alſo continued to take the Profits* till the Heir of A. came of Age. On a Bill by a Creditor of A. it was decreed by the Maſter of the Rolls, that the Defendant, the laſt Husband, ſhall be liable in Reſpect of the Profits received by the Wife and her former Husband and himſelf to the Payment thereof, ſo far as the Profits taken by either of them did extend. And upon Appeal, the Court conceived the Decree juſt, and that the Defendant muſt take his Wife chargeable with this Debt. Chan. Caſes 80. Hill. 18 & 19 Car 2. Gilpen v. Smith.

3. On arguing Exceptions to the Maſter's Report, the Queſtion was how far the ſecond Husband ſhould be charged of his own Eſtate, for a *Devaſtavit* and *Breach of Truſt by the Wife and her firſt Husband*. Per Cur. where there is a Bond there is a Lien by Deed, and ſo the ſecond Husband bound; but where there is barely a Breach of Truſt or Debt by ſimple Contract, there, in Equity, the Plaintiff ought to follow the Eſtate of the Wife in the Hands of the Executor of the firſt Husband. Vern. Rep. 309. pl. 303. Hill. 1684. Norton v. Sprigg.

(E. a. 6) Survivor charged or benefited.

1. BARON marries a *Feme wrongfully ſeiſed of Lands*, and after the Marriage *ſhe occupies them without the Baron's Aſſent*, yet Action lies againſt Both, as well for the Occupation before the Eſpouſals, as after

after during the Feme's Life; but after her Death Action lies not for this Occupation againſt the Baron; but if the Perſon who has Right enters into the Land after Marriage, and the Baron re-enters in Right of his Feme, or if after the Marriage *he occupies* the Lands, and then the Feme dies, Treſpaſs lies againſt him; per Rede J. Kelw. 61. Paſch. 20 H. 7. pl. 1.

2. A. *Feme Sole* makes an *Agreement* with other Perſon *to diſtribute the Reſidue of the Eſtate of M.* among them, and after marries the Defendant; per Cur. what came in between ſeven and eight Years after Marriage by the Death of the ſaid M. was not within the Compaſs of the ſaid Agreement, but was to go to the Benefit of the Husband. Chan. Rep. 26. 3 Car. 1. Fol. 883. Rickſers v. Herne.

3. If a Man marries an *Executrix and waſtes the Goods*, 'tis a Devastavit in the Wife; per Cur. For it was her Folly to take ſuch Husband that would make a Devaſtavit; and by Jones J. if a *Recovery againſt Baron and Feme* be in a Devaſtavit, if the Baron ſurvives the Wife he ſhall be charged, and if the Feme ſurvives ſhe ſhall be charged; but if the Recovery be not againſt Baron and Feme in the Life of the Feme and ſhe dies, the Baron ſhall not be charged. Cro. C. 519. pl. 20. Mich. 14 Car. B. R. in Caſe of Mounſon v. Bourn. Jo. 417. pl. 5. S. C. but S. P. does not appear.—— S. C. cited Arg. Lutw. 672.—— A Feme Covert cannot waſte during the Coverture, though the Waſting of the Baron ſhall charge her if ſhe ſurvives; Adjudg'd. 2 Lev. 145. Trin. 27 Car. 2. B. R. Horſey v. Daniel.

4. The Wife when *ſole bought Goods* for Money, and after married, and died. The Goods *came to the Husband's Hands after her Death*, but the *Debt remained unpaid*; the Bill was by the Creditor to diſcover the Goods. Defendant demurr'd, but over-ruled by the Lord Chancellor, who with ſome Earneſtneſs ſaid he would change the Law in that Point. Chan. Caſes 295. Mich. 28 Car. 2. Freeman v. Goodham. S. C. cited by Ld. C. Talbot; Caſes in Equ. in Ld. Talbot's Time, 175. Hill. 1735. in Caſe of Heard v. Stanford, who obſerved that the Goods never coming to the Husband's Hands till after the Wife's Death, made it a very hard Caſe upon the Creditor, and probably occaſioned the ſaying of the Ld. Nottingham, but that even there he over-ruled a Demurrer to a Bill for the Diſcovery of the Goods, and it does not appear what became of the Cauſe afterwards.

5. If *Husband and Wife have Judgment in Scire Facias for a Debt due to the Wife*, the Benefit thereof ſurvives to the Husband; for the Judgment is joint, and therefore ſhall ſurvive; if the Husband outlives the Wife, he ſhall have the Benefit of it; and if the Wife outlives the Husband, ſhe ſhall have the ſame Benefit of it; Per Holt Ch. J. but Rooksby J. doubted. Comyns's Rep. 31, 32. Mich. 9 W. 3. B. R. Anon.

6. *Baron by Reputation* only, As where the *Marriage was by a mere Layman*, (a Sabbatarian) is not intitled to *Adminiſtration to the Wife*. 1 Salk. 119. Heydon v. Gould. 9 Ann. coram Delegatis at Serjeant's Inn in Fleetſtreet.

7. A Feme *dum ſola gave a Bond*, and then married. The *Husband became Bankrupt*. The Bond-Debt is diſcharged by the Bankruptcy of the Husband, ſo that if he dies ſhe ſhall not be further chargeable; per Parker Ch. J. who declar'd the Judgment of the Court as to the firſt Part, and his own Opinion as to the latter Part. 10 Mod. 243. &c. Trin. 13 Ann. B. R. Miles v. Williams. Wms's Rep. 249. pl. 57. S. C. and Ibid. 257. S. P.

8. Bill by the Heirs and reſiduary Legatees of Sir W. Milman againſt Lady Milman, Executrix of Sir W. M. to have an Account of the Teſtator's Eſtate. It being proved in the Cauſe, that Sir *W. M. being very old and infirm for 7 Years before his Death, did not receive Money himſelf, tho' he ſigned Receipts, and executed Leaſes &c. but the Money was uſually paid to Lady Milman, his Wife.* Cowper C. decreed La-

dy M. to account for what Money ſhe received for 7 Years before her Husband's Death, but the Maſter ſhould be eaſy in taking the Account, and allow for Houſe-keeping &c. without Vouchers. MS. Rep. Mich. 2 Geo. Buckle v. Milman.

(E. a. 7) Where the Feme reſerves the Power of her own Eſtate. Caſes relating thereunto.

1. A is *bound to do ſuch Act as Feme covert ſhall direct*; ſhe may give Direction without Aſſent of the Baron, and if *Baron diſaſſents*, yet the Declaration and Direction of the Wife ſhall guide the Caſe, and ſhall be Cauſe to forfeit or ſave the Bond. And. 182. pl. 217. Paſch. 30 Eliz. Arg. in Caſe of Forſe v. Hembling.

2. M. (a Feme ſole) made J. S. and W. R. (*Truſtees* of 100 l. of hers) to enter into *Covenant and Bond to leave* 100 *l. to pay to whom ſhe ſhould appoint, and for want of Appointment*, then *to pay it to two Grandchildren*; afterwards (being married) *ſhe made J. S. and W. R. to cancel the Covenant and Bond*, to make void this her Intention, yet decreed to be made good to the Plaintiff, (the Grand-children ſuppoſe) See Toth. 162. where this is imperfectly reported, cites 10 Jac. or Car. C. B. fo. 442. Atwood v. Stubbs. (Quære)

3. Debt upon Obligation conditioned, that if Defendant marry ſuch a Widow, who was poſſeſſed of divers *Goods of her firſt Husband's, and his Children's, he ſhould not meddle with them, but that ſhe and her Children might enjoy them without Interruption from him.* Upon Performance of Covenants pleaded, Plaintiff aſſigned for Breach, that the firſt Husband was poſſeſſed of ſuch Sheep and Goods &c. and that the Wife had them before Marriage, and that after Marriage the Defendant, ſuch a Day, took the ſaid Goods into his Hands, and yet detains them. After Verdict it was moved, that no ſufficient Breach is alleged; for it is not ſhewed that the Husband made any Diſturbance; for by the Marriage the Goods are in the Husband, and it is *not ſhewn that he diſturbed the Wife's Enjoyment* of them; and of that Opinion were Hyde and Jones J. but Whitlock and Crooke e contra, and that the Breach is well aſſigned; for by alleging the taking and detaining the Goods, is ſuppoſed a taking and detaining them from the Wife, and Iſſue being found for the Plaintiff, the Court intends it an unjuſt Caption and Detention, contrary to the Agreement. And afterwards Hyde mutata Opinione upon reading the Books, was of the ſame Opinion, whereupon, abſente Jones, it was adjudg'd for the Plaintiff. Cro. C. 204. pl. 9. Mich. 6 Car. B. R. Crowle v. Dawſon.

4. The Wife before Marriage, by Indenture between her and the intended Husband and two Truſtees, aſſigned over all her real and perſonal Eſtate to her own Diſpoſal. After Marriage *ſhe borrows Money, and furniſhes a Houſe*, of which ſhe had deſired her Baron to take a Leaſe, but declared ſhe would defray the whole Charge, and would have the Diſpoſal of the Goods as her own. The Wife died, having diſpoſed of 1000 l. to the Baron, which was decreed to him, and that he be diſcharged of paying for the Goods, Rent &c. of the Houſe, or of the 400 l. borrowed, of which ſhe had given him 200 l. preſently upon the borrowing of it, and to return to the Baron ſome *Jewels given by him to the Wife before Marriage*, which were not to be accounted any part of her Eſtate, whether the Gift was before or after the Indenture aforeſaid,

aforeſaid, ſhe having on her Death-bed declared they belonged to the Baron, and that the Truſtees be indemnified obſerving ſuch Directions. Fin. R. 108. Hill. 25 Car. 2. Blyſſe v. Sayers, Cherry and Partridge.

5. Fowles upon his Marriage with Counteſs of Dorſet enters into Articles, that Counteſs of Dorſet ſhould have and enjoy her Eſtate to her ſole and ſeparate Uſe, and that ſhe ſhould diſpoſe of the Surplus of ſuch Eſtate by any Writing under her Hand &c. Counteſs of Dorſet lays up a conſiderable Sum of Money out of her ſeparate Eſtate, and buys Land with it, and makes an Appointment purſuant to the Power, and diſpoſes of the Land ſo purchaſed to a Stranger. After her Death Fowles preſers his Bill to have theſe Lands, and Ld. Jefferies decreed, that he ſhould have the Lands as purchaſed with his Wife's Money; but this Decree was afterwards reverſed in Dom. Proc. becauſe bought with the Money raiſed out of the ſeparate Eſtate of the Wife, which ſhe had a Power by the Articles to diſpoſe of. Cited MS. Rep. 1 Geo. in the Caſe of Petts v. Lee, as a Caſe in Ld. C. Jefferies's Time, Fowles v. the Counteſs of Dorſet.

6. In ſuch Caſe the Husband being much in Debt, and *to diſcharge his Goods going to be taken in Execution, ſhe gave a Note to pay the Debt* out of her own ſeparate Eſtate, and accordingly the Action was diſcharged. On a Bill againſt Baron and Feme, the Baron could not be met with to be ſerved with a Subpœna, but the Wife was inforced by Attachment to anſwer without him, He being made a Party only for Conformity. Ch. Prec. 328. pl. 249. Hill. 1711. Bell v. Hyde.

Gilb. Equ. Rep. 83. S. C. reported in totidem Verbis. — Abr. of Caſes in Equ. 65. pl. 8. S. C. cites no Book.

7. Covenant that the Wife ſhall diſpoſe of her perſonal Eſtate, does *not extend to what ſhall come to her after her Marriage.* MS. Tab. March 11. 1711. Pilkington v. Cuthbarſton.

And ſhe having Power to diſpoſe of her perſonal Eſtate, which only comprehended the perſonal Eſtate ſhe had before Marriage, *gets into Poſſeſſion of a conſiderable perſonal Eſtate in a private Manner upon the Death of her Father, and conceals it from the Husband, and* afterwards *by Will diſpoſes of it to Charities*, yet decreed that what was ſo concealed from the Husband ſhall not be made good to him ſo as to diſappoint the Charities. MS. Tab. S. C.

8. It being *agreed* between the Parties *before the Marriage, that the Husband ſhould have only ſo much of the Wife's Eſtate, and that ſhe ſhould have Liberty to diſpoſe of all* the Eſtate *beſides, which ſhe ſhould be intitled to by her laſt Will in Writing &c.* it was reſolved, that 5000 l. which fell to her after Marriage by the Death of her Brother, ſhould not go to her Husband or his Executors, but that the Wife ſhould have the Power of diſpoſing thereof, tho' at the Time of the Articles ſhe had not any Right or Intereſt therein, and altho' at that Time ſhe could not grant or releaſe the ſame; for this being a Covenant ſhall enure according to the *Intent of the Parties*, and *extend to a Right in futuro*, where it is the apparent Intent of the Parties that the Husband ſhould have no more than the Sum expreſsly mentioned whatever happened; By Ld. C. Cowper. MS. Rep. Hill. 1 Geo. Petts [alias Potts] v. Lee.

9. The Feme by ſuch Power conſented to by the Husband beforehand, conveyed her real Eſtate to Truſtees, and *aſſigned all her Bonds and Mortgages to her ſeparate Uſe*; but after the Marriage *ſhe permitted her Husband conſtantly to receive the Intereſt without any Complaint* to either Debtors or Truſtees, and about 10 Years after the Marriage the Husband died. Ld. C. Macclesfield decreed the Executors of the Husband to make good any part of the principal Money due on any of the Securities, with Intereſt, from his Death; but as to the Intereſt receiv'd by him during the Coverture, as *it was againſt common Right for the Wife to have a ſeparate Property* from him, (they being in Law but as one Perſon) *ſo all reaſonable Intendments* and Preſumptions *are to be admitted*

mitted againſt the Wife in this Caſe, and ſhe not having in ſo long Time made any Complaint, *her Conſent ſhall be intended* and be conſidered *as a Gift*, and that any other Conſtruction might have put him under great Hardſhips. 2 Wms's Rep. 82. pl. 18. Mich. 1722. Powell v. Hankey & Cox.

10. The Wife having reſerved Power over her own Eſtate, and veſted the ſame in Truſtees, *conſented to ſell* 10*l. a Year, part of her Land of Inheritance for* 200*l. which the Husband having received*, he therewith founded a Charity for poor Widows, and *gave a Bond for it to the Wife's Truſtees, to be paid to them within* 3 *Months after the Deceaſe, for the Benefit of her Executors.* Ld. C. Macclesfield held that this ſhould bind the Wife, and was a waiving the Intereſt of the 200 l. for her Life, and if ſhe would avoid this Bond ſhe muſt prove ſome Fraud in gaining her Acceptance thereof; that this being her ſeperate Eſtate, *ſhe muſt Prima facie be looked upon as a Feme ſole*, and that it was as if a Feme ſole had accepted ſuch Bond which would have bound her; beſides it might well be ſuppoſed that ſhe contributed to this Charity, it being to her own Sex. 2 Wms's Rep. 82, 85. pl. 18. Mich. 1722. Powell v. Hankey & Cox.

And where ſhe had *made her Will, and gave ſeveral ſpecifick and other Legacies, and made A. and B. Executors,* and likewiſe *the Huſband had poſſeſſed himſelf of ſome of her Money.*

11. A *Bond given* by a Feme Covert (having a ſeparate Eſtate) upon her borrowing Money, was inſiſted to be merely void; ſo that after ſix Years it amounts to no more than a Loan of ſo much, and that a Demand then of it is barr'd by the Statute of Limitations; and the Maſter of the Rolls agreed that the Bond was void; but he ſaid, that in this Caſe (ſhe being dead, and a Bill being brought againſt her Executors and her Husband) all her *ſeparate Eſtate was a Truſt-Eſtate for Payment of Debts*, and a Truſt is not within the Statute of Limitations. 2 Wms's Rep. 144. Trin. 1723. Norton v. Turvil.

The Maſter of the Rolls ſaid, it ſeemed as if the Plaintiff ought to be at Liberty to proſecute all, in order to be paid out of the ſeparate Eſtate left by her; to which Purpoſe ſuch Part thereof as is undiſpoſed by the Will ought to be firſt applied, and if not ſufficient, then the Creditors ſhould be paid out of the Money-Legacies; and if thoſe are not ſufficient, all the ſpecifick Legacies ought to contribute in Proportion. 2 Wms's Rep. 145. Norton v. Turvill.

MS. Rep. Mich. 1734. Halſey v. Badham.

12. A. by Will gives 2 *Legacies to his Daughter B. of* 500*l. each, one of them for her ſole and ſeparate Uſe*, ſhe being married without a Settlement. Decree for placing out the Money for her Benefit. The Huſband, upon Petition to Ld. C. Macclesfield, obtained an Order for one 500 l. and the other 500 l. by Conſent to be laid out for the ſeparate Uſe of the Wife. The Husband and Wife, ſhe being 19, *join in an Aſſignment of the laſt* 500*l. to ſecure a Debt to H. the Plaintiff*, and the *Husband becomes Bankrupt.* H. brought a Bill againſt the Aſſignees of Bankruptcy, and Husband and Wife; and Ld. King decreed the Aſſignment good, and the Reſidue to be paid to the Aſſignees. The Wife rehears &c. alledging that ſhe was poor, and not able to produce the Order of Ld. Macclesfield. Objected, That the Aſſignment was good, it being of her ſeparate Eſtate, tho' under 21; and that Infants may execute a Power by an Attorney &c. Ld. Chancellor, as to that Objection that the Order was voluntary, and did not bind Creditors, ſaid that is a hard Cenſure on the Proceedings of the Court, and ſuch Settlements are uſual Practice, and this here is according to the Will. Where the Husband makes *a voluntary Proviſion for the Wife, to take Place after his Death*, it has been adjudged fraudulent; but here it is ſet apart immediately. As to the Aſſignment itſelf, he admitted that if Feme had been ſole it had not been good, but void; but the Caſe is ſtronger, becauſe ſhe was a Feme Covert. And tho' in Caſes of meer Powers or Authorities Infants may execute, becauſe nothing moves from them, yet this is an Intereſt, and can no more be departed with in

Equity

Equity by an Infant, than by an Infant's Aſſignment of a legal Eſtate at Law. Decree varied.

13. A Woman having Lands and a perſonal Eſtate, before Marriage conveys all her Eſtate to her ſeparate Uſe, to which the *Husband* was a Party; and he *covenanted that he would not interfere* with it. On this Eſtate ſo convey'd, there was a *Mortgage for* 300*l. which, before the Conveyancers, he verbally promiſed to diſcharge.* During the Coverture *the Mortgage was aſſigned over, and he covenanted* thus, *That I or my Wife ſhall pay it.* The Husband and ſhe lived with great Affection together, and he conſtantly received all the Profits of this ſeparate Eſtate. He died, having never paid off the Mortgage, leaving Children, which he had by a former Venter, Fortunes: Theſe the Wife maintain'd after his Deceaſe. The Wife brings her Bill; 1ſt, That the Effects of the Huſband ſhould be applied to the Redemption of the Mortgage. 2dly, To have Account of the Profits of her ſeparate Eſtate, received by the Baron. 3dly, To have an Allowance for the Maintenance of his Children after his Deceaſe. It was decreed, That the Husband's Effects ſhould not be charged to redeem the Mortgage, nor be accountable for the Profits of her ſeparate Eſtate received by him; and that the Maintenance ſhould be counterbalanced by the Intereſt of their Fortunes. And upon a Rehearing the Ld. C. ſaid, that there is no Foundation to charge him with the Payment of the Mortgage; for *by the Statute of Frauds it is no Charge, unleſs reduced into Writing:* All is at an End when there is an Agreement in Writing; all the Converſation was only as previous Steps. This is the ultimate Settlement of the whole Affair on mature Conſideration of every Thing; as between him and the Mortgagee he might be charged, but not by the Wife. As to the *Receipt of the ſeparate Maintenance, if they lived together amicably, it ſhall be looked on as done by her Conſent.* As to the Maintenance, ſhe has taken it upon herſelf; and it does not appear to me but the Intereſt is ſufficient for that Purpoſe. Decree affirmed. Select Caſes in Chan. in Ld. King's Time, 20, 21. Trin. 11 Geo. Chriſtmas v. Chriſtmas.

(E. a. 8) Pin-Money. Caſes relating thereto.

1. WHERE the Husband, during his Cohabition with the Wife, makes her an Allowance of ſo much a Year for her Expences, if ſhe out of her own good Houſewifry ſaves any Thing out of it, this will be the Husband's Eſtate, and he ſhall reap the Benefit of his Wife's Frugality, becauſe when he agrees to allow her a certain Sum yearly, the End of the Agreement is, that ſhe may be provided with Clothes and other Neceſſaries, and whatſoever is ſaved out of this redounds to the Husband; per Ld. K. Finch. Freem. Rep. 304. pl. 373. Trin. 1674. in Lady Tyrrell's Caſe.

2. A Term was created on the Marriage of A. with B. for raiſing 200 l. a Year for Pin-money, and in the Settlement A. covenanted for Payment of it. There was an *Arrear of one Year at A.'s Death*, which was decreed, becauſe of the Covenant to be charged on a Truſt-Eſtate ſettled for Payment of Debts, it being in Arrear for one Year only; ſecus had it been in Arrear for ſeveral Years. Chan. Prec. 26. pl. 28. Trin. 1691. Offley v. Offley.

Abr. Equ. Caſes, 66. pl. 1. S. C.—But the Court allow'd a *Year and* 3 *Quarters* where the Whole was proved to be in Arrear; and that between Husband and Wife, who lived well together, 3 Quarters of a Year made but little Difference. Abr. Equ. Caſes, 140. pl. 7. Mich 1728. Counteſs of Warwick v. Edwards.

3. The Plaintiff's Relation (to whom he was Heir) allow'd the Wife Pin-money, which *being in Arrear*, he *gave her a Note* to this Purpose; "*I am indebted to my Wife* 100*l. which became due to her such a Day.*" After *by his Will he makes Provision out of his Lands for Payment of all his Debts, and all Monies which he owed to any Person in Trust for his Wife*; and the Question was, whether the 100l. was to be paid within this Trust; and my Ld. Keeper decreed not; for in Point of Law it was no Debt, because a Man cannot be indebted to his Wife, and it was not Money due to any in Trust for her. Hill. 1701. between **Cornwall and the Earl of Mountague.** But quære; for the Testator look'd on this as a Debt, and seems to intend to provide for it by his Will. Abr. Equ. Cases, 66. pl. 2.

4. Where the Wife has a separate Allowance *made before Marriage*, and *buys Jewels with the Money* arising thereout, they will not be *Assets* liable to the Husband's Debts. Chan. Prec. 295. pl. 232. Trin. 1710. Wilson v. Pack.

5. Where there is a Provision for the Wife's separate Use *for Clothes*, if the *Husband finds her Clothes*, this *will bar the Wife's Claim*; nor is it material whether the Allowance be provided out of the Estate which was originally the Husband's, or out of what was her own Estate; for in both Cases her *not having demanded it* for several Years together, shall be *construed a Consent from her that he should receive it*; per Ld. C. Macclesfield. 2 Wms.'s Rep. 82. 84. pl. 18. Mich. 1722. Powell v. Hankey & Cox.——And to the same Purpose his Lordship cites (Hill. 1712.) the Case of Judge Dormer and the Bishop of Salisbury.

6. *So* where 50*l. a Year was reserved for Clothes and private Expences*, secured by a Term for Years, and 10 Years after the Husband died, and soon after the Wife died, the Executors in Equity demanded 500l. for 10 Years Arrear of this Pin-money; but it appearing that the *Husband maintain'd her*, and *no Proof that she ever demanded it*, the Claim was disallow'd. 2 Wms.'s Rep. 341. pl. 98. Hill. 1725. Thomas v. Bennet.

(E. a. 9) Feme relieved against the Acts of the Baron.

1. IN Assise, if a Man *seised in Jure Uxoris leases* the Land *to B. for Life*, and *after grants the Reversion to J. in Fee, and dies*, and after *B. dies*, the Entry of the Feme is lawful; for there was no Discontinuance but for the Life of B. For the Reversion in Fee is not discontinued, because the *Baron died before the Tenant for Life*, so that the *Reversion was not executed in his Life*. Br. Discont. de Possession, pl. 15. cites 28 Ass. 6.

At *Common Law*, if a Man seised of Lands, as in Right of his Wife &c. and thereof infeoffed another &c. and died, the Feme could not enter, but was put to her Action, which was called a *Cui in Vita* &c. Litt. S. 594.——But now *in all Cases where the Feme might have Cui in Vita* at the Common Law, *she shall enter by the Purview of this*

2. 32 *H.* 8. *cap.* 28. *S.* 6. *No Fine, Feoffment, or other Act done by the Husband only, of any Lands &c. being the Inheritance or Freehold of the Wife, during the Coverture between them, shall make any Discontinuance thereof, or be prejudicial to the Wife or her Heirs, or to such as shall have Right, Title, or Interest to the same by the Death of such Wife; but that the same Wife or her Heirs, and such other to whom such Right shall lawfully appertain after her Death, may enter into the same according to their Rights and Titles therein, any such Fine &c. to the contrary notwithstanding; Fines levied by the Husband and Wife, whereunto she is Party or Privy, only excepted.*

this Statute; and where the Iſſue could not have Sur Cui in Vita or Formedon, in ſuch Caſe he ſhall not enter within the Remedy of this Statute; and therefore if the Baron has Iſſue, and aliens, and the Feme dies, the Iſſue ſhall not * enter during the Life of the Baron, becauſe at the Common Law he had no Remedy to recover the Land during the Life of the Baron, and the Words of the Act are according to their Right or Title therein. Reſolved. 8 Rep. 72. b. 73. a. Paſch. 7 Jac. Greneley's Caſe.——Mo. 58. pl. 164. Paſch. 6 Eliz. it was ſaid by Dyer, upon the Stat. of 32 H. 8. cap. 28. the Words of which are, that "*all Recoveries and Diſcontinuances, and Alienations &c. ſhall be utterly void* "*and of no Effect*; *but that the ſaid Femes, after the Death of their Barons, may enter*;" that theſe laſt Words of the Statute have Intendment to abridge the Words precedent; for if after ſuch Alienation the Baron and Feme are divorced, and the Baron dies, ſhe is put to her Writ of Cui in Vita ante Divortium; and yet the Words of the Statute are, that "ſuch Alienation ſhall be void;" but this ſhall be intended to take away the Writ of Cui in Vita.—[I do not obſerve the Words of (Recoveries and Alienations being void and of no Effect) in the Statute.]——4 Le. 104. pl. 210. in the Time of Q. Eliz. C. B. ſays, Note by Dyer upon the Words of Stat. 32 H. 8. cap 28. "That a Feoffment of the "Lands of the Wife ſhall not be a Diſcontinuance; but that the Wife may enter after the Death of "her Husband," that this is an Abridgment of the Words precedent; for in ſome Caſes ſuch a Feoffment is a Diſcontinuance; As if, after the Feoffment, they are *divorced*, ſhe cannot enter, but is put to her Writ of *Cui ante Divortium*.

If the *Husband makes a Feoffment* in Fee of the Lands of his Wife, and after they are *divorced Cauſa precontractus*, yet the Woman may enter within the Purview of that Statute, and is not driven to her Writ of Cui ante Divortium, as ſhe was at the Common Law; albeit the Entry be by Statute given to the Wife, and now upon the Matter ſhe never was his lawful Wife; but it ſufficeth ſhe was his Wife de Facto at the Time of the Alienation, and where her Husband dieth ſhe cannot be his Wife at the Time of the Entry. Co. Litt. 326. a.——8 Rep. 73. a. in Greneley's Caſe, S. P. The Feoffment was made during the Coverture between them, and tho' the Statute ſays (but *that the ſame Wife* &c.) this is to be intended of her who was his Wife at the Time of the Alienation; for when the Baron is dead, ſhe is not then his Wife, but is called his Wife only to deſcribe the Perſon that ſhall enter; and the Statute does not ſay that (the Wife ſhall enter after the Death of her Baron,) but ſays generally that (ſhe ſhall enter *according to their Right and Title*,) be it in the Life of the Baron after Divorce a Vinculo Matrimonii, or after his Death.——Mo. 58. pl. 164. Paſch. 6 Eliz. ſays that in ſuch Caſe ſhe is put to her Writ of Cui ante Divortium.

* Co. Litt. 326. a. S. P.

3. *Baron alone levies a Fine* of the Land of the Feme with Proclamation. The Baron dies, and *5 Years paſs*. The Feme is barr'd. Arg. 2 Roll Rep. 410. cites 5 E. 6. 72. Without Action or Entry ſhe is barr'd for ever; per Opinionem Curiæ, notwithſtanding the Stat. of 32 H. 8. cap. 28. which does not limit any Time of Entry &c. but this does not reſtrain the General Law made by the Stat. 4 H. 7. of Fines with Proclamations; and the Stat. 32 H. 8. ſpeaks of Fines only, without Proclamations D. 72. b. pl. 3. Mich. 6 E. 6. Anon.——S. C cited, and S. P. reſolved, 8 Rep. 72. b. Paſch. 7 Jac. in Greneley's Caſe.—— Co. Litt. 326. a. S. P.

4. Where the Baron and Feme are *joint Purchaſors in Tail*, the *Remainder to the Feme in Fee*, and the *Baron aliens by Fine* without his Feme, and dies. It was held clearly by the 2 Chief Juſtices, Stamford and Dyer J. to be within the Statute which ſpeaks of Alienation of the Inheritance or Freehold of the Wife. D. 162. a. pl. 48, 49. Trin. 4 & 5 P. & M. Wingfield v. Littleton. Mo. 28. pl. 90. Trin. 3 Eliz. Anon S. P. held accordingly by all the Juſtices.—— Co. Litt. 326. a. S. P.—— 8 Rep. 72. a. Greneley's Caſe, S. P.

5. A *Joint-Eſtate* to the Baron and Feme has always been taken to be within theſe Words (Jus Uxoris,) and yet it was not only or barely Jus Uxoris. 8 Rep. 72. a. per Cur. and ſays that according to this Reſolution it was adjudg'd in **Beaumont's Caſe**, and that with this agrees D. 191. b. pl. 22. Mich. 2 & 3 Eliz. Hawtry's Caſe.

6. Baron and Feme are *jointly ſeiſed in Tail*, Remainder *to the Baron in Fee*. They *have Iſſue*. The *Baron levies a Fine with Proclamations*. The Heirs of their Bodies are barr'd by the Statute of 32 H. 8. of Fines, but not the Feme; for ſhe is not within it. And. 39. pl. 101. Mich. 15 & 16 Eliz. Anon. Bendl. 225. pl. 257. S. C. accordingly. ——D. 351. b. pl. 24. S. P.—— 8 Rep. 72.

a. b reſolved that by ſuch Fine, or if the Baron commits *High Treaſon*, and dies, and the Feme before or after Entry dies, the Iſſue is barr'd.——Dal. in Kelw. 205. a. b. pl. 7. Bendloes ſeem'd of Opinion, that if the Feme had enter'd the Fine had been avoided; but the other Juſtices e contra.

7. If

Mo. 596. pl. 813. S. C. adjudged by all the Juſtices to be no Diſcontinuance, becauſe no *Livery was made* of ſuch Eſtate, *nor can a Warranty be annexed to it*, for the Benefit whereof a Diſcontinuance is admitted. And the Caſe of Forley v. Coſen, Mich. 32 & 33 Eliz. Rot. 937. was cited to have been adjudged no Diſcontinuance. And all the Juſtices took it that it is not within the Letter nor Equity of the Statute of 32 H. 8. which gives Entry to the Feme and her Heirs againſt the Diſcontinuance of the Baron.——But Cro. J. 105. pl. 44. Mich. 3 Jac. B. R. in Caſe of Collins v. Cancke, where the Queſtion was upon a ſpecial Verdict, Walmſley J. held that it was a Diſcontinuance, notwithſtanding the Caſe in 4 Rep. 23. a. No Judgment was given here, but they pleaded de Novo.

7. If a *Man ſeiſed of Copyhold Land in Right of his Wife, ſurrenders it to the Uſe of another in Fee who is admitted*, and the *Baron dies*, this is no Diſcontinuance to the Feme nor her Heirs, but that ſhe may enter, and ſhall not be put to her Cui in Vita, nor the Heir to his Sur Cui in Vita. 4 Rep. 23. pl. 4. Paſch. 35. Eliz. B. R. Bullock v. Dibley.

As no one will doubt but that if the Wife enters firſt, it ſhall benefit thoſe in Remainder alſo, though the Statute ſhould be thought to be made only for the Good of the Wives directly; ſo clearly here the Words give Entry as well to others as to the Wives and their Heirs; Per Hobart Ch. J. but ſaid he was of Opinion, that if a Wife being ſeiſed in Fee after ſuch Alienation of the Husband, ſhould die without Heir, that the Ld. by * Eſcheat ſhould not be within the Remedy of this Statute. Hob. 261.

8. By the Words (*ſuch other to whom ſuch Right ſhall appertain after her Death*) the Entry of him in the Reverſion or Remainder is preſerved. Co. Litt. 326. a.

* Hob. 243. Hobart Ch. J. calls the Entry of Ld. by Eſcheat an irregular Entry, and ſays the Common Law will not extend to irregular Entries that were given by ſpecial Statute, differing from the Reaſons of the Common Law.

8 Rep. 72. b. in Greneley's Caſe, S. P. reſolved; but if the Baron ſuffers a common Recovery and dies without Iſſue, the Feme is barred, and cannot enter by Force of this Statute.——Co. Litt. 326. a. S. P.

9. Where the Husband and Wife are *jointly ſeiſed* to them and their Heirs, of an Eſtate made during Coverture, and the Husband makes a *Feoffment in Fee* and dies, the Wife may enter by this Statute. And ſo it is if the Feoffment be made by the Husband and Wife, though the Words of the Statute are (*by the Husband only*) for in Subſtance this is the Act of the Husband only. Co. Litt. 326. a.

10. If the Husband cauſes *Præcipe quod Reddat upon a faint Title* to be brought againſt him and his Wife, and *ſuffers a Recovery without any Voucher, and Execution to be had againſt him and his Wife*, yet this is holpen by the Statute; for this by Conſtruction is the Act of the Huſband, and the Words of the Statute be made, ſuffered or done. Co. Litt. 326. a.

11. The *Husband is Tenant in Tail*, the *Remainder to the Wife in Tail*. The *Husband makes a Feoffment in Fee*. By this the Husband by the Common Law did not only diſcontinue his own Eſtate Tail, but his Wife's Remainder; but at this Day, after the Death of the Husband without Iſſue, the Wife may enter by the ſaid Act of 32 H. 8. Co. Litt. 326. a.

2 Inſt. 681. S. C. ſays the King is bound by this Act tho' not named; and tho' the Words of this Act are (*being the Inheritance and Freehold of the Wife*) and the Lands in this Caſe

12. *B. and his Wife being ſeiſed in ſpecial Tail, Remainder to B.* in Fee, *B. alone levied a Fine* to Ed. 6. in Fee, which Eſtate came to the Earl of H. in Fee. *B.* having Iſſue, died, his Wife entered; the Earl of H. confirmed the Eſtate in the Wife, habendum to her and the Heirs of the Body of her and her Husband. And it was ruled that the Confirmation wrought nothing, becauſe ſhe had as great an Eſtate before. And alſo the Iſſues could not be made inheritable which were before barred by their Father's Fine, and the Eſtate Tail, as againſt them, lawfully given to another. And it was further reſolved by Way of Admittance, that *if the Remainder in Fee* had *not been* to B. himſelf, but *to a Stranger*, the Entry of the Wife had reſtored that Remainder to the Stranger, and had left nothing in the Cogniſee, but a mere Poſſibility; ſo ſhe hath the

the Tail not only to herſelf, but to the Benefit of other Eſtates growing out of one Root with his. And yet during the Life of B. the Intail had been barred and all had been in the Cogniſee, and the Wife had had nothing but a Poſſibility vice verſa. Hob. 257. Hobart Ch. J. cites 9 Rep. 140. [138. b. &c. Paſch. 10 Jac. in the Court of Wards] Beaumont's Caſe.

were as well the Freehold and Inheritance of the Husband, as the Wife; yet becauſe it was a beneficial Law to ſuppreſs a Wrong, and to give the Party wronged a ſpeedy Remedy, and that it was in equal Miſchief; it was adjudged to be within this Statute.

13. Twiſden ſaid he had a Caſe from my Lord Kelinge, where a Feme Covert Infant *levy'd a Fine*, and her Friends got a Writ of Error in the Husband's and her Name. That the *Court would not ſuffer the Husband to releaſe*, but Hale ſaid he could not ſee how that could be avoided, but he had known that in ſuch Caſe the Court would not permit the Husband to * *diſavow the Guardian which they admitted* for the Wife. Vent. 209. Paſch. 24 Car. 2. B. R. in Lady Prettyman's Caſe.

* S P. by Hale Ch. J. Vent. 185. Hill 23 & 24 Car. 2. B. R. in Caſe of Freeman v. Boddington.

14. A Feme Covert was a *Midwife*, by which ſhe got a great deal of Money, *and alſo bought and ſold Goods* as a Feme Sole Merchant, *and put out ſeveral Sums at Intereſt in Truſtees's Names, the Husband having agreed by Articles, that as ſhe got it ſhe might diſpoſe of it at Pleaſure allowing him a Maintenance*, which ſhe always did, and ſhe had no Maintenance from him for 18 Years, but *maintained him, herſelf, and four Children*, all the Time, and *portioned out two Daughters, and paid her Husband's Debts, and ſo diſcharged him out of Priſon.* Afterwards he aſſigned all his real Securities of Land and Money, and all his perſonal Eſtate to his Daughters Husbands, and made them his Attornies to ſue for &c. the ſame, and the Truſtees ſhould ſtand intruſted for the Huſbands in equal Moities, but to allow the Husband and Wife 20 l. per Ann. On a Bill by the Sons-in-Law againſt the Truſtees and their Father and Mother; it was by Conſent of all Parties decreed that the ſaid Eſtate ſhould be divided into Moities, one to the Plaintiffs, and one to the Mother, or to whom ſhe ſhould appoint, and that the Plaintiff's and the Mother ſhould pay her Husband 20 l. a Year for his Life; and that ſo much of the Aſſignment as gives the Plaintiffs all the Eſtate of the Father and Mother be diſcharged, and that the Mother keep and diſpoſe of what ſhe has by Virtue of this Decree or otherwiſe, and what ſhe ſhall after acquire by her Induſtry, either by Gift, or by her Will without any controll of the Plaintiffs or her Husband, as a Feme Sole may do. Fin. Rep. 56. Hill. 25 Car. 2. Ward v. Summer, and Davis and al'.

15. Feme joins in a *Mortgage* with her Baron, and levies a *Fine to bar Dower*; in Conſideration whereof, the *Baron agrees that the Wife ſhall have the Redemption.* The Husband *Mortgages the Eſtate twice more.* The Court thought this Agreement fraudulent as againſt the Subſequent Mortgages, ſo far as to intitle the Wife to the whole Redemption; decreed per North K. that if the Wife ſurvive the Husband, ſhe ſhould have her Dower, and that without being obliged to bring her Writ of *Dower.* Vern. 294. pl. 287. Hill. 1684. Dolin v. Coltman.

16. *Bill againſt Baron and Feme as Executors for a Legacy.* The Defendants anſwer, and Witneſſes are examined, and Publication paſſed. Baron *dies.* Per Cur. here is no *Abatement*, and the Wife ſhall be bound by the Anſwer and Depoſitions; but in Caſe of the *Wife's Inheritance* it might be otherwiſe. 2 Vern. 249. pl. 234. Mich. 1691. Shelbury v. Briggs.

17. A. on Marriage gives *Bond to leave his Wife worth 500 l.* or a third Part of his perſonal Eſtate at her Election. A becomes *Bankrupt.* Decreed that the Wife come in as a Creditor on the 500 l. Bond, and what ſhould

But where a *Bond* was given by the *Husband for*

Payment of a Sum of Money *to his Wife in Case she survived him*, and the Husband after became a Bankrupt;

should be paid in Respect thereof, to be put out at Interest and received by the Creditors during the Life of the Husband, and if the Wife survived, then the Money to be paid to her. 2 Vern. 662. pl. 587. Trin. 1710. Holland v. Callisford.

Per Ld. Ch. there can be nothing stopped by way of dividend out of the Bankrupt's Estate, to answer *this contingent Debt* or Demand when it happens. Mich. 1728. Abr. Equ. Cases 54, 55. Chawell v. Cassanet.

(E. a. 10) Leases made of the Wife's Estate. Good or not.

The common Opinion amongst all the Justices at this Day is, that where the Baron and Feme made a Lease before the Statute 32 H. 8. by Parol, reserving Rent to them;

1. 32 *H.* 8. *cap.* 28. LEASES *made by him that is seised* in Right of the Wife *of Inheritance, or jointly with his Wife by Purchase during the Coverture or before, shall be good and effectual. And the Wife shall have such Remedy for the* Rent *after the Death of her Husband the Lessor against the Lessee, his Executors and Assignees, as the Husband Lessor might have had.* Proviso that *all Leases made of Land &c. whereof the Inheritance is in the Wife, shall be made by Indenture* in his and his Wife's Name, and she to seal *the same, and the* Rent to be reserved to him and his Wife and to the Heirs of the Wife. *And the Husband shall not discharge any of the Rent but only during Coverture, unless by Fine levied by both.*

and afterwards the Feme, when she is Sole, receives the Rent of the Termor, that this shall not bind her from avoiding the Lease unless it was by Indenture, because her Assent was requisite to the Commencement of the Lease, which ought to have been by Deed. D. 91. b. in a Nota of the Reporter, pl. 13. Mich. 1 Mar. in Case of Turney v. Sturges.

There are 9 Things necessarily to be observed. 1st, The Lease must be made by *Deed indented*, and not by Deed Poll, or by Parol. 2dly, It must be made to *begin from the Day of the making* thereof, *or from the making* thereof. 3dly, If there be an *old Lease* in being, it *must be surrendered* or expired, or ended *within a Year of the making of a Lease, and* the Surrender *must be* absolute, and not conditional. 4thly, There must *not* be *a double Lease in being at one Time*, As if a Lease for Years be made according to the Statute, he in the Reversion cannot expulse the Lessee and make a Lease for Life or Lives according to the Statute, nor e converso; for the Words of the Statute be, to make a Lease for 3 *Lives or* 21 *Years*, so that one or the other may be made, and not both. 5thly, It must *not exceed* 3 *Lives, or* 21 *Years from the making* of it, but it may be for a lesser Term, or fewer Lives. 6thly, It *must be of Lands, Tenements and Hereditaments, Manurable or Corporeal*, which are necessary to be letten, and *where out a Rent by Law may be reserved*, and not of Things that lie in grant, as Advowsons, Fairs, Markets, Franchises, and the like, whereout a Rent cannot be reserved. 7thly, It must be *of Lands or Tenements, which have most commonly been letten to Farm*, or occupied by the Farmers thereof *by the Space of* 20 *Years* next before the Lease made, so as if it be letten for 11 Years at one or several Times within those 20 Years it is sufficient. *A Grant by Copy of Court Roll in Fee for Life or Years, is a sufficient Letting to Farm* within this Statute, for he is but a Tenant at Will according to the Custom, and so it is of a Lease at Will by the Common Law; but those Lettings to Farm must be made by some seised of an Estate of Inheritance, and not by a Guardian in Chivalry, Tenant by Curtesy, Tenant in Dower or the like. 8thly, That upon every such Lease there be *reserved* Yearly, during the same Lease, due and payable to the Lessors their Heirs and Successors &c. *so much yearly Farm or Rent, or more, as hath been most accustomly yielded* or paid for the Land &c. *within* 20 *Years next before* such Lease made. 9thly, Nor to any Lease to be made *without Impeachment of Waste*; therefore if a *Lease* be made *for Life, the Remainder for Life* &c. this *is not warranted* by the Statute, because it is Dispunishable of Waste. *But* if a Lease be made to *one during three Lives*, this is good; for the Occupant, if any happen, shall be punished for Waste. Co. Litt. 44. a. b.

Ejectment of a Lease of A. the Husband. Upon Not Guilty pleaded, a Lease by Indenture was shewn in Evidence to the Jury in the Name of the Baron and Feme, and signed and sealed by the Baron and Feme, and *Letter of Attorney by the Baron and Feme* to deliver it upon the Land, and he *delivered it in both their Names*; but because the *Declaration in Ejectment was of a Lease of A. only*, and not in the Wives Name, Exception was taken; and per 3 J. the Declaration is good; for the Delivery by the Attorney is a void Warrant as to the Wife, and so it is the Lease of the Baron only. But if the Lease had been *delivered on the Land by the Baron alone*, it had been a good Lease for both, and the Declaration should have been accordingly; but now it is the Lease of the Baron only, and not voidable, but *void* against the Wife. Cro. J. 617. pl. 1. Mich. 19 Jac. B. R. Gardiner v. Norman.——'Tis the Lease of them both during the Husband's Life. Cro. C. 195. pl. 10. Mich. 5 Car. B. R. ..... v. Hopkins.

The Husband after Marriage purchases to him and his Wife and their Heirs, and after without his Wife, makes a Lease for sixty Years, at more Rent than the same had been let for before, only it was leased

leaſed before in two Parts and now in One. Per 3 J. againſt Hobart Ch. J. the Leaſe is good, and not within the Proviſo, becauſe it is *not the ſole Inheritance* of the Wife, and the Appointment thereby is, that the Reſervation ſhall be to them and the Heirs of the Wife, which is *not intended of a joint Eſtate*; but then the Reſervation ſhould be to both their Heirs. Cro. C. 22. pl. 15. Mich. 1 Car. C. B. Smith v. Trinder.

2. *The Wife nor her Heirs ſhall not have Liberty by this Act, to avoid any Leaſe to be made of her Inheritance by her Husband and her for 21 Years or under, or three Lives, whereupon the accuſtomable yearly Rent for 20 Years before is reſerved.* The Husband and Wife ſeiſed in Right of the Wife, levied *a fine* to the Uſe of *themſelves for their Lives*, and afterwards to the Uſe of *the Heirs of the Wife, Proviſo that it ſhall be lawful for the Husband and Wife at any Time during their Lives, to make Leaſes for* 21 *Years or* 3 *Lives.* Afterwards the *Wife being Covert made a Leaſe* for 21 Years, and it was adjudged a good Leaſe againſt the Husband, though made when ſhe was a Feme Covert; and though it was made by her alone, by Reaſon of the Proviſo. Godb. 327. pl. 419. Paſch. 21 Jac. B. R. Anon.

Baron and Feme joined in a Leaſe, but *no Rent was reſerved* therein. The Queſtion was if this was a Leaſe made by Baron and Feme. It is not like the Caſe of ſuch Leaſe by an Infant, for the Baron had Power, and the Wife joining in the Leaſe it is not void, for ſhe may affirm the Leaſe by bringing a Writ of Waſte or accepting Fealty; and adjudged accordingly. Hutt. 162. Hill. 4 Car. Anon.——It is the Leaſe of the Wife till ſhe diſagree. Cro. E. 112. pl. 9. Mich. 30 & 31 Eliz. B. R. Jackſon v. Mordant.

3. If before the Statute 38 H. 8. the Husband and *Wife* had *made a parol Leaſe* rendring Rent to them, and the *Husband died*, and the *Wife when ſole accepted the Rent*; this ſhall not bind her from avoiding the Leaſe, unleſs it had been by Indenture, becauſe her Aſſent was requiſite to the Commencement of the Leaſe, *which muſt have been by Deed.* D. 91. b. pl. 13. Mich. 3 Mar. ſays that this is the common Opinion of all the Juſtices at this Day. *Baron and Feme ſeiſed in Tail, made a Leaſe reſerving Rent.* The *Baron died.* The *Feme entred and died.* The *Leſſee entred and did Waſte.* The Iſſue in Tail brought Action of Waſte, and counted of a Leaſe made by the Baron and Feme. The Defendant pleaded that the Baron and Feme did not demiſe; Iſſue was joined thereupon, and the Matter before found, and adjudged againſt the Plaintiff, becauſe the Feme had Election to agree or diſagree to the Leaſe; and *when ſhe diſagreed, it was the ſame Thing as if it never had been the Act of her* who diſagreed. And. 350. 351. cites it as the Caſe of Thetford v. Thetford.

And. 220. pl. 239. Paſch. 28 Eliz. S. C. held accordingly.——Sav. 109. pl. 185. S. C. and the Court held that this ſhall never be taken to be the Leaſe of the Feme, and this is prov'd by her Diſagreement after her Baron's Death, and therefore Judgment was given againſt the Plaintiff.——Le. 192. pl. 274. Mich. 31 & 32 Eliz. C. B. the S. C. but Reports it to be an Action of Debt; but Anderſon held that by the Wife's Diſagreement, and her Occupation of the Land after the Death of her Husband, ſhe had made it the Leaſe of the Husband only.——3 Rep. 27. b. 28. a. cites S. C. in Action of Waſte reſolved accordingly.

And. 220. Says the Plaintiff declared of a Leaſe by the Baron and Feme by Deed indented, but the Jury found that not withſtanding the Demiſe, the Baron continued Poſſeſſion and died; and the Feme after her Baron's Death would not permit the Leſſee to enter. But that after the Death he entred and did the Waſte, and the Jury doubted; whereupon the Court held that the Baron and Feme did not demiſe.——Sav. 109. pl. 185. though the Plaintiff counted of a Leaſe by Baron and Feme, yet he did not alledge it to be by Deed; and then the Queſtion was, if the Verdict, finding that it was by Deed indented, had ſupplied that Imperfection. But the Opinion of the Court was, that this ſhall never be taken to be the Leaſe of the Feme, becauſe her Diſagreement after her Baron's Death proves it; and for this Point Judgment was given againſt the Plaintiff.——Le 192. pl. 274. S. C. it ſeemed clear to Anderſon, that the Jury have found for the Defendant viz. Non demiſerunt; for it is now no Leaſe ab Initio, becauſe the Plaintiff has not declared upon a Deed——4 Le. 50. pl. 131. S. C. and S. P. held by Anderſon J. accordingly.——But Le. 204. pl. 283. in S. C. Periam J. held that though the Plaintiff declares generally of a Leaſe made by the Husband and Wife, yet the Jury having found that it is by Indenture, it is purſuant enough.——3 Rep. 27. b. 28. a. cites S. C. and that the Jury found that it was by the Deed indented; but adjudged that by the Diſagreement of the Feme, in Judgment of Law, it was the Leaſe of the Baron only.

But in ſuch Caſe, though the Declaration in an Ejectment did not ſet forth that ſuch Leaſe was made by Deed; yet upon a Precedent of Paſch. 33. Eliz. Moſeley v. Gilbert, where the Plaintiff counted of ſuch Leaſe and did not Mention any Deed, yet it was adjudg'd; and the like in another Caſe of Diggs v. Withers. The Plaintiff in the principal Caſe had Judgment to recover. Cro. E. 481. pl. 15 Trin. 38 Eliz. B. R. Childes v. Weſcot.——2 Rep. 60. 61. Hill. 41 Eliz. C. B. Wiſcott's Caſe. S. C. adjudg'd accordingly.

4. Husband and Wife ſeiſed of Land in the Right of the Wife, the *Husband alone makes a Leaſe by Word for Years*; afterwards the *Husband and Wife levy a Fine*, and after the Wife and Husband *both die.* It was holden Cro E 216. pl. 14 S. C. adjudg'd accordingly;

for being made by the Baron only, holden clearly by the whole Court, that the Conuſee ſhould avoid the Leaſe. Le. 247. pl. 332. Mich. 31 & 32 Eliz. B. R. Harvey v. Thomas.

it was void againſt the Feme, and no Acceptance could make it good; and as it ſhall be void to the Feme, ſo it ſhall to the Conuſee ——4 Le. 15. pl. 54. S. C. & S. P. by Wray Ch. J. but Gawdy e contra, becauſe the Conuſee meddles with the Land itſelf, and an Eſtate in the Land is convey'd by the Husband, which none but the Wife or her Heirs ſhall avoid; and if the Wife after her Baron's Death accepts the Rent upon ſuch Leaſe, the Leaſe is thereby confirmed.——S. C. cited 2 Rep. 77. b. as adjudg'd that the Leaſe was determined by Death of the Baron, and the Conuſee ſhall avoid it; for the Baron joined only for Conformity and Neceſſity.—— Roll Rep. 402. Arg. S. C. cited accordingly, becauſe all paſſed from the Feme.——Bridgm. 45. S. C. cited accordingly. ——3 Bulſt. 273. Arg cites S. C.——But Goldsb. 13. pl. 13. Paſch. 28 Eliz. It was ſaid by Serj. Shuttleworth, Arg that if the Husband makes a Leaſe of the Wife's Land for 100 Years, the Wife may avoid it after his Death, but if after they both levy a Fine, the leaſe ſhall be good for ever, and ibid. 14. the ſame was agreed by Fenner of the other Side.

S. C. cited Cro. E. 482. pl. 15. Trin. 38 Eliz. C. B. in Caſe of Child v. Wiſcott, and in 2 Rep. 61. b. Hill. 41 Eliz. C. B. in Wiſcott's Caſe, S. C. and upon View of the Judgment given in that Caſe, and of another Precedent, Paſch. 33 Eliz. between Morley and Gulbert, and of another Judgment in B. R. between Diggs and Ulthers, in all which Precedents Judgment was given for the Plaintiff on Demiſe made by Baron and Feme, without alleging it to be by Deed, upon the View of which Precedents Judgment was given for the Plaintiff, in the Caſe of Child v. Wiſcott, alias Wiſcott's Caſe.

5. Plaintiff declared of a Leaſe by Baron and Feme, and *ſhews it not to be by Deed.* It was urged, that without a Deed it could not be ſaid to be the Leaſe of the Feme, and cited Pl. C. 436. and D. 91. and 15 E. 4. 8. but all the Juſtices held it well enough; for it may be intended by Deed, and yet no Declaration thereupon; and tho' it be without Deed it *is well enough*, at leaſt *during the Life of the Baron*, and it is a Leaſe from them both during that Time. Cro. E. 438. pl. 53. Mich. 37 & 38 Eliz. B. R. Bateman v. Allen.

6. The Baron was ſeiſed of Lands for the Life of the Feme in Right of the Feme, the Reverſion in Fee to the Baron. A *Leaſe for Years without Writing* by Baron and Feme of theſe Lands is void againſt the Feme. Cro. E. 656. pl. 20. Hill. 41 Eliz. B. R. Walſal v. Heath.

The Plaintiff *held two Tenements of the Husband and Wife*, and *ſurrendered both in Conſideration* that the Husband and Wife *ſhould make a Leaſe of one of them for three Lives.* The Husband died; the Wife being but Tenant for Life, and ſo by the Statute would have avoided the Leaſe for three Lives, but the Court thought good it ſhould be holpen in Equity. Mich. 13 Car. Toth. 155. Ireland v. Pavy.——36 & 37 Eliz. Domery v. Weſton, S. P. ibid.

7. A *Woman ſole takes a Conſideration for making a Leaſe for 21 Years, and* then *marries*, and ſhe and her Husband made the promiſed Leaſe. Before the 21 Years End the *Leſſee ſurrenders, and takes a new Leaſe* for 21 Years more. The Husband dies; the Wife ouſts the Leſſee, who ſues in Chancery to have the firſt Leaſe continued for the Remainder of the firſt 21 Years, and not remedied here, the Surrender being voluntary. Cary's Rep. 29. cites 44 Eliz.

Hob. 5. pl. 10. Wilkes v. Jordan, S. C. that the Baron died before the Day of the Judgment, but held well.

8. In *Ejectment. Leaſe* was made *by Baron* of Land claimed in Right of his Wife. The *Baron died before the Action brought.* It was thereſore inſiſted, that the Leaſe (the Wife not joining) was void, and determined by his Death, and that Defendant cannot be ſaid to keep him out of Poſſeſſion, and that now the Leſſee has no Cauſe to have an Hab. Fac. Poſſ. but the Court held, that ſince the *Feme did not enter after the Baron's Death*, the *Leaſe is not determined*, but voidable only. Cro. J. 332. pl. 14. Mich. 11 Jac. B. R. Jordan v. Wikes.

9. *Husband and Wife (in the Right of the Wife) and a third Perſon, were Jointenants for the Life of the Wife and the third Perſon.* The *Husband and Wife, by Indenture, let the Moiety for 21 Years.* The *Wife died.* The ſurviving Jointenant entered. All the Court held, that it was a good Leaſe, and ſhould bind the Survivor, for it is a Leaſe made by her till after the Coverture ſhe, or one who claims in Privity of her, avoids

avoids it, which cannot be by the other Jointenant, for he is paramount the Wife, and not under her, and Judgment accordingly. Cro. J. 417. pl. 6. Hill. 14 Jac. B. R. Smalman v. Agborow.

10. A. and M. are seised of Lands in Fee in the Right of M. the Wife, and *by Indenture, dated 20th August, leased the same to B. and C. his Wife, and D. their Daughter*, Habend. to them ut supra dictum est, et eorum diutius viventi successive, from Mich. following, for their 3 Lives, rendring yearly, during their 3 Lives, 13s. 4d. at 2 usual Feasts, and a Heriot after the Death of every of them. *A. and M. his Wife after Mich. made Livery in Person to B. and D. his Daughter.* After A. died, and M. his Wife accepted the Rent of B. Afterwards B. died seised, and C. his Wife enter'd and died. D. enter'd, and M. enter'd upon her. Resolved, that this Lease made by the Husband and Wife is good, and shall bind the Wife, for *the Livery alone did not make the Lease, but the Livery and the Deed, and it took its Operation by both*, and the Livery in this Case is but the Execution of the Deed, and is a sufficient Witness of their Agreement, and all the Reservations and Covenants &c. in the Deed are good, and the Lessees and Lessors are bound by them. Cro. J. 563. pl. 11. Hill. 17 Jac. B. R. Greenwood v. Tyber.

11. A *Widow* being seised of Lands secretly took a Husband, and *concealed her Marriage*, and so continuing under the Notion of a Widow, *made Leases* of divers Parcels of Land, and afterwards the Marriage was made Publick, and the Husband in Equity sought to avoid these Leases, but was denied; and it was decreed to confirm the Leases during the Term. R. S. L. 204.

(F. a) In what Actions the *Baron* shall be *charged* during the Coverture; because of the Feme.

1. If a Feme sole binds herself in an Obligation, and takes Husband, the Baron shall be charged for this during her Life. 20 H. 6. 22. b.

2. So if a Man enters into an Obligation, and after enters into Religion, the Abby shall be charged for this during the Life of the Monk. 20 H. 6. 22. b.

3. The same Law of a Trespass. 20 H. 6. 22. b.

4. If an *Action* be brought against a Widow, who is found *Guilty*, and *before Judgment marries*, the Capias shall be awarded against her, and not against her Husband. And in this Case of subsequent Marriage, the Husband not being once named in any Part of the Record, if the *Sheriff had returned* that she now was married he would have falsify'd all the Proceedings. Cro. J. 323. pl. 1. Trin. 11 Jac. B. R. Doily v. White. Brownl. 226. S. C. held accordingly. 2 Bulst. 80. S. C. adjudged.—Lane 48. Doille v. Jolliffe adjornatur.

Pasch. 7 Jac. in the Exchequer, S. C.

5. Case was brought against Baron and Feme, for that the *Feme affirming herself to be sole and unmarried, prevailed upon the Plaintiff to marry her*, whereby the Plaintiff was much troubled in his Mind, and put to great Charges. After Verdict it was mov'd, that the Feme cannot, by any Contract or Agreement, charge the Baron, and if he is chargeable in this Case, it must be by this Contract of her with the Plaintiff Sid. 375. pl. 1. pl. 1. S. C. that Judgment was stay'd.—2 Keb. 399. pl. 2. S. C. and Judgment stay'd.

to marry him; and this Marriage cannot be without the Aſſent and Contract of the Plaintiff himſelf, and therefore ſhall not charge the Baron, and of that Opinion were the Court, and gave Judgment accordingly. Lev. 247. Mich. 20 Car. 2. B. R. Cooper v. Witham.

6. If a Woman gives a *Warrant of Attorney, and then marries*, you may file a Bill and enter Judgment againſt both by the Practice of the Court. Ruled upon Motion. Show. 91. Hill. 1 W. & M. Anon.

7. If a *Feme ſole recovers Damages, and then marries*, and the *Judgment is revers'd*, Reſtitution lies againſt her and her Husband; Per Holt Ch. J. 2 Salk. 587. pl. 1. Trin. 3 W. & M. in B. R. in Caſe of the King v. Leaver.

(G. a) In what Actions the *Baron* ſhall be *charged after* the *Death of the Feme*; becauſe of the Feme.

Br. Debt, pl. 180, (181) cites S. C. accordingly. — Fitzh. Debt, pl. 33. cites S. C. & S. P. by Babington. ——— F. N. B. 121. (C) S. P. and cites S. C. ——So where a Feme was Tenant in Dower, and ſhe was to pay to the Heir the third Part of the Rent which he paid over, and ſhe takes Baron, and dies, the Rent being arrear, Debt lies by the Heir againſt the Baron for this Rent. Kelw. 125. pl. 83. Caſus incerti temporis.

1. If a Feme, Leſſee for Life, rendring Rent, takes Husband, and dies, the Baron ſhall be charged in an Action of Debt; for the Rent incurred during the Coverture, becauſe he took the Profits out of which the Rent ought to iſſue. 10 H. 6. 11. Curia.

A *Leaſe* was made *to a Woman dum ſola of a Houſe, with the Appurtenances, rendring Rent*; *ſhe married the Defendant*, and *during the Coverture, the Rent being in Arrear*, *ſhe died*, and the Leſſor brought an Action of Debt againſt the Husband for this Rent ſo in Arrear. It ſeemed that the Action well lies, according to 10 H. 6. 11. a. ſed adjornatur; but afterwards it was adjudged for the Plaintiff. Raym. 6. Hill. 12 Car. 2. B. R. Payne v. Minſhall. —— Lev. 25. Paſch. 13 Car. 2. B. R. Vane v. Minſhall, S. C. adjudged that the Baron here is chargeable in reſpect of the Perception of the Profits by himſelf, and ſo chargeable after his Feme's Death.———Keb. 20. pl. 57. Fane v. Minſhaw, S. C. held accordingly, per tot. Cur. for during the Coverture he is Aſſignee in Law, and receives the Profits, and therefore it is but reaſonable that he ſhould be charged.—Ibid. 22. pl. 63. S. C. & S. P. agreed clearly, and (Mallet J. abſente) Judgment for the Plaintiff.

If a *Leaſe of Lands* be made *to a Feme ſole for Life*, reſerving Rent, who marries, and the *Rent is arrear at the Death of the Wife*, an Action lies againſt the Husband; Per Powell J. Holt's Rep. 106 Paſch. 7 Ann. in Caſe of Billinghurſt v. Speerman.

2. If a Feme be indebted to another, and takes Husband, and dies, the Baron ſhall not be charged in Debt for this after the Death of the Feme, becauſe this was but in Action. 10 H. 6. 10. 12. 20 H. 6. 22. b.

See Tit. Waſte, (R) pl. 10. and the Notes there.

3. If a Feme Leſſee for Life takes Baron, and dies, the Baron ſhall not be charged for Waſte during the Coverture; for he was never Leſſee. Co. 5. *Foliambe*, contra 11 H. 6. 11.

4. The Baron ſhall have Treſpaſs after the Death of the Feme, for a Treſpaſs done upon the Land in Leaſe to the Feme during the Coverture. 10 H. 6. 11. 6.

S. C cited Lutw. 672. Arg. and ſaid he had ſeen the Record of this Caſe, and that no Judgment is enter'd. —S. C. cited 3 Mod. 189, 190. Arg. and ſays the Husband is not chargeable, becauſe the Judgment is not properly againſt him, he

5. If A. takes B. an Executrix to Wife, againſt whom an Action of Debt is after brought as Executors, and Judgment given againſt them to recover de Bonis Teſtatoris, and thereupon a Fieri Facias iſſues to levy the Debt and Damages, and the Sheriff thereupon returns a Devaſtavit, and after the Feme dies; whether Execution upon this Judgment may be ſued againſt the Baron, there not being any Judgment upon the Return of the Devaſtavit to recover de Bonis propriis. Mich. 9 Car. B. R. between *Trotman and James*, dubitatur. Intratur Tr. 9 Rot. 715.

he being join'd only for Conformity; but if upon the Return of the Devaſtavit there had been an Award of Execution de Bonis propriis, that would have been a new Judgment, and the old one de Bonis Teſtatoris had been diſcharged, and then the Husband muſt be charged for the new Wrong.—— Where Devaſtavit is return'd againſt Baron and Feme Executors, and Judgment given that the Plaintiff recover, and then the Feme dies, adjudged that the Baron is liable to Execution, notwithſtanding the Death of the Wife. Sid. 337. pl. 3. Trin. 19 Car. 2. B. R. Eyres v. Coward.——2 Keb. 238. pl. 15. Ayer v. Coward, S. C. adjudged for the Plaintiff.——S. C. in a MS. Rep. of Ld. Ch. J. Kelyng, reported thus, viz. Judgment was obtained *againſt the Defendant and Wife as Executrix*, and a *Devaſtavit returned*. They bring a *Writ of Error*. The Wife dies, and Execution is taken out againſt the Husband. It was agreed by all, that by the Death of the Wife the Writ of Error is abated. Next it was agreed, that if no Devaſtavit had been returned, the Husband had not been chargeable after the Death of the Wife; but there being a Devaſtavit returned, the Husband is charged as for his own Debt; and it was ſaid it has been reſolved, that after a Devaſtavit returned againſt the Husband and Wife, Action of Debt will lie againſt the Husband. MS. Rep. Paſch. 15 Car. 2. B. R. Ayres v. Coward.

6. If a Man takes a *Feme ſeiſed of Land by Tort at the Time of the Eſpouſals*, and the Feme *after the Marriage occupies the Land without the Agreement or Aſſent of the Baron*, yet Action lies againſt both, as well for the Occupation before the Eſpouſals, as after, during the Life of the Wife; but after her Death the Action lies not for this Occupation againſt the Baron. But if *he, who Right has, enters after the Marriage, and the Baron in the Right of his Wife re-enters*; *or if the Baron* after the Marriage, and before any Re-entry of him, that Right has, *occupies* the Lands, and then the Feme dies, in this Caſe Treſpaſs lies againſt him &c. Kelw. 61. a. b. pl. 1. Paſch. 20 H. 7. B. R. Anon.

7. Executrix married B. and then A. a Legatee, threatning to ſue B. for his Legacy, B. *promiſed Payment in Conſideration of Forbearance*. B. pleads that his Wife was dead before his Promiſe ſuppoſed to be made. Adjudged that the Wife being dead, B. is not chargeable; and tho' it were alleged that he had Goods in his Hands, yet it is not ſhewn how he had them, and he is thereby liable to the Executor or Adminiſtrator for them. Cro. J. 257. pl. 16. Mich. 8 Jac. B. R. Smith v. Johns. Yelv. 184. Smith v. Jones, S. C. adjudged accordingly per tot. Cur.

8. One married a Feme with a good Perſonal Eſtate; ſhe died, and left a poor Grand-child. It was reſolved the Husband ought to maintain the Grand-child. 1 Sid. 114. cited by Hale Ch. B. as 7 Car. Worceſter City v. Gerard.

9. *Judgment in Debt* was had *againſt a Feme ſole, who afterwards married*, and then the *Plaintiff brought a Scire Facias againſt the Husband and Wife* to have Execution; and after 2 Nihils return'd, Judgment was againſt them to have Execution. *A Year and Day expired before any Execution was executed.* The *Wife died.* The Plaintiff brought a *new Sci. Fa. againſt the Husband alone*, to have Execution of the ſaid Judgment. The Court held, that the Judgment on the Sci. Fa. againſt the Husband and Wife, made the Husband liable; and ſo a Judgment given in C. B. in Ireland, and affirm'd in B. R. there, was affirm'd here. Carth. 30. Paſch. 1 W. & M. in B. R. Obrian v. Ram. Comb. 103. S. C. and Judgment affirmed. —3 Mod. 186. Hill. 3 Jac. 2. B. R. the S. C. argu'd, but adjorna-tur; but ſays that it was afterwards in 1 W. & M. affirmed.——S. C. cited by Holt Ch. J. 1 Salk. 116. pl. 7. Mich. 9 W. 3. and 3 Salk. 63. pl. 2. ——S. C. cited by Holt Ch. J. 6 Mod. 257. Mich. 3 Ann. B. R.—— Skinn. 683. pl. 2. S. C. cited by Holt Ch. J.

10. A Man *marries an Adminiſtratrix*. The Plaintiff obtains a *Decree againſt him and his Wife for* 1500 *l. She dies.* Whether the Plaintiff can proceed againſt the Husband, without reviving againſt the Adminiſtrator of the Wife? It ſeems the Husband is not bound to anſwer farther than the Value of *the Eſtate which he had with his Wife.* 2 Vern. 195. pl. 177. Mich. 1690. in Caſe of Jackſon v. Rawlins.

11. Where there is a *Judgment againſt Feme ſole*, and afterwards a *Scire Facias*, and Judgment thereupon, *againſt the Husband and Wife*, and ſhe Carth. 30, 31. Paſch. 1 W. & M.

in B R. Obrian v. Ram, S. P. adjudged accordingly in C. B. and affirmed in B. R. in Error.——3 Mod 186. S. C. and Judgment affirmed.——Comb. 103. S. C. and Judgment affirmed.

she dies, the Husband is bound; per Holt Ch. J. Cumb. 311. Hill. 6 W. 3. B. R. in Case of Curry & Ux' v. Stevens.

Fol. 552. (H. a) What *Actions* the Baron shall have *after* the *Death of* the *Feme*. Because of the Feme.

See (H) pl. 1. S. C.

1. IF a Feme having a Rent for Life takes Husband, the Baron shall have an Action of Debt for the Rent incurr'd during the Coverture, after the Death of the Feme. 10 H. 6. 12. 11.

2. If the Baron takes a Seignioress to Wife, he shall have, after the Death of the Feme, Ravishment of Ward, and Ejectment of Ward, if ousted in the Life of the Feme, of a Ward fallen in the Life of the Feme. 10 H. 6. 11.

3. So he shall have Debt for Relief fallen in the Life of the Feme. 10 H. 6. 11. b.

Br. Testament, pl. 9. cites S. C.

4. Debt was brought *by R. W. Executor of the Testament of Alice his Wife, Executrix of the Testament of H. B. upon an Obligation of* 20 *l. due to the Testater*, and the Defendant was awarded to answer, notwithstanding it was the Will or Testament of a Feme Covert. Br. Dette, pl. 107. cites 4 H. 6. 31.

The Action is gone by the Death of the Wife; per Cur. Noy 18. Higgins's Case, S. C.——Brownl. 205. Huggins v. Butcher, S. C. seems only a Translation of Yelv.

5. An Action of *Battery for beating the Wife* was brought by the Husband after her Death. This, being a Personal Wrong, is dead with the Person. Yelv. 89. Trin. 4 Jac. B. R. Higgins v. Butcher.

6. A personal Thing (as Action *for Work done by the Wife*, who dies) will not survive to the Baron. 4 Mod. 156. Mich. 4 W. & M. in B. R. Buckley v. Collier.

1 Salk. 116. pl. 7. S. C. & S. P. accordingly, by Holt Ch. J. ——Comb. 455. S. C. adjornatur. ——Carth. 415. S. C. adjudged.—And tho' the Judgment in the Sci. Fa. does *not alter the Nature, yet it changes the Property of the Debt*, and Debt may be brought on an Award of Execution; Per Holt Ch. J. Skin. 683. S. C.——S. C. cited by Holt Ch. J. 2 Ld Raym. Rep. 1050. Mich. 3 Ann. at the Bottom.

7. Error upon a Judgmedt in C. B. in Scire Facias, where a *Feme sole recovered* in C. B. *and took Husband*, and after they *joined in a Scire Facias to have Execution, and had Judgment* in the Scire Facias, the Wife died, and the Husband sued Execution, without taking out Letters of Administration; and ruled, that the Judgment in Scire Facias attached a joint Interest in Baron and Feme, and if the Husband died, it would survive to the Wife, & e contra. *A Scire Facias is an Action, and is in the Nature of an Original*, and if they had recovered in an Original, there could be no Question in the Case; and by the Judgment in the Scire Facias in this Case the Debt vests, and of such Opinion was the Court. Skin. 682. pl. 2. Mich. 9 W. 3. B. R. Woodyeer v. Gresham.

(I. a) Where the Default of the Baron is the Default of the Feme, ſo that the one ſhall not anſwer without the other.

1. QUID Juris clamat againſt Baron and Feme, and the *Feme was received in Default of the Baron*, and pleaded in Bar for Part, and confeſſed for the reſt Ready to attorn, and was not permitted in the Abſence of her Baron, but Diſtringas ad Attornand' awarded. Br. Coverture, pl. 19. cites 21 E. 3. 1.

2. *Treſpaſs againſt Baron and Feme, he came*, and *ſhe not*, he ſhall anſwer; and *contra if ſhe comes and he not*, and *ſhe ſhall not anſwer till he comes*, *or* till he *be outlawed*. Br. Reſponder, pl. 32. cites 22 Aſſ. 46.

3. Treſpaſs againſt Baron and Feme; *at the Exigent the Baron came*, and the *Feme not*, and becauſe the *Feme was miſ-named in the Exigent*, therefore *Exigent de novo iſſued againſt her*, and *idem dies* was given *to the Baron*, and yet the Baron was compelled to anſwer immediately. Br. Baron and Feme, pl. 87. cites 39 E. 3. 18. S. P. For *ſhe was not named by her Name of Coverture, but by her proper Name only.* Br. Exigent, pl. 34. cites S. C.

4. If the *Baron be outlawed, and gets* Charter of *Pardon, and brings Scire Facias*, it ſhall not be allowed if he does not bring in his Feme with him. Br. Baron and Feme, pl. 10. cites 40 E. 3. 34. Debt againſt Baron and Feme, *they were outlaw'd*, and *each of them ſued a* Charter of *Pardon*, and *ſued Sci. Fa.* and found Mainpriſe; the *Sheriff returned Tarde*, and the *Baron appeared, and the Feme not*, and the Baron alone would have ſued Scire Facias Sicut Alias upon the firſt Mainpriſe, or Scire Facias de novo, and new Mainpriſe, and was not ſuffered without the Feme. Br. Baron and Feme, pl. 19. cites 44 E. 3. 3.

Baron and Feme *were outlawed*, and the *Feme appeared and ſhewed* Charter of *Pardon*, and it was not allowed, becauſe the Baron did not appear, and ſhe cannot plead without her Baron, by which ſhe was ſuffered to go at large. Br. Baron and Feme, pl. 39. cites 11 H. 4. 89. —— Br. Utlagary, pl. 13. cites 11 H. 4. 99. S. P [but it ſeems miſprinted, and that it ſhould be 89. beſides, there are not ſo many Pages as 99.]

5. The Default of the Feme *in Dower* againſt Baron and Feme is the Default of both, by which the Demandant recovered Seiſin of the Land; Quod Nota. Br. Baron and Feme, pl. 12. cites 41 E. 3. 24. Br. Default, pl. 5. cites S. C.

6. *Detinue againſt Baron and Feme*; the *Baron rendered himſelf at the Exigent*, and the *Feme not*, and the *Baron pray'd that the Plaintiff may count againſt him*, and was compelled, notwithſtanding the Default of the Feme, becauſe the Proceſs is determined againſt him, and he *counted of a Bailment to the Feme when ſhe was ſole, and therefore* the Baron *was not compelled to anſwer without his Feme, but went quit*; Quod Nota; for the Baron *ſhall not have corporal Pain for his Feme*, for he ſhall not be impriſoned till the Feme comes, *but* by ſuch Default the *Baron ſhall loſe iſſues*. Br. Exigent, pl. 52. cites 43 E. 3. 18. Br. Baron and Feme, pl. 63. & 75. cites S. C. — S. C. cited Le. 138. pl. 189.

7. *And* ſo it was *in Præcipe quod reddat*; *Grand Cape ſhall iſſue for ſuch Default of the Feme*. Br. Exigent, pl. 52. cites 43 E. 3. 18. In a *Præcipe* againſt Husband and Wife, the Default of one of them is the Default of both; for one cannot anſwer without the other; it is no Inconveniency to the Wife, for upon Default after Default of the Husband ſhe may be received to defend her Right. Jenk. 27 in pl. 50. cites 26 H. 6. Default 4.

In *Writ of Land* againſt *Baron* and Feme, he *made Default*, and *ſhe ſaid that ſhe was ſole, and not covert, and was ready to anſwer*, but the Court would not receive her, but *awarded Grand Cape*, and at the Return thereof, if the Baron did not come, ſhe ſhould have her Plea. Thel. Dig. 119. Lib. 11. cap. 2. S. 3. cites Paſch. 6 E. 3. 249.

8. *Treſpaſs* againſt Baron and Feme; *at the Exigent* the *Sheriff returned that he had taken them*, and the *Baron came in Ward, and the Feme not*, and the Baron was compelled to anſwer without his Feme, and pleaded Not Guilty; Quod Nota; contrary in *Debt*. Br. Baron and Feme, pl. 18. cites 44 E. 3. 1.

If Feme covert and her Baron, and others, are Defendants, as Executors

9. *Debt againſt Baron and Feme, the Baron rendered himſelf*, and the *Feme was returned waived*, by which the Baron went quit by Judgment, and was not compelled to anſwer. Br. Reſponder, pl. 40. cites 11 H. 4. 56.

or Adminiſtrators, and ſhe comes without her Baron, ſhe ſhall not be compelled to anſwer without her Baron, notwithſtanding the Statute. Br. Reſponder, pl. 10. cites S. C. —— Fitzh. Reſponder, pl. 17. cites S. C.

Le. 138. pl. 139. cites the Book of Entries 187. where Debt was brought againſt the

10. In Debt or Treſpaſs againſt Baron and Feme, nor *in any perſonal Action*, if the Baron appears and the Feme not, or via verſa the *one ſhall not anſwer without the other*, but if the Feme be *waived*, the Baron ſhall go ſine Die; by all the Juſtices. Br. Baron and Feme, pl. 8. cites 4 H. 6. 29. & 44 E. 3. 1. accordingly.

Husband and Wife, and Proceſs continued until the Exigent; the Husband rendred himſelf, and the Wife was waived, and Judgment given, Quia videbatur Juſticiariis hic that the Husband abſque præfata Uxore ſua reſpondere non potuit, & rationi diſſonum ſit ipſum in Curia hic, cum in eadem loquela reſpondere non potuit, ulterius detineri, ideo eat inde ſine Die.

Br. Corone, pl. 50 cites S. C. & S. P.

11. Feme covert ſhall anſwer *to Felony* without her Baron; per Littleton; and ſo they are not one Perſon in Law to all Intents. Br. Baron and Feme, pl. 49. cites 15 E. 4. 1.

12. The *Wife's* Anſwer was admitted without the *Husband's*, he pretending to plead to the Juriſdiction of the Court. Toth. 74. cites 4 Jac. Trentham v. Kinnerſley & Ux.

13. An *Attachment againſt the Wife alone*, and not the Husband; for that ſhe would not anſwer the Bill. Toth. 77. cites Mich. 4 Jac. Keies v. Macher.

14. Upon a Latitat againſt the Husband and Wife, a Cepi Corpus was returned for the Wife; but Non eſt inventus for the Husband. Reſolved, that nothing could be done in this Caſe, unleſs there were Bail put in by the Husband; for a Woman without her Husband cannot be ſued, nor put in Bail, and therefore, becauſe the Plaintiff could not declare, the Wife was diſcharged. Cro. J. 445. pl. 2. Mich. 15 Jac. B. R. Anon.

15. In an *Information for Recuſancy of the Feme*, it was ſaid that the Feme cannot join Iſſue without the Baron; for in 42 E 3. ſhe cannot *plead to Outlawry* without her Baron; and in 11 H. 4. ſhe cannot plead *Pardon* of the Outlawry without her Baron. Arg. quod fuit conceſſum per Curiam. 2 Roll Rep. 90. Paſch. 17 Jac. B. R. in Sir Geo. Curſon's Caſe.

16. A Wife to anſwer without her *Husband*, he being *beyond Sea*. Toth. 75. cites 11 Car. Portman v. Popham.

If the Bill againſt Baron and Feme be for a *Demand*

17. *Wife's Anſwer* is no Anſwer, being made *without the Husband's* Anſwer, and no Proceſs in ſuch Caſe can be had againſt the Wife. Arg. 2 Chan. Caſes 173. Hill. 1 Jac. 2. in Caſe of Ld. Ward v. Ld. Meath.

out of her ſeparate Eſtate, and the Baron is beyond Sea, and not amenable by the Proceſs of the Court if ſhe be ſerved with a Subpœna, Ld. Cowper held the Proceſs regular, rather than there ſhould be a Failure of Juſtice, and ſhe muſt appear and anſwer. 2 Vern. 613. pl. 551. Trin. 1708. Dubois v. Hole & Ux.

Gilb. Equ. Rep. 83. S. C. reported in totidem Ver-

18. Where the Feme reſerved the Power of her own Eſtate, the Huſband being much in Debt, and *to diſcharge his Goods*, going *to be taken in Execution*, *ſhe gave a Note to pay the Debt* out of her own ſeparate Eſtate, and

and accordingly the Action was discharged. On a Bill against Baron and Feme, the Baron could not be met with to be served with a Subpœna; but the Wife was inforced by Attachment without him, he being made a Party only for Conformity. Chan. Prec. 128. pl. 249. Hill. 1711. Bell v. Hyde.

bis.— Abr. of Cases in Equity, 65. pl. 8. S. C. cites no Book.

19. Tho' a *separate Answer of a Feme Covert ought regularly to have an Order to warrant it*, yet if it be put in without an Order, but done deliberately by good Advice, and she fully apprised thereof, and done at her Request, and with Consent of her Husband, and the Plaintiff accepts of it, and replies to it, and the Answer being to the Feme Covert's Advantage, neither she in her Life, nor the Husband after her Death, or any on her Behalf, can assign this which was done in her Favour as an Irregularity; and so was resolved by Ld. C. King to be regularly put in. 2 Wms.'s Rep. 371. Trin. 1726. The Duke of Chandois v. Talbot & Ux'.

Select Cases in Chan. in Ld. King's Time, 24. S. C. but very short, and only says, that a separate Answer put in by the Wife alone, without Order of the Court for that Purpose, is irregular.——The Wife by Order of Court answer'd separately. Cases in Equ. 42. in Ld. Talbot's Time, Mich. 1734 Penne v. Peacock & Ux.

20. On a Motion to suppress the Answer of the *Defendant*, for that she *marrying after the Bill filed, and before Answer put in*, had *put in her Answer without her Husband*. But Ld. C. King said, that marrying pendente lite does not abate the Suit, and tho' there is no Charge in the Bill against the Husband, or Subpœna served on him, yet he *must join* in the Answer of the Wife *for Conformity*; for no married Woman can put in an Answer without her Husband, by the Rules of the Court, *without special Leave* of the Court, *and an Order for that Purpose*. MS. Rep. Hill. 4 Geo. 2. in Canc. Abergavenny v. Abergavenny.

2 Wms's Rep. 311. pl. 88. Abergavenny v. Abergavenny, is not the S. P.

(K. a) Arrest &c. of Feme.

1. *Trespass* against Baron and Feme. The *Baron was outlaw'd* by the Exigent, and the *Feme surrender'd herself*, and because the Feme shall not answer without her Baron, and he is outlaw'd, therefore she went quit. Br. Baron and Feme, pl. 10. cites 40 E. 3. 34.

2. If Feme Covert makes actual *Disseisin with Force*, she shall be imprison'd. Arg. 2 Brownl. 96. cites 9 H. 4. 7. b. 8 E. 3. 52. 22 E. 2. Damages, 20. 27 H. 6. Ward 118.

3. *In Assise* against Baron and Feme, she shall be *attach'd by the Goods of the Baron*; for she is ameanable by the Baron. Br. Baron and Feme, pl. 45. cites 7 H. 6. 9. by the best Opinion.

Br. Attachment in Assise, pl. 4. cites S. C.

4. The *Husband appears, and the Wife not*. Attachment went against them both. Cary's Rep. 92. cites 19 Eliz. Monox v. Abel & Ux'.

So where the Baron only appear'd and demurr'd. Cary's Rep. 52. 1 Eliz. Spicer v. Pakine.

5. The *Husband and Wife were outlaw'd*; the *Wife came in in Ward by Process, and brought a Charter of Pardon*. The Court held that she shall be discharged of the Imprisonment; but the Charter cannot be allow'd, because she cannot sue Scire Facias against the Plaintiff, to make him declare upon the Original, without her Husband, and the Pardon is with Condition. Ita quod ipsa staret recta in Curia. D. 271. b. pl. 27. Hill. 10 Eliz. Anon.

Process in Debt against Baron and Feme continues till the Exigent. The Baron appears, but *will not suffer the Wife to appear*; and 'twas ruled per Cur. that in this Case *she may make Attorney*, to prevent being waived. D. 271. b. Marg. pl. 27. cites 42 Eliz. C. B.

When

When Baron and Feme are taken on a *Capias Utlagatum*, the Feme ſhall be diſcharged; per Holt. Farr. 82. Mich. 1 Ann. B. R. obiter.

Le. 138. pl. 189. S. C. and after the Juſtices had adviſed thereof, the Superſedeas was ſtay'd, without recording the Appearance of the Huſband; and Lady Malory's Caſe was cited, where the Husband appear'd, and put in Superſedeas for himſelf only; but it was not allow'd, but Proceſs continued till Outlawry.

6. In Debt againſt Husband and Wife, *Executrix of her former Huſband*, the *Husband appeared upon the Exigent, and would have put in a Superſedeas for himſelf alone*, without Appearance or Superſedeas for the Wife, and ſo the Court at firſt thought he might; but upon a Precedent ſhew'd of 18 Eliz. in one **Sommers's Caſe**, who would have put in ſuch Superſedeas for himſelf alone, but was not ſuffer'd ſo to do; but was compell'd to put in an Appearance, Attorney, and Superſedeas for his Wife alſo, the Court were of the ſame Opinion. Cro. E. 118. pl. 4. Mich. 30 & 31 Eliz. B. R. Bilford v. Fox.

A Superſedeas was put in for the Feme on an Exigent againſt the Baron and Feme, and on much Debate it was agreed, that the Feme (for the Safeguard of herſelf from Impriſonment) being returned upon the Exigent, or upon the Capias, viz. upon the one Quod reddidit ſe, upon the other Cepi; and as to the Husband (Non eſt inventus) may appear, [her Appearance may be enter'd;] and ſo long as the Proceſs continues againſt the Husband, ſhe ſhall have Idem Dies; but when the Baron is returned Utlagatus, ſhe ſhall be diſcharged without Idem Dies, and that ſtands well, and reconciles all the Books; but whether ſhe ſhall have a Superſedeas de non Moleſtando is doubtful; for by the 11 H. 4. 89. and Dy. 271. if the Baron be outlaw'd, and the Wife waived, and the King pardons the Feme, that ſhall be allowed, and ſhe ſhall go Sine Die; and ſee 4 E. 3. 34. and 14 H. 6. 14 13 H. 4. 1. and it ſeemed by all to be agreed, that the Baron after he purchaſeth his Pardon, or after he comes and reverſes the Outlawry, he ſhall not have Allowance of his Pardon, nor his Appearance received, unleſs he brings in his Feme, who by Preſumption of Law is ameſnable by him; but the Baron is not ameſnable by the Feme. Hutt. 86. Hill. 2 Car. Anon.———Cro. J. 58. pl. 2. Smith v. Aſh, S. C. and the Exigent appointed to be filed againſt both.———Litt. Rep. 18. S. C. accordingly.

7. The Wife was *Executrix* of her firſt Baron, and upon a *Devaſtavit returned*, a *Ca. Sa. iſſued againſt both de Bonis propriis*. The *Baron was in the Fleet*, and the Feme was brought into Court by Hab. Corp. and *pray'd that ſhe be committed alſo* to the Fleet; but Anderſon moved that ſhe ſhould not; for if ſhe and her 2d Baron had been joint Executors, or if ſhe had not proved the Will, or adminiſter'd during her Widowhood, ſhe ſhould not be charged in Devaſtavit, becauſe then it was the Act of the Baron. But *ſhe was committed*, becauſe it appears that ſhe was Executrix, and that ſhe *adminiſter'd when ſhe was ſole*, and then the Devaſtavit of the Baron ſhall be ſaid the Act of the Feme. D. 210. a. pl. 23. Marg. cites Mich. 38 & 39 Eliz. C. B. Vaughan v. Thompſon.

Noy 13. Ampſon v. Stockburn. Per Popham, the Capias muſt be againſt the Feme only; but cites 9 E. 4. 24. a. contra.———See Tit. Amercement, (D. a) pl. 9. and the Notes there.

8. In Debt on Bond made by the Wife dum ſola fuit, Judgment muſt be that Baron and Feme *capiantur*. Mo. 704. pl. 982. Hill. 39 Eliz. Bardolph v. Perry & Ux'.

9. The Defendant and his Wife were committed to *Newgate* for not performing an Order. Toth. 157. cites 10 Jac. Weſtdeane v. Frizell & Ux'.

Brownl. 226. S. C. held accordingly. ——2 Bulſt. 80. S. C. adjudged.——Lane, 48. Doillie v. Jolliffe, Paſch. 7 Jac. in the Exchequer, S. P. and ſeems to be S. C. Adjornatur.

10. *Widow pending a Suit againſt her, takes Husband.* The Plaintiff recovers againſt her. Per tot. Cur. the Capias ſhall be awarded her, and not the Husband. Cro. J. 323. pl. 1. Trin. 11 Jac. B. R. Doyley v. White.

3 Bulſt. 150. Wood & Ux' v Sutcliff, S P. per Coke Ch. J.

11. Baron and Feme in Execution. The *Feme eſcapes*. Debt lies againſt the Marſhal; per 3 Juſtices againſt 1. 2 Bulſt. 320. Hill. 12 Jac. Sutcliff v. Reynolds.

12. Action

12. Action was brought againſt Baron and Feme, and an *Attorney appears for the Baron alone*; Per Cur. it is the Appearance of Baron and Feme in Law. Brownl. 46. Paſch. 12 Jac. Anon. *Appearance for the Husband* will not be received without an Appearance for the Wife too. 6 Mod. 86. Mich. 2 Ann. B. R. in Caſe of Wigg v. Rook.

13. The Baron ſhall never be *charged for the Act or Default of the Wife*, but when he is made a *Party to the Action*, and Judgment given againſt him and the Wife, As for the Debt of the Wife, or Scandal publiſh'd by the Wife, or Treſpaſs by her &c. ſo that in Indictments of her, he ſhall not be charged for the Fine ſet upon her. 11 Rep. 61. b. Mich. 12 Jac. in Dr. Foſter's Caſe.

14. Latitat againſt Baron and Feme. The *Feme was arreſted*, but *Baron was not found.* The Feme is diſmiſs'd; for there can be no Declaration till the Baron be taken, and has put in Bail. Cro. J. 445. pl. 23. Mich. 15 Jac. B. R. Anon. It was ſaid that the Plaintiff ſhould ſue them by Proceſs of *Outlawry*, and ſo he might have *Remedy*. Ibid.

15. Feme ſole enters into Bond, and then marries. Debt is brought againſt them on the Bond, and they *deny the Deed.* The Baron ſhall be taken for the Fine as well as the Wife; for ſhe had nothing to pay the Fine with. And ſo in Treſpaſs againſt the Baron and Feme, and they both are found guilty, both ſhall be *taken for the Fine*, which the Prothonotaries agreed to. Het. 53. Mich. 3 Car. C. B. Johnſon v. Williams. Dal. 39 pl. 11. 4 Eliz. Anon. S. P. and Het. ſeems only a Tranſlation of Dal.

16. Aſſault and Battery was brought againſt the Husband and Wife, for a *Battery by the Wife*, and Defendants were found guilty. The Judgment ſhall be *Quod capiatur* againſt the Baron only. Cro. C. 513. pl. 8. Mich. 14 Car. B. R. Anon.

17. Where an Action, in which Bail is required, is brought againſt an *Attorney and his Wife*, he muſt put in Bail for himſelf and his Wife, and therefore the Declaration being againſt the Wife in Cuſtodia, and the Husband in propria Perſona, it was ordered that Querens nil capiat per Billam. Sty. 226. Trin. 1650. B. R. Elſy v. Mawdit. D. 377. a. pl. 30. Trin. 23 Eliz. Powle's Caſe, S. P. where the Husband was Clerk of the Crown in Chancery.——S. C. cited Vent. 299.

18. If there be *Cauſe to have Special Bail*, the Wife muſt lie in Priſon till the Husband appears, and puts in Bail for her; for ſhe cannot put in Bail for herſelf, being Covert Baron; per Glyn Ch. J. Sty. 475. Mich. 1655. B. R. Attlee v. Lady Baltinglas.

19. In *Debt againſt Husband and Wife for her Debt dum ſola, he was outlaw'd, and ſhe was waived, and taken* and impriſon'd; but the *Husband could not be found.* It was moved, that ſhe might be diſcharged upon an *Affidavit that ſhe was but* 17 *Years old when ſhe married*, and ſo could not be Debtor; *and as to the Outlawry, that ſhe was pardoned by the General Pardon.* She was diſcharged. Sid. 20. pl. 2. Hill. 12 Car. 2. C. B. Biron v. Bickley.

20. *Debt upon Bond ſealed by both*, and both were taken by Capias. Per Cur. an *Habeas Corpus* to bring them into Court might be without Motion, in order that the Baron only may be committed, and the *Feme diſcharged.* Lev. 1. Mich. 12 Car. 2. B. R. Slater v. Slater.

21. The Secondary, upon Search, reported all the Precedents to be, that *unleſs the Wife be arreſted*, or the Husband give Bond for her Appearance, he ſhall *not be forced to put in Bail for both, if he will lie in Priſon*; but elſe he ſhall, before he can be bailed in Debt brought againſt both, upon a *Statute enter'd into by the Feme dum ſola*, which the

Court agreed. Keb. 225. pl. 39. Hill. 13 Car. 2. B. R. Cranmer v. Andrews.

22. The *Husband in Custodia*, in a Writ where he and his Wife are named, *must appear for himself and Wife; but is not forced to put in Special Bail for her, if she be not arrested*; but the Sheriff may, upon the Arresting him, take an Obligation for good Bail, which by Hern, Secondary, is the constant Practice of the Court; but he must find Special Bail for himself. Keb. 241. pl. 82. Hill. 13 Car. 2. B. R. Nevil v. Cage & Ux'.

The Feme enter'd into an Obligation dum sola, and after married the Defendant. Debt was brought against her,

23. The *Husband confess'd a Judgment* against himself and his Wife as *for a Debt owing by the Wife dum sola*; whereas it appear'd upon Examination, that *it was contracted after the Marriage*, and this was on Purpose to take the Wife in Execution; but it appearing that the Baron was in Execution also, the Wife was discharged; and so she should, had the Contract been before the Marriage. Lev. 51. Mich. 13 Car. 2. B. R. The Lady Chaworth's Case.

and she being in Prison, and the Plaintiff, after knowing of the Marriage, brought another Writ against the Baron and Feme, and took the Baron also, and declared against both in Custodia. The Court on Motion discharged the Feme; for the Baron only is to be imprison'd, and before he shall be discharged, shall find Bail for himself and her. Lev. 216. Trin. 19 Car. 2. B. R. Whitfield v. Holmes.

Feme Covert sealed a Bond, and being arrested and carried to Prison, the Court, upon Affidavit made that she was Covert, and entring her Appearance, discharged her without Bail. Freem. Rep. 210. pl. 216. Trin. 1676. Lady Thornborough's Case.

Keb. 198. pl. 194. S. C. it was mov'd to discharge her, it being an Arrest on mesne Process only, and to say she is in Custodia, is no Reason, because when he comes in he shall find

24. In Debt against Baron and Feme, if *upon the Latitat the Feme appears*, she shall be accepted; per Cur. *But* where she is *in Execution*, she shall not be discharged, nor could the Lady Baltinglas, who was in Custodia only upon Proceſs; but per Cur. she ought to be discharged, and that without Bail, if it *appear upon the Writ that she is a Feme covert*; *but if* she be *sued as a Feme sole*, she shall put in Bail; and by Twisden, it is an unreasonable Course, that because she cannot appear by Reddidit se, but in Custodia, therefore she should not be dismissed as in C. B. else this would be as good as a Divorce, a continual Non est inventus being returned against the Husband, and no Declaration can be against her, and so she shall always be in Prison. Adjornatur. Keb. 189. pl. 171. Mich. 13 Car. 2. B. R. Bars v. Desman.

Bail for himself and his Wife, and so the Plaintiff may declare against them Both in Custodia, and per Cur. she was discharged, Nisi. Twisden said, that there had been 3 Opinions, viz. 1st. That she should lie in Prison till the Husband come in, and that is unreasonable. 2dly, That she ought to file common Bail, if another will be bound for her, which may prevent a Fraud in arresting of her at the Beginning of a long Vacation, this the Court conceived reasonable, but it is at the Election of the Wife, whether she will or not. 3dly, That she ought to be discharged without Bail, which the Court conceived reasonable, and so awarded here. Ibid.

If *Feme covert be arrested*, let Cause of Action be what it will, she shall be *discharged upon common Bail*; but if *Husband* is *arrested*, he

25. *Feme covert* in Suit against Baron and Feme *is arrested, and gives Bond for her Appearance*, and now prayed to be delivered on common Bail, the Sheriff having *returned Cepi Corpus of the Baron and Feme both, having only taken her*, which the Court denied after return of Cepi Corpus; contra if *Non est inventus* had been returned as to the Husband; but yet *if it appears only a Practice* they will discharge her, to examine which they gave Rule for the Sheriff to return the Body of the Husband. Keb. 367. pl. 62. Mich. 14 Car. 2. B. R. Dethick v. Yaxley & Ux.

shall not be discharged by giving Bail for himself without giving it for his Wife likewise. 6 Mod. 17. Mich. 2 Ann. B. R. Cornish v. Marks.——S. P. by Twisden J. Mod. S. pl. 24. Mich. 21 Car. 2. and said, that so it was done in Lady Baltinglass's Case, and that where it is said in Crooke, [Cro J. 445. pl. 23. Anon.] that the Wife in such Case shall be discharged, it is to be understood that she shall be discharged upon common Bail; and so Livesey said the Course was.——If it be clear and *notorious that she*

ſhe is covert, common Bail ought to have been received, but if it be *doubted*, ſhe ought to find ſpecial *Bail*; Per Cur. 6 Mod. 105. Hill. 2 Ann. B. R. Anon.———S. P. if the Cauſe requires ſpecial Bail. 7 Mod. 10. Paſch. 1 Ann. B. R. per Holt Ch. J. Anon.

26. *Debt* againſt Husband and Wife, for a Debt *ſuppoſed to be due by her dum ſola*; Special Bail was put in. Judgment was had againſt them, and they *ſurrendered themſelves in Diſcharge of the Bail.* It was moved to diſcharge the Feme, *becauſe no Debt was due from her dum ſola, but this Action was contrived between the Plaintiff and the Husband, to make her a Priſoner.* It was agreed, that if the *Wife* is *taken upon meſne Proceſs before her Husband*, ſhe *ſhall be diſcharged, and* when the *Husband* is *taken*, he *ſhall give an Appearance for Both*; but it was ſaid, that *upon an Execution the Wife may be taken firſt*; *but* dubitatur what ſhould be done; & adjornatur. Sid. 395. pl. 2. Mich. 20 Car. 2. B. R. Gabry v. Gabry. Vent. 51. Mich. 21 Car. 2. B. R. Jackſon v. Gabree, S.C. the Gaoler let the Husband eſcape. It was mov'd to diſcharge the Wife, becauſe the Husband took no Care of her, but

let her lie there in a very neceſſitous Condition. At firſt the Court doubted what to do, but afterwards reſolved, that unleſs the Plaintiff would get the Husband taken again, as he might do, they would diſcharge the Wife, and ſaid, that the Eſcape of the Husband was the Eſcape of the Wife.—2 Keb. 576. pl. 98. S. C. and per Cur. if the Husband will lie in Priſon the Wife muſt do ſo too; but if he will put in Bail for himſelf, he muſt do ſo for his Wife alſo; but if he will not appear, or this were not in Execution, ſhe ſhould be diſcharged, and it was referred to the Secondary to examine the Practice, and if they were in Execution or not.— ——Sid. 395. in S. C. the Reporter adds a Nota, that there was a Caſe in C. B. 12 Car. 2. as he remembers, between Hunt & Drake & Ux. which was the ſame as this, only that the Baron was Priſoner before, and that it was by Contrivance to take his Wife, who was the Siſter of Sir John Potts; and that Bridgman then Ch. J. there, and the other Juſtices, diſcharged the Feme, but firſt they examined the Practice, and ordered that the Judgment ſhould be taken off the Roll.

27. If they are arreſted in an *Action* which *requires ſpecial Bail*, and the *Husband puts in Bail for himſelf, he muſt put in Bail for his Wife alſo*; but *if he lies in Priſon, the Wife cannot be let out upon common Bail.* Vent. 49. Mich. 21 Car. 2. B. R. Anon. But it is otherwiſe if the *Husband abſconds*, and cannot be arreſted. Vent

49. Mich. 21 Car. 2. B. R. Anon.———In ſuch Caſe ſhe ſhall not be diſcharged but upon common Bail, and then new Proceſs ſhall go againſt the Baron, with an Idem Dies given to the Wife; Per Holt Ch. J. 1 Salk. 115. in pl. 3. Hill. 7 W. 3. B. R.

28. A *Judgment* in a Sci. Fac. was had *againſt a Feme* upon a former Judgment upon two Nihils returned, *but before the Sci. Fac. brought ſhe was married to A.* and was *brought againſt her as ſole by Contrivance* between the Plaintiff and her Baron to oppreſs her, and lay her up in Priſon, and ſhe could not help herſelf by Error or Audita Querela, becauſe her Baron would releaſe, and the Plaintiff knew of her being married. The Court ſaid, that this Judgment might be ſet aſide for the Miſdemeanor of the Plaintiff; but being informed that the Marriage was under Debate in the Eccleſiaſtical Court, and near to Sentence, they ſuſpended making any Rule till that was determined. Vent. 208. Paſch. 24 Car. 2. B. R. Lady Prettyman's Caſe. 3 Keb. 27. pl. 47. Lady Prettyman v. Marſhall, S. C. the Court inclined accordingly, but adjourn'd it for the ſame Reaſon

29. Plaintiff brought a *Bill againſt the Husband and Wife*, who was the Daughter of the Plaintiff. The *Husband puts in a Plea and ſwears to it, but the Wife refuſed* to ſwear to it. Upon Suggeſtion that the Wife's Refuſal was in Combination with her Mother, it was ordered, that the Plea ſtand as for the Husband, and the Plaintiff to proceed againſt the Wife. Ch. Caſes 296. Hill. 28 & 29 Car. 2. Pain v. ....

30. Writ againſt Husband and Wife. The *Wife was taken and offered Bail for herſelf*, but the Bailiffs inſiſted on Bail for her Husband alſo who was not taken, and committed her, and an Attachment was granted againſt the Bailiffs; for tho' the Husband is compellable to give Bail for himſelf and his Wife, yet ſo is not the Wife, but for herſelf only; but per Holt, if we grant an Attachment they ſhall not take an

Action,

Action, they ought not to have two Remedies. Cumb. 304. Mich. 6 W. & M. in B. R. Hellier v. Condy.

S. P. by Kemp Secondary, and ſaid it had been the Practice of B. R. for 40 Years of his Knowledge.

31. If an Action be brought againſt Husband and Wife, and the *Husband is arreſted*, he ſhall give a *Bail Bond* for the Appearance of him and his Wife, and muſt put in Bail *for both*; but if one brings an Action againſt the Husband only, he cannot declare againſt Husband and Wife; per Holt Ch. J. 1 Salk. 115. pl. 3. Hill. 7 W. 3. B. R. in the Caſe of Carpenter v. Fauſtin.

Goldsb. 127. pl. 19. Hill. 43 Eliz. Anon.

Gilb. Equ. Rep. 83. S. C. in totidem Verbis.

32. Upon a Suit in Chancery againſt Baron and Feme, wherein the *Baron was made a Party only for Conformity*; ſhe was taken up on an *Attachment for not putting in her Anſwer*, and could not be diſcharged without entering her Appearance with the Regiſter, and paying Coſts of the Motion. Ch. Prec. 328. pl. 249. Hill. 1711. Bell v. Hyde & Ux.

(L. a) Where the Baron is baniſh'd, or an Alien, or beyond Sea.

Br. Nonability, pl. 9. cites 2 H. 4. 7. S. C. and ſome of the Juſtices ſaid, that it was becauſe ſhe was the King's Farmer.——Br. Baron and Feme, pl. 66. cites S. C. accordingly, but Brooke ſays Quære, and ſays vide 1 H. 4. 1. ——Br. Brief, pl. 422. cites S C ——Jenk. 4. pl. 4. cites S. C ——3 Bulſt. 188. Coke Ch. J. ſays her Dower was allowed.——Mo. 851. S. C. cited in Eliz. Wilmot's Caſe.

1. WILAND was baniſhed 18 E. 1. by Parliament, and his Wife *had her Jointure*, by Advice of all the Judges and others; Per Coke Ch. J. and per Doderidge, in the Abridgment there are divers Caſes in Time of H. 1. and H. 3. accordingly, and 10 E. 3. the Wife of Matravers brought *Writ of Dower*, Matravers being baniſh'd. Roll Rep. 400. pl. 27. Trin. 14 Jac in Wilmore's Caſe.

Br. Coverture, pl. 76. cites S. C.

2. If the *Baron forejures the Realm* the Feme is a Perſon able to alien her Land without the Baron. Br. Baron and Feme, pl. 81. cites 31 E. 1. and Fitzh. Cui in Vita 31.

3. The King brought *Quare Impedit* againſt the Wife of an Exile; Per Doderidge J. Mo. 851. in pl. 1159. cites 10 E. 3. 399.

4. The Plaintiff ſhewed by his Bill, that he freighted a Ship into Spain, which was there confiſcate and all his Goods; for the Defendant's Husband, being *Maſter of the Ship*, had an Engliſh Book found in the Ship, contrary to the Laws there, which he was forewarned of, and knew the Laws, and the Defendant's *Husband was condemned to the Gallies for 14 Years*, and the Plaintiff, as well for his own Relief as for the Relief of the Defendant, deviſed to obtain Licence from her Majeſty, for tranſporting 60 Tuns of Beer yearly, for 8 Years, the Profits whereof to be equally divided between them, and the Bill exhibited to her Majeſty was in both their Names, and the Party of the Charge, but the Defendant cautiouſly got the ſame altered into her own Name, and hath ſold the ſame away without yielding the Plaintiff any Profit; the Defendant doth demur, becauſe ſhe is a Feme covert; it is order'd a Subpœna be awarded againſt her to make a better Anſwer. Cary's Rep. 143, 144. cites 22 Eliz. Caſtleton v. Alice Fitz-Williams.

Mo. 666. in pl. 910. it

5. The *Wife may ſue in her own Name in her Husband's Abſence beyond Sea*, as in Caſe of Aſſault &c. but ſhe cannot be ſued before he returns

turns again ; Per Williams J. and the whole Court. Bulſt. 140. Trin. 9 Jac. Anon. was admitted per Cur. Paſch. 44 Eliz. that the Feme of an Exile may ſue alone, and cited 2 H. 4.

6. The Wife ſhall be accounted as Feme ſole in Caſe of Baniſhment and *Abjuration* ; Per Coke. Roll. Rep. 400. pl. 27. Trin. 14 Jac. in Wilmore's Caſe. 3 Bulſt. 188. S. P. per Coke, S. P. for then he is Civiliter Mortuus, and the Husband being diſabled to ſue for the Wife, it would be unreaſonable that ſhe ſhould be remedileſs ; and ſo it would be equally on thoſe who had any Demands on her, that not being able to have any Redreſs from the Husband, they ſhould not have any againſt her. G. Hiſt. of C. B. 198. — And may make a Will. 2 Vern. 104. Counteſs of Portland v. Prodgers.

7. A *Feme Covert brought Treſpaſs by the Name of a Widow.* The Defendant *pleaded that ſhe was* a Feme Covert viz. *the Wife of J. Wilmot, who was in full Life at Lisborn in Portugal.* The Plea was diſallowed by the Court for Impoſſibility of Trial. Mo. 851. pl. 1159. Trin. 14 Jac. B. R. Wilmot's Caſe.

8. *Aſſumpſit* for Wages and Money lent ; On *non Aſſumpſit* the Defendant proved ſhe was married and her Husband alive in *France.* The Jury found for the Plaintiff; upon which, as a Verdict againſt Evidence, ſhe moved for a new Trial, but it was denied ; for it ſhall be intended ſhe was divorced. Beſides the Husband is an Alien Enemy, and in that Caſe why is not his Wife chargeable as a *Feme Sole*, as much as if he had abjured or been baniſhed ? 1 Salk. 116. Deerly v. Dutcheſs of Mazarine. Ld. Raym. Rep. 147. S. C. It was moved that the Verdict againſt her, was againſt Evidence and Law ; for that a Feme Covert cannot be ſole charged without Divorce and Alimony, although the Husband be a Foreigner. But Holt Ch. J. thought that ſuch Husband being under an abſolute Diſability to come and live here, the Law perhaps will make ſuch Wife chargeable as a Feme ſole for her Debts and Contracts. And the Reporter ſays, that afterwards the Plaintiff had his Judgment as Mr. Coleman told him.—Cumb 402. S. C. adjornatur.

9. Bill againſt Baron and Feme for a Demand out of the ſeparate Eſtate of the Feme, and the *Baron is beyond Sea*, and not to be come at by the Proceſs of the Court ; yet if the Feme is ſerved with a *Subpœna*, ſhe muſt appear and anſwer the Plaintiff's Bill ; Per Cowper C. 2 Vern. 613. pl. 551. Trin. 1708. Dubois v. Hole.

(M. a) Where they are ſaid to be one Perſon in Law.

1. COSINAGE *againſt Baron and Feme and 6 others of a Carve of Land* &c. 2 *appeared and the others made Default*, by which iſſued *Grand Cape of 5 Parts*, and *they made Default at another time*, and *the two appeared again*, and the *Demandant counted againſt them that the 2 wrongfully deforced him of two Parts of the Carve of Land in 7 Parts divided* ; Per Roll, there are 8 Perſons, therefore it ſhould be in 8 Parts divided. Per Martin, the Count is good, for the Baron and Feme are not but one Perſon in Law, and therefore well ; quod Curia conceſſit. Br. Count. pl. 44. cites 4 H. 6. 26.

2. The Baron in Replevin ſhall have *Aid of his own Feme* after Avowry, and Proceſs by Summons to bring her in. Br. Baron and Feme, pl. 46. cites 7 H. 6. 45. Br. Aid pl. 14. cites S. C.

3. Baron and Feme are not one Perſon *to have the Privilege*, becauſe the Baron is Servant of the Chancellor, *nor Eſſoign de Servitio Regis*, nor

other Eſſoign caſt by the Baron ſhall not ſerve the Feme, *but Protection* for the Baron ſhall ſerve both; nor *Feme of an Attorney* ſhall not ſue by Bill as her Baron ſhall do. Br. Baron and Feme, pl. 9. cites 35 H. 6. 3.

Br. Baron & Feme pl. 49. cites S. C. & S. P.

4. Feme Covert in Caſe of Felony *ſhall anſwer without her Baron*, and ſo are not one Perſon to all Intents; Per Littleton. Br. Corone, pl. 50. cites 15 E. 4. 1.

5. Baron and another referred a Matter to *Arbitration*. The Arbitrators *award the Feme to join in a Fine of the Land about which the Reference was*; this award as to the Feme is void, for ſhe is not compriſed in the Submiſſion, but the Baron is liable to be ſued on his Bond if he does not do it; Per Frowike Serj. Kelw. 45. b. pl. 2. Trin. 17 H. 7. Anon.

So of Payment of *Rent*, though due on a Leaſe made by the

6. *Payment to the Feme* of Money awarded to the Baron is no *Plea* in Action of Debt on the Bond; and Judgment for the Plaintiff. Le. 320. pl. 401. Trin. 31 Eliz. B. R. Froud v. Bates.

Wife dum ſola, and that the Leſſee had no Notice of her Marriage, and the Baron may make the Leſſee pay it over again. Cro. J. 617. (bis) pl. 7. Mich. 19 Jac. B. R. Tracy v. Dutton. ——Palm. 207. S. C.

7. In *Account of* the *Receipt* of 10 l. *by the Hands of the Plaintiff's Wife*; Defendant waged his Law, and at the Day he had to wage his Law, it was doubted whether it lay, becauſe the Receipt is ſuppoſed to be by another's Hand. But becauſe a Receipt by the Hands of the Wife of the Plaintiff or Defendant is all one Receipt by their own Hands; he was *received to wage his Law*. Cro. E. 919. pl. 12. Hill. 45 Eliz. B. R. Goodrick's Caſe.

Jenk. 26. pl. 50. S. P. and if the Protection is repealed and declared void, this turns to the Default both of Husband and Wife.——Jenk. 93. pl. 81. S. P.——Jenk. 80. pl. 57. S. P.

8. *Protection* for the Husband, ſhall ſerve alſo for the Wife. Co. Litt. 130. b. (e).

9. A. deviſed the *Reſidue of his Eſtate to B. C. and D. and the Wife of D.* equally to be divided. D. and his Wife ſhall take but as one Perſon. Vern. 233. pl. 228. Paſch. 13 Car. 2. Bricker v. Whalley.

10. *A. B. hath* 3 *Neices*, *one* of them *takes Husband*. A. B. deviſes a *Legacy to the Husband and Wife*, *and the other Neices equally*; the Queſtion in Chancery was whether there ſhould be *three Parts or four*. It was argued that being Tenants in Common there ſhould be four Parts, as likewiſe that ſo it ſhould be adjudged by the Civil Law, and that in Chancery they govern Legacies by the Rule of the Civil Law, unleſs where it directly contradicts the Common Law; but it was ruled by Ld. K. North, that there ſhould be but three Parts, and that Husband and Wife ſhould take but as one Perſon according to the Rule of the Common Law, and the rather, for that the *Legacy* here was *given in Reſpect of the Wife*, and *not of the Husband* alſo. Skin. 182. in Chancery, pl. 9. Paſch. 36 Car. 2. B. R. Anon.

11. Husband Wife *were ſued*, and afterwards in the Pleadings it was ſaid, *Venerunt partes prædict' per Attornatos ſuos prædict'*; this was held naught upon a Writ of Error, becauſe they are but one Perſon in Law. 3 Salk. 62. pl. 1. Paſch. 12 W. 3. B. R. Maddox v. Winne.

(N. a) What Act by the one to the other is good.

1. THE *Cuſtom* of York is, that a Feme Covert may take Land purchaſed by her Baron, of the Gift of her Baron. Br. Cuſtoms, pl. 56, cites 12 H. and Fitzh. Preſcription 61.

2. A

2. A *Deviſe by the Baron to his Feme* is good, tho' they are one and the ſame Perſon in Law; for the Deviſe *does not take Effect till after the Death of the Baron*, and then they are not one Perſon. Br. Deviſe, pl. 34. cites 3 E. 3. It. Not. S. P. Br. Deviſe, pl. 18. cites 31 Aſſ. 3. —— Litt. S. 168. S. P. as to Lands of Tenure in Burgage, where the Cuſtom was to deviſe.

3. Gift made *by the King to the Queen* by Charter is good. Br. Corporations, pl. 45. cites 49 Aſſ. 8.

4. A Feme Covert may be *Attorney for her Husband*. F. N. B. 27. (C) Br. Attorney, pl. 91. S. P. cites Paſch. 13 E. 3. Fitzh. Tit. Attorney, 73 ——A Feme may be Attorney to deliver Seiſin to her Huſband, and the Husband to the Wife. Co. Litt. 52. a.

5. In diverſe Caſes a Man may be a *Means to make a Thing paſs* unto his Wife, *which ſhall not immediately paſs from him*; and therefore if a Man *infeoffs a married Woman, and makes a Letter of Attorney unto the Husband to make Livery* of Seiſin according to the Deed, and he makes Livery of Seiſin accordingly, it is a good Feoffment; for the *Husband is but a Means* to convey the Freehold to the Wife; for by this Act done no Freehold doth paſs from the Perſon &c. Perk. S. 196. Co. Litt. 187. b. at the Bottom, S. P. tho' they are but one Perſon in Law, ſo as neither of them give any Eſtate or Intereſt to the other.

6. In Debt, per Fiſher, if a Man be *bound to infeoff a Woman by a certain Day, and before the Day he marries her*, he may make Leaſe for a Month to a Stranger, the Remainder to his Feme, and 'tis a good Performance. Quære. Br. Feoffment de Terre, pl. 38. cites 4 H. 7. 4.

7. *Grant* was made *to the Queen by the King* of certain Land for Term of Life; and ſo ſee that the Queen is a Perſon exempt, and may take of her own Baron by Grant of him. Br. Patents, pl. 55. cites 7 H. 7. 7.

8. Note that it was adjudged, that a *Feme Covert Executrix may make a Sale of the Land to her own Baron*, and this is a good Bargain; and becauſe the Feoffees would not make a Feoffment accordingly, therefore they were committed to the Fleet. Br. Executor, pl. 175. cites 10 H. 7. 20. S. P. becauſe ſhe is but an Inſtrument for others, and the Eſtate paſſes from the Deviſor. Co. Litt. 187. b. —— There is a Diverſity between a *naked Power* and a Power that *flows from an Intereſt*. When a bare Power is given to a Feme by Will to ſell Lands, tho' ſhe marry ſhe may ſell, and may *ſell the Lands to her Huſband*, becauſe 'twas not created by herſelf out of any Intereſt of her own; but where a Feme, on a Settlement of her own Eſtate, reſerves a Power which flows from an Intereſt, that Power ought to be executed by the Feme ſole, and if by the Baron and Feme, 'tis not good. Chan. Caſes, 18. Hill. 14 & 15 Car. 2. The Marquis of Antrim v. Duke of Buckingham. —— 2 Freem. Rep. 168. pl. 214. S. C. in much the ſame Words —— For ſhe on the Matter nominates the Party, and he takes by the Will; per Winch J. 2 Brownl. 194.

9. *Actus Simplices* a Man may do to his Wife, As to pay Money to her, and the like. Arg. 2 Bulſt. 291. in Dockwray's Caſe, cites 27 H. 8. 15. If the Baron be bound *to pay his Wife Money*, that is good. Co. Litt. 207. a.

10. Debt upon an Obligation indorſed for Performance of Covenants, of which one was, among others, that the Defendant ſhould *pay annually 7 l. to J. his Feme on ſuch a Feaſt*, and Iſſue found againſt him; and it was pleaded in Arreſt of Judgment, that a Man cannot pay to his own Feme. And per Fitzherbert and Shelly J. clearly, this may be as well as a Man may find his Feme Living and Veſture; but he cannot give or infeoff his Feme. Br. Conditions, pl. 8. cites 27 H. 8. 27.

11. The

11. The Husband *leaſes* Land *to A for Life*, the *Remainder to his own Wife in Tail.* This is not good, becauſe a Gift immediate to his own Wife is not good; and if he in Remainder is not capable at the Time of the Livery, he never ſhall be. Br. Lect. Stat. Limit. 78.

12. The *Husband* may *ſurrender a Copyhold* to the Uſe of his Wife, becauſe it is not done immediately to her, but to the Lord of the Manor to her Uſe, and by his Admittance of the Feme, according to the Surrender. 4 Rep. 29. b. pl. 18. Mich. 27 & 28 Eliz. the 4th Reſolution in Caſe of Bunting v. Lepingwell.

She cannot take by an immediate Conveyance

13. A Feme Covert cannot *take* any Thing *of the Gift of her Husband.* Co. Litt. 3. a. at the Top.

from her Baron; but it ought always to ſuppoſe the Gift and Demiſe to be from the Feoffees. Arg. Cro. E. 722. pl. 52. Mich. 41 & 42 Eliz.

By Act executed, a Man cannot *convey* to his Wife. Arg. Roll Rep. 69. ——2 Vern. 385. Moyle v. Gyles.

By no Conveyance at the Common Law a Man could, during the Coverture, either in Poſſeſſion, Reverſion, or Remainder, limit an Eſtate to his Wife; but a Man may by his Deed *covenant with others* to ſtand ſeiſed to the Uſe of his Wife, or make *a Feoffment or other Conveyance to the Uſe of his Wife*; and now the Eſtate is executed to ſuch Uſes by the Statute of 27 H. 8. For an Uſe is but a Truſt and Confidence, which by ſuch a Mean might be limited by the Husband to the Wife; but a Man cannot covenant with his Wife to ſtand ſeiſed to her Uſe, becauſe he cannot covenant with her, for the Reaſon which Littleton here yieldeth. Co. Litt. 112. a.

If a Man be bound with a Condition to infeoff his Wife, the Condition is void, and againſt Law, becauſe it is againſt a Maxim in Law, and yet the Bond is good. Co. Litt. 206. b.

14. If a Feme *Diſſeiſoreſs makes a Feoffment* in Fee *to the Uſe of A. for Life, and* after *of herſelf in Tail, and* the Remainder to the Uſe *of B. in Fee*, and then *takes Husband the Diſſeiſee, and he releaſes to her all his Right*, this ſhall enure to B. and to his own Wife alſo; for by Littleton's Rule it muſt accrue to all in the Remainder. Co. Litt. 297. b.

S. P. Went. Off. Executors, 207. but ſays he marvels at it, yet Volenti non fit Injuria.

15. If Ceſty que Uſe had *deviſed that his Wife ſhould ſell his Land*, and made her Executrix, and died, and ſhe took another Husband, ſhe might *ſell the Land to her Husband*; for ſhe did it *in Auter Droit*, and her Huſband ſhould be in by the Deviſor. Co. Litt. 112. a. at the Bottom.

——Arg. Godb. 15. cites 3 E. 3. Br. Deviſe, 43.

* She may deviſe *her Copyhold Lands* to her Husband with or without his Conſent, if the Cuſtom of the Manor be ſo.

16. Tho' the laſt Will does not take Effect till after his Deceaſe, yet if a Feme Covert be ſeiſed of *Lands* in Fee, *ſhe cannot* * *deviſe* the ſame *to her Husband*, becauſe at the making her Will ſhe had no Power (being ſub Poteſtate Viri) to deviſe the ſame, and the Law intends it ſhould be done by Coercion of her Husband. Co. Litt. 113. b.

Mo. 123. pl. 268. Paſch. 25 Eliz. Anon.

The *Cuſtom* of a Copyhold Manor was, that a *Feme Covert might give Lands to her Husband.* Adjudged an unreaſonable Cuſtom, becauſe it cannot have a reaſonable Commencement; for the Wife being always ſub Poteſtate Viri, it ſhall be intended that ſhe did it by Coercion of her Husband. Godb. 143. pl. 178. 33 Eliz. C. B Skipwith v Sheffield.——And tho' it was urged that the Cuſtom might be good, becauſe ſhe might be examined by the Steward of the Court, as the Manner is upon a Fine to be examined by the Judge, yet the Court ſaid nothing to it. Ibid. 144.

17. A Man cannot *Covenant with* his Wife. Co. Litt. 112. a.

18. *Leſſee is reſtrained from alienng, but only to his Wife*, and if no Wife, then to a younger Brother. If *Leſſee makes Eſtate to his Wife* for her Life, and the *Reſidue* of the Term *to his Brother*, this had been void as to the Wife, becauſe he cannot make Alienation to his Wife; and this ought to be conſtrued to be done by ſuch Alienation as he may make to her, and that muſt be by Will, and cannot be otherwiſe, and good preſently to the younger Brother; Per Coke Ch. J. 2 Bulſ. 212. Mich. 12 Jac. Fox v. Whitchcott.

19. *Br*

19. *By Way of Uſe* a Man may convey to his Wife, or by *Surrender* by Cuſtom, as of *Copyhold*. Arg. 2 Bulſt. 273. Mich. 12 Jac. 4 Rep. 29. b Bunting v. Lepingwell.——Roll Rep. 138. Arg.——Co. Litt. 112. a. S. P.

20. A. after Marriage, *promiſed his Wife to pay her* 100 *l.* and ſince they are *ſeparated*. The Court conceived ſuch Promiſe to be utterly void in Law, and would not relieve the Plaintiff. Chan. Rep. 60. 8 Car. 1. Stoit v. Ayloff. A Man cannot make a good *Promiſe* to his Wife in Law, tho' he may to a Stranger for her. 2 Lev. 148. Mich. 27 Car. 2. B. R. in Caſe of Clerk v. Nettleſhip.

21. K the Plaintiffs late *Husband purchaſed a Walk in a Chaſe and took the Patent to himſelf and his Wife, and one B. for their Lives, and* the Life *of the longeſt Liver* of them. *K. died, and made the Defendant his Executor*; the Plaintiff's Bill was to have the Benefit of this Purchaſe, and to have the Patent delivered to her. The Defendant by anſwer ſet forth, that *K. died greatly indebted, and had not left ſufficient Aſſets for Payment thereof*. Per Cur. it ſhall be preſumed to be intended as an Advancement and Proviſion for the Wife; the Wife cannot be a Truſtee for the Husband; and therefore decreed that the Plaintiff ſhould enjoy the Patent during her Life, and after her Deceaſe, in Caſe B. ſhould ſurvive her, to be a Truſt for the Executor of the Husband, and applied towards the Payment of his Debts. 2 Vern. 67. 68. pl. 62. Trin. 1688. Kingdome v. Bridges.

22. Wife cannot be examined as a *Witneſs againſt her Husband*. 2 Vern. 79. pl. 74. Trin. 1688. Cole v. Grey & Ux'.

23. One *Jointenant made* a *Deed of Gift* to his Wife of his Moiety to ſever the Jointure and make a Proviſion for her, he being taken Sick on a Journey. It being void in Law, as being made to her, and being voluntary and without Conſideration, Equity would not make it good. Ch. Prec. 124. pl. 108. Mich. 1700. Moyſe v. Gyles. 2 Vern. 385. pl. 352. S. C.

24. *She may take by his Will*, though ſhe cannot take by any Conveyance at Common Law; for the Will not taking Effect, in Point of Transferrence of an Intereſt; after the Husband's Death, ſhe is *in Nature of a Stranger*, and ſo the Land will paſs to her; Per Trevor Ch. J. 11 Mod. 156. Hill. 6 Ann. C. B. in Caſe of Archer v. Bokenham.

25. *Mortgagee made M. the Wife of B. Executrix*, and Reſiduary Legatee for her ſole and ſeperate Uſe; *B. gave her a Note under his Hand* that ſhe ſhould have Benefit of the Mortgage. The *Note* gives the Wife good Right both to the Principal and to the Intereſt due on the Mortgage, and is grounded on natural Juſtice. 2 Vern. 659. pl. 585. Trin. 1710. Harvey v. Harvey. Wms's Rep 125. Trin. 1710. S. C.

26. Baron *on his Death-Bed delivered to his Wife a Purſe of* 100 *Guineas, and bid her apply it to no other Uſe but her own*; *and* alſo *drew* a Bill *upon a Goldſmith to pay* 100 *l. to his Wife to buy her Mourning*, and to maintain her till her Jointure ſhould become due, and about 17 Days after died. The Maſter of the Rolls held the Gift of the Purſe to be good as Donatio Cauſa Mortis, ut Res magis valeat &c. becauſe otherwiſe a Man cannot give to his own Wife; and ſaid this was the Nature of a Legacy to his Wife; And as to the *Bill drawn* on the Goldſmith he held the ſame good, and that it *ſhould operate as an Appointment*; but that if ſhe had received it in her Husband's Life it might be liable to ſome Diſpute, but that he apprehended it *amounted to a Direction to his Executors, that the* 100 *l. ſhould be appropriated to his Wife's Uſe*; and inclined to think that had ſhe received it in his Life-time ſhe ſhould have kept it, and being for Mourning it might operate *like a Direction given touching his Funeral*, which ought to be obſerved, though not in the Will, and theſe

Gifts being but ſmall in Compariſon of the perſonal Eſtate, and ſo was only an Inſtance of his Care, he decreed accordingly. Wms's. Rep. 441. Trin. 1718. Lawſon v. Lawſon.

(O. a) Diſputes Inter ſe.

Hawk. pl. C. 1. 93. cap. 33. S. 19. cites S. C.

A Feme is not a Felon by taking the Goods of her Baron, becauſe ſhe has Colour. Br. Corone, pl. 141. (142) cites 5 H. 7. 18.

3 Chan. Rep. 89. 16 June, 17 Car. 1. S. C. reported much in the ſame Manner.——2 Freem. Rep. 146. pl. 191. 16 June, 7 Car. 1. S. C. reported with very little Difference.

2. A Woman before her Marriage with the Baron, had a *Decree for* 600 *l. per Ann.* and it was *agreed before Marriage* between them by Parol, that *ſhe ſhould have the ſole Diſpoſal* thereof, and accordingly before Marriage, ſhe *by Deed aſſigned* the Benefit of the Decree to one C. who after the Marriage, together with the Wife, releaſed it to the Defendant, it was had againſt; but per Coventry K. and 2 J. this verbal Agreement was to ſubvert both the Ground of Law, and the Right veſted in the Baron by the Inter-marriage, and therefore if ſuch Agreement is *not ſettled by ſome legal Aſſurance* to make it binding in Law, 'tis not fit to maintain it in a Court of Equity. N. Ch. R. 15. 26 July, 7 Car. 1. Suffolk (Earl) v. Greenvill.

3. In Action on the Caſe for *ſcandalous Words* brought againſt the Defendant, ſhe *pleaded in Bar* by Attorney, *that ante Diem of exhibiting the Bill*, viz. 1 Die Julii, 12 Car. 2. *The Plaintiff married her* the Defendant; and upon demurrer to this Plea, ſhe had Judgment, though it was pleaded in Bar. Raym. 395. Trin. 32 Car. 2. B. R. Walſal v. Mary Allen.

See Tit. Ne exeas Regnum, pl. 7. in the Notes there.

4. A Motion was made for a *Ne exeat Regnum*, the Wife having ſued him in the Eccleſiaſtical Court for Alimony, and it was ſuſpected that he would go beyond Sea to avoid the Sentence; the Writ was granted in aid to the Eccleſiaſtical Court, and alſo a *Supplicavit de bono geſtu*, the Court being informed that he uſed his Wife very ill. 2 Vent. 345. Trin. 32 Car. 2. in Canc. Sir Jerome Smithſon's Caſe.

5. Though a Man cannot have a *Bill againſt his Wife* for Diſcovery of his own Eſtate, yet where before Marriage ſhe enters into Articles concerning her own Eſtate, ſhe has made herſelf as a ſeparate Perſon from her Husband; and ſhe was ordered to anſwer in a Week. Ch. Prec. 24. pl. 26. Paſch. 1691. Sir R. Brooks v. Lady Brooks.

6. A Feme was *indicted by her Husband* for *poiſoning his Cows* with bruis'd Glaſs put into their Grains, and ſhe was admitted in Forma Pauperis, tho' the Court ſaid that the Husband could not convict her. 6 Mod. 88. Mich. 2 Ann. B. R. Anon.

But none can bring a Bill in the Name

7. A Feme covert may *ſue her Husband by Prochein Amy*. Ch. Prec. 275. pl. 223. Hill. 1708. Kirk v. Clark.

of a Feme covert as her Prochein Amy without her Conſent, and if ſuch Bill be brought, it will be diſmiſs'd on her Affidavit. Chan. Prec. 176. pl. 262. Mich. 1713. Andrews v. Cradock ——Gilb. Equ. Rep. 36 S. C. in the ſame Words. The Caſe was, a Bill was brought by Andrews as *Prochein Amy to the Wife* of the Defendant Cradock, againſt her Husband and his Father who was Executor of her Grandfather, in Truſt for her, *to have an Account of the perſonal Eſtate of her Grandfather, and* to have *a Settlement made upon her and the Iſſue of the Marriage* &c. Mr. Vernon for the Defendant; This *Bill* being brought *by the Father of the Wife againſt her Conſent, and diſavowed by her perſonally in Court*, ought to be diſmiſs'd; it is true, a Feme covert may ſue in this Court by Prochein Amy as a Feme ſole, but no Perſon can bring a Bill in this Court in the Name of a Feme covert *without her Conſent*, as it may be done in the Caſe of an Infant. There is no Inſtance of a Suit in this Court by a Wife againſt her

her Husband to have a Settlement made by her Husband upon her and her Children, but if a Feme covert is intitled to a Truſt either of a real or perſonal Eſtate, and the Husband brings a Bill in this Court to have the Benefit of the Truſt, in ſuch a Caſe the Court, before they will give the Husband any Remedy, will take Care of a Proviſion for the Wife and Children; for ſince the Husband ſtands in need of the Aid of this Court to get in his Wife's Fortune, it is reaſonable that the Court ſhould compel the Husband to make a Proviſion for her; for he that will have Equity ought to do Equity; but where the Husband has a legal Title and Remedy to recover his Wife's Portion, this Court will not take away his legal Remedy, or hinder the Husband from ſuing at Law in Right of his Wife by an Injunction till he makes a Proviſion for his Wife. Per Harcourt C. the Wife diſowns the Suit, and it is not reaſonable a third Perſon ſhould bring a Bill in her Name againſt the Husband without her Conſent, and when ſhe *perſonally appears in Court, and diſavows the Suit*, this tends to the ſowing Diviſion between Husband and Wife, and breeding Diſputes and Quarrels in Families. This is an Appeal from a Decree of the Maſter of the Rolls, who ordered the Defendants to account &c. therefore the Decree muſt be reverſed, except as to bringing the Writings and Deeds relating to the Wife's real Eſtate before the Maſter, to remain there till further Order of the Court. MS. Rep. Trin. 13 Ann. in Canc. Andrews v. Cradock & al'

8. A. *bequeathed the Reſidue of her perſonal Eſtate* being about the Value of 2000 l. in *S. S. Stock, to a Feme covert, but by her Maiden Name, not knowing her to be married, and made her Executrix.* The Husband agreed with a Friend of the Wife's to ſettle it in Truſtees, whereof ſhe to name one, and the Husband the other, and to go to the Survivor. A Transfer is made by them accordingly. Afterwards a Variation was propoſed by the Wife's Friends, and to limit the Uſes, after the Death of the Survivor, to the Iſſue of the Marriage, and for want of Iſſue to the Adminiſtrators of the Wife. A Declaration was drawn, but was objected to by the Husband, who deſir'd that the Truſt might be for them and the Survivor, and after to the Iſſue, and then the Survivor to take the whole; but before ſuch Declaration was executed, the Husband died inteſtate without Iſſue. Ld. C. Talbot taking Notice of making the Wife Executrix, and reſiduary Legatee, by her Maiden Name, not knowing her to be married at the Time, thought it would be hard to ſay this 2000 l. did abſolutely veſt in the Husband, notwithſtanding the Caſe 3 Lev. 403. which had been cited, eſpecially as by being Executrix ſhe is chargeable with Debts; but, however, as he had it ſingly thro' his Wife, and had made no Settlement upon her, it was reaſonable it ſhould be ſettled upon her; that the Agreement was compleat on both Sides, and the ſubſequent Transfer muſt be taken in Purſuance of that Agreement, and was of Opinion, that upon her ſurviving the Stock was become her ſole and abſolute Property; and ſo decreed the Defendants, the Truſtees, to be Truſtees for the Wife in her own Right. Caſes in Equ. in Ld. Talbot's Time, 171. Hill. 1735. Fort v. Fort & Blomfield.

(P. a) Acts or Agreements of the Feme before Marriage in Fraud of the Husband, or in Derogation of the Rights or Expectation of the Baron, avoided.

1. THE Plaintiff's *Wife before Marriage convey'd away her Eſtate to* the Defendant, being *her Son*, and after the Defendant conveyed the ſame to his Children, being Infants, becauſe (as the Court conceived) it was paſſed without any Conſideration; it was decreed for the Plaintiff againſt the Defendant and the Infants, in 32 & 33 Eliz. li. B. ſo. 430. 454. & 484. Toth. 162. Povy v. Peart.

If a Widow conveys her perſonal Eſtate to Truſtees, *ſubject to ſuch Uſes as ſhe ſhould* by Deed atteſted by 2 Witneſſes *after Marriage appoint, and for want* of ſuch Appointment, *to her Children by the firſt*

firſt Marriage; if ſhe afterwards marries, and the ſecond Husband has no Notice of ſuch Deed, it will be void and fraudulent as againſt him; Per Ld. C. King. Trin. 1729. 2 Wms's Rep. 553. 535. in Caſe of Poulſon v. Wellington.

If a Woman privately before Marriage gives a *Bond without any Conſideration to a third Perſon* for 1000 l. and marries one who knows Nothing of this Bond, ſurely Equity would relieve againſt ſuch Bond. 2 Wms's Rep. 360. per Ld. C. King, who put this Caſe. Trin. 1726. in Caſe of Cotton v. King.

But where a Widow conveyed Lands in Truſt for herſelf during her Widowhood, and after in Truſt for ſome of her Children, and did this in a *publick Manner*, and *before any Treaty for a ſecond Marriage*, and alſo covenanted to transfer 1000 l. S. S. Stock, of which ſhe was poſſeſſed, to the like Uſes, reſerving over and above a handſome Maintenance in Lands jointur'd upon her, and in Ready Money, and afterwards married one that had no Eſtate, and would have ſet aſide the Conveyance and Covenant as fraudulent, yet Ld. C. King held the ſame good, and not avoidable by him, and that the Covenant to transfer, tho' no actual Aſſignment was made, ſhould bind him, and diſmiſs'd the Bill. 2 Wms's Rep. 606. Trin. 1732. King v. Cotton.

2. A Widow having an Eſtate deviſed to her for 400 Years by her former Husband, and being about to marry Sir P. N. ſhe *made a Settlement* thereof, *in Order to prevent ſuch After-Husband from having the ſame*, and Sir P. N. having Intimation that ſhe intended to make ſuch Settlement, but not knowing of its being made, *broke off the Treaty of Marriage*, *which was afterwards brought on again* by ſome Friends of the Widow, and Sir P. accordingly married her upon Hopes and in Confidence of having the Intereſt ſhe had in the ſaid Eſtate, and without which he would not have married her, the Court decreed the ſaid Deed to be abſolutely ſet aſide, and no Uſe to be made thereof againſt Sir P. N. or any claiming under him. 2 Chan. Rep. 81. 24 Car. 2. Howard v. Hooker.

3. A *Recognizance entered into by the Wife the Day before Marriage* was ſet aſide, and a perpetual Injunction granted, tho' one Witneſs depoſed the Husband's Conſent to the drawing it, but that Witneſs had an Aſſignment of it to himſelf. 2 Chan. Rep. 79. 24 Car. 2. Lance v. Norman.

4. It was held clearly per Cur. and admitted by both Parties, that if a Feme, *with the Privity of the Husband before Marriage conveys a Term* for Years in Truſt *for herſelf*, that is clearly out of the Husband's Power, and he can neither diſpoſe of nor releaſe the Intereſt of the Wife, and if the Feme ſhould join in the Grant it would not amend the Caſe. *But* the Court ſeemed to incline, that *if* a Feme does ſecretly, *without the Knowledge of her Husband*, before Marriage, convey a Term for Years in Truſt for herſelf, that this ſhall be in the Power of the Husband, ſo as he may either grant or releaſe the Intereſt of the Wife. 2 Freem. Rep. 29. pl. 2. Hill. 1677. in Draper's Caſe.

Vern. 18. S. C. but ſays the Queſtion was upon an Aſſignment without the Knowledge of the intended Husband. Againſt the Diſpoſal were cited the Caſe of Edmonds v. Barrington, and Sir John Dacomb's Caſe, and Sandy's Caſe.

5. M. a *Feme poſſeſſed of a long Term* being *about to marry A. who was indebted to J. S. 400 l. by Agreement of A. and J. S. makes a Leaſe to J. S. for 10 Years to ſecure Payment of the 400 l.* the Lands being reckoned 80 l. a Year, and then *by Indenture ſealed in the Preſence of A.* (the intended Husband) *aſſigns the Reſidue of the Term in Truſt to be at her Diſpoſal, whether ſole or covert*, (but there were *no other Words whereby to exclude the Husband*) and brought in Money &c. to the Value of 600 *l.* After Marriage other Creditors of A. got Judgment againſt him, and on a Fi. Fa. the Sheriff ſold the Reſidue of the Term; and on a Bill in Chancery it was decreed for the Vendees againſt the Truſtees of M. becauſe the like Point had been decreed ſo in Sir Edward Turner's Caſe, the Lord Chancellor holding it not fit a Decree ſhould be one way in Parliament and another way in Chancery, but declared it againſt his own Opinion, becauſe Widows in moſt Caſes cannot otherwiſe provide for themſelves; and the Husband in this Caſe forſook his Wife, and refuſed Reconciliation, and allowed her Nothing &c. yet decreed ut ſupra. 2 Chan. Caſes 73. Mich. 33 Car. 2. Pitt v. Hunt.

It was admitted on the other Side, that there had been ſuch a Reſolution, but ſaid that

that the Law is now changed by the Reſolution of the Lords in Sir Edward Turner's Caſe, which was exactly the ſame with this, and was by all the Lords in Parliament reſolved, that the Husband might diſpoſe of the Truſt of the Term. The Ld. Chancellor ſeemed to wonder at that Reſolution, and ſaid it could not amount to an Act of Parliament to change the Law; and altho' at firſt there poſſibly was no great Reaſon for thoſe Reſolutions, that the Husband could not diſpoſe of a Truſt for the Feme made without his Privity before Marriage, yet the Law being ſo ſettled, People made Proviſions for their Children according to what the Law was then taken to be, and now thoſe Proviſions are defeated by this new Reſolution; ſo that now it is almoſt impoſſible for a Man ſo to provide for his Child, but it ſhall be ſubject to the Diſpoſal of an extravagant Husband; and he recommended the Saying of Ch. B. Walter, viz. It is no Matter what the Law is, ſo it be known what it is. But at laſt he ſaid he muſt be concluded by the Lord's Judgment, and ſo he decreed it according to Ch. Baron Turner's Caſe, ſaying, that there muſt not be one Sort of Equity above Stairs in the Houſe of Lords, and another below Stairs in Chancery; and he thought, that from henceforth it would not ſerve a Turn to have the Husband's Conſent or Privity to an Aſſignment of a Term in Truſt for the Feme before Marriage, unleſs he was likewiſe made a Party to the Aſſignment. ——— 2 Freem. Rep. 78. pl. 86. Hunt v. Pitt, S. C. and Lord Chancellor ſaid, that this Reverſal in the Houſe of Lords was contrary to his Opinion, and ſince the Lords had ſo done, they had altered the Law in that Particular, and therefore declar'd his Opinion to be, that the Husband had Power over the Term. But if the Husband be made a Party, or does make an Agreement not to diſpoſe of it, there it ſhall not be in his Power to diſpoſe of it.———S. C. of Turner cited, and ſaid that the Judgment given by the Ld. Nottingham to the contrary, was ſaid by himſelf to have been on a Miſtake; for that the Wife having married a former Husband, ſhe before the Marriage made ſuch Agreement, but no ſuch Proviſion was made when ſhe married Sir Edward Turner, but he thinking ſuch Proviſion had been made, decreed the Sale void, but it was reverſed by his own Approbation, as it ſeems, in Dom. Proc. 3 Ch. R. 223. Paſch. 1688. in Caſe of Sanders v. Page.

6. A Woman before Marriage *agreed* with her Husband, *that ſhe ſhould have Power to act as a Feme ſole notwithſtanding that Marriage.* The *Husband died*, and *ſhe married another* Husband who was *not privy to the Settlement on the former Marriage.* It was decreed, that the ſecond Husband ſhould not be bound by that Settlement on the former Marriage. 2 Vern. 17, 18. in pl. 11. Hill. 1686. cites it as a Caſe about 4 Years ſince of Edmonds v. Dennington.

(Q. a) What Agreements &c. are extinguiſh'd by the Marriage.

1. IN Detinue by Feme it is a good *Plea, that after the Bailment ſhe married the Bailee*; for by this the Bailment is diſcharged; Per Fineux Ch. J. and he ought to declare upon a Trover. Br. Barre, pl. 53. cites 21 H. 7. 29.

2. A. makes an Obligation *to B. to the Uſe of C.*——A. ſeals it. B. and C. being, at the Time of Sealing it, at one Place, A. *puts the Obligation into the Hands of C.* and ſays, *this will ſerve*; this is a good Delivery; and tho' C. *afterwards marries A.* yet the Obligation remains, and is neither extinguiſh'd or ſuſpended. Adjudged and affirmed in Error. Jenk. 221. pl. 75. A. This Caſe proves, that where an Obligation is made to the Uſe of another, *without ſaying in the Obligation, that it is to his Uſe*, his Releaſe ſhall be of no Force; for in the principal Caſe the Marriage does not extinguiſh it; but if the Obligation had named Ceſty que Uſe it had been otherwiſe. Jenk. 222. pl. 75.———D. 192. b. pl. 26. Mich. 2 & 3 Eliz. Parker v. Gibſon, Adminiſtrator of Tenant, S. C.

3. In Debt on a Bond for Performance of *Covenants in an Indenture* made by the Baron before Marriage, *to pay Legacies given by the Feme in a Will made by her before Marriage*; tho' it was objected, that the Marriage continuing till her Death, the Will and Deviſe was void. But adjudged for the Plaintiff; for tho' it was not a Will to all Intents, Debt upon Bond conditioned, that whereas the Obligor had taken

A. S to Wife, who was poſſeſſed of ſeveral Goods, if he

yet it referred to that which did bear the Name of a Will, and tho' it was not a Will in Facto, it is not material. Cro. E. 27. pl. 9. Paſch. 26 Eliz. C. B. Eſton v. Wood.

ſhould *permit her to make a Will, and to diſpoſe in Legacies not exceeding* 50 *l. and pay and perform what ſhe appointed*; not exceeding 50 l. that then &c. The Defendant pleaded, that ſhe did not make a Will; whereupon Iſſue was joined, and *found that ſhe made a Will*, and diſpoſed of Legacies not exceeding 50 l but that ſhe was covert at that Time; adjudged for the Plaintiff; for tho' ſhe, being covert, could not make a Will by Law, or diſpoſe of any Goods without her Husband's Conſent, yet *this was a Will within the Intent of the Condition*, and it is but her Appointment which he is bound to perform, and Judgment Niſi. Cro. C. 219. pl. 5. Trin. 7 Car. B. R. Marriot v. Kinſman.

Where an Agreement is between Baron and Feme before Marriage, that the Wife may by Will *diſpoſe of part of her Eſtate*, or for a *Thing* which is *future to the Marriage*, ſuch an *Agreement* is not *diſſolved by the Marriage*; but where an Agreement is to have Execution during the Coverture, there the Marriage extinguiſhes ſuch Agreement; Per Hale Ch. B. Chan. Caſes 118. Mich. 12 Car. 2. in Caſe of Pridgeon v. Pridgeon.

Hob. 216. pl. 280. S. C. accordingly. ——Noy 26. S.C. ſays, Judment was ready to be given for the Plaintiff, but they compounded in Court —Brownl. 18, 19. S. C. 3 Judges held for the Plaintiff, and one for the Defendant.——Godb. 271. pl. 379. S. C. ſays, that Hobart and Warburton were againſt Winch and Hutton.——S. C. cited Cro. J. 571. pl. 11. by the Reporter, and ſays, that three Juſtices held that the Action well lay, but that Hobart held e contra.——Litt. Rep. 32. cites S. C. as reſolved, that the Intermarriage was only a Suſpenſion of the Promiſe.——Het. 12. cites S. C. but ſeems only a Tranſlation of Litt. Rep. ——S. C. cited by Glyn Ch. J. 2 Sid. 59. ——Freem. Rep. 512, 513. pl. 687. Hill. 1699. B R. in Caſe of Gage v. Acton, Holt Ch. J. admitted, that in ſuch Caſe the Promiſe is not releaſed, becauſe it cannot poſſibly happen during the Coverture, and this is like a Condition precedent, ſo that if a Man declares upon ſuch a Promiſe, he muſt aver that the Husband is dead, and that ſhe ſurvived him &c. but it is not ſo in Caſe of a Bond with a Condition, for there the Party declares upon the Bond only, without taking Notice of the Condition. cites 5 Co. 70. Hoe's Caſe. But a Contingency which may or may not happen during the Time of the Marriage, may be releaſed by the Husband; As where a Term for Years is deviſed to A. for Life, and after his Deceaſe to the Uſe of A. there A. the Husband may releaſe, becauſe the Contingency may happen in the Life-time of the Husband. ——S. C. cited by Holt Ch. J. Ld. Raym. Rep. 521, 522, 523. and ſays, that Noy in his Report of the Caſe of Smith v. Stafford reports, that it was ſaid by Warburton, that it would be otherwiſe in the Caſe of a Bond, and that the whole Court agreed to it; and nevertheleſs, they reſolved otherwiſe in Caſe of a Promiſe, which proves that it muſt neceſſarily be, that they grounded themſelves upon the Difference between a Bond and a Promiſe, or otherwiſe their Reſolution will be contradictory; and one muſt conſider the whole Caſe, and not diſallow the Diſtinction, and agree to the Reſolution, for that would be to agree to the Concluſion, and deny the Premiſſes.

4. A. *promiſed* M. a Feme ſole, *that if ſhe would marry him, he would leave her worth* 100 l. Hobart Ch. J. ſaid, that the Promiſe is extinguiſhed by the Marriage, but Winch and Hutton J. e contra; for that the Law will not work a Releaſe contrary to the Intent of the Parties, and that the Marriage which was the Cauſe does not deſtroy that which itſelf creates. Hutt. 17, 18. Hill. 15 Jac. Smith v. Stafford.

5. A Feme ſole *poſſeſſed of a Term, conveyed the ſame over in Truſt for her, and covenanted with J. S. whom ſhe did intend to marry, that he ſhould not meddle with it*, and for that Purpoſe took a *Bond* of him. They intermarried; he may intermeddle with it, but he ſhall not have it, and by Equity he cannot aſſign it, by reaſon of the Covenant before Marriage. Mar. 88. pl. 141. Paſch. 17 Car. Anon.

S. C. cited by Holt Ch. J Ld. Raym. Rep. 522.

6. A. intending to marry ſuch a Woman, covenanted, *that if ſhe would marry him, and ſhould ſurvive, he would give* 300 *l. to her next of Kin*, and gave a Bond to a third Perſon for the Performance of this Covenant. In Debt for this 300 l. it was argued, that tho' this was a future Covenant, which could not be broken in the Life-time of the Parties, yet it might be releaſed; and if ſo, then the Marriage was a Releaſe in Law, and ſo the Debt extinct; but the Court inclined the Judgment ought to be for the Plaintiff, and ruled it to be moved at another Time. 2 Sid. 58. Hill. 1657. B. R. Luprat v. Hoblin.

3 Ch. Rep. 6. S C.—— N. Ch. Rep. 17. S. C. and

7. A. before Marriage with M. agrees with M. by Deed in Writing, that ſhe, or ſuch as ſhe ſhould appoint, ſhould during the Coverture receive and diſpoſe of the Rents of her Jointure, by a former Husband, as

ſhe

ſhe pleaſed. Per Cur. the aforeſaid *Agreement with the Feme herſelf* before Marriage, was by the Marriage *extinguiſh'd*. Chan. Caſes, 21. Paſch. 15 Car. 2. Darcy v. Chute & Haughton. Letter of Attorney made by her before Marriage is void.—3 Ch. Rep. 91.——S. C. cited 2 Wms's Rep. 243. Arg. But the principal Caſe there being, that before the Marriage the *Feme gave Bond to her intended Husband to convey her Lands to him and his Heirs*; but tho' the Marriage took Effect ſhe died without Iſſue, without conveying the ſame; and it being objected that the Bond was ſuſpended, and ſo extinguiſhed by the Marriage, Ld. C. Macclesfield held it unreaſonable that the Intermarriage, upon which alone the Bond is to take Effect, ſhould itſelf be a Deſtruction of the Bond; and that the Foundation of that Notion is, that in Law the Husband and Wife being one Perſon, he cannot ſue his Wife on this Agreement; whereas in Equity it is conſtant Experience that the Husband may ſue the Wife, and the Wife the Husband, and he might ſue her in this Caſe upon this very Agreement. 2 Wms's Rep. 244. Mich. 1724. Cannel v. Buckle.

8. The Baron before Marriage *articled with the Feme to make a Settlement of certain Lands, before the Marriage ſhould be ſolemnized*; but they *intermarried before the Settlement*. Then the Baron died; and on a Bill by the Widow for an Execution of the Articles, it was decreed againſt the Heir at Law of the Baron; tho' objected, that marrying before the Execution of the Settlement was a Waiver of the Articles, and the Benefit of them; and ſhe being the only Party with whom they were made, her Marriage with the other Party before Performance was a Releaſe in Law. 2 Vent. 343. Mich. 30 Car. 2. Haymer v. Haymer.

9. Husband covenants with his intended Wife, that ſhe ſhould have *Power to diſpoſe of* 300 *l.* of her Eſtate, notwithſtanding the Intermarriage. Whether this Covenant is diſcharged by the Marriage? The Court inclined to diſmiſs the Bill brought by the Husband for the Money; but it was urged that the Wife conſented, and ſo put off for her to come and ſignify her Conſent in Court. Vern. 408. pl. 383. Mich. 1686. Furſor v. Penton.

10. Lands limited to A. in *Truſt for a Feme Covert*, and that A. ſhould receive the Rent, and apply them as the Feme, whether Sole or Covert, ſhould appoint. Per Cur. this is only a *Truſt*, and not an Uſe executed by the Statute. Vern. 415. pl. 393. Mich. 1686. Nevil v. Saunders.

11. *Settlement by the Feme before Marriage*, for her ſeparate Uſe, *without the Privity of the Baron*. Ld. Chancellor decreed, that the Husband ſhould have the Poſſeſſion of the Eſtate, and that the Truſtees ſhould make a Conveyance of the Lands to the Six Clerks, that it might be ſubject to the Order of the Court. 2 Vern. 17. pl. 11. Hill. 1686. Carlton & Lady Dayrill his Wife v. Earl of Dorſett.

12. A Feme ſole, being *Executrix* and Reſiduary Legatee of J. S. *lends* 100 *l. to A. and B.* for which ſhe *takes a Note in her own Name, and a Bond in a Truſtee's Name*, and afterwards *marries B.* one of the Obligors. *B. dies.* On a Bill againſt A. he inſiſted, that the Marriage with B. was an Extinguiſhment of the Bond, as well as if it had been made in her own Name; ſed non allocatur. 2 Vern. 290. pl. 280. Paſch. 1693. Cotton v. Cotton. Ch. Prec. 41. S. C.

13. Debt on Bond for Performance of Covenants, in certain *Articles* made between the Defendant and his Wife before Marriage, (viz. *That the Man ſhould bring* 50 *l. and the Woman* 25 *l. into a Stock, into the Hands of a* 3*d Perſon, to be ſo and ſo diſpoſed of.*) It was argued, that the Promiſe was ſuſpended, and conſequently extinguiſh'd by the Marriage. But per Holt Ch. J. tho' the Articles are ſuſpended by the Marriage, yet it was the Intent of the Parties that the Things ſhould be perform'd, tho' the Articles are gone; and the Bond is not void, being made to a 3d Perſon. And Eyres J. cited 1 Inſt. 206. and they ſaid the Money was to be brought in preſently, ſo that tho' the Marriage had been a Releaſe, yet they ſhould plead Performance to that Time. Judiciuni pro Quer' niſi. Comb. 242. Hill. 5 W. & M. B. R. Gibbons v. Davies. Skin. 409, 410. pl. 5. Heeding v. Davis, S. C. and though the Caſe of Smith v. Stafford, Hob. 216. was cited, yet Holt Ch. J. ſaid this Caſe had been ſhaken. —Vern. 409. Arg. cites Hob. 216. the Caſe of Smith v. Stafford; where, according to the Book, a Promiſe by the Husband to the Wife to leave

leave her 500 l. at his Death, was diſcharged by the Intermarriage; but ſays, Note that the Caſe of Clarke v. Thompſon, Cro. J. 571. is directly contrary, and therefore the Caſe of Smith and Stafford is cited; and 3 Judges were of Opinion, that the Promiſe was not diſcharged by the Intermarriage, and only my Ld. Hobart was of the contrary Opinion [This Remark on the Caſe of Smith v. Stafford, is in a Nota at the End of the Caſe of Clark v. Thomſon, Cro. J. 571. pl. 11.]——2 Sid. 59. Hill. 1657. it was ſaid by Glyn Ch. J. that the Opinion of Hobart in Smith and Stafford's Caſe, ſeems contrary to the Judgment of the ſame Caſe, and contrary to Hetl. Rep. 12. For in Favour of common Aſſurances and continual Practice, it would ſeem very dangerous to adjudge this Debt extinguiſh'd.

14. Upon a Treaty of Marriage the Man gave a *Bond to the Woman, condition'd that if he did permit her to diſpoſe of* 100 *l. then the Bond ſhould be void.* Afterwards the Marriage took Effect, ſo that the *Bond became void, yet this was held to be a good Agreement*; and the Court decreed that the Husband ſhould give Bond to Truſtees with the ſame Condition. It was held, that a Bill may be exhibited by her Prochein Amy; or if Truſtees exhibit a Bill for or on her Behalf, it is good either Way. 2 Freem. Rep. 205. pl. 279. Mich. 1695. Drake v. Storr.

Carth. 511. Hill. 11 W. 3. Gage v. Acton, S. C. adjudged accordingly by 2 Judges, contra Holt; whereupon a Writ of Error was brought in Cam. Scacc. but the Plaintiff in Error, perceiving the Court inclined to affirm the Judgment, did not proceed.——12 Mod. 288. S. C. argued at Bar and at Bench, and ſays that the Caſe went afterwards into Chancery, where Relief was given, the Bond being conſider'd as a Marriage-Agreement.——Freem. Rep. 512. pl. 687. S. C adjornatur.——Ibid. 515. pl. 691. S. C. adjudged by 2 Judges, contra Holt Ch. J.——Ld. Raym. Rep. 515. S. C. with the Arguments of the Judges, and adjudged that the Bond was not extinguiſh'd by the Marriage, by the 2 Judges contra Holt Ch. J.——2 Vern. 480. pl. 436. Hill. 1704. Acton v. Pierce & Saxby & al' S. C. and decreed the Bond good in Equity, tho' extinguiſh'd at Law, and that it ſhould bind the Real Aſſets; and decreed that ſhe redeem a Mortgage as well of Copyhold as Freehold, included in the ſame Security, and to hold over.——Chan. Prec. 237. pl. 199. Acton v. Acton, S. C. decreed accordingly.——Freem Rep. 512. pl. 687. Hill. 1699. B. R. and ibid. 515. pl. 691. B. R. the S. C. and held by Gould and Turton J. that the Bond is not diſcharged, but Holt Ch. J. e contra.

15. *Bond by a Man to a Woman before their Intermarriage*, that in Caſe they intermarried, and the Wife ſurvived, and the Husband left her 1000 l. then to be void. Per Holt Ch. J. the Bond is extinguiſh'd by the Marriage. Per Gould and Turton J. 'tis only ſuſpended, becauſe it would ſubvert the Marriage-Agreement, and the rather becauſe 'twas not payable during the Coverture, but 'twas a Debt on Contingency; ſo that if the Wife dum ſola had releaſed all Demands, the Debt had not been extinguiſh'd. 1 Salk. 325. Hill. 11 W. 3. B. R. Gage or Gray v. Acton.

(R. a) Will made by Feme Covert. Good in what Caſes.

1. A Feme Covert deviſes Goods by her Teſtament, and the *Baron delivers the Goods to the Executors of the Wife*, as was proved by Verdict; the Court, upon this Preſumption, adjudg'd that the Baron gave precedent *Aſſent* to the making the Will. Arg. Mo. 192. pl. 341. cites 5 E. 2.

A *Feme ſeiſed of Land* deviſable, *deviſed to her Baron*, and died. This Deviſe is void, per Cur. For the Law preſumes that this Deviſe is by Coercion of the Baron. Ibid. pl. 32. cites 6 E. 3. It. Notingh.——S. P. ibid. pl. 34. cites 5 E. 3. It. Not.

2. Quære, if a Feme Covert may *deviſe to her own Baron*; for it may be by Coercion of the Baron. Br. Deviſe, pl. 18. cites 31 Aſſ. 3.

Br. Teſtament, pl. 13. cites S. C.

3. A *Feme* hath Feoffees to her Uſe, and takes Baron, and *makes her Will that the Feoffees ſhall infeoff her Baron*, and *dies*. The Baron ſhall not have a Subpœna againſt the Feoffees; for the Will of the Feme Covert is void; by all except Tremayle. Br. Conſcience &c. pl. 28. cites 18 E. 4. 11.

4. Mar-

4. Marriage is a *Countermand* of a Will made by a Feme ſole. 4 Rep. 60. Mich. 30 & 31 Eliz. C. B. Forſe v. Hembling. And. 181. pl. 217. Anon. but S. C adjudged that the Will is void.——Goldsb. 109. pl. 16. Anon. but ſeems to be S. C. and Anderſon Ch. J. held the Marriage to be a Countermand; but the other 3 Juſtices contrary, tho' all held the Will void; but the other 3 though: that was by reaſon of the Diſability of the Teſtatrix at the Time of her Death, when the Will ſhould take Effect and be conſummated.

A Woman's Marriage is alone a Revocation of her Will; per Ld. C. King. 2 Wms's Rep. (624.) Trin. 1731. Coiter v. Layer.

But tho' her Will is revoked, yet if her Husband, before Marriage with her, was bound or *covenanted to perform her Will*, and after her Death he does not perform it, by paying the Legacies therein bequeath'd, his Bond or Covenant ſtands good, and is ſuable againſt him. Went. Off. Executor, 23. cites it adjudged M. 25, 26 Eliz. Wood's Caſe.

5. Feme by Aſſent of Baron may make Teſtament, and Executors to ſue for *Choſes en Action*, and to poſſeſs Goods and Chattels which ſhe had as Executrix; but not to *give Legacies*. Agreed per tot. Cur. Mo. 339. pl. 459. Mich. 32 & 33 Eliz. C. B. Sir Moile Finch v. Finch. So of *Goods tortiouſly taken from her before Marriage*, and then ſhe marries. 2 And. 92. Sir M. Finche's Caſe, S. C.——Cro C. 106. pl. 7. Hill. 3 Car. S. P. by three Juſtices.——Mod. 211, 212. pl. 44 Paſch. 28 Car. 2. C. B. Anon. S. P. per Cur. and ſuch a Will by the Husband's Aſſent being properly a Will in Law, ought to be proved in the Spiritual Court.

6. Where the Wife's making a Will, and conſequently an Executor, *may be prejudicial to her Husband*, and prevent him of ſome Benefit or Advantage, or tend to his Loſs or Diſadvantage, it ſhall not be available or effectual without his Aſſent. Went. Off. Ex. 200.

7. Debt upon *Bond* conditioned, that whereas the Defendant was about to marry A. S. &c. *If he ſhould ſurvive her, then if within three Months after her Deceaſe, he ſhould pay to the Obligee* 300 *l. to and for ſuch Uſes as the ſaid A. S. by any Writing under her Hand and Seal ſhould appoint*, then &c. A. S. by Will in Writing ſealed &c. appointed ſuch Sums to be paid. The Defendant pleaded, that the Wife made no Appointment, for that ſhe ought to have made a Deed in Writing and not a Will, becauſe a Will is ambulatory and revocable, and is not to have any Effect till after her Death, beſides that a Feme Covert cannot make a Will. But the Court (abſente Jones) held the Declaration good; for though a Feme Covert cannot make a Will without the Aſſent of her Husband after 'tis made, yet that Declaration in Form of a Will is good enough; and Judgment Niſi for the Plaintiff. Cro. C. 367. pl. 2. Mich. 10 Car. B. R. Tylley v. Peirce. 'Twas agreed that where the Wife has *Power to diſpoſe in the Life time of the Baron*, if it be not particularly provided that ſhe may diſpoſe by Will, yet a Diſpoſition by a Writing in Nature of a Will, wou'd be a good Diſpoſition or Appointment. 2 Vern. Rep. 330. pl. 315. Mich. 1695. in Caſe of Sawyer v. Bletſoe.

8. *Bond* was given before Marriage, that the Wife *might diſpoſe of* 500*l.* After Marriage the Wife *conſented to cancel* the Bond which was exchanged into a Note, that ſhe ſhould diſpoſe of it, *ſo as he might be firſt acquainted with it.* The Wife diſpoſed of the 500 l. without firſt acquainting the Husband; decreed againſt the Husband in favour of the Diſpoſition. Chan. Rep. 118. 13 Car. 1. Palmer v. Kennel.

9. A Feme Covert living ſeperate from her Baron and ſaving Money out of her Alimony, may by Will diſpoſe of *Things in* or *upon a Truſt*, and that *without the Aſſent of her Husband*, there having been an Agreement to that Purpoſe; per Cur. Chan. Rep. 125. 15 Car. 1. Gorge v. Chaney. Chan. Caſes, 118. Mich. 20 Car. 2. S. C. cited accordingly, and ſaid that this was now declared to be a juſt Order.——Toth. 161. S. C. accordingly, as to diſpoſing by Will, but ſays nothing of the Agreement.

10. Debt upon *Bond*, that whereas the Obligor being about to marry M. if he ſhould *permit her to make a Will of her Husband's Goods to the*

Value of 100 *l. to be paid within a Year after her Decease*, then &c. The Defendant pleaded that he did permit her to make a Will &c. But the Court held the Plea not good, for he ought to have pleaded that he paid accordingly, for otherwise he answers to one Part only of the Condition, for to be paid, and to pay is all one, otherwise it would be idle to permit her to make a Will and not to pay; and Judgment for the Plaintiff. Cro. Car. 397. pl. 18. Mich. 16 Car. B. R. Sherman v. Lilly.

11. An *Authority* was given to the Wife *to devise* 300 *l.* she *devised* 50*l. to one and* 50 *l. to another, and so on*; and the Court held this a good Disposal. Keb. 348. in pl. 31. Mich. 14 Car. 2. B. R. Harris v. Belfie.

2 Mod 170. Hill. 28 & 29 Car. 2. C. B. Brock v. Turner, S. C. and these Points were resolv'd by the Court 1st. If there be an Agreement before Marriage that the Wife may make a Will, if she do so, it is a good Will, unless the *Husband disagrees*; and *his Consent shall be imply'd till the Contrary appear.* And the Law is the same, though he knew not when she made the Will; which when made it is in this Case, as in others, Ambulatory till the Death of the Wife, and his Dissent thereto; but if after her Death he doth Consent, he can never after dissent, for then he might do it backwards and forwards in infinitum. 2dly, If the Husband would not have such Will to stand, *he ought presently after the Death of his Wife to shew his Dissent.* 3dly, If the Husband consent that his Wife shall make a Will, and accordingly she doth make such a Will and dieth; and if after her Death he comes to the Executor named in the Will and seems to approve her Choice, by saying that he is glad that she had appointed so worthy a Person, *and seems to be satisfied in the Main with the Will, and recommends a Coffin-maker* to the Executor, *and a Goldsmith for making the Rings, and a Herald Painter for making the Escutcheons*; this is a good Assent, and makes it a good Will, though the Husband when he sees and reads the Will (being thereat displeased) opposes the Probate in the Spiritual Court by entring Caveats and the like; and such Disagreement after the former Assent will not hurt the Will, because such Assent is good in Law, though he knew not the particular Bequests in the Will. 4thly, When there is an Express Agreement, on Consent that a Woman may make a Will, a *little Proof will be sufficient to make out the Continuance of that Consent after her Death*; and it will be needful on the other Side to prove a Disagreement made in a solemn Manner, and those Things which prove a Dissatisfaction on the Husband's Part, may not prove a Disagreement, because the one is to be more formal than the other; for if the Husband should say that he hoped to set aside the Will, or by Suit or otherwise to bring the Executors to Terms, this is not a Dissent.—3 Keb. 624. pl. 3. S. C. and it was insisted that the Husband ought to have Administration, because there was a Surplus of Things [or, besides Things] in Action, which the Plaintiff the Husband claimed by the Will; and per Cur. the Will is void, and the Husband bound only by the Articles to permit it; and Prohibition nisi.

12. B. *before his Marriage with P. Covenants with her Relations to permit her to make a Will of such and such Goods.* She made a Will of those Goods, and died. The Will being brought to the Prerogative Court to be proved; the Husband suggested for a Prohibition that the Testatrix was Fœmina viro co-operta, and so disabled to make a Will, and a Prohibition was granted. Per North Ch. J. the Spiritual Court has the Probate of Wills, but a Feme Covert cannot make a Will; if she gives any Thing by her Husband's Consent, the Property thereof passes from him to the Legatee and it is his Gift. If the Goods were given into another's Hands in Trust for the Wife, yet her Will is but a Declaration of the Trust, and not a Will properly so called. Mod. 211. pl. 44. Pasch. 28 Car. 2. C. B. Anon.

13. Devise of a *Power to a single Woman to grant an Annuity.* She marries. This Power remains in her and is not vested in the Husband, and her disposing it by a nuncupative Will is good. Fin. Rep. 346. Pasch. 30 Car. 2. Gibbons v. Moulton.

14. It was declared by the Ld. Chancellor, if the Wife do make a Will and give Legacies &c. although the Husband did Promise her to perform it, and gave her leave to make it, nay *although he did after the Death of the Wife assent to it*, yet he is not bound by it, and the Performance of it in him is only Honorary, *unless the Husband did agree before Marriage* that she should do it, and then he will be bound by his Agreement; but all Promises after, nay if the Wife makes him Executor and he proves the Will, yet he is bound no farther than in Honour, for the Will of a Wife is a void Thing, and it is in strictness no Will; and if a Bond be given to perform the Will of a married Woman, and she makes a Will, it

it hath the Import of a Writing and nothing elſe. 2 Freem. Rep. 70. pl. 82. Trin. 1681. Chiſwell v. Blackwell.

15. A Man *ſettles Land* of 6 l. per Ann. to the Uſe of himſelf for Life, and then to his Wife for Life, and agrees that ſhe ſhall hold the Land *untill* 100 *l. ſhall be paid to her Executors*, Adminiſtrators or Aſſignees; ſhe by a Writing purporting a Will, diſpoſes of this 100 l. and dies in the Life of her Husband. It is a good Appointment in Equity; per Ld. K. North. Vern. 244. pl. 235. Trin. 36 Car. 2. Bletſow v. Sawyer. 2 Vern. 328. pl. 315. Mich. 1965. S. C. Sawyer v. Bletſow, ſtated thus viz. A. conveys Land to B in Truſt out of the Rents and Profits, to pay 6 *l. per Ann* for the ſeparate Uſe of M. A.'s Wife, and to be *at her Diſpoſal*, then to the Uſe of A. for Life, and after his Death to the Heirs of M. till the Heirs or Aſſignes of A ſhould pay *to the Executors, Adminiſtrators or Aſſignes of M.* 100 *l. with Intereſt, from the Death of A.* then to the Wife for her Life, for her Jointure, Remainder over. M. dies, having by a Will diſpoſed of this 100 l. The Court thought ſhe could not diſpoſe of it.

16. Where a Feme Covert *ſaves Money out of a ſeparate Maintenance*, ſhe may diſpoſe of it as a Feme Sole; per Ld. K. North. Vern. 245. in Caſe of Bletſoe v. Sawyer, and ſaid that there had been ſeveral Decrees accordingly. S. P. and ſo if a Woman has Pin-money, and ſhe by Management and good Houſewifry ſaves Money out of it, ſhe may diſpoſe of ſuch Money ſo ſaved by her, or of any Jewels &c. bought with it, by a Writing in Nature of a Will, if ſhe dies before her Husband; and ſhall have it herſelf, if ſhe ſurvives him; and ſuch Money, Jewels &c. ſhall not be liable to the Husband's Debts; cited by Hutchins. Chan. Prec. 44. pl. 44. Paſch. 1692. in Caſe of Herbert v. Herbert, as decreed in Sir Paul Neal's Caſe ——Equ. Abr. 66. cites S. C. but no Book; and ſays that the Wife was allowed what ſhe had ſaved out of her Pin-Money, againſt the Deviſee of the real Eſtate. Mich. 1694. between Mills & Wikes.

17. Where ſhe has Power given her by her Husband to make a Will, *Probate* of ſuch Will *per Teſtes is ſufficient Proof*, without any other Proof; becauſe as to that Purpoſe the Husband has made her a Feme ſole, and no Prohibition will lie. Chan. Prec. 84. pl. 75. Mich. 1697. Balch v. Wilſon.

18. Where a Feme Covert has a Power reſerved to diſpoſe by laſt Will or Writing, and ſhe makes her Will and diſpoſes, and the *Huſband ſubſcribes his Approbation*; in ſuch Caſe the Perſon to whom ſhe gives is *not Legatee, but Nominee*, and if he dies before the Wife, 'tis *not like a Legacy* which is thereby *lapſed*; but it is only the Execution of a Truſt, and the Executors or Adminiſtrators ſhall take. Abr. Equ. Caſes, 296. pl. 2. Mich. 1700. Burnett v. Holgrave.

19. Feme Covert *by Conſent of Husband* makes her Will, and another Feme Covert Executrix. Her Father upon Oath of her dying a Widow obtained Adminiſtration, and being cited below by the Executrix to have the Adminiſtration revoked, moves for a Prohibition upon Suggeſtion that ſhe was Covert at the Time of Death, and has Rule Niſi; and the Matter being opened to the Court, they diſcharged the Rule. And per Holt, a married Woman cannot make her Will, even *as Executrix* without Conſent of her Husband. 12 Mod. 306. Mich. 11 W. 3. Richardſon v. Seiſe.

20. Feme by Articles before Marriage, reſerves Power to diſpoſe of a Term by Will or otherwiſe. Two Days before Marriage ſhe *makes a Will*, and gives the Truſt of the Term to B. She marries and dies. This Will is not ſuch a Will of which the Court below hath any Juriſdiction ſo as to be proved by Executor, but it amounted to an *Appointment in Equity* who ſhould have the Truſt according to the ſaid Articles; and the Way here, had been to grant Adminiſtration to whom ſhe had appointed the Truſt, and not to proceed by Way of Probat. 7 Mod. 147. Hill. 1 Ann. B. R. Taylor v. Raines. Though in ſtrictneſs a Feme Covert cannot make a Will, yet being impowered to make a Writing in Nature of a Will, the Writing will *operate as a Will*; per Ld. Ch. King. 2 Wms's Rep. (624) Trin 1723. Cotter v. Layer.

21. Where

She may make a Will of such Goods which she has as Executor.

21. Where a Woman is *Executrix and marries*, there she may make a Will with Consent of her Baron, and cannot without; per Holt Ch. J. 1 Salk. 313. pl. 20. Hill. 1 Ann. B. R.

And if she makes a Will *of Goods which she has as Executor, and of Debts otherwise due to her*; the Will is good as to the First, and void as to the Last, and in such Case her Executor shall take the First, and the Husband as Administrator the Last, so that in such Sense she dies testate and intestate, and having both an Executor and Administrator. Went. Off. Ex. 201.——A Feme Covert cannot devise what she has as Executrix without her Husband's Assent; and therefore a Prohibition was granted to the Spiritual Court to hinder their proving such Will. 11 Mod. 221. pl. 14. Pasch. 8 Ann. B. R.

22. If a Woman, *having Debts due to her*, marries, she may make a Will quoad these, and the Ordinary may prove it. In other Cases she cannot; for it is only a Writing in Form of a Will; but in the principal Case, which was a Will made in Pursuance of a *Power reserved before Marriage* with the Consent and Privity of the intended Husband, tho' he refused to be a Witness or Party to the intended Deed, it appearing that the Ordinary had *only granted Administration quoad the Goods* in this Will, it was allow'd as reasonable. 1 Salk. 313. pl. 20. Hill. 1 Ann. B. R. Shardelow v. Naylor.

23. If a *Will* is made *by Feme Covert* of Lands of Inheritance to J. S and *the Baron dies, and then the Wife* dies, tho' her Intention is plain, and tho' after the Decease of the Baron, when she became Sui Juris, she might have devised the Lands to J. S. or by a *Republication* have made the former Will good, yet it is not relievable in Equity; per Ld. K. Wright. 2 Vern. 475. pl. 431. Hill. 1704. in Case of Clavering v. Clavering.

Chan. Prec. 255. pl. 207. S. C. that by Consent of the Man before Marriage, she made over her Estate Real and Personal to be at her own Disposal.

24. Where a Woman on Marriage reserved a *Power to dispose of her Personal Estate, and Rents and Profits of her Real*, 'twas objected she had disposed of several Morrgages &c. that appearing not to be Part of the Estate over which she had reserved a Power. Per Wright K. it appeared not that any other Estate came afterwards to her, and therefore what she died possess'd of is to be taken to be the separate Estate, or the *Produce of it*; and as she had Power over the Principal, she consequently had it over the Produce of it. 2 Vern. Rep. 535. pl. 478. Hill. 1705. Gore v. Knight.

In this Case all the Product or Increase of it, or that which comes in lieu of it, shall be also at her Disposal. ——S. P. Pasch. 1719. Abr. Equ. Cases, 346. Gold v. Rutland, and though Trustees are mentioned, yet a *Disposition by her own Hands* is good.

Gilb. Equ. Rep. 143. S. C. in totidem Verbis.

25. The Baron, in Consideration of a Bond, given by him to Trustees for the Use of the Wife, being delivered up to him, and of her joining with him in disposing of a Leasehold Estate of her's, conveys a long Term, supposing it to be a Fee, to Trustees for his own and his Wife's Life, and the Survivor of them, Remainder *to the Heirs of the Wife*. She dies without Issue, and by Writing in Nature of a Will devised to J. S. and his Heirs. The Husband claimed it as her Administrator. J. S. took out Administration to her, and got a Release from her Heir at Law; and Ld. Cowper taking all this together, decreed that J. S. was well intitled to discharge a Mortgage then on the Premisses, and the Devise good. Ch. Prec. 480. pl. 301. Hill. 1717. Marshall v. Frank.

26. Where a *Power* is given to a Woman, at that Time unmarried, *to dispose by Will*, and she afterwards marries, 'twas decreed that the *Marriage is a Suspension of her Power*; but if she survives her Husband, the Power revives; but Quære inde; for the Lords sent to have the Opinion of the Judges upon it. MS. Tab. Feb. 9th, 1727. Rich v. Beaumond.

(S. a) Where

(S. a) Where they take by Moieties.

1. IN Formedon, where a *Gift in Tail* is made *to J. N.* the *Remainder to the right Heirs of the Baron and Feme*, this Remainder is in Jointure, and Survivorſhip ſhall hold Place. And ſo where a Gift is made to N. in Tail, the Remainder to the right Heirs of P. and Q. who are dead at the Time of the Gift made, there the Remainder is in Jointure, and Survivorſhip ſhall hold Place; per Mombray. Br. Jointenants, pl. 12. cites 38 E. 3. 26.

2. *A perſonal* Duty being a *Choſe en Action*, ſhall well *lie in Jointure* between a Man and his Wife; *but* otherwiſe of other perſonal Things. Noy 149. in Caſe of Norton v. Glover, cites 4 H. 6. 6. a.

3. Where the *Baron and Feme purchaſes* Land, and the *Baron aliens, and dies*, the Feme may have Cui in Vita and recover the Whole; for there are no Moieties between the Baron and Feme during the Coverture, and therefore it is not good for any Moiety; but if they purchaſe before Coverture, and after intermarry, and the Baron aliens all, and dies, the Feme ſhall have Cui in Vita of the Moiety, and recover it, and the Alienation is good of the other Moiety. Note the Diverſity; for it appears. Br. Cui in Vita, pl. 8. cites 19 H. 6. 45.

4. *Baron and Feme purchaſed in Fee*, and after they *leaſed for Years by Indenture*, and after the *Baron releaſed to the Leſſee and his Heirs.* This is no Diſcontinuance, and yet this gives Franktenement to the Leſſee during the Life of the Baron; by ſeveral, without Doubt. Br. Releaſe, pl. 81. cites 29 H. 8.

5. If the Baron and Feme *purchaſe jointly, and are diſſeiſed, and the Baron releaſes*, and after they are divorced, the Feme ſhall have the *Moiety*, tho' before the Divorce there were no Moieties; for the Divorce converts it into Moieties. Br. Deraignment, pl. 18. cites 32 H. 8.

6. W. made a *Feoffment* in Fee &c. to the Uſe of himſelf for Life, Remainder *to his Son and to his Wife who ſhould be, and the Heirs of their Bodies.* The Son married M. then W. the Father levied a Fine to King H. 8. and bound himſelf and his Heirs to Warranty, and died. The *Son was attainted of Treaſon and executed*, leaving Iſſue then living. Then the Queen by Letters Patents granted the Land to another, and afterwards the Widow and her Iſſue was reſtored. The Queſtion was, whether ſhe had a Right to the Whole, or only to one Moiety? D. 122. a. b. pl. 21, 22. Mich. 2 & 3 P. & M. Sir Tho. Wyatt's Caſe. A. *gives* Lands *to B. and ſuch Wife* as he ſhall after marry, or as ſhall be his Wife. B. takes the Whole; but if A. ſeiſed in Fee, for Advancement of his Son, Name, Blood, and Poſterity, *covenant to ſtand ſeiſed* to the Uſe of himſelf for Life, and after to the Uſe of *his Son and ſuch Wife as he ſhall marry*, and the Heirs Male of his Body. A. dies, and then the Son takes a Wife; the Wife has a joint Eſtate with her Baron, to them and the Heirs Male of the Body of the Baron. Jenk. 328. pl. 52. Trin. 3 Jac. in the Court of Wards ——— 1 Rep. 101. a. Arg S P. ſays it was ſo held in Ld. Pawlet's Caſe, 17 Eliz. D. 340.——D. 339. b. 340. &c. pl. 48, 49, 50. the Judges differ'd in Opinion, and afterwards the Parties accorded between themſelves, and Judgment was given by Default.——2 Le. 17. pl. 25. Brent's Caſe, S. C. argued by the Judges. The Caſe was, *Feoffment by the Baron* to the Uſe of *himſelf and Wife for Life*; if he ſurvives his Wife, then to the Uſe of *himſelf and ſuch Woman as he ſhould after marry for her Jointure*, Remainder in Fee to a Stranger. Per Harper J. the Limitation of the Uſe cannot be purſued preciſely, according to the Words, and therefore the Words ſhall be *conſtrued*, after the Deceaſe of the firſt Wife unto the Uſe of the Husband until he marries, and afterwards to the Uſe of him and his ſecond Wife, in which Caſe they ſhall take jointly.——S. C. cited 2 And. 198. Arg.——Mo. 377. Arg. cites D. 340. S. C. ſays it was admitted by all the Juſtices of C. B that the Eſtate was good enough.

In the Caſe of an *Uſe* the Husband takes all in the mean time, and when he marries the Wife takes it by Force of the Feoffment, and the Limitation of the Uſe jointly with him; for there is *not any Fraction, and ſeveral Veſting by Parcels.* See 13 Rep. 59. in Sammes's Caſe.

A Fine was levied to the Uſe of himſelf and ſuch Wife as he ſhall after marry for their Lives; and after to the Uſe of J. his Daughter, and the Heirs of her Body; and after he married A. M. and died; and Wray, Mead, Onſlow, and Plowden were of Opinion, that a good Uſe for Life was ſettled in A.

M. Jointenant with her Husband, becauſe tho' the Uſe did not ſettle in her compleatly till the Marriage, yet it ſhall relate, as to its Commencement, to the firſt Fine executed. And afterwards the Parties, not ſatisfied with this Opinion, ſued in C B where the Caſe was adjudged with this Reſolution, as appears in Writ of Entry there brought, by the next in Remainder againſt the ſaid A. M. Mich. 13 & 14 Eliz. Arg. Mo. 517. cites it as Mutton's Caſe.——See Tit. Uſes, (L) pl. 1. in the Notes.

7. *Copyhold* Land was ſurrender'd to the Uſe of the *Wife for Life*, *Remainder* to the Uſe of *the right Heirs of the Husband and Wife.* The Huſband enter'd in the Right of the Wife. The Remainder is executed for a Moiety preſently in the Wife, and the Husband of that was ſeiſed in the Right of the Wife, and the *Wife dying firſt*, her Heir ſhould have it; but if the Husband had died firſt, his *Heir ſhould have one Moiety.* 3 Le. 4. pl. 10. Mich. 4 & 5 P. & M. in C. B. Anon.

8. Gift *to A. and M. and to the Heirs of the Body of the ſaid A. begotten of the ſaid M.* Remainder to a Stranger in Tail, Remainder over in Fee. A. after marries with M. they take by Moieties. Mo. 95. pl. 235. Paſch. 12 Eliz. Brabroke's Caſe.

9. Land is given *to Baron and Feme in Special Tail during the Coverture.* Afterwards the *Baron is attainted* of Treaſon, and *dies.* The Wife continues in as Tenant in Tail; the Iſſue is reſtored by Parliament, and made inheritable to his Father, ſaving to the King all Advantages devolved to him by the Attainder of his Father. The Wife dies. Walmſley Serj. conceived that the Iſſue was inheritable; for the Attainder which diſturbed the Inheritance is removed, and the *Blood reſtored*, and nothing can accrue to the King; for the Father had not any Eſtate forfeitable; but all the *Eſtate ſurvived to the Wife*, not impeachable by the ſaid Attainder; and when the Wife dies, then is the Iſſue capable to inherit the Eſtate Tail. Windham and Rhodes J. prima facie, thought the contrary; yet they agreed that if the *Wife had ſuffered a Common Recovery*, the ſame had bound the King. Le. 157. pl. 221. Mich. 31 Eliz. C. B. Anon.

10. William Ocle and Joan his Wife *purchaſed Lands to them and their Heirs.* After William Ocle was *attainted* of High Treaſon for the Murder of the King's Father E. 2. and was executed. Joan his Wife ſurvived him. E. 3. granted the Lands to Stephen de Bitterly and his Heirs. John Hawkins the Heir of the ſaid Joan, in a Petition to the King, diſcloſed this whole Matter; and upon a Sci. Fa. againſt the Patentee has Judgment to recover the Lands; but if an Eſtate be made to a Man and a Woman and their Heirs before Marriage, and after they marry, the Husband and Wife have Moieties between them. Co. Litt. 187. b.

D. 149. b. pl. 5. Trin. 3 & 4 P. & M. Bedel v. Holſtock. S. P. but if they had any *Iſſue*, ſuch Iſſue ſhould have a *Formedon of the Whole.*

11. If a *Feoffment* had been made before 27 *H.* 8. *of Uſes*, to the Uſe of a Man and a Woman and their Heirs, and *they Intermarry* and then the Statute is made; if the Husband aliens it is good for a Moity, for the Statute executes the Poſſeſſion according to ſuch Quality, Manner, Form and Condition, as they had in the Uſe, ſo as though it veſts during the Coverture, yet the Act of Parliament executes ſeveral Moieties in them, ſeeing they have ſeveral Moieties in the Uſe. Co. Litt. 187. b.——Goldsb. 148. pl. 72. Hill. 43 Eliz. S. P held accordingly; per tot. Cur. without Argument.——Mo. 92 pl. 228. Trin. 10 Eliz. Symonds's Caſe, S. P. held accordingly by Welch, Brown & Dyer, but Weſton and Bendlows, e contra; but all agreed that ſeveral Moieties might be of Eſtate Tail, as well as of fee Simple between Baron and Feme.——S. P. adjudged by the Advice of Wray & Anderſon Ch. J. in the Court of Wards, that the Husband and Wife took by Moieties. Mo. 715. 716. pl. 1000. Mich. 32 & 33 Eliz. The Queen v. Savage.

The *Confirmation* in this Caſe to the Husband

12. If I leaſe Land *to a Feme ſole* for Term of Years *who takes Baron*, and afterwards I *confirm the Eſtate* of the Baron and his Wife, to have and to hold the Land for Term of their two Lives, they have joint Eſtate

Eſtate in the Freehold of the Land, becauſe the Wife had not Frank-tenement before. Co. Litt. S. 526. and Wife for their Lives makes them Jointenants for Life; becauſe a Chattel of a Feme Covert may be drown'd, and ſo Note a *Diverſity* between a *Leaſe for Life, and a Leaſe for Years* made to a Feme Covert; for her Eſtate of Freehold cannot be altered by the Confirmation made to the Husband and her, as the Term for Years may, whereof her Husband may make Diſpoſition at his Pleaſure. Co. Litt. 300. a.

13. If a Feoffment be made to a Man and a Woman, and their Heirs with Warranty, and they Intermarry and after are impleaded, and vouch, and *recover in Value*, Moieties ſhall not be between them; for tho' they were Sole when the Warranty was made, yet at the Time when they recovered and had Execution they were Husband and Wife, in which Time they cannot take by Moieties. Co. Litt. 187. b. Pl. C. 483. a. Mich. 17 & 18 Eliz. in Caſe of Nicholls v. Nicholls, S. P. in totidem Verbis.

——D. 149. b. pl. 82. Trin. 3 & 4 P. & M. Bedyl v. Holſtock.

14. If an Eſtate be made *to a Villien and his Wife being free*, and to their Heirs, albeit they have ſeveral Capacities viz. The Villein to purchaſe for the Benefit of the Lord, and the Wife for her own; yet if the Lord of the Villein enter, and the Wife ſurvives her Husband, ſhe ſhall enjoy the whole Land, becauſe there are no Moieties between them. Co. Litt. 187. b.

15. *Leaſe for Life to Feme ſole*, who takes Husband, *Leſſor confirms the Eſtate of Baron and Feme*, to have and to hold for Term of their Lives; in this Caſe the Baron does not hold jointly with his Wife, but holds in Right of his Wife for Term of her Life; but this ſhall enure to the Baron for Term of his Life if he ſurvives the Wife. Co. Litt. S. 525. *And* they do not hold jointly for two Reaſons. 1ſt, The Wife has the Whole for her Life, and *Jointenants muſt come in by one Title*; but in this Caſe, if the *Confirmation* had been made *to the Husband and Wife*, to have and to hold the Land to them two, *and to their Heirs*, they had been Jointenants to the Fee Simple, and the Husband ſeiſed in the Right of his Wife for her Life; for the Husband and Wife cannot take by Moieties during the Coverture. Co. Litt. 299. a. b.

16. If a Reverſion be granted to a Man and a Woman, they are to have Moieties in Law, but *if they Intermarry*, and *then Attornment is had*, they have no Moieties (and yet by the Purport of the Grant they are to have Moieties) becauſe it is by *Act in Law*. Co. Litt. 310. a. Pl. C. 483. Mich. 17 & 18 Eliz. in Caſe of Nicholls v. Nicholls, S. P. accordingly; for though they were Sole when the Grant was made, yet when the Reverſion ſettled in them they were Baron and Feme, between whom there are no Moieties, and ſo the Time in which the Thing veſts, ought to be reſpected.

17. If a Gift be made *to a Man and a Woman not married*, though with an Intention of their Intermarriage, and afterwards they Intermarry, yet they take by divided Moieties. Noy 122. Ward v. Mathew.

——And cites it adjudg'd in one Edmunds's Caſe.

18. *Articles before Marriage to ſettle a Term* to himſelf for Life, to his Son for Life, to the Uſe of the Woman the Son was about to marry, and after their Deceaſe to the Uſe of the Iſſue of their two Bodies to be begotten according to the Deſcent of Lands ſo intailed. After Marriage the Leaſe was aſſigned to thoſe Uſes. The Reporter ſays, the Articles being before Marriage, the Son and his Wife took by divided Moieties. Chan. Caſes 266. Mich. 27 Car. 2. in Caſe of Bullock v. Knight.

19. Baron *purchaſed a Copyhold, and takes ſurrender to himſelf, his Wife and his Daughter and their Heirs*; Per Lord Commiſſioners, Baron and Feme take one Moiety by Entierties, ſo as the Baron cannot alien ſo as to bind the Feme, and the other Moiety is well veſted in the Daughter; Per Commiſſioners. 2 Vern. Rep. 120. pl. 120. Hill. 1690. Back v. Andrews. Chan. Prec. 1. pl. 1. S. C. decreed accordingly.

(T. a) Take.

(T. a) Take. In what Caſes Feme may take by Grant to herſelf.

Br. Teſtament, pl. 9. cites S. C.—

1. *Obligation made to a Feme Covert* is good. Br. Obligation, pl. 36. cites 4 H. 6. 31.

S. P. Br. Nonability, pl. 2. cites 3 H. 6. 23.——A *Man was bound to Baron and Feme*, and *he made the Feme his Executrix and died*, and *ſhe brought Debt* upon the Obligation *as Executrix* of the Baron, and well, per Cokaine J. For ſhe may waive it by the Coverture, *and refuſe the Survivorſhip*; but Weſton Serj contra. Br. Waiver de Choſes, pl. 13. cites 4 H. 6. 5.

2. Treſpaſs upon the Statute of 5 *R.* 2. Ubi ingreſſus non datur per legem. The *Defendant pleaded Gift in Tail*, the *Remainder to a Feme Covert, to which A. B. Husband of the ſaid Feme agreed*, and ſo concludes her Baron and gave Colour. Quære if the Agreement be neceſſary; for it ſeems that it is in the Feme till the Baron diſagrees. Br. Agreement, pl. 1. cites 3 H. 7. 9.

*Br. Action ſur le Caſe, pl. 5. cites S. C.

3. **Feoffment* made *to Feme Covert*, or Gift *of Goods to her* &c. is good *if the Baron* agrees, or if he *does not diſagree*. Br. Coverture, pl. 3. cites 27 H. 8. 24.

(U. a) Inter ſe. Miſ-uſage.

1. *Attempt to cut the Husband's Throat*, is a Cauſe for which the Husband may be *Divorc'd*; per Curiam. Lane 98. Hill. 8 Jac. in the Exchequer, in Caſe of Scot v. Helyar.

Godb. 215. pl. 307 S. C. accordingly.

2. The Wife of Sir Thomas Seymor libelled for *Alimony*, becauſe the Baron beat her ſo that ſhe could not cohabit with him; the Court denied a Prohibition, but if ſhe had cohabited, ſhe could not have ſued for Alimony. Mo. 874. pl. 1219. Hill. 11 Jac. Sir Thomas Seymor's Caſe.

Godb. 215. pl. 307. S. C. & S. P. and cites F. N. B. 80. (F)—

3. A Wife may make the *Peace* againſt the Baron for unreaſonable Correction. Mo. 874. pl. 1219. Hill. 11 Jac. in Sir Thomas Seymor's Caſe.

Litt. Rep. 189. Arg. Mich. 4 Car. in Stanlie's Caſe, in C. B. the S. P.——The Court being informed of his ill Uſage of his Wife, a Supplicavit de Bono Geſtu was granted. 2 Vent. 345. Trin. 32 Car. 2. in Chancery, Sir Jerom Smithſon's Caſe.

4. Debt on Bond by A. againſt the Baron. The Condition was, that he ſhould *not ſell his Wife's Apparel*, it is good, As if Baron be *bound to a Stranger* to pay 20 l. per Ann. to his Wife, it is good; per Coke. Roll Rep. 33. pl. 43. Hill. 13 Jac. B. R. Smith v. Watſon.

5. *Taking away the Wife's Apparel, and other of her Neceſſaries*, is good Ground for her to *ſue a Divorce* Cauſa Savitiæ. Sid. 118. Paſch. 15 Car. in Caſe of Manby v. Scott.

3 Keb. 433. pl. 37. Ld. Leigh's Caſe, S. C. accordingly.

6. Baron for *ill Uſage* was bound by the Court to his *good Behaviour*. 2 Lev. 128. Hill. 26 & 27 Car. 2. B. R. The King v. the Ld. Lee.

And by Hale Ch. J. the Salva Moderata Caſtigatione in the Regiſter, is not meant of Beating, but only of Admonition, and Confinement to the Houſe in caſe of her Extravagance, which the Court agreed.——3 Salk 139. pl. 4. S. C.——Freem. Rep. 376. pl. 488. S. C.——11 Mod. 109. pl. 2. Paſch. 6 Ann B. R. The Queen v. Lt Geo Howard ——But the Court cannot *remove* her from the Baron. 2 Lev. 128. Hill. 26 & 27 Car. 2. B. R. The King v. Ld. Lee.

7. In

7. In a Bill to eſtabliſh an Agreement for a ſeparate Maintenance for the Defendant's Wife, the Plaintiff *pray'd a Diſcovery* of ſeveral Unkindneſſes and Hardſhips to the Wife, *to make her recede from the Agreement*. The Defendant demurr'd, as a Matter not properly examinable or relievable in this Court. Vern. 204. pl. 200. Mich. 1683. Hinks v. Nelthorp.

8. By Articles before Marriage 6000 l. Part of the Wife's Portion, is paid, and a Settlement made of 1000 l. per Ann. and 6000 l. *Reſidue of the Portion, to be veſted in Land*, and ſettled to Baron for Life, to the Feme for Life, Remainder as a Proviſion for younger Children. The Husband, *by cruel Uſage*, having forced the Feme to *ſeparate* from him, the Court decreed the 6000 l. to be put out at Intereſt, and be paid to the Feme for her *ſeparate Maintenance* till a Cohabitation. 2 Vern. 493. pl. 144. Paſch. 1705. Lady Oxenden, per Prochein Amy, v. Sir James Oxenden & al'. Et e contra.

Chan. Prec. 239. pl. 200. Ld. Rockingham and Lady Oxenden v. Sir James Oxenden, S. C. decreed accordingly. —Gilb. Equ Rep. 1.

Paſch. 1706 S C. ſays the Lady had a Decree for 300 l. a Year out of a Truſt Eſtate, which the Court laid hold of as being under a Truſt, and in their Poſſeſſion; but that the Ld. Keeper doubted what to have done, had there been no ſuch Truſt Eſtate to have laid hold of, and ſaid he would give no Opinion, it not being the Caſe in Queſtion. ——MS. Rep. S. C. in totidem Verbis with Gilb. Equ Rep.

9. Feme being *parted from* her Husband, by reaſon of *Cruelty*, *becomes intitled to* 3000 *l.* as her Share of her Mother's Perſonal Eſtate, who died inteſtate. Harcourt Ld. K. decreed the Intereſt to the Feme for her ſeparate Uſe for her Life, and after to the Husband, if he ſurviv'd, for his Life; and if any Iſſue, then the Principal to the Iſſue; but if no Iſſue, then to the *Survivor* of the Husband and Wife. Memorandum; The Baron had given a *Note to the Feme*, that if he ſhould again uſe her ill, ſhe ſhould have her Share of her Mother's Eſtate to her own Uſe. 2 Vern. 671. pl. 598. Paſch. 1711. Nichols & Danvers v. Danvers.

10. Baron proves drunken, abuſive, *waſteful, and cruel to his Feme.* The Court decreed the Intereſt of a Bond of 500 l. given to Truſtees for the Feme's Portion, to be paid to the Feme for her *ſeparate Maintenance.* 2 Vern. 752. pl. 657. Mich. 1717. Williams v. Callow.

11. As to the *Coercive Power* which the Husband has *over the Wife*, 'tis not a Power to confine her; for by the Law of England ſhe is intitled to all reaſonable Liberty, if her Behaviour is not very bad. 8 Mod. 22. Mich. 7 Geo. 1. Lyſter's Caſe.

Coke Ch. J. thought the Husband could not give Correction to the Wife; but Nichols and Warburton J. held the contrary. Godb. 215. in Sir Thomas Seymour's Caſe.

She cannot either by herſelf or her *Prochein Amy* bring a *Homine Replegiando againſt him*; for he has by Law a Right to the Cuſtody of her, and may, if he think fit, *confine but not impriſon her*; for if he does, 'twill be good Cauſe for her to apply to the Spiritual Court for a *Divorce propter Sævitiam.* Chan. Prec. 492. Paſch. 1718. Atwood v. Atwood.——Gilb. Equ. Rep. 149. S. C. in totidem Verbis.

(W. a) Where they live ſeparate.

1. A Woman living ſeparate from her Husband, *ſnatch'd away Money* out of 100 l. which was going to be paid to her Mother. Her Husband is not chargeable in Equity with the Money ſo taken; but the Wife ought to anſwer the ſame, and to put in her Anſwer in this Court, or to be proſecuted for Contempt. Chan. Rep. 68. 9 Car. 1. Plomer v. Plomer.

2. The *Wife profecuted the Husband for having a 2d Wife*; but the *fame was not proved.* But he being in Court on his Recognizance, after the Acquittal, *ſhe pray'd to charge him with Actions for Neceſſaries* for herſelf and Children, and the Court allow'd her to do ſo, ſhe having proved her own Marriage clearly before. 2 Keb. 585. pl. 129. Mich. 21 Car. 2. B. R. Hume's Caſe.

3. Baron left his Wife 20 Years ſince in the Country, and lived in London, and married another. The Wife coming to London to proſecute him, he got her arreſted. The *Gaoler ſues the Baron for her Diet and Lodging* while ſhe was in Priſon. Per Hale Ch. J. the Baron is not chargeable without ſome *Evidence of his Aſſent*, As if he had viſited her in Priſon, or by ſome Act had approved the Proviſion of the Gaoler; but here the Contrary appears; for ſhe came to proſecute him, and ſhe was committed to Gaol, and had Clergy on her Proſecution; and if he *will not allow her Neceſſaries*, ſhe ſhould have *complain'd* in Courſe of Law for Maintenance. 2 Lev. 16. Trin. 23 Car. 2. B. R. Calverly v. Plummer.

4. *Goods deviſed to M. (the Wife of B.) for Life*, and after her Death *to A.* M. and B were parted, and there had been great Suits for Alimony, and M. *during the Separation had waſted the Goods.* North Ld. K. thought it reaſonable that B. ſhould be charged for this Converſion of M. A.'s Title being paramount the Feme, and not under her. Vern. Rep. 143. pl. 136. Hill. 1682. Ld. Paget v. Read.

5. In Caſe for Meat, Drink, Waſhing and Lodging, found for the Wife of the Defendant by the Plaintiff. The Proof was, that the *Wife came in a neceſſitous Condition, and ſaid to the Plaintiff that ſhe was the Wife of the Defendant, and that he had turned her out of his Houſe, and allowed her 50 l. per Ann. but he would not pay it.* Holt Ch. J. held, that the Husband is not chargeable; for it being apparent that they did not cohabit, he ſhall not have a Credit to charge him without his Conſent; and tho' it was proved that *he had paid another who had received and tabled her, before the Plaintiff received her*, yet the Plaintiff was nonſuited. Skin. 323, 324. pl. 2. Mich. 4 W. & M. in B. R. Peirce v. Welden.

If the Wife elopes, and takes up Neceſſaries upon Credit of a Tradeſman, tho' the Tradeſman has no Notice the

6. If a Wife cohabits with her Husband, and by it gains a Credit, tho' ſhe departs without the Leave of her Husband, and comes to London, and becomes in Debt, the Husband ſhall be charged till *Notice given of her Elopement*; for it ſhall be intended to be with the Conſent of the Husband; but after Notice the Husband ſhall not be charged, without his Conſent. Skin. 324. Mich. 4 & 5 W. & M. in B. R. in Caſe of Pierce v. Welden.

Husband is not liable. Ld. Raym Rep. 444, 445. ſays it was ſo ruled by Holt Ch. J. at Exeter Lent-Aſſiſes, 10 W. 3. in Caſe of Longworthy v. Hockmore.——S. C. cited by Holt Ch. J. 12 Mod. 245. Mich. 10 W. 3. in Caſe of Tod v. Stokes, where he held accordingly, that the Husband in ſuch Caſe ſhould not be liable; and it is ſufficient *for the Husband to give general Notice* that Tradeſmen &c. ſhould not truſt his Wife. But Serj. Wright, now Ld. Keeper, at the ſame Time acquainted his Lordſhip, that Treby Ch. J. of the Common Pleas had ruled that Point otherwiſe between the ſame Parties; to which Holt ſaid that, notwithſtanding that, he would adhere to his Opinion in all the Points aforeſaid; and the Plaintiff was nonſuited.

Ld. Raym. Rep. 444. S. C. and ruled by Holt Ch. J. that tho' it was not the

7. After notorious Separation by Conſent, *and a ſeparate Allowance*, 'tis unreaſonable ſhe ſhould have it in her Power to charge him, and a *perſonal Notice* is not neceſſary; 'tis ſufficient that it be publick and commonly known; per Holt Ch. J. at Guildhall. 1 Salk. 116. pl. 6. Mich. 8 W. 3. Todd v. Stoakes.

General Reputation in London, where the Plaintiff lived, that the Defendant and his Wife were ſeparated, yet ſince it was the General Reputation in the Place where the Defendant lived, and that for 5 Years paſt, it was ſufficient; but if ſhe had *come immediately from her Huſband after the Separation*, before

before it could have been publickly and generally known, and had taken up Neceſſaries upon Credit, the Husband would have been liable.——12 Mod 244, 245. S. C. held accordingly.——S. P. per Cowper C. Chan Prec. 499 in Caſe of Augier v. Augier.

8. If the *Husband turns away his Wife, and afterwards ſhe takes up Neceſſaries* upon Credit of a Tradeſman, the Husband ſhall be liable to the Tradeſman to pay for them. Ld. Raym. Rep. 444, 445. ſays it was ſo ruled by Holt Ch. J. at Exeter Lent Aſſiſes, 10 W. 3. in Caſe of Longworthy v. Hockmore.

9. After an Agreement for parting, and the Husband having given a Note to the Wife's Father *to pay back the Portion*, he ſaving the Husband harmleſs, the Wife went and lived with her Father, and he brought a Bill for the Portion to be paid back, offering to perform the Agreement on his Part. The Husband *offered to take his Wife Home*, and maintain her and Child, and to pay the Father for the Time paſt; but decreed the Husband to pay back the Portion to the Father, upon his giving Security to *indemnify the Husband* againſt the Debts and Maintenance of the Wife and Child. 2 Vern. 386. pl. 353. Mich. 1700. Seeling v. Crawley.

10. *Money earn'd by the Wife* living ſeparate ſhall go towards her *Maintenance to keep her*. 1 Salk. 118. Paſch. 2 Ann. coram Holt Ch. J. at Niſi Prius in Middleſex. Warr v. Huntly.

11. Tho' the Wife be ever ſo vicious, if the Husband *cohabits* with her, he is liable to pay for Neceſſaries furniſh'd her; *ſo* if he *turns her away* for her Wickedneſs; *but* if *ſhe leaves him*, they that truſt her, after it is *notorious* that ſhe has left him, do it at their Peril. *But* if he once *receives her again*, or *came after* her, or *lay with her* but for a Night, that would make him *liable to her Debts*, as in Caſe of Dower; Per Holt Ch. J. 6 Mod. 171. Paſch. 3 Ann. B. R. Robinſon v. Goſnold. 1 Salk 119. pl. 13. S. C. per Holt Ch. J. at Guildhall. —— He muſt ſend Credit with her for *reaſonable Expences*; Per Holt Ch. J. 12 Mod. 245. Todd v. Stokes.——If ſhe goes away *without his Conſent*, ſhe ſhall find Credit where ſhe goes without any Charge to her Husband of his giving any *Perſonal Notice* of leaving him; Per Holt Ch. J. 12 Mod. 245. Mich. 10 W. 3. at Guildhall, Todd v. Stokes.——And he ſaid, that this had been carried too far in the Caſe of Scot v. Manby.

12 After an Agreement to live ſeparate, he ſhall not *compel her by Force to live with him again*, or confine her for that Purpoſe; but it was ordered that he have Leave to write to her, and to uſe any lawful Means to a Reconciliation, and if ſhe was willing to ſee him, the Children and Servants ſhould not hinder him, unleſs by her Order. But that whenever ſhe permitted his coming to her, he ſhould not offer any Violence, or uncivil Behaviour to her Perſon. 8 Mod. 22. Mich. 7 Geo. 1. Liſter's Caſe.

(X. a) Alimony, or ſeparate Maintenance.

1. THE Plaintiff ſets forth in her Bill, that ſhe joined with her Husband in Sale of Part of her Inheritance, and after ſome Diſcord growing between them, they ſeparate themſelves, and 100 l. of the Money received upon Sale of the Lands was *allotted* to the Plaintiff *for her Maintenance*, and put into the Hands of Nicholas Mine &c. *and Bonds* then *given* for the Payment thereof *unto H. G. deceaſed, to the Uſe of the Plaintiff*, which Bonds are come to the Defendant as Adminiſtrator to the ſaid H. G. who refuſes to deliver the ſame to the Plaintiff,

tiff, and hereupon ſhe prays Relief; the Defendant does *demur in Law, becauſe the Plaintiff ſueth without her Husband*; and it is ordered the Defendant ſhall anſwer directly. Cary's Rep. 124. cites 21 & 22 Eliz. Sanky, Alias, Walgrave v. Golding.

Godb. 215. pl. 307. S. C. accordingly.

2. She *cannot ſue for it during Cohabitation.* Mo. 874. pl. 1219. Hill. 11 Jac. Sir T. Seymor's Caſe.

A Feme co-being ſepa-rated, having an Allow-ance of 200 l. ſhe improved it, and *diſpoſed* of it *by her Will.*

3. *Money given* to a Feme covert *for her Maintenance becauſe her Husband is an Unthrift*; the Husband prerends rhe Money to be his; but the Court ordered the Money to be at her Diſpoſing. 21 Jac. li. B. ſo. 719. Toth. 158. Fleſhward v. Jackſon.

Toth. 161. Mich. 15 Car. Gorges v. Chancie. ——— Chan. Rep. 125. Gage v. Chanſey, S C. decreed ——S. C. cited Arg Chan. Caſes 118. and ſays, that upon Debate this was eſtabliſhed as a good Diſpoſition, and ſays that this now was declared a juſt Order. Mich. 20 Car. 2

The *Wife of an improvident Husband* had, unknown to him, *by her Frugality, raiſed ſome Monies for the Good of their Children, which ſhe had diſpoſed of for that Purpoſe*, they being otherwiſe unprovided for, and this Diſpoſition of the Wife was eſtabliſhed by a Decree of Ld. Coventry; but afterwards upon a Review and Aſſiſtance of the Judges this Decree was reverſed, as being dangerous to give a Feme Power to diſpoſe of her Husband's Eſtate. Chan. Caſes 117, 118. Arg. cites it as about 1639. Scot v. Brograve.

Litt. Rep. 78. S.C. accordingly.— S P. and after a Sentence there for a Separation propter Sævitiam and Alimony allowed there, the Husband moved for a Prohibition on an Offer of Cohabitation, and to give Caution to uſe her fitly, but it was denied, the Court of the Ordinary being the proper Court for Alimony. Cro. J. 364. pl. 1. Hill. 12 Jac. B. R. Hyat's Caſe.

4. The *Eccleſiaſtical Court* is the proper Court for Alimony, and if the Perſon *will not obey*, they cannot but excommunicate him. Het. 69. Mich. 3 Car. C. B. Owen's Caſe.

In a Suit by the Wife againſt her Husband for Alimony the Court decreed the Defendant to pay the Plaintiff 300 l. a Year, ſo long as they lived apart. Chan. Rep. 164. Anno 1650. Aſhton v. Aſhton.

5. Alimony was *decreed* at the Suit of *her Brother, who had maintained her a Year and an half ſince her Departure*, and alſo the Benefit of a Bond given before Marriage. Chan. Rep. 44. 6 Car. 1. Lasbrook v. Tyler.

6. A *Wife hath a Stock for her own Uſe*, and dies, who is *buried by a Friend without Direction of her Husband*, he that buries her muſt be at the Charge, and not the Husband. Mich. 14 Car. Toth. 161. Poole v. Harrington.

Contra per the other Juſtices. Ibid. 125.

7. The *Spiritual Court never allows any Suit for Alimony but after Divorce*, tho' ſometimes they have decreed it upon Divorce; Per Twiſden J. who ſaid that the Judges of the Spiritual Court had ſo informed him. Sid. 116. Paſch. 15 Car. 2. in Caſe of Manby v. Scot.

Upon a Bill brought by the Wife againſt her Husband to be relieved for ſuch ſeparate Maintenance, the Husband *demurred, becauſe ſhe ſued without her Husband*, but it was over-ruled. N. Ch. R. 88. Raynes v. Lewis.——Chan. Caſes 35. Mich. 15 Car. 2. Regnes v. Lewis, S. C accordingly.——Bill was brought by the Wife's Prochein Amy againſt her Husband. Chan. Prec. 496. Trin. 1718. Augier v. Augier. —— Gilb. Equ. Rep. 152. Angier v. Angier, S. C in totidem Verbis.

8. A *Deed* by which the Baron *agreed* to allow the Wife a ſeparate Maintenance was *confirmed* in Chancery. Fin. R. 73. Hill. 25 Car. 2 Turner v. Boteler & al'.

9. The Baron *covenanted with L. to pay his Wife, or ſuch as ſhe appoint, 50 l. a Year* as a ſeparate Maintenance, *provided ſhe live at ſuch a Place as N. and W. appoint.* Baron pleaded, that ſhe did not live at ſuch Place as N. and W. appointed. Plaintiff replies, that ſhe was always ready to live at ſuch Place, but that *N and W. appointed no Place.*

Defen-

Defendant demurr'd, for that it was a Condition precedent; but Plaintiff inſiſted it was only ſubſequent, and ſo become impoſſible, N. being ſince dead, and no Place being appointed. Per Cur. the Condition is ſubſequent, the Covenant being, in Purſuance of a former abſolute Agreement, to pay ſo much, and it is like an Aſſent of the Husband, which is intended, till the contrary appears. 3 Keb. 363. pl. 43. Mich. 26 Car. 2. B. R. Leech v. Beer.

10. No Alimony except Pro Expenſis Litis can be decreed but by Conſent, unleſs *firſt* there is *a Decree for Separation*. Chan. Caſes 251. Hill. 26 & 27 Car. 2. Whorewood v. Whorewood.

11. Action at Law againſt the Executors of the Baron for *Goods bought* in the Baron's Life-time by the Wife, while ſhe lived ſeparate, and had a ſeparate Maintenance, and after Verdict for the Plaintiff at Law, the Executors bring Bill for Relief, and ſuggeſt as above, and that the Plaintiff knew it to be ſo, and pray'd an Injunction; but denied, it being a *proper Defence at Law*. Vern. 71. pl. 66. Mich. 1682. Ferrars v. Ferrars.

12. Where, on a Separation, Lands are convey'd by the Baron in Truſt for the Feme, Chancery will not bar the Feme from *ſuing the Baron* in the Truſtee's Name, and a Surrender or Releaſe by the Baron ſhall not be made Uſe of againſt the Feme. 2 Chan. Caſes, 102. Paſch. 34 Car. 2. Mildmay v. Mildmay. Vern. 53. pl. 50. S. C. but the Wife being a very lewd Woman, and having elop'd from her Husband, and the Husband * *offering* in his Anſwer *to take her again*, Finch C. would make no Order in it; but that ſhe might proceed at Law againſt the Husband, as in the Place of the Tenants, and recover the Rents there if ſhe could.

* An original Bill to *ſet aſide a Decree for Alimony*, and which was confirmed in the Houſe of Lords, was adjudged proper, the Husband offering in it to be reconciled, and decreed accordingly; but not to vacate the Decree wholly, but to be a Security for good Uſage, and the Husband to bring in all Arrears of the Alimony into Court in the firſt Place. Fin. Rep. 153. Mich. 26 Car. 2. Horwood v. Horwood.——Chan. Caſes, 250. Whorewood v. Whorewood, S. C. accordingly.—— Chan. Rep. 223. 14 Car. 2. S. C. but upon another Point.

13. A Woman living ſeparate from her Husband, and having a ſeparate Maintenance, *contracts Debts*. The *Creditors*, by a Bill in this Court, may follow the ſeparate Maintenance whilſt it continues; but when that is determined, and the Husband dead, they cannot by a Bill charge the Jointure with the Debts; by Ld. Keeper North; and the rather becauſe the Executor of the Husband, who may have paid the Debt, is no Party. Vern. 326. pl. 322. Paſch. 1685. Kenge v. Delaval.

14. Defendant *covenanted* with the Plaintiff *to permit S. the Defendant's Wife to live ſeparate from him, until he and ſhe ſhould by Writing under their Hands, atteſted by 2 Witneſſes, give Notice to each other that they would again cohabit*; and *that during the Coverture, and until ſuch Notice, he would pay unto the Plaintiff* 300 *l. per Ann. for her Maintenance, by quarterly Payments* &c. and for 75 l. being one quarterly Payment, he brought Action of Covenant. The Defendant *pleaded* in Bar, *that after the ſaid Indenture, and before this Action brought, another Indenture was made between him and S. his Wife of the one Part, and the Plaintiff of the other Part, reciting the ſaid firſt Indenture*; *and* alſo *that he and his Wife did intend to cohabit, and did then actually cohabit*; *and that ſo long as they ſhould cohabit, the ſaid yearly Payment ſhould ceaſe*; *and that in the ſaid laſt-recited Indenture the Plaintiff did covenant with the Defendant, that he ſhould be ſaved harmleſs from the ſaid yearly Payment, ſo long as he and his Wife ſhould cohabit*; and *avers that ever ſince the laſt Indenture they did cohabit*, and demands Judgment of the Action. The Plaintiff *replied, that they did not cohabit Modo & Forma* &c. Adjudged per tot. Cur. for the Plaintiff; for unleſs the Cohabitation had been according to the firſt Indenture it was no Bar, the laſt Indenture not having taken

away the Effect of the former, and a later Covenant cannot be pleaded in Bar of a former; but the Defendant must bring his Action on the last Indenture, if he would help himself. 2 Vent. 217. Mich. 2 W. & M. in C. B. Gawden v. Draper.

1 Salk 115. pl. 2. S. C. accordingly. —12 Mod. 89. S. C. accordingly. —See Tit. Prohibition (Q.) pl. 10. & 11. and the Notes there.

15. Where Baron and Feme live separate, and *Alimony is sentenced to* the Wife, if the Wife sues in the Spiritual Court for Defamation, the *Baron cannot release the Costs*; otherwise if Baron and Feme cohabit. So of a *Legacy*; but if the Suit be there for a Legacy, which is originally due to the Baron and Feme, and is not a Part of the Alimony, he may release the Suit, and also the Costs, because he may discharge the Principal; per Holt Ch. J. 5 Mod. 71. Mich. 7 W. 3. Chamberlain v. Hewson.

Note here the Woman lived very decently and modestly all the while she was in the Plaintiff's House,

16. Tho' a Husband be bound to pay his Wife's Debts for a reasonable Provision, yet if *she parts from him*, especially by reason of *her Misbehaviour*, (as in the principal Case it must be presumed she did, she living in Adultery after the Separation) and he *allows her a Maintenance*, he shall never after be * *charged with her Debts*, till a *new Cohabitation*. 6 Mod. 147. Pasch. 3 Ann. at Nisi Prius, coram Trevor Ch. J. Cragg v. Bowman.

and 'twas also proved that her Maintenance was duly paid her. Ibid. * S. P per Ld. Cowper; however to avoid the Expence the Husband might be put to in defending such Suits, he sent it to a Master to settle a *Security to indemnify the Husband against her Debts*. Chan. Prec. 496. Augier v. Augier.——Gilb. Equ. Rep. 152. Angier v. Angier, S. C. in totidem Verbis.

17. Wife having separate Allowance, and being separated, *may make a Gift of what she saves* as a Feme sole. MS. Tab. December 6, 1705. Gage v. Lister.

18. *Dutton* having more than 3000 l. per Ann. *married M.* the Plaintiff, *who had* 10,000 *l. Portion*, and settled 1000 l. per Ann. upon her for her Jointure, and the greatest Part of D.'s Estate was settled upon the first and every other Son in Tail Male successively, as usual in Marriage-Settlements. *D. run greatly in Debt, and J. his eldest Son being of full Age*, D. upon a Calculation of his Debts, and the Value of his Estate for Life, with Impeachment of Waste, *agreed with J. to convey all his Estate to him, and J. covenants to pay all D.'s* Debts, and to allow him 500 l. per Ann. Rent-charge for his Life; *and* further (upon which the Question arises) *that J. shall indemnify D. from all Debts, Charges, and Expences for the Maintenance of the said M. being then separated by Consent. M. brings a Bill against D. her Husband, and J. the Son, to have an Allowance for her Maintenance* &c. Cowper C. said that by this Covenant to indemnify the Father from maintaining his Wife, the Son has taken upon himself the Charge of maintaining her, and, as to this Purpose, stands in the Place of the Husband, who is bound to give his Wife an Allowance, if he voluntarily separates from her; and he took *the Son in this Case* to be *in Nature of a Trustee for the Wife, so far as a reasonable Allowance for her Maintenance*; and tho' the Son doth offer to maintain her at his own House, yet he did not think she is bound to accept that Offer; for tho' he stands in the Place of the Husband as to her Maintenance, and a Husband is not bound to allow any Thing to his Wife for Maintenance if he offers to take her home, yet in this Case here lies no such Obligation upon the Wife to live with the Son, and tho' she refuses, she ought to have a reasonable Allowance; and ordered her to be allowed 200 l. per Ann. Note, in this Case Ld. Chancellor allowed her to keep the Plate &c. which she bought, or was given to her by her Friends, during the Separation. MS. Rep. Trin. 1 Geo. Canc. Dutton v. Dutton & al'.

19. An

19. An *Agreement* between Husband and Wife to live ſeparate, and that ſhe ſhould have a ſeparate Maintenance, ſhall *bind them both till they agree to cohabit* again. 8 Mod. 22. 7 Geo. 1. Liſter's Caſe. S. P. Chan Prec. 496. Trin. 1718. Augier v. Augier.

20. In the Caſe of ſeparate Maintenance, if the *Husband maintains the Wife*, it *bars her Claim in reſpect* thereof; per Ld. C. Macclesfield. 2 Wms's Rep. 84. Mich. 1722. in Caſe of Powell v. Hankey & Cox.

21. In Caſe of a Wife's ſeparate Maintenance, if it be *not demanded by her, ſhe will be concluded*, even where ſhe has no other Perſon to demand it of but her Husband; per Ld. C. Macclesfield. 2 Wms's Rep. 84. Mich. 1722. in Caſe of Powell v. Hankey & Cox.

22. Tho' the Wife has a ſeparate Maintenance, with Power to make a Will, and by Will *makes an Executor, and diſpoſes of all ſhe had*, but the Executor took nothing, the Whole being otherwiſe diſpoſed of, it was decreed that the Husband's Eſtate in the Hands of another Perſon, the Husband being now dead, is ſubject by Law to *pay the Wife's Funeral Expences*. 9 Mod. 31. Trin. 9 Geo. in Canc. at the Rolls, Bertie v. Ld. Cheſterfield.

(Y. a) Feme Executrix, what ſhe may do without her Baron.

1. IN Detinue it was admitted, that if a *Man gives a Legacy, and makes his Feme his Executrix*, and dies, and *ſhe takes Baron*, and after *ſhe delivers the Legacy*, this is well, notwithſtanding ſhe be Covert Baron. Br. Executors, pl. 47. cites 7 H. 4. 13. Sid 188. pl. 14. Paſch. 16 Car. 2. B. R. The Court held that tho' anciently it had been a Point whether a Feme Covert might aſſent to a Legacy, yet ſince Ruſſel's Caſe [5 Rep. 27.] they thought it ſettled that ſhe cannot aſſent, and they were of the ſame Opinion; for in caſe ſhe has Power to aſſent or diſ-aſſent to a Legacy, then if a Term ſhould be deviſed for Life to the Feme, (who is alſo Executrix) the Remainder to J. S. and ſhe takes J. S. to Baron, yet it ſhould be in her Power to affirm or deſtroy this Deviſe, the which would be very miſchievous.

2. In Treſpaſs a Feme Executrix took Baron, and after *ſhe bailed the Goods of the Teſtator to J. S. without her Baron*; and well, per Vaviſor & Brian; for ſhe may *deliver Legacies*, and *receive Debts*, and *make a Releaſe* or Acquittance, and may *give the Goods without her Baron*; for ſhe alone may do all Matters in Fact. *Contra of Matters of Record*; for ſhe cannot ſue nor be ſued without her Baron. Br. Executors, pl. 178. cites 16 H. 7. 5. 6.

3. Feme Executrix took Baron; there in Debt againſt them as Executors, *he may ſay that the Feme has fully adminiſter'd*, and the *other may ſay that the Feme has Aſſets &c. without ſpeaking of the Baron*; for it is ſaid there, that the Feme may adminiſter without the Baron. Quære. Br. Executors, pl. 150. cites 18 H. 6. 4. Br. Aſſets enter Mains, pl. 8 cites S. C.

4. In Treſpaſs, per Newton, a Feme Covert may be Executrix, and ſhe and her Baron may ſue for a Debt, and yet ſhe cannot make a Deed without the Baron. Br. Executors, pl. 68. cites 19 H. 6. 25. S. P. but ſhe cannot ſue without her Baron; Per Markham.

Ibid. pl. 75. cites 21 H. 6. 30.

5. If Feme Executrix takes Baron, and after ſhe *releaſes Debt of the Teſtator by Deed in her own Name*, this is good, for ſhe repreſents the Teſtator; Per Littleton, but Cook contra without her Baron. Br. Covenant, pl. 52. cites 18 E. 4. 10. S. C. cited 5 Rep. 27. b but the Opinion was utterly denied. Hill.

16 Eliz. B. R. in Ruſſel's Caſe. For tho' ſhe be Executrix, yet ſhe cannot do any thing to the Prejudice

judice of her Baron. But without Queſtion, the Releaſe of the Baron in ſuch Caſe is good, and ſo the Doubts in the Books of 13 E. 1. tit. Executors 119. 5 E. 3. 45. Barbor's Caſe. 18 H. 6. 4. 10. 18 E. 4. 10. 21 E. 4. 13 & 24. 2 H. 7. 15. 6 H. 7. 6. 5 H. 7. 13 & 14. are well explained.

If Feme Executrix *deliver up a Bond* inſtead of an Accquittance during the Coverture, to one that was bound to her Teſtator, the Baron has no Remedy; Per Keble. Kelw. 122. pl. 74. Caſus incerti temporis.——And ſhe may receive Money without her Baron and give *Acquittance* for it; and if an Acquittance made by her be a Devaſtavit, yet it is good, and ſhe and her Husband are bound by it. And. 117. pl. 164. Hill. 26 Eliz. Anon. ——Br. Executors, pl. 113. cites S. C. accordingly.

6. In Account, if a *Feme* be *Executrix* and *takes Baron*, and after *ſhe delivers Money to J. S.* and her *Baron dies*, and *ſhe brings Writ of Account, and does not name herſelf Executrix*, and well, becauſe it was a Thing which was once in his Poſſeſſion. Br. Executors, pl. 101. cites 2 H. 7. 15. Per Keble.

7. And Rede agreed that a Feme Executrix may *pay Debts* of the Teſtator *and the Legacies*, but *not deliver Money to render Account*. But Keble ſaid that ſhe may do the one and the other. Ibid.

8. Feme Executrix *cannot make Acquittance* as Executrix *without her Baron*; but *contra by the Spiritual Law*. Br. Executors, pl. 101. cites 2 H. 7. 15.

9. D. *confeſſed a Judgment* to F. who made his Wife, the Plaintiff, *Executrix* and died; ſhe *adminiſtred and married a ſecond Husband, and* then, *ſhe alone*, without her Husband, *acknowledged Satisfaction, though no real Satisfaction was made*. The Court held that this was not good. Sid. 31. pl. 6. Hill. 12 & 13 Car. 2. B. R. Fenner v. Dives.

10. A Wife *Adminiſtratrix under* 17 ſhall join with her Husband in an Action; Per Twiſden J. Mod. 297. Trin. 29 Car. 2. B. R. in Caſe of Foxwiſt v. Tremain.

(Z. a) Power of the Baron of Feme Executrix.

In caſe of a Feme Covert made Executrix, the Baron has a great Power.

1. IT was ſaid, that if *a Feme* be made *Executrix* who *does not Adminiſter*, and *ſhe takes Baron*, the *Baron may Adminiſter* for him and his Feme, and prove the Teſtament &c. and there Releaſe of the Baron is good. Br. Executors, pl. 147. cites 33 H. 6. 31. *Baron may Adminiſter* and bind her though ſhe refuſes, and may * *Releaſe* the Debts of the Teſtator, but the Wife cannot do any Thing to the Prejudice of the Baron without his Conſent; Per Holt Ch. J. 1 Salk. 306. Mich. 11 W. 3. in Caſe of Wangford v. Wangford, cites S. C. of 33 H. 6. 31.—Baron may diſpoſe by his Grant the Goods, which the Wife has as Executrix. Jenk. 79. pl. 56. ——She cannot give the Goods away without *Conſent of the Husband*, and if he Conſents to it, then it he that gives it. 6 Mod. 93. Jenkins v. Plume. * Without Conſent of the Wife. Carth. 462. Mich. 10 W. 3. B. R. ſeems admitted in Caſe of Yard v. Ellard.

S. P. For Action perſonal ſuſpended, is extinct for ever. And

2. If a Feme *Executrix takes Baron*, and *he releaſes all Actions*, this ſhall be a Bar during the Coverture without Queſtion; by the Juſtices. But Choke doubted if it ſhall be a Bar after the Death of the Baron; but per Pigot, once extinct is for ever. Br. Releaſes, pl. 29. cites 9 E. 4. 42. Brook ſays it ſeems to be a good Bar for ever. Br. Executors, pl. 151. cites S. C.——S. P. If the Baron does not except it in his Releaſe. Ibid. pl. 152. cites 39 H. 6. 15. 16.——S. P. Br. Extinguiſhment, pl. 20. cites 9 E. 4 42.

S. P. But if the Baron did no Act in his Life, the Action remains to the Execu-

3. If a *Feme Executrix takes Baron*, and the *Baron puts himſelf in Arbitrement for Debt of the Teſtator*, and *Award is made*, and the *Baron dies*, the *Feme ſhall be barred*; Per tot. Cur. Brook ſays, that from hence it ſeems to him, that the Releaſe of the Baron without the Feme is a good Bar againſt the Feme, quod conceditur, Anno 39 H. 6. 15. and therefore there

there he excepted thoſe Debts in his Releaſe, and otherwiſe they had been extinct. *Br.* Releaſes, pl. 79. cites 21 H. 7. 29.

tor, and if the Baron gives the Goods which the Feme has as Executrix, the Gift is good; and by this Arbitrement, all the Actions which ſhe has jointly againſt the Defendant and a Stranger a gone; and the Baron with his Feme may Adminiſter theſe Goods; Quod Nota. *Br.* Executors, pl. 96. cites 21 H. 7. 29.——*Br.* Dette, pl. 125. cites S. C.

4. A Feme Executrix take Baron, and they bring Debt as Executors, and have Judgment. The Defendant pleaded *Outlawry of the Husband* in Bar; But per Cur. clearly the Husband forfeits nothing of the Goods which the Wife had as Executrix; and Judgment for the Plaintiff. 3 Bulſt. 210. Trin. 14 Jac. Hix v. Harriſon.

5. The *Poſſeſſion* of the Wife as Executrix, is alſo the Poſſeſſion of her Baron, and Damages recovered in Trover by them, ſhall be to the Eſtate of Teſtator, and ſo may concern them both. Sty. 48 Mich. 23 Car. B. R. Fremling v. Clutterbook.

(A. b) What Act of the Baron of Executrix alters the Property of Goods &c. to himſelf.

1. A Made his Will, by which he gave divers Legacies, and then adds. "*The Reſidue of all my Goods I bequeath to Frances my Wife, whom I make Executrix to pay my Debts.*" Frances paid the Debts and Legacies, and had Goods left and *marries B. who made J. S. Executor* and dy'd. J. S. took the Goods, the Widow brought Detinue againſt J. S. and Judgment for her, for notwithſtanding the Deviſe of the Reſidue &c. ſhe had it not as Deviſee, but as Executrix, by Reaſon of the Words of the Deviſe *(to pay my Debts)* which have no other Meaning, but that ſhe ſhall enjoy them as Executrix. And. 22. pl. 45. Mich. 15 & 16 Eliz. Hunks v. Alborough.

Mo. 98. pl. 242. S. C. held accordingly.—— Bendl. 219. 222. S. C. adjudged for the Plaintiff; and ſee the Pleadings there.—— D. 351. a. pl. 21. Anon.

S. C. & S. P. and the Opinion of all the Juſtices was for the Plaintiff.

2. A *Stranger lays claim to a Term* which the Wife has as Executrix to her Baron, and her ſecond Husband by Writing *ſubmits to an Award* the Title and Intereſt of his Wife. The Arbitrator awards one Moiety to the Claiment, and *awards* the other *Moiety* to the Baron and Feme. The ſecond Baron dies. The Wife is bound. For if the Baron had granted over the Term, ſuch Grant would bind the Feme, and conſequently the Submiſſion in this Caſe being for the Title and Intereſt of the Term, is the ſame in Effect as if the Baron had granted the Term over, but if the Arbitrators award that the Poſſeſſor ſhall hold the Term; this it ſeems does not bind the Right of the other, for ſuch Arbitrement does not extinguiſh the Right as it does in the other Caſe where it makes the Poſſeſſion to paſs. D. 183. a. pl. 57. and Marg. Ibid. cites Paſch. 23 Eliz. B. R. Anon.

So where Feme Covert is *reſiduary Legatee*; the Husband and the Executor differ about the Reſiduum and ſubmit to Arbitration. The *Money awarded* to the Husband will go to his Executors, and not ſurvive to the Wife; for per Jefferies Ch. the Award is a Sort of Judgment. Vern. 396. pl. 366. Paſch. 1686. Oglander v. Baſton.

3. A Feme *Adminiſtratrix* to her former Husband, *brought Debt with her then Husband upon an Obligation to the Inteſtate*, and had *Judgment for Debt, Damages and Coſts.* The *Feme died.* The *Baron* after a Year and Day *brought Sci. Fa.* to have Execution; and all the Court (except Hide Ch. J. who doubted thereof) conceived that the Sci. Fa. lay not

Cro C. 227. pl. 4. Mich. 7 Car. B. R. S. C. moved again and argued, and all the

Court, Hide Ch. J. being dead, conceived that the Sci. Fa. did not lie for the ſame Reaſons before given, and the Recovery had,

for the Husband, becauſe being a Debt demanded by the Wife as Adminiſtratrix, it was in Auter Droit; and though they recover, yet ſhe dying before Execution, the Duty remains to ſuch Perſon as takes a new Adminiſtration as in Right of the Inteſtate; and though the Baron is Party to the Judgment, yet he has no Property in the Debt, whereas *he that ought to have a Sci. Fa. muſt have Privity and Property to have the Debt*, otherwiſe it is a vain Suit. Cro. C. 208. pl. 2. Hill. 6 Car. B. R. Beamond v. Long.

was in Right of the Inteſtate. And though it was further objected that the Judgment was for Coſts and Damages which belong to the Baron, though the ſame Debt did not belong to him, and therefore the Sci. Fa. was maintainable for the Damages; yet the Court held the Sci. Fa. to have Execution of the Judgment for the Debt, and alſo for the Damages is not maintainable, and whether he might maintain a Sci. Fa. for the Damages and Coſts, they would not deliver any Opinion; and gave Judgment for the Defendant. And the Caſe being moved at Serjeant's Inn, to the Chief Baron, and other Barons, and to Harvy J. they all agreed in the ſame Opinion.———Jo. 248. pl. 1. S. C. held accordingly.——S. C. adjudged accordingly. See Tit. Execution (P) pl. 3.——S. C. cited. Arg. 3 Mod. 64. ——S. P. held accordingly; per tot. Cur. Cro. C. 464. pl. 1. Trin. 12 Car. B. R. Anon.

4. *Obligee made his Wife Executrix.* She married a *ſecond Husband*, who *became Bankrupt*, and the Commiſſioners aſſigned this Debt. But by Holt Ch. J. they have no Power to aſſign any thing but what is the Bankrupt's Eſtate, and if the Wife dies before Aſſignment by him, there muſt be an Adminiſtration de Bonis Non. His Power to diſpoſe of her Eſtate does not make a Title in him; and tho' he may diſpoſe of a *Term which he has in Jure Uxoris*, yet if he becomes a Bankrupt, the Commiſſioners cannot aſſign over this Eſtate; And by Powel J. they have Nothing to do with the Debts of the Teſtator, but only with the Debts of the Bankrupt. Holt's Rep. 104, 105. Hill. 6 Ann. Lutting v. Browning.

(B. b) In what Caſes the Husband muſt or may take Adminiſtration.

1. WHERE the Wife has *Debts or Duties due to her*, ſhe cannot, by making another Perſon Executor, preclude her Husband from that Benefit which to him ſhould appertain as Adminiſtrator of her Goods. Went. Off. Ex. 200.

2. *But* where they *belong to her as Executrix* no Benefit can redound to the Husband by having ſuch Adminiſtration of his Wife's Goods; for thoſe ſhould go to the next of Kin of the Wife's Teſtator, who muſt take Adminiſtration De Bonis Non of ſuch Teſtator, if ſhe has no Executor, and therefore her making Executor as touching theſe brings *no Prejudice to her Baron*, and ſo is out of the Reaſon of the Caſe of Ognell v. Underhill & Appleby. Went. Off. Ex 200.

3. Where the Wife is *Executrix and Legatee*, if ſhe *claims as Executrix*, and dies, if the ſecond Baron would have Advantage of it, he muſt take Letters of *Adminiſtration De Bonis Non of the firſt Husband*, and not of the Wife; but if ſhe had claimed the Land and the Term in it *as Legatee*, and had *not been in Poſſeſſion*, Adminiſtration taken of the Rights and Debts of the Wife had been good as to that Intent, tho' his Wife was not actually poſſeſſed of it, but only had a Right unto it, and of ſuch *Things in Action* the Husband might be Executor or Adminiſtrator to his Wife, and if the Baron takes Adminiſtration differently, and brings Action, he will be nonſuit; and if the *Wife before Election*

Election marries, the Baron may make the Election. Le. 216. pl. 298. Mich. 32 & 33 Eliz. C. B. in Caſe of Cheyney v. Smith.

4. The *Wife intitled by the Statute of Diſtributions dies, before Diſtribution*, inteſtate, and ſo does the Husband too ſoon after. Whether the Intereſt veſted in the Wife did veſt in the Baron without taking Adminiſtration to his Wife, or not? It was argued that it did, and ſo that it ſhould go to the Adminiſtrator of the Husband, and not to the Adminiſtrator of the Wife. But ſee the Decree. 2 Vern. 302. pl. 293. Mich. 1693. Cary v. Taylor.

5. Feme covert *Executrix* dies inteſtate; Adminiſtration may be granted to the next of Kin of the firſt Teſtator De Bonis Non. Jo. 176. pl. 9. Hill. 3 Car. B. R. in Caſe of Jones v. Rowe. Bulſt. 45. Mich. 8 Jac. S. P. admitted, in Caſe of Smith v. Jones.——But where ſhe *is reſiduary Legatee*, it ſhall be granted to her Husband. 2 Vern. 249. pl. 235. Mich. 1691. Rouſe v. Noble.

(C. b) Actions. Writ and Declaration.

1. WRIT of *Aſſiſe* brought by Baron and Feme was *abated*, *becauſe* they were *not ſeiſed after the Eſpouſals*. Thel. Dig. 116. Lib. 10. cap. 26. S. 3. cites Tempore E. 1. Br. 863.

2. The *Reverſion* of Tenant in Dower was *granted to Baron and Feme, and the Heirs of the Baron*. They brought Waſte againſt Tenant in Dower, and the Writ was *Ad Exhæredationem eorum*. The Defendant challenged the Writ, becauſe the Feme had nothing but for Term of Life &c. ſed non allocatur; whereupon he pleaded another Plea. Fitzh. Waſte, pl. 4. cites Hill. 3 E. 2. Baron and Feme ſeiſed to them and the Heirs of the Baron *make a Leaſe*; the Leſſee commits Waſte; they *bring an Action of Waſte*, and conclude *Ad Exhæredationem eorum*, and the *Judgment* alſo was entered, *that they ſhould recover the Damages*, whereas the Damages ought to go to him only that had the Inheritance. The Reporter ſays, that it ſeems to be ill. Freem. Rep. 543. pl. 424. Trin. 1673. Anon.

Error of a Judgment in *Waſte againſt the Tenant for Years* brought by Baron and Feme of a Moiety, being ſeiſed in Reverſion to them and his Heirs Ad Exhæredationem of them. The Court agreed they muſt join in the Action, but the Concluſion muſt be Ad Exhæredationem of him, but the Original not being certified it is well enough. 3 Keb. 175. pl. 12. Trin. 25 Car. 2. B. R. Curtis v. Brown, ſeems to be S. C.

3. Writ of *Entry in the Poſt againſt Baron and Feme, ſuppoſing that the Feme had not Entry unleſs after* &c. was held ill. Thel. Dig. 117. Lib. 10. cap. 26. S. 30. cites 9 E. 2. Br. 812. Writ of Entry *in the Poſt* againſt Baron and Feme, ſuppoſing the Entry of both, was adjudg'd *good*, notwithſtanding that the Baron found his Feme ſeiſed. Thel. Dig. 116. Lib. 10. cap. 26. S. 5. cites Mich. 20 E. 3. Brief 374. 17 E. 3. 40. 39 E. 3. 33. and Mich. 9 E. 2. Brief 812.

4. It is doubted how the Writ of Aſſiſe ſhould be where the *Baron and Feme are diſſeiſed of the Land of the Feme*, and after the *Baron is outlawed of Felony*, and afterwards received to the Peace, Utrum diſſeiſivit eos vel eam. Thel. Dig. 115. Lib. 10. cap. 26. S. 1. cites Hill. 1 E. 3. 5.

5. *Where a Feme has Common of Paſture*, and *after the Marriage* at the firſt time that they put in their Beaſts *they are diſturbed* &c. the Writ ſhall be Diſſeiſivit eos. Thel. Dig. 115. Lib. 10. cap. 26. cites it as held Hill. 1 E. 3. 5.

6. A *Feme* was *ſeiſed of a Rent*, and *took Baron*; *they diſtrained*, and *Reſcous is made*, and they bring Aſſiſe, the *Writ ſhall ſay*, *Quod diſſeiſivit* Aſſiſe of a *Rent* upon Reſcous was

brought by Baron and Feme, where the *Feme was ſeiſed before the Coverture*, and *Reſcous was made to them Both after the Coverture*, and therefore the Aſſiſe was Quod diſſeiſivit eos; but *if the Reſcous be before the Coverture*, and ſhe took Baron, and they brought Aſſiſe, it ſhould be Quod diſſeiſivit eam; Note the Diverſity, when the Diſſeiſin is made to the Feme ſole, and when to the Baron and Feme. Br. Faux Latin, pl. 65 cites 8 Aſſ. 4. ——— Thel. Dig. 115. Lib. 10. cap. 26. S. 1. cites Hill. 1 E. 3. 5. that it was held there, that where a Feme is ſeiſed of Rent, and takes Baron, and at the next Day after the Eſpouſals that Rent is Arrear, and they make Diſtreſs, and Reſcous is made, the Writ ſhall be Quod diſſeiſivit eos. ——— If a Feme be ſeiſed of Rent, and takes Baron, who diſtrains, and Reſcous is made, they ſhall have Aſſiſe, Quod diſſeiſivit eam. Br. Seiſin, pl. 34. cites 3 Aſſ. 5. [The Year-Book is, that tho' the Baron never was corporally ſeiſed, yet the Writ ſhall be Quod diſſeiſivit eos, and not eam.] *vit eos*, and not eam, tho' the Baron never was ſeiſed; Quod Nota. Br. Faux Latin, pl. 61. cites 3 Aſſ. 5.

7. Where the *Land deſcends to a Feme covert*, the Writ ſhall ſuppoſe that the Baron and Feme have entered; but otherwiſe it is if he found his Feme ſeiſed. Thel. Dig. 175. Lib. 11. cap. 54. S. 21. cites Paſch. 7 E. 3. 320. for the Entry of the Feme ſhall be ſuppoſed. 7 E. 3. 354. 21 E. 3. 31. and 28 E. 3. 39.

8. Two *Femes*, *Infants*, *Jointenants*, the *one diſſeiſed the other*, and ſhe *took Baron*; the *Baron and Feme entered*; the other ouſted them, and they *brought Aſſiſe*, *Quod diſſeiſivit eam*, and the Writ good, and they recovered. Br. Faux Latin, pl. 63. cites 7 Aſſ. 17.

9. In *Dower* by Baron and Feme, it was *pleaded*, *that he was not her Baron the Day of the Writ purchaſed*; and it was agreed, that the Writ ſhould abate, notwithſtanding that they could not have a new Writ of other Form. Thel. Dig. 119. Lib. 11. cap. 2. S. 8. cites Mich. 11 E. 3. Brief 476.

The Form in the Writ is, that the Land ſhall remain to the Baron and Feme, as it ſhall revert; but it ſhall not deſcend. Thel. Dig. 116. Lib. 10. cap. 26. S. 22. cites 19 H. 6. 49. but ſays, that contra it is ſaid of Remainder. 38 E. 3. 19. and 6 E. 3. 268.

10. *In Conſimili Caſu* the *Writ ſuppoſed that the Land*, *after the Alienation in Fee*, *ought to revert to the Baron and Feme*, and adjudg'd good. Thel. Dig. 116. Lib. 10. cap. 36. S. 8. cites Hill. 18 E. 3. 2. where the Writ was Jus & Hæreditas of the Feme; and that ſo agrees Trin. 38 E. 3. 19. in Scire Facias. 7 H. 4. 19. 3 H. 6. 2. 18 H. 6. 20. and 19 H. 6. 46.

In *Scire Facias by Baron and Feme out of a Fine by which Land was rendered to the Anceſtor of the Feme*, the Writ was *Quare &c. to the Baron and Feme deſcendere non debeat*, by which it was abated; for nothing can deſcend to the Baron. Thel. Dig. 116. Lib. 10. cap. 26. S. 11. cites Trin. 27 E. 3. 82.

Writ of *Scire Facias for Baron and Feme out of a Fine*, *by which the Remainder of the Land was tail'd to the Anceſtor of the Feme and his Heirs* &c. was abated, becauſe it was *Quare to the Baron and Feme*, *Daughter and Heir of* &c. *Remanere non debeat*. Thel Dig. 117. Lib. 10 cap. 26. S. 29 cites Paſch. 6 E. 3. 267.

Writ by Baron and Feme *of Remainder in Jure Uxoris* ſhall ſay remanere debet to both; contrary of *Formedon in Deſcender*, *Reverter*, *or Eſcheat*. Br. Baron and Feme, pl. 35. cites 11 H. 4. 15. per Hill. ——Br. Scire Facias, pl. 72. cites S. C.

11. Where *Waſte* is done *by a Feme ſole*, and afterwards *ſhe takes Baron*, the *Writ ſuppoſing the Waſte to be done by both*, *is good enough*. Thel. Dig. 116. Lib. 10. cap. 26. S. 6. cites Mich. 19 E. 3. Brief 246. 20 E. 3. Brief 252. 22 Aſſ. 87. Mich. 49 E. 3. 26. and 14 H. 6. 14.

12. *Entry againſt Baron and Feme*, *de quibus the Baron diſſeiſed the Grandfather of the Demandant*. The Writ was abated by Judgment after the View, becauſe no Degree is made againſt the Feme. Thel. Dig. 176. Lib. 11. cap. 54. S. 36. cites Trin. 20 E. 3. Brief 392. 22 E. 3. 17.

13. In *Appeal of Maihem by the Baron and Feme againſt the Baron and Feme*, the Writ was *Unde la Feme pl' appellat eam*, and was abated, inaſmuch as no Tort is ſuppoſed to the Baron Plaintiff, nor by the Baron Defendant. Thel. Dig. 116. Lib. 10. cap. 26. S. 9. cites Paſch. 20 E. 3. Brief 252.

14. In

14. In Treſpaſs where a *Feme ſole does a Battery*, and *takes Baron*, and Action is brought againſt them, the *Writ ſhall be that both of them did the Battery*. Br. Faux Latin, pl. 70. cites 22 Aſſ. 87.

The Writ ſuppoſing that the Treſpaſs was done by both, is good enough. Thel. Dig. 116. Lib. 10. cap. 26. S. 6. cites S. C.——A Feme Covert commits a Treſpaſs Vi & Armis; Treſpaſs is brought againſt the Baron and Feme. The *Writ is, that both committed the Treſpaſs*. Upon Not guilty pleaded, the Jury *finds the Woman guilty, and the Husband Not guilty*. The Book is that the Wife ſhall be impriſoned, and the Husband not; and that the Plaintiff ſhall not be amerced pro falſo Clamore againſt the Husband; for there was *no other Form in the Regiſter*. Jenk. 23. pl. 43.

15. *But* where *Battery* is done to *the Feme ſole who takes Baron*, they ſhall have Action Quod *percuſſit Uxorem dum ſola fuit*; and ſo ſee a Diverſity between the Plaintiff and Defendant; for againſt the Defendant it ſhall be general, and for the Plaintiff it ſhall be ſpecial; and in the Caſe above it was found that the Feme was Guilty, and the Baron not. Br. Faux Latin, pl. 70. cites 22 Aſſ. 87.

16. Aſſiſe by Baron and Feme Quod *diſſeiſivit eam*, and no Exception, and therefore well as it ſeems. Br. Faux Latin, pl. 73. cites 30 Aſſ. 4.

Entry ſur Diſſeiſin in Nature of Aſſiſe *by the Baron and Feme againſt A. quod diſſeiſivit eos.* Chaunt. *Proteſtando quod non diſſeiſivit* &c. *pro placito, that at the Time of the Diſſeiſin ſuppoſed the Feme was Covert of one H. and after H died, and ſhe married this Baron*; ſo the Writ ſhall be Diſſeiſivit *eam*, & non *eos*, Judgment of the Writ; and per Junc & Cott. J. this is a good Plea, tho' the Writ does not ſuppoſe any Time of the Diſſeiſin; and where the Feme is diſſeiſed, and takes Baron, the Writ ſhall be Quod * diſſeiſivit eam, by which Ellerker paſs'd over. Br. Faux Latin, pl. 57. cites 14 H. 6. 13. 14.

Where *Diſſeiſin or Treſpaſs* is done *to a Feme ſole*, in *Writ* to be brought thereof *by the Baron and the Feme after the Marriage*, he *need not put Dum ſola fuit but in the Count*. Thel. Dig. 117. Lib. 10. cap. 26. S. 24. cites Hill. 21 H. 6. 33. and ſays ſee 7 H. 7. 2. and the Regiſter, Fol. 95. But the Writ ſhall be Diſſeiſivit eam, or Bona ipſius la Feme cepit &c. Cites Nat' Brev. 87.

If a *Feme* be *diſſeiſed and takes Baron*, they ſhall have Writ Quod *diſſeiſivit the Feme dum ſola fuit*, Br. Parnor de Profits, pl 22. cites 4 E. 4. 17.——Br. Faux Latin, pl. 107. cites S. C.

* Thel. Dig. 116. Lib. 10. cap. 26. S. 21. cites S. C. and 14 H. 6. 13.

17. *Diſſeiſor infeoffed a Feme ſole*, who *took Baron*. The *Writ* againſt them *ſhall be, that the Feme enter'd by the Diſſeiſor*, and not that both enter'd by the Diſſeiſor, and yet good by Award. Br. Faux Latin, pl. 103. cites 39 E. 3. 25, 26.

Writ of *Entry againſt Baron and Feme, ſuppoſing their Entry by ſuch a one*, was *abated becauſe the Baron found his Feme ſeiſed*. Thel. Dig. 116. Lib. 10. cap. 26. S. 4. cites 4 E 3. It. Derb. Brief 744. 39 E. 3. 33. 7 H. 4. 17. 13 R. 2. Brief 647.

If a *Writ* be to be brought *againſt the Baron, of Lands which he has by his Feme*, the Writ ſhall be that *the Wife enter'd by J. N.* and *not that the Husband and Wife enter'd by J. N.* Br. Cui in Vita, pl. 26. cites 7 H. 7. 1. 2.——Br. Faux Latin, pl. 77. cites 7 H. 7. 2 S. C.

18. In *Waſte by Baron and Feme, upon a Leaſe made by the Feme before Marriage*, the Writ was *Ad Exhæredationem* of the Feme; and adjudg'd good. Thel. Dig. 116. Lib. 10. cap. 26. S. 14. cites Paſch. 42 E. 3. 18.

Writ of *Waſte by Baron and Feme* of the Heritage of the Feme, ſuppoſing *ad Exhæredationem ipſorum*, was abated. Thel. Dig. 116. Lib. 10. cap. 26. S. 20. cites Mich. 8 H. 6. 9.

19. *Treſpaſs* by Baron and Feme *of Aſſault to the Feme, and Impriſonment till the Baron made Fine ad Damnum ipſorum*, and the Writ and Count awarded good, ad Damnum ipſorum &c. Br. Baron and Feme, pl. 21. cites 46 E. 3. 3.

Thel. Dig. 115. Lib. 10. cap. 25. S. 5. cites S. C. and Mich. 6 E. 3. 276.

——Br. Count, pl. 29. cites S. C. & S. P.——Br. Treſpaſs, pl. 52. cites S. C.——Br. Faux Latin, pl. 113. cites 46 E. 3. 3. S. C.

In Treſpaſs for beating the Wife ad Damnum ipſorum, it was moved in Arreſt of Judgment, that it ought to have been to the Damage of the Baron, becauſe a Feme Covert cannot have Damages; but per Cur. it is good, becauſe it is ſuch Action as may ſurvive to her alone; but otherwiſe it would not be. Sid. 387. pl. 23. Mich. 20 Car. 2. B. R. Horton v. Byles.——2 Keb. 434. pl. 73. Hort's Caſe, S. C and per Cur. and all the Clerks, the Declaration could not be otherwiſe, becauſe the Action and

Damages ſurvive, and in all Caſes of Survivor the Action may be laid ad Damnum ipſorum; and Judgment for the Plaintiff-- ——S. C. cited, and S. P. held per Cur. accordingly, and the Plaintiff moved to arreſt his own Judgment for Expedition. 2 Ld. Raym. Rep. 1208, 1209. Mich. 3 Ann. Newton v. Hatter.

A Writ of Treſpaſs was brought by Husband and Wife for *Battery of the Wife ad Damnum ipſorum*, and cites the Regiſter 105. But per Cur. that is not Law, and Judgment was arreſted for this Exception in the principal Caſe. Comb. 184. Mich. 3 W. & M. in B. R. Baker v. Barber.———Show. 345. Hill. 3 W. & M. in Caſe of Meacock v. Farmer, S. P. the Regiſter 105. was cited, but the Court did not regard it.

20. Where a *Feme* is *Leſſee for Years*, and *does Waſte*, and afterwards the *Term is expired*, and *ſhe takes Baron*, the Writ of Waſte ſhall be *Quas the Feme tenuit*, and *not Quas the Baron and Feme tenuerunt.* And *ſo* it ſhall be *where ſhe holds for Term de Auter Vie, and Ceſty que Vie dies, and after ſhe takes Baron*, the Writ ſhall be *Quas the Feme tenuit*; *but if Land be leaſed to a Feme for her Life, and ſhe leaſes over her Eſtate, and afterwards takes Baron*, the Writ ſhall be *Quas tenent.* Thel. Dig. 117. Lib. 10. cap. 26. S. 28. cites Mich. 46 E. 3. 25.

21. *Dum fuit infra Ætatem againſt Baron and Feme, ſuppoſing their Entry after the Demiſe that the Demandant made to the Feme.* The Writ was abated; for it appears that the Leaſe was made to the Feme. Thel. Dig. 116. Lib. 10. cap. 26. S. 16. cites 46 E. 3. Brief 777. And adds Quære; for *it may be that the Leaſe was made during the Coverture, by which they enter'd after the Demiſe, and there the Entry of both ſhall be ſuppoſed*, and cites Trin. 7 H. 4. 17.

22. In *Aſſiſe* by Baron and Feme it was *pleaded, that ſhe was eſpouſed to another, and the Eſpouſals continued a long Time after, which other is yet alive*; to which it was *replied, that ſhe at the Time of thoſe Eſpouſals was only* 3 *Years old, and this other of* 7 *Years*; *and that ſhe afterwards being of the Age of* 20 *Years took to Baron the Plaintiff, and that ſhe never aſſented to the firſt Eſpouſals, and ſo is ſhe his Feme.* Thel. Dig. 119. Lib. 11. cap. 2. S. 11. cites Paſch. 49 E. 3. 17. 49 Aſſ. 7. but nothing was ſaid further at this Time. But afterwards Mich. 50 E. 3. 19. the Aſſiſe was awarded to try whoſe Wife ſhe is.

23. So in *Aſſiſe* by Baron and Feme, or *Debt* or *Treſpaſs*, *Not his Feme* is a good Plea to the Writ. *But in Dower, and Appeal of the Death of her Baron*, it ought to be *Ne unques accouple* in lawful Matrimony with the Deceaſed. Thel. Dig. 120. Lib. 11. cap. 2. S. 12. cites Mich. 7 H. 6. 13. 50 E. 3. 15.

24. In *Appeal by Baron of the Raviſhment of his Feme*, upon the Statute of R. 2. it was pleaded that ſhe was *never accoupled* to him in lawful Matrimony, and this Plea was accepted, and Writ to the Biſhop to certify. Quære if of Neceſſity. Thel. Dig. 120. Lib. 11. cap. 2. S. 13. cites Mich. 11 H. 4. 13.

25. A Feme *married infra Annos Nubiles* ſhall not maintain Writ, leaving out her Baron; Per Newton. Thel. Dig. 120. Lib. 11. cap. 2. S. 21. cites 7 H. 6. 12.

Thel. Dig. 85. Lib. 9. cap. 5 S 43.

26. *Baron and Feme leaſe for Years*, the Baron may have Debt without counting of the Death of his Feme. Br. Count, pl. 83. cites 9 H. 6. 11. cites S. C that the Count was of a Leaſe made by him and A. nuper his Feme, and held good, without ſaying that ſhe was dead.

27. In *Cui in Vita by Baron and Feme*, the Writ was, *Quod reddat Jo. & A. Uxori ejus quæ fuit Uxor Ro.* &c. *quæ clamat tenere ſibi & Heredibus de Corpore dicti Ro. exeuntibus ex dimiſſione Will' qui ipſum A. & præd. Ro. quondam Virum* &c. *inde feoffavit* &c. and held good, notwithſtanding that it may be intended that the Baron by the Word (*ſibi*) claimed the Eſtate to himſelf for Life with his Feme; but becauſe it appeared that the Feoffment was made to the Feme, and to her firſt Baron, the Writ was adjudged good. Thel. Dig. 116, 117. Lib. 10. cap. 26. S. 23. cites Mich. 18 H. 6 24.

28. In

28. In *Treſpaſs* the Writ was general *by the Baron and Feme, Quod Clauſum of the Feme* fregit *et Bladа ejuſdem Feme* depaſtus fuit &c. and *did not ſay dum ſola fuit*, where Feme covert cannot have Property without the Baron, and the *Declaration was dum ſola fuit*, and therefore the Writ good; and the Regiſter is accordingly that the Writ ſhall be general, and the Declaration ſpecial, as above. Quod Nota. Br. Gen. Brief, pl. 7. cites 21 H. 6. 30. Br. Faux Latin, pl. 37. cites S. C.—— Thel. Dig. 86. Lib. 9. cap 7. S. 16. cites S. C. but ſays ſee 14 H. 6. 14. and 7 H. 7. 2. held contra.——In Treſpaſs by Baron and Feme, *Quod clauſum of the Baron and Feme & Bona & Catalla ſua*, apud D. *cepit* &c. and *counted that the Treſpaſs was done to the Feme dum ſola* fuit. The Defendant pleaded Not Guilty, and was found Guilty, and pleaded in Arreſt of Judgment becauſe the Count did not warrant the Writ; for there is a Special Writ in the Regiſter, Quod Bona & Catalla Uxoris cepit &c. and not Bona & Catalla ſua, and Count quod Bona Uxoris dum ſola fuit cepit &c. and it was ſaid there, that there is a Writ in the Regiſter for the Baron and Feme, Quod diſſeiſivit the Feme dum ſola fuit; but where there is no other Writ of Form but the common Writ, there the Writ ſhall be general, and the Count ſpecial. Contra where there is ſpecial Form of Writ for the Matter; per tot. Cur. Br. General Brief, pl. 13. cites 7 H. 7. 2.

29. In *Treſpaſs againſt the Baron and Feme;* it was agreed by all the Juſtices, and ſeveral Serjeants, that the *Baron ſhall not anſwer without his Feme*, but ſhall have *Idem Dies*, and if ſhe be *waived*, then the Baron ſhall go quit; but *the one ſhall not anſwer without the other*, by all. Br. Reſponder, pl. 2. cites 34 H. 6. 29.

30. *A Feme brought Treſpaſs of her Evidence and Charters taken*; the Defendant ſaid, that after the Treſpaſs ſhe took *Baron*, who *releaſed to him all Actions*, and a good Bar. Br. Releaſes, pl. 88. cites 39 H. 6. 15. *Quære, in Detinue* of them, if it ſhall be taken as a Perſonal or Real. Br. Releaſes, pl. 88. cites 39 H. 6. 15.

31. In *Writ of Entry upon the Statute of Rich. by Baron and Feme*, the Entry was ſuppoſed *in Manerium ipſorum*, and held good, without ſaying in Manerium *Uxoris*. Thel. Dig. 117. Lib. 10. cap. 26. S. 25. cites Paſch. 4 E. 4. 13.

32. A *Feme Diſſeiſoreſs took Baron*, the *Writ* againſt them *ſhall be Quod diſſeiſiverunt* the Plaintiff, and not Quod Uxor dum ſola fuit diſſeiſivit eum. Br. Faux Latin, pl. 107. cites 4 E. 4. 17. A Writ ſuppoſing the Diſſeiſin done by Both is good enough. Thel. Dig. 115. Lib. 10. cap. 26. S. 6. cites Mich. 19 E. 3. Brief 246. 20 E. 3. Brief 252. 22 Aſſ. 87. Mich. 49 E. 3. 26. and 14 H. 6. 14.

33. It was held, that a Man ſhall have Writ of *Account againſt Baron and Feme, Quod reddat Compotum de tempore quo the Feme dum ſola fuit was Receiver* or Bailiff &c. Thel. Dig. 117. Lib. 10. cap. 26. S. 26. cites Mich. 4 E. 4. 26.

34. If a *Feme indebted takes Baron*, the Action againſt both ſhall be *debent*. Br. Baron and Feme, pl. 71 cites * 9 E. 4. 24. Br. General Brief, pl. 13. cites 7 H. 7. 2. S. P. for the Baron is now Debtor by the Marriage. * The Year-Book is, that the Writ ſhall be Debent & *injuſte detinent*, and that both muſt make their Law; for the Baron by marrying her had made himſelf chargeable and Party to this Duty. —— 10 Mod. 163. Arg. cites S. C. and 20 H. 6. 22.

35. In Account *by the Baron of Receipt by the Defendant by the Hands of the Feme of the Plaintiff*, the Defendant may wage his Law; for the Baron and Feme are one Perſon in the Law, and therefore it is the immediate Receipt of the Plaintiff himſelf. Br. Ley Gager, pl. 54. cites 15 E. 4. 16.

36. In *Reſcous brought by the Baron and Feme*, the *Writ was in Una Acra Terræ obligata diſtrictioni the Baron and Feme &c.* and held good, notwithſtanding that he had the Rent *in Right of his Feme*; for during the Coverture the Diſtreſs ſhall be to both. Thel. Dig. 117. Lib. 10. cap. 26. S. 27. cites Hill. 15 E. 4. 17.

37. Where

Br. Faux Latin, pl. 77. cites S. C. — *So where a Feme is indebted and takes Baron*, and *Debt is brought againſt them*, the *Writ ſhall be debent*; for the Baron is Debtor with her by the Eſpouſals. Ibid.

37. Where *Debt* is *due to a Feme who takes Baron*, who brings Action, the *Writ ſhall be Debet to both*, and *ſhall count ſpecially how it was due to the Feme dum ſola fuit.* Br. General Brief, pl. 77. cites 7 H. 7. 2.

* The Word in all the Editions of Brooke is (Feme) but in the Year-Book it is (Baron) and otherwiſe it is not intelligible.

38. *Dower* by the Baron and Feme, the *Tenant ſaid, that the firſt Baron had nothing after the Eſpouſals*; Priſt; and the *Demandant did not deny it*, by which the Tenant prayed that they ſhould be barr'd; & non allocatur; for this ſhall be Prejudice to the Feme after the Death of the * Baron, by which they acknowledged to the Tenant by Fine, and the Feme was examined; Quod Nota; for ſhe ſhall not be examined upon a Confeſſion of Action, therefore non recipitur; Note the Diverſity. Br. Baron and Feme, pl. 20. cites 44 E. 3. † 10.

† All the Editions of Brooke are as here viz. 44 E. 3. 10. but it ſhould be 44 E. 3. 12. [b. pl. 22.] and the Tenant pray'd that the Confeſſion be enter'd; ſed non allocatur.

39. The Baron ſhall have Action for *Battery of his Feme*, without ſaying *Per quod* &c. Per Frowike, Kingſmill, and Fiſher J. Br. Treſpaſs, pl. 442. cites 20 H. 7. 5.

Cro. E. 96. pl. 10. Paſch. 30 Eliz. B. R. Cookſon v. Caſtline, S. P and cites S. C.

40 Baron and Feme, and J. S. brought *Treſpaſs Quare Clauſum fregit Herbam ſuam meſſuit & fœnum ſuum aſportavit ad damnum ipſius* the Baron and Feme, and J. S. and held the Declaration good; for though it is not good for the Hay, yet Clauſum fregit & Herbam meſſuit makes it good. Le. 105. pl. 140. Mich. 30 Eliz B. R. Wilkes v. Parſons.

and though it was objected that the Feme could not join for the Hay, becauſe it was a Chattle ſevered from the Inheritance and veſted in the Baron; yet the clear Opinion of the Court was that they may well join, for as they may join in Treſpaſs of Clauſo fracto and cutting their Graſs, ſo they may for the Hay coming of it; and adjudged accordingly.——But Wray ſaid if it had been for taking 20 Loads of Hay without ſaying *Inde provenient* it is otherwiſe; becauſe it may be intended Hay lying on the Land before, for which they cannot join. Ibid.———S. C. cited. D. 305. b. Marg. pl. 59. as adjudged accordingly.

5 Rep. 36. a. Walcot's Caſe. S. C. & S. P. agreed accordingly Per tot. Cur.

41. In *Debt* againſt Baron and Feme upon a *Bond by the Feme dum ſola*, the Writ ought to be in the *Debet and Detinet*; for the Baron has the Goods of the Feme in his own Right; Per Cook, and ſo is the Regiſter 140. 3 Le. 206. pl. 263. Paſch. 30 Eliz. B. R. Walcot v. Powell.

42. If an *Obligation* be made *to a Feme Covert*, and the *Baron diſagrees* to it, the Obligor may plead *Non eſt Factum*; for by the Refuſal, the Obligation loſes its force and becomes no Deed. 5 Rep. 119. b. Trin. 2 Jac. C. B. in Whelpdale's Caſe.

43. In *Trover and Converſion* brought againſt Husband and Wife; It was objected that the Converſion ſhould be laid only in the Baron, for the Feme cannot have any Property; but it was anſwered that this Action is not founded upon any Property, but upon the Poſſeſſion only, and the Point of it is the Converſion, which is a Tort which the Feme may be charged with as well as in Treſpaſs or Diſſeiſin; but they cannot bring Trover and ſuppoſe the Poſſeſſion in themſelves, becauſe the Law tranſfers the whole Intereſt in Point of Ownerſhip to the Husband, according to 21 E. 4. 4. Quod fuit conceſſum per tot. Cur. Yelv. 165. Mich. 7 Jac. B. R. Draper v. Fulkes.

44. In *Treſpaſs* brought *by Husband and Wife for breaking the Cloſe of the Husband, ad damnum eorum*; after Verdict, it was moved that the Declaration was not good nor aided by the Statute; and adjudged accordingly. Cro. J. 473. pl 4. Paſch. 16 Jac. B. R. Marſhall v. Doyle.

45. In

45. In Treſpaſs by Baron and Feme. The Declaration was of an Aſſault and *Battery made to the Feme*, and alſo that the Defendant *alia Enormia eis intulit*; it was moved that this was ill, for the Word (eis) muſt relate to both, and therefore the Feme could not join for an Injury done to the Baron. But adjudged and affirmed in Error, that theſe Words are only in Aggravation and Damages, and not Material, nor do they alter the Subſtance of the Declaration. Cro. J. 664. pl. 16. Hill. 20 Jac. B. R. Thomlins v. Hoe. Sty. 236. Mich. 1650. Watts v. Lord S. P. being moved in Arreſt of Judgment as ill, becauſe the Wrong being Perſonal only to the Feme, could not be ſaid to be done to the Baron; and to this Roll Ch. J. agreed.

46. Treſpaſs by Husband and Wife for *breaking the Cloſe of the Huſband, and for Battery of the Wife, ad damnum ipſorum. The* Defendant to the Breaking of the Cloſe, pleaded Not Guilty; as to the Batery juſtified. The firſt Iſſue was found for the Defendant. The 2d, for the Plaintiff. It was moved in regard it was found againſt the Plaintiff for the Iſſue in which they ought not to join, that the Verdict has diſcharged the Declaration for that Part which is ill, and it is good for the Reſt. And of that Opinion was Lea Ch. J. and Doderidge; but Haughton & Chamberlain e contra. For that the Declaration being ill in itſelf in its Subſtance, the Verdict ſhall never make it good; and therefore Adjornatur. Cro. J. 655. pl. 5. Hill. 20 Jac. B. R. Buckley v. Hale. In Treſpaſs brought by Baron and Feme of their Cloſe broken *and Corn carried away*, Judgment was given for the Plaintiffs. Error was brought and aſſigned that the Feme ought not to join, becauſe ſhe had no Property in the Corn; and Judgment was reverſed. Cro. E. 133. pl. 10. Paſch. 31 Eliz. B. R. Arundel v. Short. ——— D. 305. b. Marg. pl. 59. cites S. C. and that Judgment was reverſed, becauſe Feme Covert cannot have Corn in Common with her Baron; and if it had been, that the Corn had been to them in Common before the Coverture, it ought to have been ſhewn; for a Declaration ought to have a General, and not a Special Intendment. ——— So of Battery and taking of a Horſe, ad Damnum ipſorum; after Verdict it was objected that they ſhould have brought ſeveral Actions, becauſe the Wrong is ſeveral, and therefore Judgment was ſtay'd till the Plaintiff ſhould move. Sty. 129. 130. Mich. 24 Car. Stradling v. Boreman. ——— S. P. adjudged againſt the Plaintiff. Het. 2. Paſch. 3 Car. C. B. Thomas v. Newark. ——— See Keb. 944. pl. 2. Hill. 17 & 18 Car. 2. B. R. Collingwood v. Biſhop.

47. An *Avowry* is made *upon the Husband and Wife*, where the *Wife is the Tenant*; in this Caſe *no Diſclaimer lies*, for the Wife cannot be examined in this Caſe, and the Husband Diſclaimer ſhall not hurt the Wife for her Freehold or Inheritance, any more than his Confeſſion ſhall. Jenk. 143. pl. 97.

48. In Action on the Caſe brought by Husband and Wife *as Adminiſtratrix*, the Declaration was *ad reſpondend' to the Husband and Wife, Cui the Adminiſtration of the Goods &c. was granted*; in Error brought this was aſſigned for Error that it was uncertain to whom (Cui) ſhould relate. But it was held good, becauſe (Cui) is intended of the Wife laſt before mentioned. Lat. 212. Paſch. 3 Car. Walter v. Hays.

49. *Treſpaſs* &c. againſt the Defendant, brought by the Husband and Wife, *for beating the Wife and taking the Goods of the Husband only, ad Damnum ipſorum*; it was objected againſt the Declaration, that the Wife cannot join for a Treſpaſs done to her Husband alone, but he ought to join in a Treſpaſs done to her alone; and Judgment for the Plaintiff. Het. 2. Paſch. 3 Car. C. B. Thomas v. Newark. If Husband and Wife bring an Action of *Treſpaſs for Beating the Wife*, he may declare of a Treſpaſs done to him, *ad Damnum ipſius* the Plaintiff; Per Crook & Yelverton J. Het. 2. Paſch. 3 Car. C. B. Thomas v. Newark.

50. Caſe in Nature of a *Conſpiracy* was brought by Husband and Wife, *for cauſing them to be indicted of Felony falſely and maliciouſly*, and to be kept in Priſon till acquitted, *ad Damnum ipſorum* &c. After Verdict and Judgment for the Plaintiffs, Error was brought and aſſigned, becauſe it was Ad Damnum ipſorum, whereas a Wife cannot join with her Husband for Damages, becauſe it is ſeveral to either of them; and Jo. 340. pl. 7. Anon. S. C. 3 Juſtices held that they could not join for the Tort

done to the Baron; but if it had been for conſpiring to indict the Feme, they might join well enough; but Crooke J. ſeemed e contra.

of that Opinion was Berkley J. but Croke J. held the Contrary, becauſe *the Action is grounded upon one entire Record in which they were both injured*, and they may join if they will, or the Husband may have an Action alone for it, that he was damnified; Adjornatur, cæteris abſentibus. Cro. C. 553. pl. 8. Trin. 15 Car. B. R. Dalby v. Dorthall.

51. Husband and Wife *as Executrix, brought Trover and Converſion of the Goods of the Teſtator*; after a Verdict, it was moved that the Declaration was *of a joint Poſſeſſion of Goods by Husband and Wife*, and *Damages are given to them jointly*, whereas the Goods properly belonged only to the Wife as Executrix; but Roll J. anſwered, that the Poſſeſſion of the Wife as Executrix was alſo the Poſſeſſion of her Husband, and ſo the Damages recovered ſhall be to the Eſtate of the Teſtator, and ſo may concern them both. Sty. 48. Mich. 23 Car. B. R. Fremling v. Clutterbook.

52. *Debt by Baron and Feme upon a Bond made to the Feme dum ſola*, and the Declaration was ad Damnum ipſorum. It was moved that it ſhould have been ad Damnum of the Baron only; but adjudged good, for it was a Damage to the Woman, the Money not being paid to her when ſhe was ſole, and being now married, it is a Damage to the Huſband. Sty. 134. Mich. 24 Car. B. R. Anon.

Keb. 784. pl. 32. S. C. & S. P. agreed per Cur. that ſeveral Actions ſhould have been brought; But Windham e contra, conceived this only a Conſequence of the Battery, and not like Trover, which ought to be only Ad Damnum, or Ad Uſum ipſius; and were this only for taking the Coat, it ought to be Ad Damnum ipſius; Adjornatur.

53. In *Treſpaſs* by Husband and Wife, *for beating her and tearing her Coat, ad Damnum ipſorum*; after a Verdict, it was moved that as to the tearing the Coat, which is the Goods of the Baron, the Action ſhould be in the Name of the Husband alone, and Judgment was ſtayed; for by Twiſden J. ſhe cannot have Action after her Baron's Death for the tearing her Coat. Sid. 224. pl. 14. Mich. 16 Car. 2. B. R. Staunton v. Hobart.

54. In Action of Battery by the Husband and Wife, for *Impriſonment of the Wife till he paid* 10 *l.* Exception was taken becauſe the Concluſion was *Ad Damnum ipſorum*; Sed non allocatur, and Judgment for the Plaintiff. 2 Keb. 230. pl. 4. Trin. 19 Car. 2. B. R. Brown v. Tripe.

55. Where-ever the Damages do ſurvive the Declaration may be *Ad Damnum ipſorum*; Per Cur. 2 Keb. 434. pl. 71. Mich. 20 Car. 2. B. R. in Caſe of Atwood v. Payne.

Mod. 9. pl. 27. S. C. adjudged for the Plaintiff. ——Sid. 425. pl. 10. S. C. and the Court held the Declaration well enough, it being laid to be to the Uſe of the Baron, and ſo found by the Verdict.——2 Keb. 554. pl. 41. S. C. and the Court ſaid it was agreed, in the Caſe of Manby v. Scott, that the Husband was chargeable for neceſſary wearing Apparel, tho' not againſt his Prohibition, or upon an Elopement, and ſo the Court ſaid now, and that this ſhall be intended to the Uſe, unleſs the contrary appears upon the Evidence, but in Trover it muſt be ſpecially alleged to his Uſe, and not Ad Uſum ipſorum; and Judgment for the Plaintiff.

56. *Indebitatus Aſſumpſit* againſt the Husband *pro diverſis Mercimoniis &c. ſold* and delivered *to the Wife to the Uſe of her Husband*, it being *for wearing Apparel*. It was moved in Arreſt of Judgment, that the Declaration being that the Sale was to the Wife, tho' it was to the Uſe of her Husband, was ill; but the Court held, it being for her Apparel, and that ſuitable to her Degree, the Declaration was good, and that the Husband is chargeable. Vent. 42. Mich. 21 Car. 2. B. R. Dyer v. Eaſt.

3 Keb. 151. pl. 19 S. C. & S. P. ad-

57. In *Avowry as Bailiff to Baron and Feme* for Rent arrear, he being ſeiſed in her Right. The Plaintiff demurred ſpecially, becauſe it is not

not averred that the Feme is living; but by Hale, the aretro exiſten' is quaſi an Averment of the *Life of the Wife*, and after Verdict, or on a General Demurrer it had been good, but doubted if it is ill *on ſpecial Demurrer*; but Twiſden and Wild held it good on a ſpecial Demurrer, and Judgment for the Avowant. 2 Lev. 88. Paſch. 25 Car. 2. B. R. Harlow v. Bradnox.

jornatur, but ſays it was likewiſe demurr'd to, becauſe the Marriage was not averr'd; ſed nonallocatur

58. In *Indebitatus* by Baron and Feme, *as the Adminiſtrator of J. S. on Account as Adminiſtrator, and Arrearages found to Baron and Feme as Adminiſtrators, & ſuper ſe aſſumpſerunt to Baron and Feme as Adminiſtrators*; the Defendant demurred, becauſe this would ſurvive to the Husband, and it is not ſaid that the Debt was due to the Wife as Adminiſtratrix; ſed per Cur. this is well enough, and Judgment for the Plaintiff. 3 Keb. 396. pl. 96. Mich. 26 Car. 2. B. R. Harvey v. Halſtead.

59. *Debt upon a Judgment* by Husband and Wife, in which they *declared, that C. recovered 90 l. and made the Feme, Plaintiff, Executrix, and died, and that ſhe took to Husband Quendam Philippum Bickerſtaffe* &c. The Defendant pleaded, that the Plaintiffs never were married, and upon a Demurrer the Declaration was adjudged ill, becauſe *Quendam* Philippum ſhall not be intended the Plaintiff Philip, according to Dyer, 70. b. [pl. 39. Trin. 6 E. 6.] 2 Lev. 207. Mich. 29 Car. 2. B. R. Philip Bickerſtaffe & Ux. v. Peircy.

3 Keb. 810. pl. 24. S. C. cites D. 90. but it is miſprinted for 70.] and ſays that the Plaintiff had leave to diſcontinue.

60. Husband and Wife brought an Action on the Caſe for theſe Words ſpoke of the Wife, *She is a Whore, ſhe is my Whore*, and concluded *Ad Damnum ipſorum*. After a Verdict for the Plaintiff, it was objected in Arreſt of Judgment, that the Words were not actionable without ſpecial Damages laid, and that the Concluſion Ad Damnum ipſorum was ill; but it was anſwered, that it was good, becauſe if ſhe ſurvives the Damages will go to her, and that ſo are all the Precedents. Three Juſtices held the Concluſion was as it ought to be, but Withens J. e contra. 3 Mod. 120. Hill. 2 & 3 Jac. 2. B. R. Baldwin v. Flower.

So for ſaying that his Wife *is a Bawd, and keeps a Bawdy-houſe*, the Concluſion was Ad Damnum ipſorum; Brampſton Ch. J. held the Concluſion good; for the Damage of the Wife is the Damage of the Husband. Mar. 212. pl. 249. Trin. 18 Car. Chambers v. Ryley.

61. In *Debt upon Bond* brought by Husband and Wife, the Defendant *pleaded Ne unques Accouple in loyal Matrimony*. The Plaintiff demurr'd, and had Judgment, becauſe it alters the Trial; for inſtead of trying per Pais, it puts the Trial on a Certificate from the Ordinary; and alſo it admits a Marriage, but denies the Legality of it, whereas a Marriage de Facto is ſufficient, and whether legal or not is not material. 2 Salk. 437. pl. 1. Trin. 1 W. & M. in B. R. Allen & Ux. v. Grey.

Show. 50. S. C. adjudg'd for the Plaintiff. — Comb. 131. S. C. the Plea was adjudg'd ill, and a Reſpondeas Ouſter was awarded; but per Holt Ch. J. a Plea that they were not married, or not covert in Marriage, would be good.

62. *Trover* by Husband and Wife, and *declared, Quod cum Poſſeſſionat' fuerunt the Defendant converted them, ad Damnum ipſorum* &c. This was held ill after Verdict, becauſe the Poſſeſſion of the Wife is the Poſſeſſion of the Husband, and ſo is the Property, and ſo the Converſion cannot be to her Damage. 1 Salk. 114. pl. 1. Mich. 4 W. & M. in B. R. Nelthrop & Ux. v. Anderſon.

63. In Aſſault and Battery by Baron and Feme, the Defendant pleaded *Ne unques Accouple* &c. but held ill; for it cannot be tried at Common Law, the Juriſdiction whereof ought not to be taken away in Perſonal Actions. Comb. 473. Paſch. 30 W. 3. B. R. Jones's Caſe.

So in Caſe by Baron and Feme for a Cauſe ariſing to the Feme before Marriage, the Defendant pleaded ſuch Plea, and Plaintiffs replied, that they were married at ſuch Time and Place, the Plaintiffs had Judgment on Demurrer; for per Cur. in perſonal Actions (as this was) it was right to lay the Matter upon the Fact of the Marriage, to make it iſſuable and triable by a Jury, and not upon the Right of the Marriage, as the Defendant has done in his Plea, and as it ought to be

be done in Appeals and Real Actions. 3 Salk. 64. pl. 4. Mich. 11 W. 3. B. R. Machell v. Garrett.——12 Mod. 276. Michell v. Garret, S. C. accordingly.

2 Ld. Raym. Rep. 1031. S. C. and Judgment accordingly, Nisi &c. and Powell J. said he would not intend any Evidence to be given as to the special

64. *Trespass and false Imprisonment* by Baron and Feme, for Imprisonment of the Feme, *Per quod Negotia Domestica* of the Husband *remanserunt infecta ad grave Dampnum ipsorum.* After Verdict for the Plaintiffs it was objected in Arrest of Judgment, that there being a special Damage laid to the Husband, the Action should have been brought by him alone; but it was held good, because Matter may be laid for Aggravation of Damages, for which no Action would lie, As breaking his House, and beating his Daughter, and yet Trespass will not lie for beating his Daughter; and the Plaintiff had Judgment. 1 Salk. 119. pl. 12. Hill. 2 Ann. B. R. Russel v. Corne.

Damage to the Husband; but only admitted Proof as to the Battery; and that in this Case the Gist of the Action is not the Per quod; but if the Husband had brought the Action, then it would have been the Gist; and Holt Ch. J. said, that if it had been *Per quod Consortium amisit*, the Wife could not have been joined.——6 Mod. 127. S. C. adjudged for the Plaintiff, Nisi &c.

65. In an Action of *Battery* brought *by the Husband and Wife for a Battery upon them, ad Damnum ipsorum*, and for that Reason, after a Verdict for the Plaintiffs, the Judgment was arrested. 6 Mod. 149. Pasch. 3 Ann. B. R. Cole v. Turner.

Because she may plead Non est Factum, it being the Bond of a Feme covert. 6 Mod. 311. S. C.

66. A *Feme covert was arrested* by the Name of Minors, and gave Bail by that Name, in an Action of Debt upon a Bond, and afterwards the Plaintiff declared against her by that Name, and then she pleaded a *Misnosmer*; Adjudged, that whatever a *Bail-Bond* may do in other Cases, yet in the Case of a Feme covert it *shall not estop her* to plead a Misnosmer. 1 Salk. 7. pl. 17. Mich. 3 Ann. B. R. Linch v. Hook.

67. An *Indictment* was for entering into a Wood, and *cutting down* 20 *Ashes* and 30 Oaks, and they demurred, because it is said the *Goods and Chattels of the Husband and Wife*, which is repugnant, because Trees growing belong to the Inheritance; Per Holt Ch. J. we may understand the Husband and Wife to be Jointenants, and reject the Bona & Catalla. Judgment was for the Queen. Holt's Rep. 353. pl. 11. Trin. 6 Ann. the Queen v. Harris.

68. Action of *Assault and Battery* is brought by the *Husband and Wife*; the Declaration sets forth, that the Defendant such a Day &c. assaulted Eleanor the Wife, and *driving a Coach over her, bruised her* &c. *& ratione inde* the *Husband laid out diversas denar' Summas* for the Cure &c. *& al' enormia* iisdem intulit ad grave Damnum ipsorum. Powell J. said, that where Husband and Wife join in Action of Assault and Battery *for beating both*, it is wrong; but may be *helped by a Verdict separating the Damages*, and here the Gist of the Action is only beating of the Wife, and the *Ratione inde* is only in *Aggravation of Damages.* As to the *Alia Enormia*, it is too general to suppose Damages given for it. If the Ratione inde had been left out, the Surgeon's Bill might have been given in Evidence in Aggravation of Damages. Judgment pro Quer' Holt absente. 11 Mod. 264, 265. pl. 3. Hill. 8 Ann. B. R. Todd & Ux. v. Redford.

(D. b) Pleadings and Judgment in Actions againſt Baron and Feme.

1. IN *Replevin againſt a Feme*, ſhe was not received to *plead that ſhe was* Covert and *Feme to ſuch a one the Day of the Writ purchaſed after Prece Partium.* Thel. Dig. 119. lib. 11. cap. 2. S. 1. cites Hill. 4 E. 3. 115.

2. In Aſſiſe the Baron pleaded *Jointenancy with his Feme*, and had *Proceſs to bring in his Feme*; quod nota, and ſhe came and join'd, and maintain'd the Exception. Br. Proceſs, pl. 94. cites 16 Aſſ. 8.

3. *Entry againſt Baron and Feme, ſuppoſing the Entry* of the Feme only. The Tenants *ſaid that they both enter'd by Joint-purchaſe* &c. and held a good Plea, without traverſing the Entry of the Feme only. Thel. Dig. 176. Lib. 11. cap. 54. S. 34. cites Mich. 18 E. 3. 35. Thel. Dig. 177. Lib. 11. cap. 54. S. 46. cites Hill. 33 E. 3. Brief 914. that it is no Plea to ſay that the Baron and Feme enter'd, without traverſing that ſhe did not enter ſolely.

Where the *Entry of both is ſuppoſed*, it is *no Plea to ſay that he found the Feme ſeiſed, without traverſing that both enter'd.* Thel. Dig. 177. Lib. 11 cap. 54. S. 47. cites Mich. 13 R. 2. Brief 647.

4. Where the *Baron is eſtopp'd to plead Non-tenure*, his Feme ſhall be eſtopp'd alſo. Br. Baron and Feme, pl. 52. cites 24 E. 3. Br. Journes &c. pl. 17. cites 24 E. 3.

5. The *Baron* ſhall *plead the Miſnoſmer of his Feme.* Thel. Dig. 193. Lib. 13. cap. 1. S. 7. cites 30 Aſſ. 16. 24. S. C. & S. P.

6. *In Detinue Garniſhment iſſued* againſt one Eliz. and others, Executors of ſuch a one &c. Eliz. came and *ſaid that ſhe is Covert with ſuch a one, and was the Day of the Writ purchaſed* &c. and held a good Plea in her Mouth. Thel. Dig. 120. Lib. 11. cap. 2. S. 18. cites Hill. 21 H. 6. 29.

7. Where a *Feme* who is *eſpouſed in Ireland, or* in *France, is abiding in England*, and is impleaded, ſhe may *plead that ſhe was Covert the Day of the Writ purchaſed with ſuch a one*, her Baron; per Littleton. Thel. Dig. 120. Lib. 11. cap. 2. S. 14. cites Paſch. 18 E. 4. 4.

8. The Husband alone cannot *demur* for his Wife, by the Opinion of the Court. Toth. 136. cites 36 Eliz. Sturling v. Green.

9. The Feme cannot *diſavow the Suit of her and her Baron.* Br. Baron and Feme, pl. 7. cites 39 E. 3. 1. S. P. Br. Coverture, pl. 76. cites 34 Aſſ. 1.

10. A Feme may *plead* to the Writ that *ſhe is the Feme of J. not named Feme.* Br. Baron and Feme, pl. 13. cites 42 E. 3. 23. Br. Brief, pl. 56. cites S. C.

So where it is *againſt J. and A. his Feme*, ſhe *may ſay* to the Writ *that ſhe is not Feme of J.* but the Baron ſhall not have the Plea, but the Feme herſelf. Br. Baron and Feme, pl. 13. cites 42 E. 3. 23.

Aſſumpſit was brought *againſt* the *Defendant as an unmarried Woman.* She and her Husband *plead* in the following Manner, to wit, And *S. H. and A. his Wife, late the ſaid A. Garlick*, and *introduce the Plea with the Marriage*, and then *ſay that the ſaid A. Non-aſſumpſit.* The Plaintiff ſigned Judgment, as if there had been no Plea in the Cauſe, which was ſet aſide upon hearing Counſel on both Sides. Barnes's Notes in C. B. 169, 170. Eaſter, 7 Geo. 2. Amey v. Garlick.

11. Baron and Feme ſhall not be ſuffer'd to confeſs *Action in Dower*; for there does not lie Examination. Br. Coverture, pl. 76. cites 44 E. 3. 12.

12. In *Quid Juris clamat* againſt the Baron and Feme, they may *deny the Deed* which binds the Feme. Br. Baron and Feme, pl. 83. cites 44 E. 3. 34. and 45 E. 3. 11. accordingly. And ſays ſee Fitzh. Quid Juris clamat 11 & 38, that Quid Juris clamat was maintain'd againſt Feme Covert. Ibid.

13. In *Quid Juris clamat* the Baron and Feme may *confeſs a Deed that the Tenant holds without Impeachment of Waſte. Contra of an Infant* in this Action. But in Per quæ Servitia a *Feme Covert was not ſuffer'd to confeſs Acquittal*; for there does not lie Examination, and a Feme Covert ſhall not be bound by her Conuſance but where ſhe is examined, therefore quære of the firſt Caſe. Br. Coverture, pl. 67. cites 45 E. 3. 33 E. 3. and 43 E. 3. in Nat. Brev. in the Addition of Quid Juris clamat & Per quæ Servitia.

14. In *Entry in Nature of Aſſiſe* againſt Baron and Feme, the *Baron pleaded Non-tenure for his Feme and Jointenancy for himſelf with a Stranger*, and good per Cur. and not double; for he ought to anſwer for both. Br. Baron and Feme, pl. 88. cites 10 H. 6. 22.

Br. Coverture, pl. 76. cites S. C.

15. Feme Covert ſhall not be received to *diſavow the Baron's Attorney*; but he may make Attorney for both. Br. Baron and Feme, pl. 7. cites 33 H. 6. 31.

In Battery againſt Baron and Feme, the Baron pleads

16. If the Feme comes and will *plead other Plea than the Baron pleads, or* will *confeſs*, ſhe ſhall not be received. Br. Baron and Feme, pl. 7. cites 33 H. 6. 43.

one Plea and the Feme another, and Verdict for the Plaintiff as to both Iſſues, and Damages intirely given; but Judgment was arreſted, becauſe *Feme cannot plead by herſelf*, and becauſe *Damages intire* were given, and Repleader awarded. Cro. J. 239. pl. 3. Paſch. 8 Jac. B. R. Watſon v. Thorp.

In Action upon an *Aſſumpſit of the Wife dum ſola* fuit, the Plea was enter'd, viz. Et prædict' J. N. & Bridgeta, ven. & defend. vim & injuriam &c. & ipſa *Bridgeta dicit quod ipſa Non-aſſumpſit*, & hoc &c. Et prædict' querens ſimiliter. It was moved that a *Plea of Feme Covert without the Husband* is no Plea at all; and an Iſſue being joined and tried thereupon was ill, and not aided by any Statute of Jeofails; and of that Opinion was all the Court, and a Repleader awarded. Cro. J. 288. pl. 4. Mich. 9 Jac. B. R. Tampian v. Newſon. ——Yelv. 210. S. C. accordingly.

A. brought an Action of *Battery againſt the Husband and Wife, and 2 others.* The *Wife and one of the others, without the Husband, pleads Not guilty*; and the *Husband and the other pleaded Son Aſſault Demeſne*, and tried; and alleged in Arreſt of Judgment, becauſe the Woman pleaded without the Huſband, and the Judgment was ſtaid, and a Repleader alleged. Brownl. 235, 236. Trin. 14 Jac. Anon. And ſays that this Caſe was confirmed by a Caſe which was between Yonges and Bartram.

In Error of a Judgment in *Battery againſt Husband and Wife*, the *Husband and Wife quoad the Wounding pleaded Not guilty.* The *Wife quoad the Battery juſtifies*, and concluded with *Et hoc parata eſt verificare.* The Court much doubted whether it was good; for the Husband ought to have joined with the Wife in that Plea, and would adviſe of it. Cro. C. 594. pl. 9. Mich. 16 Car. B. R. Watkinſon v. Turner.

17. *But* the Baron cannot *fourch by Eſſoign, if the Feme by Covin of the Plaintiff will appear*; and if *both wage their Law, and the Feme fails at the Day*, the Baron ſhall be condemn'd. Br. Baron and Feme, pl. 7. cites 33 H. 6. 43.

18. In Treſpaſs of a Cloſe broken, *the Defendant ſaid that the Place where &c. is one Acre of Land, of which he and Alice his Feme were ſeiſed in their Demeſne, as of Fee, before and at the Time of the Treſpaſs*, and the Defendant enter'd and did the Treſpaſs; and *Exception was taken, becauſe he did not ſay that they were ſeiſed in Jure Uxoris or jointly*; & non allocatur; for per Fineux Ch. J. it is ſufficient for the Defendant to *intitle himſelf to any Part of the Land, in whatſoever manner it be.* Br. Pleadings, pl. 84. cites 12 H. 7. 24.

* Without Examination, and Examination does not lie in this Action.

19. Feme Covert ſhall not acknowledge Acquittal *in* * *Per que Servitia*, and yet may acknowledge *Leaſe without Impeachment of Waſte in Quid Juris clamat.* Br. Coverture, pl. 84.

Br. Per que Servicia, pl. 13. cites Hill. 5 E. 3. S. C.

20. A *Leaſe* was granted *to B. and J. his Wife for* a Term of *Years. B. died, and J. married W.* and in declaring upon this Leaſe W. the Plaintiff, *ſet forth that he and his Wife were poſſeſſed*; *but* did *not ſay that they were poſſeſs'd as in Jure Uxoris*, as he ought, becauſe it is a Chattel Real, and the Feme ſurviving her Baron ſhall have it, and not the Exe-

cutors

tutors of the Baron, and therefore is not diveſted out of the Feme. Sed non allocatur; for true it is that the Baron and Feme are poſſeſs'd, and the manner How they are poſſeſs'd is ſhewn, and ſo by conſidering the Whole together, the Manner of the Poſſeſſion appears, and conſequently ſufficient. Pl. C. 191. a. 1 Eliz. Wroteſley v. Adams.

21. In Debt againſt *Husband* and Wife he was *outlaw'd, and his Wife waived.* Afterwards *ſhe pleaded the Queen's Pardon.* The Court held that ſhe ſhall be diſcharged of her Impriſonment; but the Pardon ought not to be allow'd, becauſe ſhe cannot ſue out a Scire Facias againſt the Plaintiff, to make him declare upon the Original, without her Huſband; and there was a Condition in the Pardon, viz. Ita quod ipſa ſtaret recta in Curia, which ſhe could not do without her Baron. D. 271. b. pl. 27. Hill. 10 Eliz. Anon.

22. *Debt* againſt Husband and Wife, *upon a Bond by the Wife dum ſola.* After Verdict it was moved, that the *Writ was in the Detinet only*, whereas it ſhould have been in the *Debet & Detinet*; for the Marriage was a Gift in Law of all the perſonal Goods to the Husband, and to his own Uſe, and therefore Debet the Money due on this Bond, as well as Detinet. Quod fuit conceſſum per tot. Cur. 5 Rep. 36. a. Trin. 30 Eliz. B. R. Walcott's Caſe. 3 Le. 206. pl. 263. Walcot v. Powell, S. C. ſays that ſo is the Re-giſter 140.

23. *Debt againſt Husband and Wife*, for certain Barrels of *Beer ſold to the Feme dum ſola* ſuit. They *both waged their Law*, and this Term both did ſwear according to the Form of the Oath. Note, the Husband did ſwear for the Debt of the Wife. Cro. E. 161. pl. 51. Mich. 31 & 32 Eliz. B. R. Weeks v. Holms.

24. *Debt* againſt J. and M. Husband and Wife, *as Executrix* of her former Husband. The Defendants *plead by Attorney* thus, Et prædict' J. & M. and that after Imparlance *that they were divorced before the Writ brought.* It was adjudged that the Writ ſhould abate; for it ſhall be preſumed the Divorce continues, if the Contrary be not ſhewn; but if they had ſaid Et prædict' J. & M. Uxor' ejus, it had been an Eſtoppel. Cro. E. 352. pl. 6. Mich. 36 & 37 Eliz. C. B. Underhill v. Brook.

25. In a Replevin the *Husband*, being ſeiſed in Right of the Wife, *avow'd for Damage feaſant in his own Name*, and that the others are his Servants &c. and this was ruled to be good, without ſhewing that they were Servants to the Wife alſo. Noy 107. Hill. 1 Jac. C. B. Harvey v. Gulſton.

26. Treſpaſs and *Aſſault againſt* Husband and Wife, *ſuppoſing that they both beat the Mare of the Plaintiff.* Upon Not guilty pleaded, the Jury *found that the Wife only beat the Mare.* Williams and Crooke J. ſaid that the Verdict is againſt the Plaintiff, becauſe it appears that his Action is falſe; for the Husband is not joined in ſuch Caſe but for Conformity only, and that there is a Special Writ in the Regiſter to that Purpoſe; and Judgment was given againſt the Plaintiff. Yelv. 106. Mich. 5 Jac. B. R. Drury v. Dennis. Brownl. 209. S. C. but ſeems only a Tranſlation of Yelv. —S. C. cited, and ſaid by the Court to be a ſtrange Opinion, Vent. 93. Trin. 22 Car. 2. B. R. where in Battery againſt Baron and Feme the Jury found the Feme only guilty, and the Court gave Judgment for the Plaintiff. Anon.——S. P. and Judgment for the Plaintiff; for per Cur. they may find the one guilty and the other not, and there is no Difference between this and other Caſes of different and ſeveral Treſpaſſors. Show. 350. Paſch. 4 W. & M. Dare v. White ——12 Mod. 19. S. P. per Cur. accordingly, Hare v. White, S. C.——S. P. admitted by Judgment, Cro. J. 203. pl. 3. Hill. 5 Jac. B. R. in Caſe of Hales v. White.

27. A *Verdict* was *againſt Husband and Wife* in Ejectment. After the Niſi Prius, and *before the Day in Bank, the Baron died.* Adjudged that the Action continued againſt the Wife, and Judgment was entered againſt her alone. Cro. J. 356. pl. 12. Mich. 12 Jac. B. R. Rigley v. Lee. In Action brought againſt Huſband and Wife, for *Words ſpoken by the Wife*, after a Verdict for the Plaintiff it was moved, that the Writ was abated by the Death of the Husband after

after the laſt Continuance. The Court doubted; but afterwards held that the Suit is not abated by the Husband's Death, ſhe being the only Tortfeaſor; but otherwiſe if ſhe had died; and Judgment accordingly. Hard. 151, 152. Paſch. 1659. in the Exchequer, Brumrig v. Hanger.

3 Bulſt. 62. Quelch v. Carpenter, S. C. and upon the Caſe of Stanley v. Dobſſon, Mich 32 & 33 Eliz. being produced in Court, where Judgment was given accordingly in B. R. on the S. P. and afterwards affirmed in the Exchequer Chamber, the Judgment given in C. B. in the principal Caſe for the Plaintiff, was now affirmed in B. R.——Cro. C. 417. pl. 5. Needler v. Symnell, S. P. and the Iſſue that Non ſunt inde culpabiles, held well enough; for the Baron and Feme are charged as for the Wrong of the Feme.——Jo. 366. pl. 4. Mich. 11 Car. B. R. the S. C. but S. P. does not appear.——But Brownl. 6. Hill. 1 Jac. Smailes v. Belt, after Verdict Judgment was arreſted, becauſe the Iſſue was Quod ipſi non ſunt culpabiles, and it ought to have been that the Woman was Not guilty.—— S. C. cited accordingly, Hob. 126. at the End of pl. 156 —— S. P. held accordingly in Trover and Converſion brought againſt Baron and Feme, for a Converſion by the Feme to her own Uſe, and they pleaded the ſame Plea. Cro. J. 5, 6. pl. 6. Paſch. 1 Jac. in the Exchequer Chamber, Coxe v. Cropwell.——Noy 41. Cox v. Carpen, S. P. held accordingly, and ſeems to be S. C.——Cro. E. 883. pl. 18. Paſch. 44 Eliz. B. R. Cox v. Crapnell, S. C. & S. P. held accordingly.

28. Caſe &c. againſt Husband and Wife, for *ſcandalous Words ſpoken by the Wife.* The Defendants *pleaded that ipſi non ſunt culpabiles*, and the *Jury found quod ipſi ſunt culpabiles.* It was moved in Arreſt, that the Husband was joined only for Conformity, and therefore they ought not to have ſaid that ipſi ſunt culpabiles, but that ipſa eſt culpabilis; and the Verdict ſhould have been ſo accordingly. But per Coke Ch. J. the *Plea of the Husband is void, and* if *ſo, the Verdict* is *good againſt the Wife*; and Judgment for the Plaintiff. Roll Rep. 216. pl. 11. Trin. 13 Jac. B. R. Carpenter v. Welch.

Hob. 93 to 101. pl. 127. S. C.—— 2 Brownl. 59. 61. S. C. ——9 Rep. 71. b. S. C.

29. In *Raviſhment of Ward* againſt Baron and Feme, the Baron was acquitted, and the Feme was found guilty, and Judgment was given againſt the Baron and Feme. Upon Argument by all the Juſtices it was unanimouſly agreed, that that Judgment againſt Baron and Feme, where the Baron was acquitted, ought not to be againſt a Feme Covert by the Stat. Weſtm. 2. cap. 35. Cro. J. 413. pl. 2. Hill. 14 Jac. B. R. Huſſey v. Moor.

30. In *Debt againſt* Husband and Wife, *upon a Bond of the Wife*, the Defendants *plead that Tempore confectionis* &c. ſetting forth the Day, *ſhe was Covert Baron* &c. The Plaintiff *confeſs'd that it was ſo*; *but ſaid that ſhe made and ſealed it in the Morning of the ſame Day in which ſhe was married*, and before the Marriage; and upon a Demurrer the Plaintiff had Judgment. 2 Roll Rep. 431. Trin. 21 Jac. B. R. Jackſon's Caſe.

31. Caſe againſt Husband and Wife, for *ſlanderous Words ſpoken by the Wife.* The *Defendants pleaded Quod ipſi non ſunt inde culpabiles*, and the *Jury found Quod ipſi ſunt culpabiles.* It was moved in Arreſt of Judgment that it ſhould have been Quod ipſi [ipſe] non eſt inde culpabilis. Sed non allocatur; for the Husband is to pay the Damages, and it may be either Way, and the Finding of the Jury good. 2 Roll Rep. 433. Trin. 21 Jac. B. R. Henborow v. Pooracre.

Covenant againg Baron and Feme as Adminiſtratrix of Sir Geo. Smith, and the *Husband alone pleads*, it is a Diſcontinuance.

32. In Battery againſt A. and his Wife, for a Battery done by the Wife. And the Pleadings was, that the Baron and Feme came and defended the Force and Wrong &c. and the *Baron for his ſaid Wife ſays that ſhe is Not Guilty*; Iſſue was joined thereupon and found for the Plaintiff, and in Arreſt of Judgment, it was awarded that the Iſſue was ill joined, for *the Wife there pleads nothing*, ſo there was nothing done at that Time with the Suit. Het. 10. Paſch. 3 Car. C. B. Aylifle's Caſe. Freem. Rep. 351. pl. 439. Mich. 1673. Aylworth v. Fenn.

S. P. but by 3 Juſtices (abſente Croke) if a

33. In *Trover againſt* Husband and Wife for certain Goods, the Plaintiff *declared that they converted the Goods ad Commodum ſuum proprium.* After Verdict, it was moved that the Declaration was not good, becauſe the

the joint Converſion of Goods during the Coverture, ſhall be ſaid the Converſion of the Baron and to his Uſe; and Judgment for the Defendant. Jo. 264. pl. 3. Trin 8 Car. B. R. Bullen's Caſe.

Feme acquires Goods by Gift or otherwiſe, they are immediately the Goods of the Baron; yet there *was an Inſtant of Time wherein, in Priority, they were the Goods of the Feme*, and *a Poſteriori* the Property ſhall be deveſted out of her and be veſted in the Huſband; but they ſaid they would confer with other Judges; and afterwards it was adjudged by all the 4 Juſtices for the Plaintiff. Jo. 443. pl. 4. Mich. 15 Car. B. R. Hodges v. Sampſon.

But Ibid. in a Nota there at the End of the Caſe, it ſeems that Rule was given to ſtay the Judgment. —Mar. 60. pl. 94. S. C. adjornatur.—Ibid. 82. pl. 134. Paſch. 17 Car. S. P. and ſeems to be S. C. ſays that the Jury found the Feme Not Guilty; and the Court held this ill Plea [Count] made good by the Verdict.

In *Trover* brought by C. againſt P. and his Wife. The Declaration was, that the Goods were found by the Baron and Feme, and were converted ad uſum ſuum, whereas it ought to be in the plural Number to wit, ad uſum eorum, or ad uſum of P. and his Wife; for as it was, it ſuppoſed the Converſion to be made only by the Husband, which is contrary to the Action itſelf which is brought againſt both; upon this Judgment was ſtayed till the other ſhould move. Sty. 18. Paſch. 23 Car. B. R. Clark v. Pew —12 Mod. 247. Mich. 10 W. 3. in Caſe of Hyde v. S... Holt Ch. J ſaid that though in Declaration in Trover againſt Husband and Wife laying the Converſion ad uſum ipſorum Judgment was arreſted; yet if it came in Queſtion again, it ſhould not be ſo by his Conſent.

33. In Treſpaſs and *Aſſault againſt a Feme* ſhe *imparls*, and afterwards *pleads that at the Time of the Bill ſhe was Covert*, and concludes in Bar; per Cur. this is only a Plea in Abatement, and a Reſpondeas ouſter was granted, Niſi. Keb. 822. pl. 110. Mich. 16 Car. 2 B. R. Becke v. Cavalier.

34. In *Debt on Obligation* Feme Covert may be aided on *Non eſt Factum*; Per Wild J. which Rainsford agreed. 3 Keb. 228. pl. 40. Trin. 25 Car. 2. B. R. Cole v. Delawn.

35. In *Aſſumpſit* againſt the Baron the Plaintiff declared upon ſeveral Promiſes *for ſo many Months Lodging for his Wife* at his Requeſt, *and* alſo *for Goods ſold to himſelf*. The Defendant *pleaded* in Bar, *that long before the Plaintiff had found Lodging for his Wife, ſhe went from him without his Conſent, and lived in Adultery &c. and that the Plaintiff had Notice of her Departure*, and yet he provided her Lodging and ſold to her the Wares and Goods ſuppoſed in the Declaration to be ſold to the Defendant, without any Aſſent or Notice of the Defendant, and *traverſed that he promiſed Modo & Forma*, prout &c. And upon Demurrer, the Court, as to the ſpecial Matter pleaded, gave no Opinion, but ſeemed of Opinion that this ſpecial Matter would have been good Evidence upon Non-aſſumpſit pleaded; and that as to the Lodging for the Wife, the Plea amounted to the general Iſſue; but though it was a Fault, yet it was cured by the Demurrer. But becauſe he *did not anſwer to the Aſſumpſit laid for the Goods ſold to himſelf*, they were of Opinion to give Judgment for the Plaintiff. The Reporter adds a Nota, that as this Pleading is, the Abſque hoc amounted to no more than a Proteſtation. 2 Vent. 155. Paſch. 2 W. & M. in C. B. Beaumont v. Welden.

36. *Treſpaſs* againſt Husband and Wife for a Treſpaſs *done by the Wife alone*; they *both plead not Guilty as to part*, and as *to the reſt* they *plead in Bar that the Husband was ſeiſed in Fee in Right of his Wife, and being ſo ſeiſed, he demiſed it to the Plaintiff for a Year, and ſo from Year to Year rendring Rent, and for ſo much in Arrear the Wife entered and diſtrained*, & ſuit inde Poſſeſſionat' uſque &c. It was objected that the Pleading that the Husband was ſeiſed in his Demeſne as of Fee in Right of his Wife was ill, for they are both ſeiſed in her Right, and ſo are all the Precedents; and further, that the Declaration charges the Wife only to be the Treſpaſſor, and yet they both as to all the Treſpaſs Præter &c. have pleaded that they are Not Guilty, when it ought to be, Quod Ipſa is Not Guilty; and upon theſe Exceptions the Court gave Judgment for the Plaintiff clearly. 2 Lutw. 1421. 1425. Trin. 7 W. 3. Catlin v. Milner.

In *Replevin* &c. the *Avowant pleaded that he was ſeiſed of the Tenements in Fee in Jure Uxoris, and ſo avowed Damage-feaſant*. The Reporter ſays, Nota, that this Avowry is not well pleaded, for it ought to be that Baron and Feme were ſeiſed in Jure Uxoris ſuæ, and that ſo are all the Precedents; but ſaid that nothing was mentioned as to this Matter. 2 Lutw. 1596. Hill. 9 W. 3. in Caſe of Allen v. Baily.

37. *Treſpaſs* againſt Husband and Wife; *Husband* died, and Sir Francis Winnington moved in Arreſt of Judgment ſed non allocatur; for *Wife may commit Treſpaſs along with Husband.* 12 Mod. 246. Mich. 10 W. 3. Hyde v. S . . . .

38. In an Action brought againſt the Baron upon ſeveral *Promiſes made by the Feme before Coverture.* The Defendant *pleads in Bar that he and the Woman, ſuppoſed in the Declaration to be his Wife, were never joined in lawful Matrimony.* The Plaintiff demurs, and upon joinder in Demurrer it was inſiſted that the Plea admits a Marriage de Facto, which is ſufficient to charge the Husband with the Wife's Promiſes, and the Loyalty of the Marriage is not Material. For the Defendant it was ſaid, that *(Never lawfully married)* in common Underſtanding is the ſame as *(Never married)* and there are many Precedents, whereupon ſuch Plea Iſſue has been joined to the Country. But the Court held clearly, that the Plea was ill; for that in perſonal Actions, the Matter muſt be laid in the Fact of the Marriage, and not in the Loyalty; and that though after Iſſue joined and a proper Trial per Pais, the Plea of the Loyalty of the Marriage cannot be objected to in Arreſt of Judgment, yet the Plaintiff is not bound to join Iſſue upon it, but may Demur if he will; and there was Judgment for the Plaintiff. MSS. Rep. Trin. 11 Geo. 2. B. R. Norwood v. Stevenſon.

(E. b) Damages and Coſts. Where given for or againſt Baron and Feme both or againſt one only.

1. *APPEAL againſt Baron and Feme* who were impriſoned, and the *Jury paſſed for them* by which *they had two Judgments*; the *one that the Baron ſhould recover Damages alone for himſelf*, and the *other that the Baron and Feme ſhould recover Damages for him and the Feme.* Br. Baron and Feme, pl. 82. cites 12 R. 2. and Fitzh. Judgment 108.

Br. Joinder in Action, pl. 98. cites S. C. —— Br. Judgment, pl. 20. cites S. C. —— Br. Baron and Feme, pl. 82. cites S. C.

2. In *Aſſiſe* by Baron and Feme the *Jury found for the Plaintiffs, and that the Goods of the Baron were carried away.* It was awarded that Baron and Feme recover Seiſin of the Land, and Damages of Iſſues; and that Baron alone recover for the Goods carried away. Br. Damages, pl. 51. cites 11 H. 4. 16.

3. If Husband and Wife join in a *Writ of Conſpiracy*, they ſhall recover Damages together, as well as in *Treſpaſs* committed *upon the Land, or againſt the Perſon of the Wife*, where they join in an Action and are Plaintiff's; ſo where they are Defendants, Judgment ſhall be given againſt them both. Quæ cohærent Perſonæ, a Perſona ſeparari nequeunt. Jenk. 28. pl. 53.

4. In *Caſe* by Baron and Feme, *for Words ſpoke of the Feme.* The *Judgment was that the Baron and Feme recover.* It was aſſigned for Error, that the Baron only is to have the Damages, and therefore that Judgment ſhould be that the Baron (only) ſhould recover; but Judgment was affirmed per tot. Cur. Godb. 366. pl. 459. Hill. 2 Car. B. R. Litfield v Melherſe.

2 Mod. 61. S. C. but S. P. does not appear.

5. Error of Judgment in *Waſte* againſt the Tenant for Years brought *by Baron and Feme* of Moiety being *ſeiſed in Reverſion to them and his Heirs*, becauſe the Damages are given to Husband and Wife, which per Curiam

Curiam is ill, and ſhould have been amended in C. B. before the Writ of Error allowed; but now it is too late, and Judgment reverſed, Niſi. 3 Keb. 175. Trin. 25 Car. 2. B. R. Curtis v. Brown.

(F. b) Equity. Suits and Proceedings by and againſt them.

1. THE Court compelled Husband and Wife *to levy a Fine.* Toth. 156. cites 2 & 3 Eliz. Barty v. Herenden.

2. The Court doth decree a Report, wherein it was thought fit that the Defendant ſhould compel his Wife, and another Man's Wife, being the other Defendant, to *levy a Fine and join in Aſſurance.* Toth. 158. Paſch. 8 Jac. Li. B. Raſt v. Whittle & al'.

3. The Court compelled the Wife to *levy a Fine, and perfect Aſſurances.* Toth. 157. cites Mich. Jac. Sands v. Tomlinſon.

4. A *Settlement by the Wife on the Baron* was by Conſent on a Bill brought by the Baron againſt the Feme *decreed*, and there was *no Fine or Recovery*, or other legal Act done to bind her, but the Baron quitted ſome Advantages he had on the Wife's Eſtate by former Settlements, and gave her Power to diſpoſe of her real and perſonal Eſtate by Will; the Wife died, and a long time after a Bill of Review was brought, but the Court, aſſiſted by Judges, declared the Decree good. 2 Ch. R. 46. 22 Car. 2. Earl of Caſtlehaven v. Underhill.

5. The Wife's Portion of 400 l. was left in the Hands of her Brother, who gave a *Bond to the Baron to pay the Intereſt to the Baron and his Feme during their Lives*, and after the Death of the Survivor of them, then to pay *the Principal to ſuch Child as they ſhould appoint*; if no Child, then the Survivor to have the Diſpoſal thereof; the Baron was grown *poor*, and prayed to have 200 *l. to buy him an Office* for Subſiſtance, and the Wife being examined apart, and conſenting, the ſame was decreed. Fin. R. 365. Trin. 30 Car. 2. Brudenell and Orm v. Price.

6. P. the Defendant gave Bond to A. for 200 l. A. died, and left E. his *Daughter Legatee and Executrix.* E. married D. the Plaintiff, and E. and D. brought a *Bill* againſt P. *for the* 200 *l.* P. own'd the Bond, but ſaid ſhe had paid 50 l. in Diſcharge of the ſaid Teſtator's Debts, and thereupon had her Bond deliver'd up to be cancell'd, and the remaining 150 l. was lent on a Mortgage, and ready to be paid, with Intereſt, as the Court ſhould direct, ſo as it may be preſerved for the Benefit of E. and not to be ſpent by her Husband. The Court ordered the ſaid Security to continue till the Money be laid out, or otherwiſe ſecur'd for the Wife, or till further Order made. Fin. Rep. 377. Trin. 30 Car. 2. Davy v. Pollard.

7. A Feme, Infant, on the Death of her Brother, without Iſſue, became *intitled to the Truſt of Lands in Fee* of 400 l. per Ann. and P. married her without her Father's Conſent. The *Father brought a Bill againſt P. and his Wife, and Truſtees, ſetting forth as aforeſaid, and that P. intended, when his Wife ſhould come of Age, to make her levy a Fine, and ſell the Lands, and therefore prayed that a Proviſion and Settlement be made* for her. The Defendants demurr'd, becauſe it appeared of the Plaintiff's own ſhewing, that he had no Right to the Lands, either in Law or Equity, or any ways impower'd to inſpect the Management of them. Ld. Chancellor allowed the Demurrer; but ſaid, that if P. had been Plaintiff, to have the Truſtees transfer the Eſtate, or to ask any other Favour

Favour of the Court, he could then make him do what was reasonable. Vern. 39. pl. 37. Pasch. 34 Car. 2. Micoe v. Fowell.

8. G. a *Man of mean Fortune had married* a Woman who was *one* of two *Coparceners to 600 l. per Ann.* The Friends of the Wife suggested *Lunacy &c.* but *she was in Court*, and being thought sensible enough, the Friends moved that the Estate might be so settled, that she might not be wrought upon by her Husband to give it him from her Children by him or by any After-Husband, which the Court thought fit to order, and it was left to Mr Pollexsen to see such a Settlement made, and the Court remembered the Case of **Sir Edward Graves.** The Settlement was to be to *the Husband and Wife, and the longer Liver of them*, then *to the Issue* between them &c. with a Power, *in Case of Failure of Issue*, for the *Wife to dispose.* Skin. 110. pl. 1. Trin. 35 Car. 2. B. R. Griffith's Case.

9. A Husband as *Administrator* to his Wife, obtained a Decree against the Trustees to raise her Portion, but he being a younger Brother, having made no Settlement on her, and *having a Son by her*, the Money was decreed to be raised, and put out for his Benefit for Life, then to the Son for Life, and if he leave Issue, then for such Issue; but if he dies without Issue, and the Father survives, he to have it. Abr. Equ. Cases 392. Pasch. 1700. Wytham v. Crawthorn.

* A Man stole a Woman, whose Portion was in Trustee's Hands, who would not part with it but on Security to make a Settlement of Lands to be purchased with the Money. The Court will not set aside an *Agreement* made by the Husband to purchase and settle, tho' a Bill was brought by a *Creditor of the Husband* by Judgment for that Purpose; for the Court would not have decreed it to the Husband, (had he brought a Bill for the Portion) without making some such Settlement. Ch Prec. 22. pl. 24 Pasch. 1691. Moor v. Rycault.

10. A. devised to B. his Daughter, the Wife of C. for her separate Use, the *Surplus of his personal Estate, and makes the Wife, his Daughter, Executrix.* Among other Parts of the personal Estate there was a *Mortgave from D. which C. her Husband, gave a * Note under his Hand that she should enjoy*, and take the Benefit of. By the Note the Husband, as to the Mortgage and Interest, has ty'd himself down. But Cowper C. thought, that as to the Surplus, it being devised to the Wife, and not to Trustees, when it comes to the Wife it belongs to the Husband, and what he has possess'd by Consent of the Wife, there is to be no Account for that, but reserved the Consideration as to the *Surplus*, whether it belongs to the Husband, or to the Wife for her own *separate Use.* 2 Vern. 659. pl. 585. Trin. 1710. Harvey v. Harvey.

Gilb. Equ. Rep. 26. Hill. 9 Ann. S. C. in totidem Verbis. ——Skin. 288. Hill. 2 W. & M. in Canc. in Case of the Earl of Salisbury v. Bennet, S. P. by Ld. Commissioner Hutchins

11. A. *devised Lands to his Son and Heir charged with* his Debts, and *2500 l. Legacy to his Daughter at 21 or Marriage, provided, if she marries in her Mother's Life-time, without her Consent in Writing* first had, *then 500 l. part thereof, to cease*, and be applied towards Payment of Debts. The Daughter, after 21, marries unknown to her Mother. There was sufficient, without this 500 *l.* to pay all the Debts. Ld. Keeper decreed the whole must be raised by Sale of so much as is necessary, unless the Defendant, the Son, will otherwise secure the Payment, but that the Money, when raised, must be brought before the Master, till the Plaintiff, the Husband, make some Settlement on his Wife, and for that Purpose to bring his Deeds before the Master, to see what Provision he can make for her. Chan. Prec. 348. pl. 256. Mich. 1712. King v. Wythers.

(G. b) Where on a Bill by a Baron for the Wife's Portion the Court will decree a Settlement.

1. THE Defendant ſued in the *Eccleſiaſtical Court for a Portion* due to his Wife; this Court ordered an Injunction to ſtay Proceedings there, till he ſhould make a competent Jointure. Toth. 179. cites 14 Car. Tanfield v. Davenport.

2. The Wife, an Infant, was intitled to 500 *l. Portion, beſides Lands of Inheritance.* On a *Bill by Baron and Feme* for the Portion, decreed the Baron to make *Settlement* on her ſuitable to her Portion in Money, tho' the Lands of Inheritance will deſcend to her Iſſue. Fin. R. 361, 362. Trin 30 Car. 2. How & Ux. v. Godfrey and White.

3 When a *Baron ſues here for his Wife's Fortune*, the Court will oblige him to make a *Settlement on her* by way of Jointure, or to ſecure a Maintenance to her in Caſe ſhe outlives the Baron; Per Wright K. 2 Vern. 494. pl. 444. Paſch. 1705. in the Caſe of Oxenden v. Oxenden. Gilb. Equ. Rep 1. S. C. & S. P. —— 2 Show. 282. pl. 275. Hill. 34 & 35 Car. 2. in Canc. Anon. S. P. and adds, but if he comes not into Chancery as a Complainant, they will never force him to ſettle, as if he ſues at Law &c. but this is to be at the Prayer of the Wife's Friends and Relations to ſecure part to the Feme, and part to the Children; but where *Baron and Feme demand the Execution of a Truſt* of a Real Eſtate in Equity, which was deviſed for the Benefit of the Feme, it muſt be decreed according to the Will; but where the Husband comes for a Perſonal Demand in Right of his Wife, the Court may impoſe Terms on him; Per Cowper C. 2 Vern. 626. pl. 558. Mich. 1708. Lupton & Ux. v. Tempeſt & al'.——Bill by Baron and Feme for his Wife's Fortune which was decreed, but the *Baron decreed not to meddle* with the Wife's Portion *till he had made* a ſuitable *Settlement on her and her Children.* Fin. Rep. 145. Mich. 26 Car. 2. Shipton & Ux. v. Hampſon & al'.

4. Bill to have a Satisfaction for their Portions charged upon their Father's Lands by Marriage Settlement, and for a Legacy given them by their Father's Will &c. The Caſe was, There was a *Truſt Term in a Marriage Settlement to raiſe Portions for Daughters, payable at their reſpective Ages of* 21, *or Day of Marriage*, with a *Proviſo*, if ſuch Daughter or Daughters ſhould happen to die before their Age of 21 or Day of Marriage, then ſuch Daughter or Daughter's Portion not to be raiſed, but the Truſt Term to attend the Freehold and Inheritance. The *Father gives by his Will* 500 *l. a-piece to his two Daughters, the Plaintiffs, payable in the ſame Manner as their Portions were to be paid by the ſaid Marriage Settlement.* Note, in this Caſe one of the Daughters *married during her Infancy*, and it was ordered that her Portion be raiſed, and brought before a Maſter, there to remain until her Husband ſhould make a Settlement ſuitable to her Fortune; Per Harcourt C. MS. Rep. Paſch. 12 Ann in Canc. Greenhill v. Waldoe. Chan. Prec. 367. pl. 258. S. C. but S. P. does not appear. —— Gilb Equ. Rep. 31. S. C. but S. P. does not appear, and is in totidem Verbis with Chan. Prec.

5. A *Feme ſole took a Mortgage in Fee for* 800 *l. and married.* The Maſter of the Rolls held, that if the Husband had ſued in Equity for the Money, or had prayed that the Mortgagor might be foreclоſed, Equity (probably) would not compel the Mortgagor to pay the Money to the Husband without his making ſome Proviſion for his Wife, or at leaſt upon her Application to the Court againſt the Mortgagor and the Husband, the Court might prevent the Payment of the Money to the Husband, unleſs ſome Proviſion were made for her. Wms's Rep. 458, 459. Trin. 1718. Boſvil v. Brander.

6. A Feme being *intitled to* 4000 *l. Portion after her Mother's Death*, and for which no Intereſt is payable in the mean time, and ſhe having married a conſiderable Tradeſman, decreed, *by Conſent of the Feme, that Baron might ſell a Moiety* of the Portion, or diſpoſe of it as he thought fit. 2 Vern. 762. pl. 662. Trin. 1718. Butler v. Duncomb. 10 Mod. 433. S. C. but S. P. does not appear.

7. A. deviſed 1000 l. to B. a Feme ſole, Infant, payable after the Death of the Teſtator's Wife, and at B.'s Age of 20 Years, if B. ſhould ſo long live. B. at above 18 Years, without her Father's Conſent, married J. S. who ſoon after became *Bankrupt*. The *Commiſſioners aſſign'd the Eſtate of J. S. and after he had his Certificate and Diſcharge, without any Aſſignment having been made of his Wife's Poſſibility* or contingent Right *to her Portion*. Afterwards the Wife, by her next Friend, brought a Bill, ſetting forth how ſhe was ſeduced into this Marriage, and the Husband's Bankruptcy and Diſcharge pray'd that the Money might be ſecured to her and her Children, which the Husband in his Anſwer confeſs'd, and ſubmitted to; but pray'd the Arrears of Intereſt, which was decreed him, deducting the Coſts, and the Legacy ordered to be laid out in a Purchaſe, and the Wife in the mean time to have the Intereſt for her ſeparate Uſe &c. Per Ld. C. Parker. Wms's Rep. 382. 386. Mich. 1718. Jacobſon v. Williams.

8. If *Husband ſues in the Spiritual Court for a Legacy left to the Wife*, Chancery will grant an Injunction to ſtay Proceedings there, becauſe that Court cannot, but this Court will, oblige him to make an *adequate Settlement* on her. Cited per Mr. Mead, as granted the laſt Seal per Ld. Macclesfield. Ch. Prec. 548. pl. 339. Mich. 1720.

9. Portions were given to Daughters, *provided they marry with Conſent of their Mother*. They married without Conſent. Tho' this Proviſo is only in Terrorem, and makes no Forfeiture, yet upon the Husband's applying to the Court for Payment of their Portions, the Maſter of the Rolls ordered Propoſals to be made before the Maſter as to the ſettling the Money. Caſes in Equ. in Ld. Talbot's Time, 212. Mich. 10 Geo. 2. Hervey v. Aſhton.

10 Ld. C. King ſaid he *thought it extraordinary* that Chancery ſhould interpoſe againſt the Husband, in Caſes where the Law gives him a Title to the Wife's Perſonal Eſtate, and doubted it had done more Harm than Good, unleſs where the Husband appeared profligate or extravagant. 2 Wms's Rep. 642. Mich. 1731. in Caſe of Milner v. Colmer.

11. *And therefore* where A. pending an Account for a great Perſonal Eſtate, married an Infant intitled to a large Share thereof, viz. 14000 l. applied to the Court for his Wife's Portion, and being ſent to a Maſter to make Propoſals as to what he would ſettle, and he *offering to ſettle 4000 l. Part of the 14000 l. Portion, and to covenant that in caſe his elder Brother, who had then no Iſſue*, and who probably would have no Iſſue by his then Wife, who lived ſeparate from him, *ſhould die without Iſſue Male in A.'s Life-time, to ſettle 500 l. a Year of the Family Eſtate of 1000 l. a Year upon her for a Jointure*; and alleging that he being in Trade, and a Freeman of the City of London, the Cuſtom of the City was alone a Proviſion for her. Ld. C. King, after Examination of the Wife in Court as to her Conſent, which ſhe gave, and likewiſe her Reaſons for it, he recommended it to A. to add to his Propoſals; but A. anſwering that he could not conveniently do it, his Lordſhip directed that the Defendant entring into ſuch Covenant, ſhould be paid the Reſidue of the Portion beyond the 4000 l. which was to be inveſted in Land, and ſettled as above. 2 Wms's Rep (639) Mich. 1731. Milner v. Colmer.

12. The Lady Shovel *deviſed 4000 l. in Truſt for the ſeparate Truſt of a Feme Covert*. The Husband and *Wife* brought a Bill againſt the Truſtees to have the Money paid them; and tho' ſhe herſelf was *in Court*, and *conſented that the Money ſhould be paid to her Husband*, yet the Maſter of the Rolls would not decree it, but diſmiſs'd the Bill. Cited in the Caſe of Penne v. Peacock, Mich. 1734. Caſes in Equ. in Ld. Talbot's Time, 43. as the Caſe of Blackwood v. Norris.

The Reporter adds, N. B. This was the Caſe only of a Perſonalty. —The ſame was obſerv'd by the Ld. Chancellor, that it was only of a Perſonalty, and ſomewhat particular. MS. Rep. in S. C.

(H. b) Equity. In what Cases Equity will order the Husband to inforce or procure the Feme to do an Act.

See (F. b)

1. ORdered, that the Baron become bound in a *Recognizance* that his Wife shall *release her Right*. Toth. 158. cites 4 & 5 E. 6. Vaux v. Gleas.

2. The Defendant's Wife would not *bring in Evidences* according to an Order, wherefore the Husband was bound that she should do it. Toth. 170. cites 4 Eliz. King's Coll. in Cambridge v. Ragland.

3. The Court ordered a Man to procure his Wife *to acknowledge a Fine* of mortgaged Lands. Toth. 171. cites 3 & 4 Car. Griffin v. Taylor.

4. *Husband and Wife* did, *upon a valuable Consideration*, by Lease and Release, *convey the Wife's Land in Fee, and covenanted that the Wife should levy a Fine* of the same *to the Use of the Purchaser*. The Wife refused to levy a Fine. The Plaintiff brought his Bill to have his Title perfected by a specifick Performance of the Covenant; and a Precedent was cited where a specifick Performance had been decreed in the like Case; but the Chancellor would not decree a specifick Performance in this Case, because upon such Decree the Husband could not compel his Wife to levy a Fine, and if she would not comply, Imprisonment would fall upon the Husband for Contempt, which was the ill Consequence of the Decree in the said cited Case. MS. Rep. Mich. 4 Geo. in Canc. Ortread v. Round. The Defendant by his Answer *admits the Covenant, and is ready to levy a Fine himself, but says his Wife refuses to join with him, and he cannot persuade her to do it.* Per Cowper C it is a tender Point to compel the Husband by a Decree to procure his Wife to levy a Fine, tho' there has been some Precedents in this Court for it; and it is a great Breach upon the Wisdom [of the Law,] which secures the Wife's Lands from being alien'd by the Husband without her free and voluntary Consent, to lay a Necessity upon the Wife to part with her Lands, or otherwise to be the Cause of her Husband's laying in Prison all his Days; and said he did not think it proper in this Case to decree a specifick Performance of the Covenant, but the Defendant must refund the Purchase-money paid to him with Costs. In another MS. Rep. Mich. 4 Geo. in Canc. Outram v. Round. S. C.

(I. b) Offences and Crimes done by the Feme, or her and Baron. What and How punishable.

1. FEME was *arraign'd of Felony*, and was Covert Baron, and *would have confess'd by Command of the Baron*, and the *Court would not take it* for Pity, *but charged the Inquest, who said that she did it by Coertion of her Baron in spight of her Teeth*, by which she went quit; and it was said that the Command of the Baron, without other Coertion, shall not make Felony. The Reason seems to be, inasmuch as the Law intends that the Feme, who is under the Power of her Baron, durst not contradict her Baron. Br. Corone, pl. 108. cites 27 Ass. 40. It was pounded to all the Judges, if a *Man and his Wife go both together to commit a Burglary, and* both of them *break a House in the Night, and steal Goods*, what Offence this was in the Wife? and agreed by all, that it was no Felony in the Wife; for the Wife being together with the Husband in the Act, the Law supposeth the Wife doth it by Coertion of the Husband, and so it is in all Larcenies; but as to *Murder*, if Husband and Wife both join in it, they are both equally Guilty. See Fitzh. Corone 160. 27 Ass. pl. 40 Fitzh. Corone 199. Poulton de Pace 126. b And the Case of the Earl of Somerset and his Lady both equally found Guilty of the Murder of Sir Thomas Overbury, by poisoning him in the Tower of London. Kel. 31. 16 Car. 2. Anon.

The

The Feme may commit Felony, if it be not by Coercion of the Husband; per Cur. 12 Mod. Mich. 10 W. 3. in the Caſe of Hyde v. S....

2. A Feme Covert *commits Felony*. *Appeal* ſhall be brought againſt her without her Husband, becauſe it concerns Life; but otherwiſe where it does not concern Life, As if ſhe commits Treſpaſs. Jenk. 28. pl. 53.

3. The Husband ſhall not anſwer for *Damages given in a Criminal Matter*, as in an Information for ſuppreſſing a Will; tho' for Civil Offences it is otherwiſe, as Battery, Slander, or Aſſumpſit by Feme Covert. Noy 103, 104. Trin. 12 Jac. Brereton v. Townſend.

4. Where Debt was brought againſt the Husband and Wife for the *Recuſancy* of the Wife, the Husband would have appear'd by Superſedeas alone; but the Court reſolved that either both muſt appear, or both be outlaw'd. Hob. 179. pl. 209. Loveden's Caſe.

5. At the Seſſions at the Old Bailey the 7th of December 1664, one *Jane Jones*, together *with one Thomas Wharton, were indicted for Burglary*, and ſhe *pleaded herſelf to be married to Wharton*, on Purpoſe to be excuſed, being with her Husband at the Burglary; and ſhe refuſed to plead by the Name of Jones, and thereupon we called for the Jury which found the Indictment, and in their Preſence, and by their Conſent, we made the Indictment as to her Name to be *Jane Wharton, alias Jones*; but we did *not call her Jane Wharton, the Wife of Thomas Wharton, but gave her the Addition of Spinſter*, and then ſhe pleaded to it; and the Court told her, that if upon her Trial ſhe could prove ſhe was married to Wharton before the Burglary committed, ſhe ſhould have the Advantage of it; but on the Trial ſhe could not prove it, and ſo was found Guilty, and Judgment given upon her. Kel. 37.

2 Keb. 468. pl. 56. Hill. 20 & 21 Car. 2 S. C. the Court ſeem'd of Opinion, that the Husband ſhould be joined; ſed adjornatur.

6. A *Feme Covert* was *indicted alone for buying and ingroſſing Fiſh, contrary to the Statute*, and found Guilty; and it was moved to quaſh the Indictment, becauſe a married Woman cannot make a Contract without her Husband, and that he ought to be joined in this Indictment; for if any Profit ariſes by buying and ingroſſing, it accrues to the Husband; it is true, for greater Offences, as Felony &c. ſhe may be indicted alone, but whether ſhe might in this Caſe the Court gave no Judgment. Sid. 410. pl. 5. Paſch. 19 Car. 2. B. R. The King v. Fenner.

——Ibid. 479. pl. 15. Paſch 21 Car. 2. S. C. the Court ſaid, that the Wife may as well ingroſs and ſell, as convert or eject, which muſt be actually proved againſt her, but in this Caſe ſhe was indicted by the Name of F. Spinſter, alias dict' the Wife of ſuch an one; the Court agreed, that the Addition is never put in the Alias dict', but all conceived, that after Verdict ſhe may be intended a ſingle Woman, the Alias dict' being uſual, and does not neceſſarily imply that ſhe was a Wife, but ſo called, and Judgment pro Rege, Niſi.——Ibid. 503. pl. 69. S. C. The Court held, that the Alias dict' is nothing, and the Verdict has found her Guilty, which they could not do, were ſhe a Feme covert; and Judgment pro Rege, and after ſhe was fined 15 s. the Value &c.

7. Where the *Husband and Wife uſe the ſame Trade*, as ſelling of Ale &c. ſhe does it as Servant, and he alone ſhall be indicted. 2 Keb. 583. pl. 122. Mich. 21 Car. 2. B. R. Moreton v. Packman.

8. Husband and Wife may be found guilty *of Nuſance, Battery &c.* and the Reaſon why in *Burglary, Larceny* &c. ſhe is excuſed, is, *becauſe* ſhe could not tell what Property the Husband might claim in the Goods. Arg. 10 Mod. 63. Mich. 10 Ann. B. R. in Caſe of the Queen v. Williams.

1 Salk 384. pl. 35. S. C. reſolved accordingly.—10 Mod. 335. S. C. cited per Cur. that the Indictment was held good.——10 Mod. 63. cites Hill 2 Ann Cook's Caſe, S. P. and that the Husband was fin'd, and the Wife ſet in the Pillory.

9. Husband and Wife were indicted for keeping a *Bawdy-houſe and procuring Lewdneſs*. The Court held the Indictment good, and ſaid, that keeping the Houſe, does not neceſſarily import Property, but may ſignify that Share of Government which the Wife has in a Family as well as the Husband. 10 Mod. 63. Mich. 10 Ann. B. R. The Queen v. Williams.

10. Hus-

10. Husband and Wife were indicted for keeping a *common Gaming-house*, and held good, and compared it to the Case of the **Queen v. Williams**; for as there the Wife may be concerned in Acts of Bawdry, so here she may be active in promoting Gaming, and furnishing the Guests with all Conveniences for the Purpose. 10 Mod. 335. Trin. 2 Geo. 1. B. R. The King v. Dixon.

(K. b) What the Wife shall have in Case of a Divorce.

1. IF a Man *gives in Tail to Baron and Feme*, and they *have Issue*, and after *Divorce is sued*, now they have only Franktenement, and the Issue shall not inherit; for it was once possible that their Issue might inherit. Br. Taile & Dones &c. pl. 9. cites 7 H. 4. 16. per Thirn J. And where in such Case Divorce was had *Causa Præcontractus of the Feme*, they shall hold jointly for their Lives, and *Survivor shall hold all*, and therefore it seems it is only a Jointenancy for Life, and the Inheritance is gone. Br. Deraignment &c. pl. 15. cites 13 E. 3.

2. If a *Man is bound to a Feme sole*, and after *marries her*, and after they are divorc'd, *the Obligation is reviv'd*. Br. Coverture, pl. 82. cites 26 H. 8. 7. per Fitzherbert and Norwich J. Br. Deraignment, pl. 1. cites S. C. and she may have Action again, tho' it was once suspended. But Brooke says Quære inde.——S. C. cited and agreed by Holt Ch. J. because the Divorce being a Vinculo Matrimonii, by reason of some prior Impediment, as Præcontract &c. makes them never Husband and Wife ab initio; but if the Husband had made a *Feoffment in Fee of the Lands of his Wife*, and then the Divorce had been, that would have been a Discontinuance as well as if the Husband had died, because there the Interest of a third Person had been concerned, but between the Parties themselves it will have relation to destroy the Husband's Title to the Goods, and it proves no more than the common Rule, viz. that Relation will make a Nullity between the Parties themselves, but not amongst Strangers. Ld. Raym. Rep. 521. Hill 11 W. 3.

3. The Feme, after Divorce, shall re-have *the Goods which she had before Marriage*. Br. Coverture, pl. 82. cites 26 H. 8. 7. by Fitzherbert and Norwich. *But* if he had given or *sold them without Collusion* before the Divorce there is no Remedy; but if by Collusion she may *aver the Collusion*, and have *Detinue* of the whole, whereof the Property may be known, and as for the rest which consists of *Money &c.* she shall sue * *in the Spiritual Law*. Br. Deraignment and Divorce, pl. 1. cites 26 H. 8. 7. ——— Br. Extinguishment, pl. 1. cites S. C. * S.P. and Prohibition does not lie. Br. Deraignment, pl. 17 cites F. N. B. Tit. Prohibition. But Brooke adds a Quære, if the Property had been altered by Sale or otherwise before the Suit commenced.

4. If *Land* be given in *Frank-marriage*, and Donees are divorc'd, which of them first moves for the Divorce shall lose the Land; Per Shelly. But by Fitzherbert the Land shall be *divided* between them, cited D. 13. pl. 62. Trin. 28 H. 8. PerKeble, the Wife shall have the Land, because it was given in Advancement of her. Kelw. 104. b. pl. 12. Casus incerti Temporis——The Divorce was at the Suit of the Feme, and the Baron continued always in Possession, and died, and after the Wife died, and the Feme was adjudged always in Possession, because there never was any Debate [or Contest] by her [about the same.] Br. Deraignment & Divorce, pl. 7. cites 12 Ass. 22.——The Year-book of this Case is, that the Land was given in Frank-marriage by the Father of the Wife, and that they had Issue, and that it was adjudged for the Issue against the Cousins and Heirs of the Baron; and that no Debate happening between the Baron and Feme about the Tenements, she was adjudged to be always Tenant of the Franktenement; whereas had any Debate been, then the Baron had been Disseisor, and the Freehold had descended to his Heirs, of which they would not have been ousable by any.

And where in Assise it was found that the *Father of the Feme gave the Tenements to the Feme and her Baron in Frank-marriage*, when they were *infra Annos Nubiles*, and at their full Age the *Baron at his Suit was divorced by the Gree of the Feme*, and after he *held himself in of the Ifole*, and ousted the Feme, and

and ſhe brought Aſſiſe, and becauſe ſhe was the Cauſe of the Gift, which was determined by the Act and Suit of the Baron, therefore the Feme recover'd the whole. Br. Deraignment & Divorce, pl. 8. cites 19 Aſſ. 2 —Br. Aſſiſe, pl. 407. cites Paſch 19 E. 3 and Fitzh. Aſſiſe, 83. S. P.

So where Land was given to the Baron and Feme *in Tail, Remainder to the right Heirs of the Baron*, and a Divorce was had at the Suit of the Baron, who held out the Feme, and ſhe brought Aſſiſe, and recovered the Whole, becauſe the Divorce was at the Suit of the Baron. Br. Deraignment &c. pl. 16. cites 8 E. 1 and Fitzh. Aſſiſe, pl. 415. & 83. Paſch. 19 E. 3.—Br. Aſſiſe, pl. 437. cites 8 E. 3. and Fitzh. Aſſiſe, pl. 415. S. P.

5. If the Baron and Feme *purchaſe jointly and are diſſeiſed, and the Baron releaſes*, and after they are divorced, the Feme ſhall have the *Moiety*, tho' before the Divorce there were no Moieties; for the Divorce converts it into Moieties. Br. Deraignment, pl. 18. cites 32 H. 8.

If after ſuch *Alienation* and Divorce the Baron dies ſhe is put to her *Cui in Vita ante Divortium*, and yet the Words of the Statute are, that ſuch Alienation ſhall be void, but this ſhall be intended to toll the Cui in Vita. Mo. 58. pl. 164. Paſch. 8 Eliz. Broughton v. Conway.

6. If Baron *alien* the *Wife's Land*, and then is a Divorce Præcontractus, or any other Divorce which diſſolves the Marriage a Vinculo Matrimonii, the Wife during the Life of Baron may *enter* by Statute 32 H. 8. 28. D. 13. pl. 61. Marg. cites 8 Rep. 73.

7. Obligor or Obligee marry with the Party, and after are divorced Cauſa Præcontractus, the *Debt is extinct*. D. 140. pl. 39. Hill. 3 & 4 P. & M.

All the Juſtices held, that the Books which ſay that the Feme ſhall have her Goods again after Divorce, are to be intended of an *abſolute Divorce ab Initio*. Cro. E. 908. pl. 19. Mich. 44 & 45 Eliz. B. R. Stevens v Totty.

8. After Divorce the Wife ſhall have ſuch *Goods as were hers* before Marriage, and are not ſpent. D. 13. pl. 63. by Fitzherbert, and ſays, that ſo was the Opinion of the Court about the 26 H. 8. Kelw. 122. b. pl. 75.

If the *Husband aliens* or ſells *his Wife's Goods by Covin*, and after they are divorced, the Wife may aver the Covin and ſhall re-have her Goods; Per Cur. Br. Colluſion &c. pl. 2. cites 26 H. 8. 7.

But after Arguments by the Civilians Popham ſaid, that a Conſultation ſhall be granted, (ſo they in the Spiritual Court admit that Plea) and Dr. Crompton ſaid, that then it is clear that the Wife there ſhall recover. Noy 45. Stephens v. Tutty & Ux. S. C.——1 Salk. 115. pl. 4. ——Mo. 665. pl. 910. S. C. ſays, that Conſultation was awarded, but ſo as that the Eccleſiaſtical Judge ſhould not diſallow the Releaſe.

9. Divorce Cauſa Adulterii of the Husband; afterwards the Wife ſues in the Spiritual Court for a *Legacy*; the Executor pleads the *Releaſe of the Baron*; the * Releaſe binds the Wife, for the Vinculum Matrimonii continues. Cro. E. 908. pl. 19. Mich. 44 & 45 Eliz. B. R. Stephens v. Totty.

* For here the Legacy is originally due to the Baron and Feme, and it is a *Real Intereſt*, and for that Reaſon the Releaſe of the Baron will diſcharge it. See Prohibition (Q) pl. 11. cites 44 El. B. R. Stephens v. Tott.

5 Mod. 71. S. C. accordingly.—— 12 Mod. 89. Chamberlain v. Hueſon, S. C. accordingly, and ſays that the Reaſon of Motam's Caſe, 2 Roll Abr. 301. tho' not mentioned, was becauſe ſhe had Alimony; per Holt Ch. J. But he held that if ſuch Feme Covert after ſuch Divorce ſues for a Legacy, which, if recover'd, comes to her Husband, there the Husband may releaſe it, becauſe there is no Alimony; and if he may releaſe the Duty, he may releaſe the Coſts.——1 Salk 115. pl 4. S. C. & S. P.

10. Husband may *releaſe Coſts* adjudged to the Wife ſuing in the Spiritual Court, notwithſtanding a Divorce *a Menſa & Thoro*; but if ſuch Divorce be, and the Wife has *Alimony*, and ſhe ſues there for Defamation &c. the Husband cannot then releaſe the Coſts; for theſe Coſts come * in lieu of what ſhe has ſpent out of her Alimony, which is a ſeparate Maintenance, and not in the Power of the Husband. 1 Salk. 115. Hill. 7 W. 3. B. R. Chamberlain v. Hewſon.

* Prohibition, (Q) pl. 10. cites 14 Ja. B. Motam v. Motam.

17. A Divorce was *a Menſa & Thoro*, and then the Husband dies inteſtate. The Wife by Bill pray'd Aſſiſtance as to *Dower and Adminiſtration*,

tion, (it being granted to another) *and Diſtribution.* The Maſter of the Rolls bid her go to Law to try if ſhe was intitled to her Dower, there being no Impediment, and as to that diſmiſs'd the Bill; and as to the Adminiſtration, the granting that is in the Eccleſiaſtical Court; but the Diſtribution more properly belongs to this Court; but ſince in that Court ſhe is ſuch a Wife as *is not intitled to Adminiſtration*, he diſmiſs'd the Bill as to Diſtribution too, and ſaid if they could repeal that Sentence, ſhe then would be intitled to Diſtribution. Ch. Prec. 111. pl. 99. Paſch. 1700. Shute v. Shute.

(L. b) What Alteration a Divorce makes in the Eſtate.

1. LAND was given to Baron and Feme *in Frank-marriage*, and after a Divorce was had between them *at the Suit of the Feme*, and yet it was ſaid that the Feme remained Tenant always. Br. Eſtate, pl. 55. cites 12 Aſſ. 22. Br. Deraignment, pl. 7. cites S. C.

2. *Things executed*, where Baron is ſeiſed in Right of the Wife, ſhall not be *avoided* by Divorce, as *Waſte*, *Receipt of Rent*, *Seiſor of Ward*, *Preſentment to a Benefice*, *Gift of Goods*, *of the Wife* &c. But otherwiſe 'tis in Matter of Inheritance, as if Baron diſcontinues or charges Land of his Wife, releaſes or manumits Villeins &c. Br. Deraignment &c. pl. 18. cites 32 H. 8.

3. Feme ſole leaſes for Years; *Leſſee does Waſte, and after marries the Feme.* They are divorced. Whether the Action of Waſte ſhall *revive* to the Feme? Kelw. 122. b. pl. 75. Anon. Caſus incerti Temporis.

4. If Feme holds of me, and *ceaſes*, and after I marry her, upon a Divorce the Action is *revived.* Arg. Kelw. 122. b. pl. 75. Caſus incerti Temporis.

5. After a Divorce a Menſa & Thoro, an *Injunction* was moved for to ſtop the Husband from *ſelling a Term of the Wife's.* The Court at firſt thought it ſhould not be granted; for that the Marriage continued, and the Husband had the ſame Power over it as before the Divorce. But upon the Importunity of the Plaintiff's Counſel 'twas granted; for tho' the Marriage continues notwithſtanding the Divorce, yet the Husband does nothing as Husband, nor the Wife as Wife. 9 Mod. 43, 44. Trin. 9 Geo. Anon.

(M. b) Actions by or againſt the Baron and Feme after Divorce. In reſpect of the Feme.

1. IT ſeems that *Writ* brought *againſt Baron and Feme ſhall abate by Divorce* made between them pending the Writ. Thel. Dig. 185. Lib. 12. cap. 13. S. 1. cites Paſch. 6 E. 3. 249. and that ſo it is held Paſch. 25 E. 3. 39.

2. Treſpaſs de Muliere abducta, and raviſh'd, cum Bonis viri aſportatis, *againſt Baron and Feme and others*, and well againſt the Feme; for *a Feme may aſſent and aid to the Raviſhment of another Feme*, and may carry away the Goods; and there 'tis agreed, that *it is no Plea that the Plaintiff*

Plaintiff and his Feme are divorced; for he is not to recover the Feme, but Damages; and if ſhe was Feme at the Time &c. this is ſufficient. Br. Treſpaſs, pl. 43. cites 43 E. 3. 23.

S. P. Br. Rape, pl. 3. cites 43 E. 3. 23.

3. N. K. brought *Treſpaſs againſt R. and his Feme*, and two others, in B. R. *of raviſhing his Feme and carrying away his Goods*, and all came into B. R. by Capias in Ward of the Sheriff, and the *Plaintiff counted of a Rape of his Feme, and carrying away his Goods*, and *Protection was ſhew'd forth for R. which was allow'd for him and his Feme*, and the *other demanded Judgment of the Writ, becauſe N. and the Feme are divorced.* Per Knivet J. if the Feme was dead, yet Action lies of the Raviſhment, and the ſame of Divorce; for *he ſhall not recover the Feme, but Damages*; and it was ſaid that the *Divorce was Cauſa Frigiditatis*; and per Kniver, then he may recover his Nature, and act as a Man, and re-have his Feme, therefore Anſwer. Kirton ſaid the Action is brought againſt R. and his Feme, and Feme cannot raviſh a Feme; Judgment of the Writ, & non allocatur; for *ſhe may aſſent, or be aiding, or carry away the Goods*, by which he pleaded Not guilty. Br. Rape, pl. 2. cites * 44 Aſſ. 12.

* This is miſprinted, and ſhould be 44 Aſſ. pl. 13.

For more of Baron and Feme in General, ſee **Abatement** (N. a) **Amercements** (M) (C. a) (D. a) **Appeal** (A) **Copyhold. Coſts** (A) pl. 1. **Damages** (E) **Default** (O) **Emblements. Error** (K) **Evidence. Execution** (P) (Q. 3) (R) (T) **Executor. Feme** (A) (B) **Fines** (T) (B. b) (C. b) &c. **Marriage. Ne unques Accouple. Rent** (C. a) **Receipt** (I) (L) (M. 2) &c. **Reſervation** (N) **Utlawry** (B. a) **Waſte** (R) (Y) (Z) &c. and other Proper Titles.

Fol. 355.

Barretors.

(A) Of Barretors in General, and their Puniſhment.

1. EDw. 3. **cap. 15.** [16] Conſervators of the Peace, **who are not Barretors, ſhall be aſſigned in every County.**

A Juſtice of Peace may arreſt

2. 34 **Ed. 3. cap. 1. Juſtices of Peace ſhall** have Power to reſtrain **the Offenders, Rioters, and all other Barretors.** 2 **R. 2. cap. 7.** any common Barretor, and put him in Ward till he finds Security for his good Behaviour for the Future &c. by this Statute. Kelw. 41. in pl. 6. per Keble, and agreed by the Court. Mich. 7 H. 7. Anon.

Juſtices of Peace have Authority to enquire and hear it, *without any Special Commiſſion* of Oyer and Terminer, and their Commiſſions are equal to that Purpoſe. Cro. J. 32. pl. 4. Trin. 2 Jac. B. R. Barnes v. Conſtantine. ——Yelv. 46. S C. & S. P. held accordingly. ——Sid. 334. pl. 20. Paſch. 19 Car. 2. B. R. the S. P. admitted in Caſe of the King v. Browne.——2 Keb. 212. pl. 49. and 226. pl. 81. S. C. & S. P. admitted.

Barretry is an Offence of a mix'd Nature, of which *Juſtices of Peace cannot hold Plea* by virtue of their Commiſſion of the Peace; but this ought to be by another Power. 2 Roll Rep. 151. Hill. 17 Jac. B. R. Anon.——Hawk. Pl. C. 244. cap. 81. S. S. cites S. C. ſays it ſeems, from the Words of the Statute, that Juſtices of Peace (as ſuch) have Cognizance of Barretry without any other Commiſſion; but Quære.

3. A. acquitted of being a common Barretor, threatning the Witneſſes to carry them into the Star-Chamber, and appearing to the Court to be a notable Knave, was *bound to his good Behaviour*. Lat. 5. Paſch. 1 Car. Toplin's Caſe.

4. Common Barretry is an *Offence againſt divers Statutes*, viz. Maintenance, and the like; per Cur. Cro. C. 340. pl. 4. Hill. 9 Car. B. R. Chapman's Caſe.

(A. 2) Who ſhall be ſaid a Barretor.

1. IF a Man proſecutes an infinite Number of Suits, which are his own proper Suits againſt others, yet he ſhall not be a Barretor by this; for if they are falſe, the Defendants ſhall have Coſts againſt him; and if ſuch Perſon ſhall be a Barretor, then he that ſues for Cauſe may be comprehended; but he that ſtirs up Suits among his Neighbours is a Barretor. Mich. 11 Jac. B. R. *Some's Caſe*, per Cur. Hawk. Pl. C. 243. cap. 81. S. 3. S. P. but ſays that if ſuch Actions be merely groundleſs and vexatious, without any manner of Colour, and brought only with a Deſign to oppreſs the Defendants, he does not ſee why a Man may not as properly be called a Barretor for bringing ſuch Actions himſelf, as for ſtirring up others to bring them.

2. A Barretor is a *common Mover* and Exciter or Maintainer *of Suits*, Quarrels, or Parts either *in Courts or elſewhere in the Country*. In Courts, as in Courts of Record, or not of Record, as in the County, Hundred, or other inferior Courts in the Country in 3 Manners. 1ſt, *in the Diſturbance of the Peace*. 2dly, *in taking or keeping of Poſſeſſions of Lands in Controverſy, not only by Force, but alſo by Subtility* and a Deceit, and moſt commonly in Suppreſſion of Truth and Right. 3dly, by *falſe Inventions, and ſowing of Calumniations, Rumours and Reports, whereby Diſcord* and Diſquiet *may grow between Neighbours*. Co. Litt. 386. a. b. 8 Rep. 36. b. Paſch. 30 Eliz. the Caſe of Barretry, S. P.

3. A *Feme Covert* was indicted as a common Barretor, but the Indictment was quaſh'd. 2 Roll Rep. 39 Trin. 16 Jac. B. R. Anon. Hawk. Pl. C. 243. cap. 81. S. 6. cites S. C. and ſays it ſeems to have been holden, that a Feme Covert cannot be indicted as a common Barretor, but this Opinion ſeems juſtly queſtionable; for ſince a Feme Covert is as capable of exciting Quarrels, in the frequent Repetition whereof the Notion of Barretry ſeems to conſiſt as if ſhe were ſole, why ſhould ſhe not as properly be indicted for it?

4. Common Barretor is *as much*, as Twiſden J. ſaid he had heard Judges ſay, *as common Knave*, which contains all Knavery. Mod. 288. pl. 34. Trin. 29 Car. 2. B. R.

5. A Man may *lay out Money* in behalf of another in Suits of Law to recover a juſt Right, and this may be done in Reſpect of the *Poverty* of the Party; but if he lends Money *to promote* and ſtir up Suits, then he is a Barretor. 3 Mod. 98. Hill. 1 Jac. 2. B. R. Anon.

6. If an *Action be firſt brought, and then another proſecutes it*, he is no Barretor, though there is no Cauſe of Action. 3 Mod. 98. Hill. 1 Jac. 2. B. R. Anon. Hawk. Pl. C. 243. cap. 81. S. 4. cites S. C. and ſays it ſeems ſo.

(B) Pleadings and Proceedings.

1. AN Indictment was Contra formam Statuti, to which it was excepted that there is no Statute that makes this an Offence, but it was an *Offence at Common Law*, and the Statute of 34 E 3. 1. doth not Hawk. Pl. C. 244 cap. 81. S. 10. ſays that it ſeems

to be certain that an Indictment of Battery, concluding contra formam Statuti, is good, though no Statute be made directly againſt it, but only for the Puniſhment of it, ſuppoſing it an Offence at Common Law.

make this an Offence, but appoints a Puniſhment; but it was held good, for there are many Precedents. Cro. E. 148. pl. 14. Mich. 31 & 32 Eliz. B. R. Burton's Caſe.

* No certain Place need be expreſſed, for it muſt be intended in ſeveral Places. Cro. J. 527. pl. 4.

2. A. was indicted, that at ſuch a Day, and divers Days before and after he was a common Barretor and Perturbator Pacis, but ſhew'd *no* * *Place where* nor *Cauſe* for which he is a common Barretor; but per Cur. it is good, and the Trial ſhall be De Corpore Comitatus, for it is in every Place. Cro. E. 195. pl. 11. Mich. 32 & 33 Eliz. B. R. Parcell's Caſe.

Paſch. 17 Jac. B R. Palfry's Caſe.——As to no Place being alledged, Doderidge J. ſaid that if he is a Barretor in one Place, he is ſo in all Places; but the Indictment being per Quod he did ſtir up Jurgia Contentions, and no Place alledged where he did ſtir them up, it was ſaid that in ſuch Caſe the Place was very material, and for that Reaſon it was quaſhed. Godb. 383. pl. 471. Paſch. 3 Car. B. R. Man's Caſe.——Palm. 450. S C. the Indictment was quaſh'd, becauſe no Place was alleg'd where he was a Barretor, nor where he ſtirred up Suits; yet at firſt Doderidge ſaid it was good, becauſe a Barretor is one that ſtirs up Suits between his Neighbours, and if he is a Barretor in one Place, he is ſo throughout the whole County; but here if it be traverſed, no Venire Facias can be awarded, and therefore it was quaſhed.——Lat. 194. S. C. in totidem Verbis with Palm.——An indictment of Barretry charged the Defendant for the Multiplicity of his own Suits at ſuch a Place, and for raiſing of others to Suits. Exception was taken to the Indictment that no Place was alleged; but Coke Ch. J. held it well enough, becauſe the Word (et) couples all together, and therefore it ſhall be intended to be at the ſame Place. Roll Rep. 295. pl. 12. Hill. 13 Jac. B. R. The King v. Wells.——2 Keb. 409. pl. 33. Mich. 20 Car. 2. B. R. The King v. Clayton, S. P. held good without ſaying where.—— Hawk. Pl. C. 244. cap. 81. S. 11. ſays it has been holden, that an Indictment of this kind may be good without alledging the Offence at any certain Place, becauſe from the Nature of the Thing conſiſting in the Repetition of ſeveral Acts, it muſt be intended to have happened in ſeveral Places, for which Cauſe it is ſaid that a Trial ought to be by a Jury from the Body of the County.—— But it had been reſolved, that ſuch an Indictment is not good without concluding Contra pacem &c. for this is an eſſential Part of it. Hawk. Pl. C. 244. cap. 81. S. 12.——2 Hawk. Pl. C. 227. cap. 25. S. 61. S. P.

Cro. J. 404. pl. 2. Trin. 14 Jac. B. R. Rice v. Regem.

3. An Indictment of Barretry at the Seſſions of the Peace, may be *tried the ſame Day of the Indictment found.* Judged and affirmed in Error. The Barretor was fined 40 l. and impriſoned. Jenk. 317. pl. 9.

Indictment was that he was a Common Barretor, contra Formam diverſorum Statutorum.

4. Indictment for Barretry omitted the Words *Contra Pacem* Domini Regis, vel *contra formam Statuti.* Exception was taken for theſe Cauſes, and it was held to be inſufficient, it being an eſſential Part of the Indictment; and therefore was reverſed. Cro. J. 527. pl. 4. Paſch. 17 Jac. B. R. Palfrey's Caſe.

Exception was taken that it was not good, becauſe it is an Offence at Common Law, and there is not any Statute to puniſh it, ſed non Allocatur; for ſo is the common Courſe of Indictments. Beſides common Barretry is an Offence againſt divers Statutes viz. Maintenance and the like. Cro. C. 340. pl. 4. Hill. 9 Car. B. R. Chapman's Caſe.——Barretry was an Offence at Common Law, yet it is good to conclude Contra Formam diverſorum Statutorum; Per Cur. Obiter. 12 Mod. 99. Trin. 8 W. 3. in Caſe of The King v. Bracy.

5. An *Attorney*, upon Barretry being *proved againſt him by divers Affidavits* read in Court, had *Judgment to be put out of the Roll of* Attornies, and be *fined* 50 *l. and turned over the Bar, and ſtand committed.* Sty. 483. Trin. 1655. B. R. Alwin's Caſe.

Sid. 108. pl. 21. The King v. Upton, S. C. ſays the Clerk of the Crown informed the Court that it was filed, and therefore could not be remanded; but becauſe it *appeared* to the Court *to be done by Practice, and the Offence to be great*, they awarded a Procedendo contrary to the Opinion of Twiſden, and likewiſe to the Courſe of the Court.——Keb. 470. pl 80. S. C. ſays it was *filed the ſame Day that the Certiorari was returned*, which the Court conceived an irregular Surprize, notwithſtanding the Bar and the Clerks affirmed that after filing none could iſſue.

6. An *Indictment* of Barretry was *brought into this Court and filed.* Upon a Motion for a *Procedendo*, Twiſden J. ſaid that it could not be; for a Record filed here, cannot be removed without an Act of Parliament. But by the Opinion of Foſter & Windham, a Procedendo was granted. Quære de ceo. Lev. 23. Hill. 14 & 15 Car. 2. B. R. Upham's Caſe.

7. Error

7. Error aſſigned to reverſe a *Judgment* in an Indictment for Barretry, was becauſe it is that he ſhall be fined 100 l. and be *of the good Behaviour, without ſaying How long, and ſo uncertain*; but the Record was that he ſhould be fined. Et ulterius Ordinatum eſt, that he ſhall be of the good Behaviour; and therefore the Court held that the Good Behaviour, as it is here entered, is no Part of the Judgment; but they ſeemed to doubt if it had been entered in apt Words, whether ſuch Uncertainty would not have hurt the Judgment. Sid. 214. pl. 14. Trin. 16 Car. 2. B. R. The King v. Rayner.

Keb. 755. pl. 57. S. C. ſays the Et ulterius Ordinatum eſt is well enough, it being no Part of the Judgment, but the Judgment is compleat without it; and Judgment affirmed.

8. U. was *indicted at the Aſſiſes* of common Barretry, which *being removed into B. R. by Certiorari*, he appeared and *pleaded Not Guilty, & de hoc ponit ſe ſuper Patriam, & Thomas Fanſhaw Miles, Coronator & Attorn' Domini Regis &c.* and *found Guilty de Premiſſis in Indictamento infra ſpecificato interius ei impoſit' modo & forma prout præd' T. F. interius verſus eum quer'*. It was moved in Arreſt that the Verdict was inſufficient, becauſe the Defendant is *not found Guilty generally, but* only that he is Guilty *modo & forma prout præd' T. F. verſus eum queritur, whereas in Fact the ſaid Sir T. F. had not complained againſt the Defendant; for this was not an Information exhibited in this Court* by the ſaid Sir. T. F. *but an Indictment in the Country*; and the ſaid Sir T. F. did only join Iſſue for the King, which if the Indictment had remained in the Country the Clerk of the Aſſiſes ought to have done, and this Fault was not aided by any Statute of Jeofails, becauſe this Caſe was excepted out of all the Statutes of Jeofails, and thereupon Cur. adviſare voluit; but afterwards the Court over-ruled the Exception, and adjudged the Verdict ſufficient, becauſe the Words modo & forma &c. was *meer Surpluſage*; for the Defendant is found Guilty de Premiſſis in Indict' infra ſpecificato interius ei impoſit', which is a compleat Verdict of itſelf without ſaying more, and the ſubſequent Words are meerly a void Surpluſage; wherefore Judgment was given againſt the Defendant. But becauſe it ſeemed to the Court to be a malicious Proſecution, which had been for a long Time, viz. 7 Years, a ſmall Fine was ſet on the Defendant. 2 Saund. 308. pl. 52. Trin. 17 Car. 2 The King v. Urlyn.

9. H. was indicted at the Seſſions, and Judgment was there given againſt him that he was a *Promoter of Suits, and a common Oppreſſor of his Neighbours*, and was fined 200 l. The Juſtices all agreed that the Indictment was not good without the Word (Barretor,) and their great Reaſon was becauſe all the Precedents are ſo, and therefore the Judgment was reverſed; but they ſaid that the finding him to be a common Oppreſſor of his Neighbours, had been good Evidence to find him guilty of Barretry; and therefore they bound H. to his good Behaviour, and will'd that the Country indict him again with the Word (Barrectator.) Sid. 282. pl. 13. Paſch. 18 Car. 2. B. R. The King v. Hardwicke.

2 Keb. 42. pl. 84. S. C. ——The Words (Communis Barrectator) in ancient Indictments were material to be inſerted where they were of Barretry. 8 Rep. 37. b. Paſch. 30 Eliz. The Caſe of Barretry.——Communis Barrectator is a Term which the Law takes Notice of and underſtands; Per Twiſden J. Mod. 288. pl. 34. Trin. 29 Car. 2. B. R.——Hawk. Pl. C. 244. cap. 81. S. 9. ſays it ſeems clear that no general Indictment of this Kind, charging the Defendant with being a common Oppreſſor and Diſturber of the Peace, Stirrer up of Strife among Neighbours is good, without adding the Words Communis Barrectator, which is a Term of Art appropriated by the Law to this Purpoſe.

No *general Charge* is allowable in any Caſe but Barretry, which in its Nature muſt conſiſt of an Heap and Multitude of Particulars; Per Holt Ch. J. and 6 other Judges. 2 Salk. 681. pl. 2 Paſch. 5 Ann. B. R.——Dalt. Juſt. 72. [publiſh'd in 1742] ſays it was ruled, that where the Defendant was indicted that he was *Quotidianus Perturbator Pacis*, the Indictment was held good. Hill. 8 W. 3. The King v. Gregory.——A Common Deceiver is 100 General, and ſo is Communis Oppreſſor, Perturbator &c. and ſo of all others (except Barretor and Scold) without adding of particular Inſtances; per Cur. 6 Mod. 311. Mich. 3 Ann. B. R. in Caſe of the Queen v. Hannon.

2 Keb. 292. pl. 75. S. C. says the Judgment was reverſed.

10. N. was indicted of Barretry, and *found guilty, and had his Judgment.* Afterwards he *brought Writ of Error*, and *aſſign'd*, among other Things, *that it was tried by the Juſtices of Oyer and Terminer at the next Aſſiſes*, which could not be, but it ought to be before Juſtices of Gaol-Delivery. The Court were of Opinion that Judgment ſhould be reverſed for thoſe Errors; but the Parties agreed to try it again at the Bar the next Term. Sid. 348, 349. pl. 15. Mich. 19 Car. 2. B. R. The King v. Nurſe.

* 2 Hawk. Pl. C. 227. cap. 25. S. 61. S. P. & cites S. C. becauſe it appears from the Nature of the Thing, that it could not but be a common Nuſance.

11. Exception to *Indictment* of Barretry was, becauſe it is only ſaid *Ad Seſſionem Pacis tent' coram Juſticiariis pro le Weſt-riding in Yorkſhire, tent' per Adjornamentum*, and does *not ſay it was actually adjourn'd, nor before what Juſtice*; ſed non allocatur; for the firſt Juſtices goes to all, and it was ſaid *ad Commune nocumentum diverſorum*, and does *not ſay* * *omnium*, as in Caſe of a Highway. Sed non allocatur; for it is ſufficient, as in Caſe of Indictment for a common Scold; and Judgment pro Rege. 2 Keb. 409, 410. pl. 33. Mich. 20 Car. 2. B. R. The King v. Clayton.

12. In an Information for Barretry it was ſaid that the Defendant ſtood upon his *Protection*; but per Cur. there is no Protection in Caſe of Breach of the Peace, nor againſt a Rule of B. R. Freem. Rep. 359. pl. 458. Mich. 1673. Anon.

13. One convicted of Barretry *produced a Pardon of all* Treaſons &c. and all Penalties, Forfeitures, and *Offences*. The Court ſaid that the Words (all Offences) will pardon all that is not capital. Mod. 102. pl. 7. Mich. 25 Car. 2. B. R. Angel's Caſe.

14. On Indictment for Barretry the Evidence was, that one *G. was arreſted at the Suit of C. for 4000 l. and brought before a Judge to give Bail, and that the Defendant, a Barriſter at Law, then preſent, did ſollicit this Suit, when, in Truth, at the ſame Time C. was indebted to G. in 200 l. and that he did not owe the ſaid C. one Farthing.* The Ch. J. was firſt of Opinion that this might be Maintenance, but that it was not Barretry, unleſs it appeared that the Defendant did *know that C. had no Cauſe of Action after it was brought.* If a Man ſhould be arreſted for a trifling, or for no Cauſe, this is no Barretry, tho' it is a Sign of a very ill Chriſtian, it being againſt the expreſs Word of God; but a Man may arreſt another, thinking he hath a juſt Cauſe ſo to do, when as in Truth he hath none; for he may be miſtaken, eſpecially where he hath great Dealings between the Parties. But if the *Deſign* was *not to recover his own Right, but only to ruin and oppreſs his Neighbour*, that is Barretry. Now it appearing upon the Evidence, that the *Defendant entertained C. in his Houſe, and brought ſeveral Actions in his Name where nothing was due*, that he was therefore guilty of that Crime. 3 Mod. 97, 98. Hill. 1 Jac. 2. B. R. The King v. ....

2 Salk. 287. pl. 1. S. C. the Party was fined 100 l. and levied by the Sheriff, and by him paid into the Hands of the Collectors. Holt Ch. J. held that a Writ of Reſtitution lay not to the Collectors, becauſe not Parties to the Record; and he alſo doubted whether a ſpecial Sci. Fa. and ſo make them Parties, would be ſufficient.

15. Judgment on *Indictment* of Barretry was *reverſed on Error*, and held per Cur. on Motion, that *no Writ of Reſtitution lies to a Stranger to the Record*; and by Ch. J. Holt, if it did, it muſt be by *Scire Facias.* Show. 261. Trin. 3 W. & M. The King v. Lever.

In Indictments of Barretry, the *Indictment is general*, becauſe it conſiſts of Multiplicity of Facts; but the Court in Juſtice will compel the Proſecutor to aſſign ſome particular Inſtances, and if he proves them, he ſhall be admited to prove as many more of them as he pleaſes to aggravate the Fine; Per Gould J. Ld. Raym. Rep. 490. Trin. 11 W. 3. obiter.

16. In an Indictment of Barretry the Defendant muſt have a *Note of the Particulars*, that he may know how they intend to charge him; otherwiſe the Court will not proceed to Trial. 5 Mod. 18. Hill. 6 W. & M. in B. R. The King v. Grove.

H.

H. was indicted for Barretry, in which Caſe the Defendant ought to have a *Copy of the Articles* to be inſiſted on againſt him at the Trial, before hand, that he may have an Opportunity of preparing a Defence; and here a *Notice left with the Defendant's Servant* was adjudged ill, and a Trial, without due Notice, ought not to ſtand; and when there is a Rule to give a Copy of Articles, and that is not done, the Proſecutor ought not to be admitted at the Trial to give any Evidence, and then the Defendant is of courſe acquitted. 12 Mod. 516, 517. Paſch. 13 W. 3. The King v. Ward.———2 Hawk Pl. C. 227. cap 25. S. 61. S. P.——And 1 Hawk. Pl. C. 244. cap. 81. S. 13. ſays, it ſeems to be ſettled Practice, not to ſuffer the Proſecutor to go on in the Trial of an Indictment of this Kind, without giving the Defendant a Note of the particular Matters which he intends to prove againſt him, for otherwiſe it will be impoſſible to prepare a Defence againſt ſo general and uncertain a Charge, which may be proved by ſuch a Multiplicity of different Inſtances.

16. In Indictments of Barretry the *Names* are never inſerted; per Holt Ch. J. and Rookesby. Carth. 453. Trin. 10 W. 3. B. R. in Caſe of Iveſon v. Moor.

17. In Caſe of Barretry the Defendant, upon Motion, may have a *Rule to have Articles deliver'd him of the Inſtances*, and the Proſecutor ſhall not give Evidence of any Particular beſides; and if he gives no Articles, he ſhall give no Evidence; per Harcourt, Maſter of the Office. 6 Mod. 262. Mich. 3 Ann. B. R. in Caſe of Goddard v. Smith. 1 Salk. 21. pl. 11. S. C. but S. P. does not appear——3 Salk. 245. pl. 9. S. C. but S. P. does not appear.——11 Mod. 56. pl. 32. Paſch. 4 Ann. B. R. the S. C. but S. P. does not appear.

For more of Barretors in General, ſee other proper Titles.

Baſtard.

(A) Baſtard. [*Who, in reſpect of the Time of his Birth.*]

Fol. 356.

1. IF a Man dies, and his Wife hath Iſſue born 40 Weeks and 8 Days after his Death, as if he dies the 23d of March, and the Iſſue is born the 9th of January following, this Iſſue ſhall be legitimate, for by Nature it may be legitimate, and the Law has not appointed any certain Time for the Birth of legitimate Infants. * Mich. 17 Jac. B. R. between upon Evidence at the Bar, which concerned the Heir of one Andrews, reſolved per Curiam; in which Caſe Dr. Paddy and Dr. Homford, two Phyſicians, being ſworn, informed the Court, that by Nature ſuch Iſſue may be legitimate; for they ſaid that the exact Time of the Birth of an Infant is 280 Days from the Conception, ſcilicet, 9 Months and 10 Days after the Conception, accounting it per Menſes Solares, ſcilicet, 30 Days to each Month; but it is natural alſo, if the Birth be at any Time within 10 Months, ſcilicet, within 40 Weeks, for by ſuch Account, 10 Months and 40 Weeks are all one. But by Accident an Infant may be born after the 40 Weeks or before; and in the Caſe at the Bar it was proved that the Wife longed for and ſays

* Cro. J. 541. pl. 1. Alſop v. Bowtrell, S. C. and the Court deliver'd their Opinion to the Jury, that the Child born 40 Weeks and more after the Death of the Husband might well be his Child. —Palm 9. Alſop v. Stacy, S. C.

that a Record of 18 R. 2 was vouched, where the Baron died, and the Feme took another Baron, and 40 Weeks and 11 Days paſs'd after the Death of the firſt Baron, and then the Feme had Iſſue, and it was adjudg'd the Iſſue of the 2d Baron, and not of the firſt; but Doderidge ſaid, there is a Difference between the principal Caſe, and the Caſe of 18 R. 2 for in this Caſe, if the Child is not the Child of the firſt Baron it will be a Baſtard, whereas in that other Caſe it is legitimate either way; and adjudged in the principal Caſe, that the Child is legitimate.——Godb. 281. pl. 400. Anon. S. C.——S.C. cited Arg.. Litt. Rep. 178. and cites ſeveral other Caſes to the like Purpoſes of earlier and later Births.——Sty. 277. it was ſaid by the Court to have been adjudged in Caſe of Thecker v. Duncomb, that a Woman may have a Child in 38 Weeks, and that by cold and hard Uſage ſhe may go with Child above 40 Weeks.

for Things in the Life of her Husband, and the Husband died of the Plague; ſo that he was ſick but one Day before his Death; and that the Father-in-Law of the Woman perſecuted her, and uſed her with great Inhumanity, and cauſed her to lie in the Streets for ſeveral Nights; and that the Woman was in Travail 6 Weeks before ſhe was deliver'd, but that it was interrupted by the ſaid Uſage of her Father-in-Law, and that ſhe was deliver'd within 24 Hours after ſhe was received into a Houſe and well uſed, which was good Proof of the Legitimation; tho' it was proved of the other Part, that the Woman was a lewd Woman of her Body; and upon Evidence the Jury found him legitimate. Nota, at the Trial one Chamberlain, a Man-midwife, informed the Court upon his Oath, that he had known a Woman deliver'd of one Child, and within a Fortnight after of another; and the Doctors ſaid the Birth is ſooner or later, according to the Nutriment that the Mother hath for it.

1 H. 6. 3. Rolf ſaid a Woman might be enſeint for ſeven Years.

2. Bracton, Lib. 5. Fol. 417. b. Si partus naſcatur poſt mortem Patris (qui dicitur poſthumus) per tantum tempus quod non ſit veriſimile quod poſſit eſſe defuncti Filius, & hoc probato, talis dici poterit Baſtardus.

S. C. cited Cro. J. 541. pl. 1. in the Caſe of Alſop v. Bowtrell. * But ſays, Note it is not there ſhewn what was Ultimum tempus Mulieribus pariendo conſtitutum.—Co. Litt. 123. cites S. C. and ſays that † Fol. 357. Legitimum tempus in that Caſe appointed by Law is at the fartheſt 9 Months, or forty Weeks; but ſhe may be deliver'd before that Time.

3. 18 E. 1. Rot. 13. in B. R. with Mr. Bradſhaw, *Johannes de Radewell* brought an Aſſiſe verſus *Radulphum & Henricum*, coram Johanne de Vallibus, Willielmo de Valam, & Sociis ſuis itinerantibus apud Bedfordiam. This Aſſiſe was brought there the 15 E. 1. and after in 18 E. 1. the Parties and Recognitors of the Aſſiſe came coram Rege, and the Aſſiſe found inter alia, that after the Death of Robert the Husband of Beatrice, the Mother of the ſaid Henry, the ſaid Beatrice came into the Court of the ſaid Radulph, (of whom the Land is held by the Service of Chivalry) & prædicta Beatrix præſens in Curia quærita an eſſet pregnans necne, juramento aſſerebat ſe non eſſe pregnantem, & ut hoc omnibus liqueret, veſtes ſuas uſque ad tunicam exuebat, & in plena Curia ſic ſe videri permiſit, & dicunt quod per aſpectum corporis non apparebat eſſe tunc pregnans; upon which Evidence the ſaid * Radulph, the Lord, took the ſaid John for his Heir &c. Et quia invenitur per veredictum juratorum Aſſiſæ captæ coram præfatis Juſticiariis itinerantibus quod præd' Henricus natus fuit per undecim dies † poſt ultimum tempus legitimum mulieribus pariendi conſtitutum, ita quod præd' Henricus dici non debet Filius præd' Roberti ſecundum legem & conſuetudinem Angliæ uſitata, imo dici debet ſecundi viri præd' Beatricis ſi forte ſe nupſerit alicui infra undecim dies poſt mortem primi mariti ſui, ut ſi extra matrimonium baſtardus; & quia per veredictum juratorum invenitur quod præd' Robertus non habuit acceſſum ad prædictam Beatricem per unum menſem ante mortem ſuam, per quod magis præſumitur contra prædictum Henricum, & plane invenitur in Recordo, quod prædictus Johannes ſtetit in ſeiſina ut frater & hæres præd' Roberti per unum annum & amplius, & per voluntatem, & aſſenſum præd' Radulphi capitalis Domini &c. conſideratum eſt quod præd' Johannes recuperet ſeiſinam ſuam de præd' tenementis per viſum juratorum, & præd' Radulphus & Henricus in miſericordia. Vide 8 Ed. 2. quod vide

Rotulo

Rotulo Parliamenti 6 Ed. 3. Membrana 4. Nota, the Jury found the Husband languiſh'd of a Fever long before his Death.

4 Britton, Fol. 166. the Manner is ſhewn how a Jury of Women ſhall be impannelled by the Sheriff, after the Death of the Huſband, upon the Complaint of the next Heir, and the Feme ſhall be viewed by them, and after ſhall be put in one of the King's Caſtles to be kept from Company; and if ſhe hath not a Child within 40 Weeks after the Death of her Husband, or if ſhe be not found Enſeint, let her be puniſhed by Fine and Impriſonment, and the Lords of the Fee, as ſoon as may be without Delay, may take the Homage of the Heirs; and if ſhe hath a Child within the 40 Weeks, then let this Infant be received to the Inheritance, if another Heir cannot aver this Child to be another's than her Husband's, or &c. Vide this. As to this Matter, ſee Tit. Ventre inſpiciendo.

5. If a Man hath a Wife and dies, and after within a ſhort Time the Woman marries again, and within 9 Months hath a Child, ſo that the Infant may be the Child of the firſt or ſecond Husband; in this Caſe, if it cannot be known by Circumſtances, the Infant may elect the firſt or ſecond Husband for his Father. Co. Lit. 8. Where a Man dies, his *Feme privement enſeint* with a Son, and *another Man marries her*, and after the Son is born, he ſhall be adjudged Son of the firſt Baron, and not of the ſecond Baron; Per Thorp, quod Wilby conceſſit; but ſaid that he heard Berr. J. ſay that the Infant may chuſe which of them he would take for his Father, which is not Law as it ſeems. Br. Baſtardy, pl. 18. cites 21 E. 3. 39. ——The Reaſon is, that in hoc Caſu Filiatio non poteſt probari, and ſays that ſo the Book [21 E. 3. 39] is to be intended; and ſays that for avoiding ſuch Queſtion, and other Inconveniencies, the Law before the Conqueſt was, Sit omnis vidua ſine marito duodecim menſibus, & ſi maritaverit, perdat dotem.

(A. 2) *Who* ſhall be *ſaid to be* a Baſtard, [tho' born in Marriage, and in reſpect thereof.] See Tit. Baron and Feme (A)

1. If a Man having one Wife, takes another Wife and hath Iſſue by her, living the firſt Wife, this Iſſue is a Baſtard. * 18 H. 6. 31. † 18 Ed. 4. 30. b. Co. 7. Kenn. 44. For the ſecond Marriage is void, 38 Aſſ. ‡ 24. adjudged. * Fitzh. Replication, pl. 8. cites S. C. † Br. Baſtardy, pl. 43. cites 18 E.

4. 28. S. C. & S. P. accordingly by Littleton. ‡ This is the firſt pl. 24. there being another pl. 24. which is not S. P.—— See Tit. Baron and Feme (A) pl. 2. S. P. and the Notes there.

2. If a Man marries his Couſin within the Degrees, the Iſſue between them is no Baſtard, till a Divorce comes; for the Marriage is not void. 18 H. 6. 34. b. Br. Baſtardy, pl. 9. cites 11 H. 4. 78. S. P.——See (H) infra, S. P.

3. So it is if the Brother marries his Siſter. 18 H. 6. 32. * 39 Ed. 3. 31. b. * Br. Baſtardy, pl. 23. cites S. C.

4. So if a Man marries his Couſin within the Degrees of Spiritual Affinity, the Iſſue is no Baſtard till a Divorce. 39 Ed. 3. 31. Br. Baſtardy, pl. 23. cites S. C.——

See Baron and Feme (A) pl. 3. S. C.——After the Stat. 32 H. 8. cap. 38. the Husband cannot be afraid to loſe his Wife, or the Wife her Husband, nor the Heir of them to be baſtarded, by reaſon that the Husband before Marriage had been Godfather, either at Baptiſm or Confirmation, to the Couſin of his Wife; or that ſhe had been Godmother before the Marriage to the Couſin of her Husband. for the Divorces Cauſa Compaternitatis & Commaternitatis (which in the Act of 1 & 2 P. & M. is called Cognatio Spiritualis) are by this Act taken away. 2 Inſt. 684.

5. If

* Br. Baſtardy, pl. 6 cites 47 E. 3 14.
† Br Baſtardy, pl. 12. cites S. C.

5. If a Man hath Iſſue by A. and after intermarries with her, yet this Iſſue is a Baſtard by our Law. *47 Ed. 3. 14. b. † 11 H. 4. 84. 18 Ed. 4. 30. 39 E. 3. 31. b. 38 Aſſ. 24.

6. And ſo he is a Baſtard by the Common Law of Scotland. Skene Regiam Majeſtatem, Lib. 2. Cap. 5. Verſ. 2, 3.

7. An Ideot a Nativitate may conſent to a Marriage, and his Iſſue ſhall be legitimate. Trin. 3 Jac. B. R. between *Style and Weſt* adjudged, upon a ſpecial Verdict, par un petit Queſtion.

Fol. 358.

8. If the Husband be gelt, ſo that it is apparent that he cannot by any Poſſibility beget a Child, if his Wife hath Iſſue ſeveral Years after, this will be a Baſtard, tho' it was begot within Marriage, becauſe it is apparent that it cannot be legitimate. Hill. 14 Jac. in Camera Stellata, between *Done and Lagerton* Plaintiffs, and two *Hintons and Starky* Defendants, ſo held by the Chancellor and Bountacute, but Hobart e contra.

Becauſe no Law will intend that an Infant under that Age can beget a Child.

9. A Male of 7 *Years old* is married to a Female of 14; ſhe before the Male is 13 has Iſſue, this Iſſue is a Baſtard. Jenk. 95. pl. 84. cites 1 H. 6. 3.

1 H. 6. 3. b. pl. 8. ——— Br. Baſtardy, pl. 26. cites S. C. ——— Noy 142. cites S. C. ——— *So* if the *Male is* 13, *and the Female* 12. Jenk. 289. in pl. 26.

(B) *Who* ſhall be ſaid a Baſtard, and who a *Mulier*.

* Fitzh. Baſtardy, pl. 9. cites S. C.
† *As Coſinage by W. N. againſt J. P.*

1. By the Law of the Land, a Man can not be a Baſtard who is born after Eſpouſals, unleſs it be by ſpecial Matter. * 40 Ed. 3. 16. b. † 21 Ed. 3. 39. ‡ 39 E. 3. 31. ‖ 31 Aſſ. pl. 10. 2 E. 3. 29. b. per Herle and Cond.

and *Demand of the Seiſin of Walter, who died without Iſſue, by which the Land reſorted to Ralph as Uncle and Heir of the Part of his Father, and from Ralph deſcended to Lawrence as to Son and Heir, and from Lawrence to the Demandant as Son and Heir*; Per Mombray, this *Ralph took to Feme Margery, and had Iſſue Roger eigne, and Lawrence, Father of the Demandant, puiſne*, and *Roger had Iſſue the Tenant*, and ſo is the Tenant Iſſue of the elder Brother, and the Demandant Iſſue of the Younger; Judgment ſi Actio; the *Demandant ſaid, that Roger, Father of the Tenant, was not Son of Ralph, but Son of one J. D.* and becauſe he did not deny the Eſpouſals, and that Roger was within the Eſpouſals by Margery, therefore ſuch general Averment was refuſed; But per Wilby, he *might have ſaid that Roger was the Son of John, and born out of the Eſpouſals* &c. by which the Demandant was awarded to anſwer further by whom the Iſſue was; the *Demandant ſaid, that Ralph the Grandfather had Iſſue Lawrence, abſque hoc that he had ſuch Iſſue Roger born and begotten by this ſame Ralph during the Eſpouſals between him and Margery*; Priſt; and the *other ſaid, that Ralph the Grandfather took to Feme Margery, and during theſe Eſpouſals Roger was born and begotten of the ſame Margery*, and ſo was this ſame Roger the Son of Ralph; Priſt; and the other e contra, and ſo ſee that ſpecial Baſtardy ſhall be tried per Pais, and not by Certificate of the Ordinary. Br. Baſtardy. pl. 18. cites 21 E. 3. 39. ‡ Br. Baſtardy, pl. 17. cites S. C. but not exactly S. P. ‖ Br. Baſtardy, pl. 37. cites 39 Aſſ. 10. S. P. and Roll here ſeems to be miſprinted. ——— Fitzh. Baſtardy, pl. 18. cites S. C.

* Br. Baſtardy, pl. 5. cites S. C. — Fitzh. Baſtardy, pl. 10. cites S. C.

2. If a Woman be groſsly enſeint by A. and after A. marries her, and the Iſſue is born during the Marriage, this is a Mulier, and not a Baſtard. * 44 Ed. 3. 12. b. 45 Ed. 3. 28.

* Br. Baſtardy, pl. 26.

3. So if a Woman be groſsly enſeint by one Man, and after another marries her, and after the Iſſue is born, this is a Mulier, becauſe it

is

is born during the Marriage, and no Iſſue can be taken by whom the was enſeint, becauſe that cannot be known. * 1 H. 6. 3. Contra † 44 Ed. 3. 12 b. 45 Ed. 3. 28. Contra 18 H. 6. 31. b. ſo altho' the Iſſue be born within three Days after the Marriage. 18 Ed. 4. 3. cites S. C. Fitzh. Baſtardy, pl. 1. cites S. C. † Br. Baſtardy, pl. 5. cites S. C. ——Fitzh Baſtardy, pl. 12. cites S C. —— In ſuch Caſe by the Common Law ſuch Iſſue is a Mulier, and by the Spiritual Law a Baſtard. Br. Baſtardy, pl. 43. cites 18 E. 4. 23.

4. If a Feme covert hath Iſſue in Adultery, yet if her Husband be able to beget Children, and is within the four Seas, this is no Baſtard. Hill. 14 Jac. in Camera Stellata, between *Done ana Edgerton* Plaintiffs, and two *Huntons and Starky* Defendants, agreed by the Judges and Chancellor. * 39 Ed. 3. 14. * Br. Baſtardy, pl. 21. cites S. C. in Aſſiſe the Tenant ſaid, that J. was ſeiſed in Fee, and took to Feme K. of whom he begot the Tenant, a Son, and the Plaintiff, a Female, and died, and the Plaintiff claiming as Heir entred, and the Defendant ouſted her. The Plaintiff replied, that the Tenant was Baſtard. The Defendant rejoined that he was Mulier. Whereupon the Biſhop was wrote to, who certified Baſtard, and the Manner How, viz. That J. took to Feme K. who elop'd, and lived in Adultery with F. S. who begot of her the Tenant, and ſo Baſtard. Thereupon the Tenant complained to the Parliament, becauſe the Certificate was Contra Legem Terræ, and this it ſeems, for that it is not certified whether the Baron was Infra Quatuor Maria or not. But afterwards Judgment was given for the Plaintiff according to the Certificate; and ſo ſee that the Juſtices have no Regard to the Manner or Cauſe of the Certificate, but only to the Effect thereof, which was, that the Tenant was a Baſtard; Quod Nota. —— Fitzh. Baſtardy, pl. 8. S. C. ſays, that by his being adjudged a Baſtard by the Law of Holy Church, the Juſtices took the Aſſiſe in Right of Damages, and awarded that the Plaintiff recover Seiſin and Damages; Quod Nota.——By the Common Law, if the Husband be within the four Seas, viz. within the Juriſdiction of the King of England, and the Wife has Iſſue, no Proof is to be admitted to prove the Child a Baſtard; for in that Caſe Filiatio non poteſt probari unleſs the Husband had an apparent Impoſſibility of Procreation. Co. Litt. 244. a.

5. If a Wife elopes, and lives in Adultery with another, and during this, Iſſue is born in Adultery, yet this is a Mulier by our Law. * 1 H. 6. 3. † 43 E. 3. 18. b. 20. 18 E. 4. 30. Hill. 14 Jac. in Camera Stellata, agreed per Curiam, in the Caſe of *Edgerton* before cited. ‡ 39 E. 3. 14. || 38 Aſſ. 14. Contra 40 E. 3. 16. b. ¶ 33 Aſſ. 8. but the Baron ought to be within the four Seas, ſo that by Intendment he may come to his Wife, otherwiſe the Iſſue is a Baſtard. 40 [43] E. 3. 20. 33 Aſſ. 8. * Br. Baſtardy, pl. 26. cites S. C. —— Fitzh. Baſtardy, pl. 1. cites S C. — † Br. Baſtardy, pl. 4. cites 43 E 3. 19 [and it ſhould be 19. b. 20.] S. P. by Kirton contra, but by Belk. according to Roll, if the Husband be within the 4 Seas, and can come to her, Quod non fuit negatum; Ideo Quære in Caſe the Baron was impriſoned at the Time. ‡ See pl. 4. and the Notes. || Br. Baſtardy, pl. 35. cites S. C. that he was certified a Baſtard, and therefore the ſpecial Matter indorſed on the Writ, viz. that ſhe lived 7 Years from her Husband, in which Time the Child was begotten and was not regarded. ¶ Fitzh. Baſtardy, pl. 16. cites S. C.

6. So if a Feme covert goes into another County, and takes Husband, and hath Iſſue by him, the firſt Husband being within the Seas, the Iſſue is a Mulier. 7 H. 4. 9. b. Br. Baſtardy, pl. 8. cites S C. ——Fitzh. Baſtardy, pl. 4. cites S. C.——One that is born of a Man's Wife while the *Husband* at and from the Time of the begetting to the Birth *is Extra Quatuor Maria*, is a Baſtard within 18 El 5 which is a remedial Law; Per Holt. 2 Salk. 484. pl. 38 Mich. 10 W. 3. B. R. The King v. Albertſon. —— S. P. but if he were here at all during the Time of the Wife's going with Child, it is legitimate, and no Baſtard. 1 Salk. 122. pl. 5. Mich. 3 Ann. B. R. The Queen v. Murrey.

7. But otherwiſe it is if the Baron be over the Seas. 7 H. 4. 9. b. Br. Baſtardy. pl. 8. cites S. C.——Fitzh. Baſtardy, pl. 4. cites S. C.

8. If the Feme hath Iſſue, the Baron being over the Seas for 7 Years before the Birth, the Iſſue is a Baſtard by our Law. 19 H. 6. 17. b. Br. Baſtardy, pl. 20. cites S. C & S. P. admitted.

9. [So] if a Feme covert hath Iſſue, the Baron being over the Seas 6 Years before the Birth, this is a Baſtard by our Law. 18 H. 6. 34.

10. So if the Feme hath Iſſue, the Baron being over the Seas 3 Years before the Birth, and three Years after the Birth, the Iſſue is a Baſtard. 18 H. 6 32. b.

11. If a Man hath been ſo long over the Sea, before the Birth of the Iſſue which his Wife hath in his Abſence, that the Iſſue cannot be his Iſſue, this is a Baſtard. Hill. 14 Jac. Camera Stellata. between *Done & Edgerton* Plaintiffs, and two *Huntons & Sharky* Defendants, reſolved by the Judges and Chancellor.

If *Baron be in Ireland for a Year, and Feme in England* 12. Contra 13 Ed. 2. Baſtardy 25. where it was found the Father was in Ireland when the Son was begotten, yet the Plaintiff was nonſuit, which is, that he is no Baſtard.

during this Time has Iſſue, it is a Baſtard; but it ſeems otherwiſe now for Scotland, both being under one King, and make but one Continent of Land; Abſence beyond Sea takes away all Intendment, that Baron privately and ſecretly may be with his Wife as he may if he be in England, though his Wife had *eloped* and lived with the Adulterer. Jenk. 10. pl. 18.

Fol. 359. 13. If a Woman hath Iſſue, her Husband being within the Age of 14, the Iſſue is a Baſtard. 1 H. 6. 3. b.

For an Infant at ſuch Age cannot have Iſſue. Br. Baſtardy, pl. 26. cites S. C.

14. If a Woman hath Iſſue, her Husband being but of the Age of 3 Years, the Iſſue is a Baſtard. 18 H. 6. 31. becauſe it appears he cannot have Iſſue at this Age. So if ſhe hath Iſſue, the Husband being but 6 Years of Age at the Birth. 18 H. 6. 34.

Br. Baſtardy, pl. 36 cites S. C. 15. So if ſhe hath Iſſue, the Husband being but 7 Years of Age at the Birth, this Iſſue is a Baſtard. 38 Aſſ. 24. Per Cankc.

Br. Baſtardy, pl. 36 cites S. C.—— * Br. Baſtardy, pl. 32. cites S. C. 16. So if ſhe hath Iſſue, the Baron being only of the Age of eight Years at the Birth; for it cannot be intended by Law that it was beget by the Baron. 38 Aſſ. 24. Per Cankc, * 29 Aſſ. 54. adjudg'd.

——S. P. accordingly, and ſo if he be under the Age of Procreation. Co. Lit. 244. a.

Br. Baſtardy, pl. 32. cites S. C. but 17. So it is if the Baron be but of the Age of 9 Years at the Time of the Birth of the Iſſue. 29 Aſſ. 54. Quære.

S. P. exactly does not appear.——But Br. ibid. pl. 36. cites 28 Aſſ. 24. That if Infant at 7 or 8 Years be married and has a Child within one or two Years, this Iſſue is a Baſtard. Quod non negatur.

Scire Facias upon a Fine; the Tenant ſaid that he held for Life, the Reverſion regardant to A. and prayed Aid of 18. P. 10 Ed. 1. B. Rot. 23. *Foxcroft's Caſe.* One R. being infirm, and in his Bed was married to A. a Woman, by the Biſhop of London, privately, in no Church nor Chappel, nor with the Celebration of any Maſs, the ſaid A. being then big by the ſaid R. and within 12 Weeks after the Marriage the ſaid A. was delivered of a Son, and adjudged a Baſtard; and ſo the Land eſcheated to the Lord by the Death of R. without Heir.

him, and the other ſaid that the *Mother of A. was groſsly enſeint of A. by H. and ſo enſeint H. Father of A. in his Malady eſpouſed her, and died the 15th Day after*, and ſo A. a Baſtard, and *the other ſaid, that ſhe was enſeint by W. and not by H.* and *ſo at Iſſue*; Quod mirum! that this Iſſue was ſuffered. Br. Baſtardy, pl. 5. cites 44 E. 3. 10.

Br. Verdict. pl. 21. cites S. C. 19. In Aſſiſe at Warwick, 19 H. 7. it was found by Verdict, that the Father of the Tenant had taken the Order of *Deacon*, and after *married a Feme and had Iſſue*; the Tenant who entered, and another collateral Heir

Heir entered upon him, and they were adjourned for Difficulty; and it was debated in the Exchequer Chamber, whether the Tenant ſhould be a Baſtard; and it was adjudged by Advice that *he ſhould not be a Baſtard*. Quod Nota. And Frowyke Ch. J. ſaid that he was a Counſel in this Matter, and that it was adjudged ut ſupra, quod Vaviſor conceſſit. Br. Baſtardy, pl. 25. cites 21 H. 7. 39.

20. *And* Frowike ſaid that if a *Prieſt takes a Feme and has Iſſue*, and dies, his Iſſue ſhall inherit; for the Eſpouſals are not void, but voidable. Ibid.

21. If a Man *takes a Nun to Wife*, theſe Eſpouſals are void; Per Vaviſor. Quod Nota bene, for none denied it. Ibid.

(C) *Who* ſhall be ſaid a Baſtard, who not. *What.* [How conſidered in Law.]

1. A Baſtard is Nullius Filius, neither of Father nor Mother. 41 Ed. 3. 19. 41 Br. Baſtardy, pl. 26. cites 1 H. 6. 3.

S. P. by Straunge; for a Baſtard is Filius Populi, and has no Father certain.——S P. for Qui ex damnato Coitu naſcuntur inter Liberos non computentur. Co. Litt. 3. b. & 78. a.

(D) Baſtard by our Law, and Mulier *by the Civil Law.*

1. If A. hath Iſſue by B. and after they inter-marry, yet the Iſſue is a Baſtard by our Law. * 47 E. 3. 14 b. † 11 H. 4. 84 but a Mulier by the Civil Law. 11 H. 4. 84. Bracton, Lib. 5. Fol. 416, 417. * Br. Baſtardy, pl. 6. cites S. C. but S P. does not clearly appear. † Br. Baſtardy, pl. 12. cites S. C. and S. P. admitted.

2. If the Parents are divorced, Cauſa Conſanguinitatis, they not having Notice thereof at the Marriage, the Children, had before, are Baſtards by our Law, and Mulieres by the Civil Law. 18 E. 4. 24. b. Br. Baſtardy, pl. 43. cites 18 E. 4. 28. [but it ſhould be 18 E. 4. 29. a b. pl. 30. a. pl. 28.] S. P. and ſeems to intend S. C. of Roll here, which ſeems miſprinted. ——S. C. cited Roll Rep. 212. Trin. 13 Jac. B. R.

3. If a Man hath Iſſue by a Woman, and after marries the ſame Woman, the Iſſue by our Law is a Baſtard, and by the Spiritual Law a Mulier. 18 E. 4. 30. By the Statute of Merton, 20 H. 3. cap 9 it is enacted that a Child born before Marriage is a Baſtard, albeit the common Order of the Church be otherwiſe.

4. Such Iſſue is a Baſtard by our Law, yet he ſhall be called the Son of them in our Law; for a Remainder limited to him by ſuch Name is good. 41 E. 3. 19. Co. 6. 65. See Tit Grants (D) pl. 10. S. C. and the Notes there, and ibid. pl. 8, 9, 11, 12, 13

(E)

(E) Baſtard by the *Spiritual Law*, and Mulier by our Law.

* Br. Baſtardy, pl. 4. 43. S. P. cites 18 E. 4. 28. but is miſprinted, and ſhould be 29 b. 30. pl. 28.

1. IF a Man marries a Woman groſsly big by another, and within three Days after ſhe is delivered, in our Law the Iſſue is a Mulier, and by the Spiritual Law a Baſtard. * 18 E. 4. 30. ‡ 1 H. 6. 3.

‡ Br. Baſtardy, pl. 26. cites S. C. but S. P. as to the three Days does not appear there; but by Strange, if an Infant be born within 5 or 6 Months, or leſs, after the Eſpouſals, it is a Baſtard.—Fitzh. Baſtardy, pl. 1. cites S. C. ſays, it cannot be a Baſtard, if it be born within the Eſpouſals.

* Br. Baſtardy, pl. 4. cites S. C. & S. P. by Belk. Quod non fuit Negatum; but Brooke ſays, Ideo Quære if the Baron was impriſoned at the Time.

2. So * 43 E. 3. 20. gives a Limitation, ſcilicet, that it ſhall be a Mulier, if the Baron be within the 4 Seas, ſo that he may come to his Wife. ‡ Contra 11 H. 4. 14. b.

‡ Fitzh. Baſtardy, pl. 5. cites S. C. & S. P. by Huls. that it is a Baſtard if born and begotten in Adultery, tho' the Husband is within the 4 Seas.

* See (B) ſupra, pl. 5. S. C. and the Notes there.——

3. If a Woman elope, and hath Iſſue in Adultery, the Iſſue is a Mulier in our Law, and by the Spiritual Law a Baſtard. 18 E. 4. 30. * 43 E. 3. 19. b. 20.

7 Rep. (44) 43. a. Mich. 5 Jac. S. P. obiter.

Fol. 360.

4. But 40 E. 3. 16. is, that if a Feme continues in Adultery, and hath Iſſue, this is a Baſtard in our Law.

Fitzh. Baſtardy, pl. 9. cites S. C.

5. But by the Law of the Land a Man cannot be a Baſtard that is born after Marriage, unleſs by ſpecial Matter. 40 E. 3. 16. b.

(F) Baſtard *by both [Laws.]*

* Br. Baſtardy, pl. 43. S. P. per Littleton, cites 18 E. 4. 28. but it ſhould be as here in Roll, viz. 18 E. 4. 30. but in the Year-Book it is pl. 28. which may be the Occaſion of the Miſprinting.

1. A Man who hath a Wife takes another Wife, and hath Iſſue by her, this Iſſue is a Baſtard by both Laws; for the ſecond Marriage is void. * 18 E. 4. 30. b. Co. 7. Kenn. 44. ‡ 18 H. 6. 31.

‡ Fitzh. Replication, pl. 8. cites S. C.

(G) *What*

(G) *What Divorce* baſtardizes the Iſſue.

1. A Divorce Cauſa Præcontractus **baſtardizes the Iſſue.** 47 E. 3. pl. 78. 18 H. 6. 34. Reſolved by the two Ch. Juſtices, the Ch. Baron, Williams, and Altham, on a Reference out of the Court of Wards, that a Divorce being by Sentence in the Spiritual Court between Kenne and his Wife, Cauſa Præcontractus, or other Cauſe, the Parties being dead between whom it was, the Court of Wards cannot now examine it to prove another Heir againſt that Sentence. Cro. J. 186. pl. 6. Mich. 5 Jac. B. R. Robinſon v. Stallage. 7 Rep. (42) 41. b. Kenne's Caſe, S. C. ——Jenk. 289. pl. 26 S. C.

Such Divorce baſtardizes the Iſſue, becauſe it diſſolves the Marriage a Vinculo Matrimonii, and ſo it is of all other ſuch Divorces, as Divorce Cauſa Metus, Cauſa Impotentiæ, ſeu Frigiditatis, Cauſa Affinitatis, Cauſa Conſanguinitatis &c. becauſe they were not Juſtæ Nuptiæ; but Divorces a Menſa & Thoro, as Cauſa Adulterii, diſſolves not the Marriage a Vinculo Matrimonii; becauſe it is ſubſequent to the Marriage. Co. Litt. 235. a.——Cro. C. 462. Arg. cites 47 E. 3. fol. ultimo, where the 5 Cauſes above are mentioned; and Ibid. 463. cites Co. Litt. 235. mentioning the ſame Divorces to be a Vinculo Matrimonii, and which are all preceding the Marriage; but that where the Diſſolution is only a Menſa & Thoro, as Cauſa Adulterii, the Coverture continues between them. ——A Child begotten after *Divorce a Menſa* & Thoro, ſhall be taken to be a Baſtard; otherwiſe after *voluntary Separation*, unleſs found that the Husband had *No Acceſs*. 1 Salk. 123. St. George's v St Margaret's Pariſh, Weſtminſter.—And Ibid. ſays, that ſo was the Opinion of Hale Ch. J. in the Caſe of Dickens v. Collins.

2. **So Cauſa** Conſanguinitatis. 47 E. 3. pl. 78. **Contra** 29 E. 3. **Baſtardy** 21. **Curia.** 1. S. P. Br. Deraignment, pl. 10. cites 8 E. 4 28.——See pl. 1. and the Notes there.——Where a Marriage has been had, and the Parties are afterwards *divorced for Conſanguinity*, or Affinity, ſuch Sentence of Divorce will be *concluſive Evidence* to baſtardize the Children born in Wedlock before the Divorce; Per Ld. Chan. 8 Mod. 182. Trin. 9 Geo. in Caſe of Hiliard v. Phaley.

3. **So Cauſa** Affinitatis. 47 E. 3. pl. 78. See pl. 1. and the Notes there.

4. **So Cauſa** Frigiditatis. 47 E. 3. pl. 78. A Divorce Cauſa Frigiditatis, where the Party has perpetuam Impotentiam Generationis, declares the Marriage to be void. 2 Inſt. 687.

Husband and Wife are divorced Cauſa Frigiditatis in the Husband; the Husband marries another Wife, and has Iſſue by her; the Husband dies; this Iſſue is legitimate. The ſaid Divorce diſſolves Vinculum Matrimonii. The ſecond Marriage might be diſſolved in the Life of the Parties, but not after the Death of any of them; and if it had been ſo diſſolved in the Life of the Parties, the ſaid Iſſue of the ſecond Marriage had been a Baſtard; ſo adjudged and affirmed in Error. Jenk. 268, 269. pl. 84. 40 Eliz. Bury's Caſe—— 5 Rep. 98. b. S. C. adjudg'd and affirmed accordingly, and a Man may be Habilis & Inhabilis diverſis Temporibus, and therefore, notwithſtanding the Depoſitions whereupon Sentence was given in the Spiritual Court, by which a natural and perpetual Imbecility ad Generandum were depoſed, the Iſſue was adjudg'd lawful. ——And. 185. pl. 221. 28 & 29 Eliz. Morris v. Webber, S. C. ſays, the Caſe was argued by the Serjeants, but little to the Purpoſe; for the Point depended on the Canon Law, and therefore after divers Arguments the Court thought it convenient to be argued by Doctors of the Civil Law, to be choſen by each Party, and after it was argued by them, gave Judgment according to the Sentence in the Spiritual Court——Mo. 225. pl. 366. S. C. adjudged for the Plaintiff, that the Iſſues were not Baſtards, becauſe the Divorce was not annull'd by Sentence declaratory of the Church in the Lives of the Parties, and our Law is not to enquire the Cauſe of the Divorce, but to take the Sentence for good till repealed; and ſays the ſame Caſe came in Queſtion again in Ejectment, Hill. 40 Eliz. between Webber and Bury, where the ſpecial Matter was found, and upon ſeveral Arguments adjudg'd again as before.—2 Le. 169. pl. 207. S. C. Trin. 29 Eliz. C. B. adjudg'd for the Plaintiff accordingly; for tho' in the Examinations and Depoſitions taken in the Eccleſiaſtical Court no Matter appears upon which ſuch peremptory Divorce might be granted, yet it might be, as the Court ſaid they were informed by the ſaid Doctors, that upon the Examination of Phyſicians and Matrons, ſufficient Matter did appear to the ſaid Eccleſiaſtical Judges, (which for Modeſty ſake ought not to be entred of Record) and that appears within the Sentence, viz. Habito ſermone cum Matronis & Medicis, which Speech not entred of Record, (Cauſa qua ſupra) might be the Cauſe that induc'd the Eccleſiaſtical Judges to give Sentence for the Divorce, tho' the Matter within the Record be too general to prove, Naturalem Frigiditatem Generandi, but rather Maleficium; and ſays, that upon Error brought 41 Eliz. Judgment was affirmed.——But ſee D. 178. pl. 140. Hill. 2 Eliz. **Sabell's Caſe**, and **Bury's Caſe**, cited there as about a Year after, where the Opinion of the Doctors was, that they ſhould be compell'd to cohabit as Man and Wife, becauſe Sancta Eccleſia decepta fuit in priori Judicio, and therefore

great Suit was made to ſtay a Fine, whereby the Feme gave all her Inheritance to her ſecond Husband; but after ſtaying it one Term, it was ingroſs'd by Command of the Juſtices, contra Mandatum Cuſtodis Magni Sigilli.——And ibid. Marg. cites Hill. 37 Eliz. Strafford v. Danger, in Caſe of Baſtardy, Feme ſued Divorce for Frigidity, and after the Baron married another Feme, by whom he had Iſſue, and adjudged that the ſecond Marriage is void, and there the Civilians gave a Rule, that Qui aptus eſt ad unam aptus eſt ad aliam, and Quando Potentia reducitur ad Actum, debet redire ad primas Nuptias. Ex Libro Mr. Tho. Tempeſt.——But ibid. cites Harriſon's Reading, Lent 1632. that Impotentia & Frigiditas quoad hanc is Cauſe ſufficient of Divorce after Exploration and Trial for 3 Years, and other Ceremonies injoined by the Canons, and that the ſecond Marriage of both is good, notwithſtanding the Party impotent have Children. ——Roll. Rep. 212. Trin. 13 Jac. B. R. cites Berrie's Caſe.

See Tit. Baron and Feme (A) pl. 9, 10, 11. and the Notes there. 2 Inſt 687. cites S. C. that *Cauſa Impubertatis* & *Cauſa Metus ſive Duritiæ*, declare the Marriage to be void; theſe Marriages are ſaid to be prohibited by God's Law, otherwiſe the Stat. 32 H. 8. would extend to them. 2 Inſt. 687.

5. **But a Divorce Cauſa** Profeſſionis **does not baſtardize the Iſſue.** 47 E. 3. pl. 78.

6. **A Divorce for Cauſe of** Spiritual Affinity **baſtardizes the Iſſue.** 39 E. 3. 31. b. **as if the Baron hath baptized the Couſin of the Feme.**

7. Aſſiſe by J. and A. his Feme againſt H. M. who ſaid that A. ſued Divorce in the Archbiſhoprick of York, becauſe ſhe was *within the Age of Conſent at the Time of the Eſpouſals*, and never aſſented to them, by which Divorce was had between them, and ſo Not his Feme; Judgment of the Writ; and ſo ſee that this is good Cauſe of Divorce. Br. Deraignment, pl. 6. cites 39 E. 3. 32.

(H) At what *Time* the *Divorce* being made, it ſhall baſtardize the Iſſue. [And what the Eccleſiaſtical Court may inquire after the Death of the Man and Woman, or either of them.]

* Br. Baſtardy, pl. 23. cites S. C. where in Aſſiſe the Tenant pleaded Baſtardy in the Plaintiff, and the Caſe was, that the *Father married a Feme, where he had before it baptized one A. Couſin of his Feme*, and therefore after the Death of the one of them a Divorce was ſued, and Judgment given. And per Thorpe, and the beſt Opinion clearly, *this Divorce is only pro peccatis, and ſhall not baſtardize the Heir* by it; for ſuch Divorce cannot deſtroy the Eſpouſals, becauſe they were determined before.——Br. Deraignment, pl. 5. cites S. C. Brooke makes a Quære if it be Cauſe of Divorce. ——And Brooke ſays, it ſeems that if *Eſpouſals* are had, which are *defeaſible but not void*, they may be avoided by a Divorce; and if not, then the Heir is inheritable. Br. Baſtardy, pl. 23 cites 39 E. 3. 32.

† Br. Baſtardy, pl. 37. cites 39 Aſſ. 10. S. P. by Thorpe.——Fitzh. Baſtardy, pl. 18. cites 39 Aſſ. 10. S. P. and it ſeems that Roll is miſprinted, and that it ſhould be 39 Aſſ. pl. 10.

1. **If Baron and Feme** continue Baron and Feme for all their Lives, **the Iſſue cannot be a Baſtard by a** Divorce after their Death, **for the Divorce in the Spiritual Court is pro Peccatis, which cannot be after their Death, and therefore ſuch Divorce there is only to diſinherit the Iſſue, which they cannot do.** * 39 E. 3. 31. b. 32. **for by ſuch Means every one might be diſinherited.** ‖ 31 Aſſ. pl. 10.

2 As **the Iſſue cannot be a Baſtard after the Death of the Baron and Feme, by a** Divorce for **Cauſe of** Spiritual Affinity, **for the Cauſe aforeſaid.** 39 E. 3. 31. b. 32. 31 Aſſ. pl. 10.

7 Rep. (44) 43. b. in Kenn's Caſe, the Reporter notes a Di-

3. **If** A. takes B. to Wife, **and hath Iſſue by her, and after** they are divorced, becauſe they were within the Age of Conſent at the Time of their Marriage, and after diſagreed, **and** after A. takes C. to his Wife, who dies, **and after** takes D. to his Wife, by whom he hath Iſſue,

ſue, and dies, upon the Suit of the Iſſue of B. the Eccleſiaſtical Commiſſioners, upon a Commiſſion directed to them, cannot examine the Marriage between A. and C. becauſe they are dead; for by this Examination the Inheritance would be drawn in Queſtion, which is not lawful after they are dead. Mich. 8 Jac. B. *Kenn's Caſe*, reſolved, and a Prohibition granted.

verſity between Repeal of a ſentence given in the Life of the Parties, and giving Sentence of Divorce after the Death of the Parties; for it appears by 22 E. 4. in Corbet's Caſe,

4. [So] If A. takes B. to his Wife within the Age of Conſent, and after at the Age of Conſent they diſaſſent, and marry themſelves elſewhere, and have Iſſue, and die, it cannot after be examined in the Eccleſiaſtical Court whether they did conſent at the Age of Conſent, before their Diſaſſent, becauſe they cannot baſtardize the Iſſue after their Death. *Engleſield's Caſe*, by all the Juſtices reſolved, and a Prohibition granted in Chancery thereupon, cited Trin. 11 Jac. B.

(there before cited) that a Sentence of Divorce cannot be repeal'd in the Spiritual Court by the Death of the Parties; but if any of the Parties be dead before any Divorce ſentenced in the Eccleſiaſtical Court, there they cannot ſue in Court Chriſtian to declare the Marriage void, and baſtardize the Iſſue, becauſe the Trial belongs to the King's Court originally; and that with this accords the 39 Aſſ. 10. 39 E. 3. 31. and 24 H. 8 Tit. Baſtardy, 44. b. that Divorce after the Death of any of the Parties, or Sentence declaratory that the Marriage was avoided after the Death of any of the Parties, ſhall not bind; for it is only in Effect to baſtardize the Iſſue, of which they have not Conuſance originally. —— Jenk. 289 pl. 26 S. C. No Man can be made a Baſtard by any Sentence after the Death of the pretended Husband and Wife who had the Iſſue; but a Sentence given for a Marriage may be repealed after the Death of the Parties, and ſo Ex obliquo baſtardize the Iſſue.

Suit there after the Death of the Parties in the Eccleſiaſtical Court

5. If Adminiſtration be committed to the Uſe of the Wife of the Teſtator, and after a Libel is preferr'd in the Eccleſiaſtical Court, ſurmiſing that * ſhe was not the Wife of the Teſtator, becauſe they were married within the Age of Conſent, and that at the Age of Conſent they did diſ-aſſent, a Prohibition ſhall be granted, becauſe after their Death they ſhall not baſtardize the Iſſue. Trin. 11 Jac. B. *Lanner's Caſe.*

* Fol. 361.

6. If a Man *eſpouſes his Siſter, and has Iſſue*, and dies, the Iſſue is inheritable, becauſe a Divorce was not had in their Lives when the Eſpouſals continued; for it cannot be after the Eſpouſals determined by Death, viz. to baſtardize the Heir. Br. Baſtardy, pl. 23. cites 39 E. 3. 32.

And if the *Commiſſary in his Viſitation finds ſuch Cauſe of Divorce*, and after a *Divorce is thereof made, after the Death of the one of the Parties*, this ſhall never baſtardize the Heir; per Thorpe ſtrongly; and it ſeems to be Law, and ſo it was taken in Parliament 24 H. 8. pl. 23. cites 39 E. 3. 32.——Br. Deraignment, pl. 5. cites S. C. Br. Baſtardy,

7. A Divorce has *relation to make void the Marriage ab initio*, where it is for a Cauſe ariſing before the Marriage, and to Iſſue born Baſtards. See Trial (B. a) pl. 5. cites 43 Aſſ. 43.

8. Where a Man *marries his next Couſin*, and they *have Iſſue*, and he dies, the Iſſue ſhall not be a Baſtard; for the *Eſpouſals are not void without Divorce*; per Norton. And it ſeems by him, that when the Eſpouſals are *determined by the Death of the one* of them, a Divorce cannot be ſued; for they cannot defeat the Eſpouſals which were determined before. Br. Baſtard, pl. 9. cites 11 H. 4. 78.

9. Per Coningsby it was adjudged, in the Caſe of Corbet, that if Baron and Feme *had Iſſue, and after were divorced*, and after the *Baron took another Feme and had Iſſue*, and the *firſt Iſſue ſued* in the Spiritual Court *to reverſe the Divorce after the Death of his Father, to baſtardize the ſecond Iſſue*, and a Prohibition was granted, quod non negatur; but it was ſaid that the Title and the Deſcent were compriſed in the Libel, and otherwiſe he had not had it, as it ſeems. Br. Deraignment, pl. 14. cites 12 H. 7. 22.

10. In Prohibition it was agreed, Arguendo, that if a *Man* be *divorced*, and *takes another Feme, and dies, having Iſſue by the firſt Feme*, this

this Iſſue may ſue to defeat the Divorce, and baſtardize the Iſſue of the ſecond Feme, tho' the Baron who was divorced is dead. Br. Baſtardy, pl. 47. cites 12 H. 7. 42.

Br. Deraignment, pl. 11. cites S. C.—Br. Deraignment, pl. 12. cites 5 E. 4. 3. S. P. and 24 H. 8.

11. Note, if a Man *marries his Couſin within the Degrees of Marriage*, who have Iſſue, and *are divorced in their Lives*, by this the Eſpouſals are avoided, and the Iſſue is a Baſtard; and *contra* if the one *dies before a Divorce*, there a Divorce had after ſhall not make the Iſſue a Baſtard; for the Eſpouſals are determined by the Death before, and not by the Divorce, and a dead Perſon cannot bring in his Proofs; and ſo is the beſt Opinion, Fitzh. Trial 41. Anno 39 E. 3. For a *Divorce after the Death of the Party is* not *but Ex Officio ad Inquirendum de Peccatis*; for a dead Perſon cannot be cited nor ſummoned to it. Br. Baſtardy, pl. 44. cites 24 H. 8.

4 Rep. 29. Mich. 27 & 28 Eliz. Bunting v. Lepingwell, S. C. reſolved that the Plaintiff was legitimate, and no Baſtard.

12. In Treſpaſs the Caſe was; *B. contracted himſelf to A.* and afterwards *A. was married to T.* and cohabited with him. B. ſued A. in the Court of Audience, and proved the Contract, and *Sentence was pronounced that ſhe ſhould marry the ſaid B.* and cohabit with him, which *ſhe did, and they had Iſſue C.* and then B. the Father died. It was argued by Civilians of each Side; but it was reſolved by the Juſtices, that C. the Iſſue of B. was legitimate. Mo. 169. pl. 303. Paſch. 23 Eliz. B. R. Bunting's Caſe.

—If a Man contracts with a Feme to marry her, and after he marries another, and the firſt Feme ſues in the Spiritual Court, and the firſt Marriage is ſentenced void, the Man and the firſt Feme are Husband and Wife; by Windham Serj. and he ſaid that Noy Att. General, in Mr. Harriſon's Lecture in Lincoln's Inn, held that by this Sentence they are complete Husband and Wife, without other Solemnity; but this was denied by Twiſden J. who ſaid that the Marriage ought to be ſolemnized before they ſhould be Baron and Feme. Sid. 13. pl. 2. Mich. 12 Car. 2. B. R. Paine's Caſe.——S. P. cited by Noy D. 105. b. Marg. pl. 17.

By the Act of 32 H. 8. cap. 38. the Divorce Cauſa Præcontractus was taken away, where the Marriage was conſummated by Carnal Copulation &c. but that is repealed, and the Divorce allowed by the Stat. of 2 E. 6. cap. 23. and 1 Eliz cap. 1. 2 Inſt. 684.

If a Marriage de Facto be voidable by Divorce, in reſpect of Conſanguinity, Affinity, Precontract, or ſuch like, whereby the Marriage might have been diſſolved, and the Parties freed a Vinculo Matrimonii, yet if the Husband die before any Divorce, then, for that it cannot be avoided, this Wife de Facto ſhall be endow'd; for this is Legitimum Matrimonium quoad dotem. Co. Litt. 33. a. b.

13. A Man *married his Father's Siſter's Daughter.* This is no Cauſe of Divorce; but it was adjudged, that tho' that Marriage [might be ſaid to] be within the Levitical Degrees, yet it is a *Marriage de Facto*, and only avoidable by Divorce, which after the Death of the Husband cannot be done, becauſe thereby the Iſſue will be baſtardized; and if the Wife had been Inheritrix &c. the Husband ſhould have been Tenant by the Curteſy; and vouch'd 7 H. 4. Noy 29. Hill. 15 Jac. C. B. Rennington v. Cole.

A *Prohibition* was granted as to the annulling the Marriage; but *that they may proceed as to puniſhing the Inceſt*, but not to make void the Marriage, or baſtardize the Iſſue; for that is againſt Law. And the Authority in Kenn's Caſe was the Rule in this Caſe. Carth. 271. S. C.—4 Mod. 182. Hinks v. Harris, S. C. and cited 7 Rep. 44. b. Kenn's Caſe, and a Prohibition was granted, Niſi.——12 Mod. 35. S. C. and Prohibition granted accordingly.

14. The Court Chriſtian having proceeded to annul an *inceſtuous Marriage*, (where the Woman died before Sentence) Prohibition was granted as to their declaring the Marriage to be void; for when the Inceſt is determined by the Woman's Death, they cannot baſtardize the Iſſue, tho' they may puniſh the Inceſt. Comb. 200. Paſch. 5 W. & M. in B. R. Hicks v. Harris.

The Rule that it ſhall not be baſtardized *after his Death*, holds only in Caſe of Baſtard Eigne & Mulier puiſne, and the Spiritual Court cannot give Sentence to annul Marriage after the Parties are dead, becauſe they proceed only *pro ſalute Animæ*, and then it is too late. 1 Salk. 120. pl. 1. Hill. 6 W. 3. B. R. Pride v. Earl of Bath.

And the Meaning of the ſaying, that one ſhall not be baſtardized after the Death of either of his Parents is, that the Spiritual Court ſhall *not proceed to diſſolve a Marriage de Facto* after the Death of either

either Parties, as in Caſe of Conſanguinity, Precontract &c. Per Holt Ch. J. 12 Mod. 432. Mich. 12 W. 3. in Caſe of Hemming v. Price.

15. Where there was a *Sentence in the Spiritual Court*, that the Parties were *not married*, a Perſon claiming under the Iſſue of that Marriage, as pretended, ſhall not be allowed to prove a Marriage on a Trial at Law; for ſuch Sentence, while unrepeal'd, is concluſive againſt all Matters precedent, and the Temporal Court muſt give Credit to it, it being a Matter of mere Spiritual Conuſance, and ſo the Plaintiff was nonſuited. Carth. 225. Paſch. 4 & 5 W. & M. in B. R. Jones v. Bow.

16. A Woman was *ſuppoſed to marry A. firſt, and afterwards during his Life to marry B.* and in a Cauſe of Jactitation of Marriage in the Spiritual Court *in Ireland*, the firſt Marriage was affirm'd; but on an Appeal to the Delagates in Ireland, the ſame was diſallow'd, and the *2d Marriage adjudged good.* By the 2d Marriage there was Iſſue, but none by the firſt. 2 Wms's Rep. 299. pl. 82. Trin. 1725. Franklin's Caſe. The Reporter adds a Quære; for in Caſe of Hill v. Underwood, Trin. 1739. Ld. Chancellor ſeemed not ſatisfied with this Reſolution.——Select Caſes in Chan. in Ld. King's Time, 47. S. C. and the Motion was objected to, becauſe tho' Commiſſions of Review had frequently gone, in reſpect of Sentences relating to Wills in Ireland, that was becauſe the Law here and there, as to them, are both the ſame; but it is not ſo in reſpect of Marriage. Per Ld. Chancellor, *by the 32 H. 8. cap. 38. where there is Iſſue, a Marriage ſhall not be ſet aſide for Precontract*: That *ſtill is the Law of Ireland, tho' altered here by the 2 & 3 E. 6. cap. 23. and tho' 2 Ed. 6. is repealed by 1 P. & M. yet it is revived by 1 Eliz. cap. 1.* But tho' the Law be different, if a Commiſſion ſhould go, they muſt judge by the Iriſh Laws. A Commiſſion of Review is not of Right, but gratuitous and diſcretionary; that it is ſo, muſt have been for ſome Reaſons, to re-examine where were viſible Hardſhips. The only End aimed at here, by granting the Commiſſion, is to baſtardize the Iſſue, which I ſhall never adviſe the King to do. If there had been no Iſſue, it had been very different; let them enjoy the good Fortune of their Legitimacy.

(H. 2) Pleadings. And in what Actions it ſhall be a good Plea to ſay that the Plaintiff is a Baſtard. And How.

1. BAſtardy is a good Plea in an *Action Poſſeſſory*, As in *Writ of Ayel, Mortdanceſtor* &c. though it be a Plea which trenches to the Right. Br. Baſtardy, pl. 27. cites * 1 Aſſ. 13. & H. 10 E. 3. accordingly in Writ of Ayel. * Br. Mortdanceſtor, pl. 13. cites S. C.

2. Where a Man *alledges that his Anceſtor, whoſe Heir he is, was Son of R. born and begotten of M. during the Eſpouſals* between R. and M. the *other*, in Coſinage, *ſhall not ſay that he was Son of J. and not Son of R.* Br. General Iſſue, pl. 12. cites 21 E. 3. 39. Br Baſtard, pl. 18. cites S. C.

3. In Aſſiſe the Tenant ſaid that his Father was ſeiſed, and died ſeiſed, and he entered as Heir; and the Plaintiff claiming as Heir, where he was born out of any Eſpouſals, entered, and the Tenant ouſted him, and held that the *Defendant ſhall give a Mother to the Plaintiff*, and ſo he did; the Plaintiff ſaid that he was born within the Eſpouſals between A. and B. his Feme, his Father and Mother, and ſo Mulier, priſt by Aſſiſe, and the other e contra, and this was tried by the Aſſiſe. Quod Nota. Br. Baſtardy, pl. 30. cites 25 Aſſ. 13. *Scire Facias to execute a Fine* levied *to A in Tail*, the *Remainder to the Plaintiff*, and that A. was dead without Iſſue. The *Tenant ſaid that A. had Iſſue J. who had Iſſue S. who had Iſſue K. who had Iſſue J. who is alive*; Judgment. Per Skrene, *K. died without Iſſue*, abſque hoc, *that he had ever ſuch a Son as J.* But per Norton, then you ſhall give to him another Father, and another Mother; and he alledged Eſpouſals, and that J. was born at N. in the ſame County; but per Cur. Skrene has ſaid enough, and that the Allegation of the Eſpouſals is to no Purpoſe to make the Plaintiff give to J. another Father. Quod Nota, by which they were at Iſſue as Skrene tender'd &c. Br. Baſtardy, pl. 10. cites 11 H. 4. 74.

4. Aſſiſe by J. M. Son of N. M. againſt W. M. and K. M. K. pleaded Nul tort, and W. ſaid quod Aſſiſa non. For he *not confeſſing that J. the Plaintiff is Son of N. M. but N. M. Father of the Tenant was ſeiſed of the Land in Fee, and took K. to Feme, of whom he begot W. now Tenant within the Eſpouſals*; and after the Death of N. his Father, we entered as Son and Heir; *and the Plaintiff claiming as Son and Heir of the Father, where he was born before the Eſpouſals abated, and we ouſted him, Judgment* if Aſſiſe; and upon long Debate the Bar was awarded good; and to this the *Plaintiff ſaid that the Father married E. before K. and begot the Plaintiff of E. within the Eſpouſals, and you have acknowledged us to be elder than you, by which he prayed the Aſſiſe*; to which the *Tenant ſaid that the Father married K. Mother of the Tenant, between whom the Tenant was begotten within the Eſpouſals*, Abſque hoc, *that E. was ever the Feme of N. the Father*, Priſt by Aſſiſe; and becauſe the Plaintiff himſelf had ſhewn that he had another Mother than K. and named E. therefore he has now given Advantage to the Tenant to traverſe it, Quod Nota, and therefore the Plaintiff was compelled by the Court to *rejoin* to this Iſſue. Quod Nota. Br. Baſtardy, pl. 31. cites 28 Aſſ. 46.

5. In Aſſiſe it was found that E. was ſeiſed, and *took a Feme at eight Years, and* that his Feme *had Iſſue J.* the Tenant at 8 Years *by a Chaplain, and after had Iſſue N.* and died, and N. entered as Heir and enfeoff'd the Plaintiff, who was ſeiſed till J. the Baſtard diſſeiſed him, by which the Plaintiff recovered; and there it is taken, if the youngeſt Son enters upon the Eldeſt, and enfeoffs A. who continues Years and Days, that the Eldeſt cannot enter, which is not Law, therefore Quære the Cauſe of the Judgment, whether for this Cauſe, or for the Baſtardy; and it ſeems for the Baſtardy. Br. Baſtardy, pl. 32. cites 29 Aſſ. 54.

6. In Detinue *of Charters by J. Son of T. of W.* it is no *Plea that the Plaintiff is a Baſtard*; for he demands only Chattels of which he was in Poſſeſſion; by which his Challenge was enter'd, and he was compell'd to anſwer. Br. Charters de Terre, pl. 24. cites 38 E. 3. 22.

7. In Aſſiſe the *Tenant made himſelf Heir to H. and that the Plaintiff is a Baſtard.* The Plaintiff replied that *H. took to Feme A. at D. between whom in the Eſpouſals was the Plaintiff born and begotten*; Judgment if he may baſtardize him; and it was held a good Plea to make the other anſwer, and ſo he did, and alleged a Divorce; for it *ſhall be intended by the Eſpouſals that he is a Mulier, without ſpecial Matter ſhewn to the Contrary.* Br. Baſtardy, pl. 37. cites 39 Aſſ. 10.

8. Scire Facias upon a Fine. The Tenant ſaid that he held for Life, the Reverſion regardant to A. and prayed Aid of him, and the other ſaid that the *Mother of A. was groſsly enſeint of A. by H. and ſo enſeint H. Father of A. in his Malady eſpouſed her, and died the 15th Day after*, and ſo A. is a Baſtard; and *the other ſaid that ſhe was enſeint by W. and not by H.* and *ſo at Iſſue*; Quod Mirum! that this Iſſue was ſuffered; for in Anno 41 E. 3. Fo. 7. Thorp would not ſuffer the *Iſſue* to be taken, *whether ſhe was enſeint by her Baron the Day of his Death* or not, *but whether ſhe was enſeint* the Day of his Death or not; Quod Nota. Br. Baſtardy, pl. 5. cites 44 E. 3. 10.

9. *Iſſue* was tendered *that J. N. was born out of any Eſpouſals*; and the *other ſaid* that he was *born in Eſpouſals between J. his Father and A. his Mother*, priſt &c. and the other e contra. Br. Baſtardy, pl. 6. cites 47 E. 3. 14.

10. Scire Facias to execute a Fine. The Caſe was, that the *Feme to whom the Plaintiff made herſelf Heir, took Baron and had Iſſue a Daughter, the Plaintiff*; and *after took other Baron, living the firſt* Baron, *and had Iſſue a Son now Tenant*; Per Richill, if the firſt Baron was within the Seas the Son is a Mulier, and ſo ſee that the ſecond Eſpouſals are void,

and

and the Son ſhall be taken for the Son of the firſt Baron; by which the Party *ſaid that the firſt Baron, after that he had Iſſue the Daughter, went beyond Sea and there remained Years and Days, within which Time the Feme married another and had Iſſue the Son*, ſo the Daughter Heir, and not the Son; and *the other ſaid that the Son was Mulier*, priſt; and the other demurred, becauſe he *did not anſwer the ſpecial Matter*; Quære. Br. Baſtardy, pl. 8. cites 7 H. 4. 9.

11. *Ne unques Accouple* in lawful Matrimony, is no Plea but *in Dower or Appeal*, and not to baſtardize any Man; but he ſhall plead Baſtardy *expreſsly, generally, or ſpecially*. Br. Baſtardy, pl. 9. cites 11 H. 4. 78.

12. Note, per Hull, Baſtardy is no Plea *in Treſpaſs*, but *ſhall conclude to the Franktenement*; for if this ſhall be a Plea, then Writ ſhall be awarded to the Biſhop for the Trial of it, which was never ſeen in Treſpaſs. Quod non negatur. Br. Baſtardy, pl. 14. cites 14 H. 4. 37.

13. Scire Facias to execute a Fine of Remainder tailed to K. his Mother, and to the Heirs of her Body, and that J. F. married K. and that he is Iſſue of her Body &c. Per Hales, you ought not to have Execution; for before theſe Eſpouſals K. was *groſsly enſeint by J. with this Plaintiff, and after J. eſpouſed K.* and after *K. eſloined herſelf from her Baron with the ſaid J. in Adultery, within which Time the Plaintiff was born*. Per Rolf, it does not lie in Conuſance of any by whom ſhe was enſeint, and though ſhe remains in Adultery, yet when the Infant is born he ſhall be the Son of the Baron. Per Strange, a Baſtard is Nullius Filius, and this Matter is only argumentative to prove him a Baſtard, for he *ought to conclude, And ſo Baſtard*; for a Baſtard is Filius Populi, and has no Father certain. Br. Baſtardy, pl. 26. cites 1 H. 6. 3.

14. Note, by the beſt Opinion, that *where Eſpouſals are pleaded* between a Man and a Woman, and that they had Iſſue R. within the Eſpouſals, the *other ſhall not ſay that he is Baſtard generally*; Per Marten & Paſton J. clearly. Br. Baſtardy, pl. 45. cites 10 H. 6. 23.

15. In Treſpaſs the Defendant pleaded Villeinage in the Plaintiff, and he ſaid that he was a Baſtard; Per Markham, to this he ſhall not be received; for *Eſpouſals* were had between the Father and Mother at D. which *continued all their Lives, within which Time the Plaintiff was born*; ſed non allocatur, for all this may be true, for it may be that the Father was 7 Years beyond Sea, within which time he was born, and therefore he *ſaid And ſo Mulier*; & non allocatur, *without ſaying further and Not Baſtard*; Quod Nota, and nothing was entered but Mulier, and not Baſtard. Br. Baſtardy, pl. 20. cites 19 H. 6. 17.

16. Where *Baſtardy was pleaded in the Plaintiff in whom the Defendant had pleaded Villeinage*, and the *Defendant ſaid that the Eſpouſals were at D. &c. which continued all their Lives*, within which Time the Plaintiff was born; & non allocatur; by which he concluded over, *and ſo Mulier, and not Baſtard*, and prayed that all be enter'd; & non allocatur; for *nothing was enter'd but Mulier, and not Baſtard*. Br. General Iſſue, pl. 13. cites 19 H. 6. 17.

17. Note, per Aſhton and Moyle, where a Man brings * *Detinue of Charters*, and makes to himſelf Title, *as Heir in Tail of the Body of the Father and Mother*, and that the Tenements were given by the ſame Charters, in this Caſe it is a good Plea for the Defendant *to ſay, that before the ſaid T. and A. Father and Mother* of the Plaintiff, *were eſpouſed, this ſame T. at St. D. in another County eſpouſed one K. ſuch a Day and Year, which Eſpouſals continued all their Lives, and after the ſaid T. eſpouſed the ſaid A. at B. who had Iſſue the Plaintiff, and* after the ſaid *A. died, and* the ſaid *T. died, living the ſaid K.* and demanded *Judgment ſi Actio*; and per Aſhton and Moile, it is a good Plea to plead this ſpecial Baſtardy in this Perſonal Action; for he intitled himſelf as Heir in Tail, and therefore a good Plea, and ſhall not ſay generally Baſtard,

* In this Action it is no Plea that the Plaintiff is a Baſtard, but his Challenge ſhall be entred, and he ſhall anſwer. Br. Baſtardy, pl. 15. cites 38 E. 3. 22.

for

for then he ſhall not have the Viſne of both Counties, but here he ſhall have it of both Counties; but the Plaintiff demurr'd, & adjornatur. Br. Baſtardy, pl. 1. cites 35 H. 6. 9.

18. Where in *Præcipe quod reddat againſt two*, the *one pleads that the Demandant is a Baſtard*, and the *other pleads a Releaſe in Bar*, if the *Baſtardy be found, and the Releaſe not*, the Plea of Baſtardy does not go to all, but the other ſhall loſe his Moiety, and he who pleaded Baſtardy ſhall ſave his Moiety; for in Plea Real each may loſe his Part, or ſave his Part, Per Priſot; but per Moile, the Baſtardy found ſhall ſerve both; Quære inde. Br. Baſtardy, pl. 24. cites 37 H. 6. 37.

19. In Treſpaſs the Pleading was, that the Defendant was a Baſtard, inaſmuch as his *Father and Mother were Couſins within the Degrees of Marriage, and therefore were divorced*, and there it is agreed by the Juſtices, that the Divorce Cauſa Conſanguinitatis makes the Iſſue, had before the Divorce, a Baſtard, and the *Divorce was pleaded without ſhewing How they were Couſins, and* in what Degree, and did not plead the Record certain, but *Quod divorſabant' Cauſa Conſanguin' prout patet de Recordo*, and yet well. Br. Deraignment, pl. 10. cites 8 E. 4. 28.

See Tit. Trial (P)

(I) Trial.

1. 18 E. 1. Libro Parliamentorum 2. upon the Petition of William de Valencis and his Wife, to have the Bull of the Pope directed to the Archbiſhop of Canterbury allowed for the Examination of a Sentence of Legitimation of Dionile the Son Williclmi de Monte Caniſio; upon Oyer of the Bull it is there ſaid, Quod Bulla illa finaliter tendit ad jus Succeſſionis Hæreditariæ terminandum, cum de Succeſſione Hæreditaria nemo debeat cognoſcere niſi Curia Regis, vel Curia Eccleſiaſtica ad Mandatum Curiæ Domini Regis, & etiam ſi Bulla procederet, manifeſte eſſet contra conſuetudinem hactenus in Regno uſitatam, & quia Dominus Rex nuper providit quod appellationes non fiant vel Cauſæ agentur in Curia Chriſtianitatis de iis, quæ a Curiis Regis ibi ſunt demandata, propter multa inconvenientia quæ exinde ſequerentur, & etiam quia Placita de ſucceſſione ita ordinata ſe habent, quod primo per brevia Domini Regis incipere debent in Curia Regis, & de Curia illa, ſi neceſſe fuerit, mitti ad Curiam Chriſtianitatis, & non e converſo, & quia multa Placita & innumerabilia, Temporibus retroactis in Curia Regis placitata, & etiam judicia ſuper eiſdem, reddita irritarentur, & reverſarentur ſi Bulla iſta procederit &c. therefore diſallow'd.

(K) *How* it ſhall be *tried*; and how not; *and by whom.*

But ſpecial Baſtardy ſhall be try'd per Pais,

1. GEneral Baſtardy ought to be tried by the Biſhop, and not per Pais. 18 E. 4. 30.

and not by Certificate of the Ordinary. Br. Baſtardy, pl. 18. cites 21 E. 3. 39. ——— In Baſtardy it was in Iſſue if he was born before the Eſpouſals, or not, and it was tried per Pais, and ſo

ſee that this is *ſpecial Baſtardy*, which ſhall be always tried per Patriam, and general Baſtardy by Certificate of the Biſhop. Br. Baſtardy, pl. 17. cites 38 E. 3. 39 E. 3. 31. and 38 Aſſ. 24.——See Tit. Trial (P) pl. 1. 22. 23. 32. and the Notes there.

2. The Ordinary cannot try Baſtardy, without a Command by the King's Writ, upon a Suit in a temporal Court. Da. 1. Baſtardy 55. 39 E. 3. 31. b. per Thorpe. *Before the Stat. of Merton, cap. 8. gave the King's Writ of Baſtardy, it was uſed*, in this Caſe, *to write to the Biſhop to certify* upon this Plea, and the *Prelates anſwered, that they could not anſwer to this Writ* &c. and therefore always ſince it has been uſed to inquire this Iſſue per Patriam, and e contra where Baſtardy is alleged generally, and ſo *ſpecial Baſtardy* ſhall be tried *per Pais*, and *general Baſtardy by the Biſhop*; Per Scroope. Br. Baſtardy, pl. 29. cites 11 Aſſ. 20.

3. When Iſſue is joined upon Baſtardy before it ſhall be awarded to the Ordinary to be tried, Proclamation ſhall be made thereof in the ſame Court, and after the Iſſue ſhall be certified into Chancery, where Proclamation ſhall be made once in every Month, for 3 Months, and after the Chancellor ſhall certify it to the Court where the Plea is depending, and after it ſhall be proclaimed again in the ſame Court, that all thoſe, whom this Plea concerns, ſhould go to the Ordinary to make their Allegations. 10 H. 6. cap. 11.

4. If the Biſhop certifies Baſtardy, unleſs this comes in at the Miſe of the Parties, * [and by Proceſs] this is nothing to the Purpoſe. 7 H. 6. 32. b. * So it is in the Year-Book.

5. In Aſſiſe it was agreed, that the *Aſſiſe may find Baſtardy* by Verdict againſt the Plaintiff or Defendant, and this in their Verdict *at large*, as it ſeems; but if Baſtardy be pleaded, then it ſhall be ſent to the Biſhop to certify it; Quod Nota, Diverſity. Br. Baſtardy, pl. 28. cites 8 Aſſ. 5.

6. Mortdanceſtor, the Tenant pleaded Baſtardy in the Demandant, this ſhall be certified *by the Biſhop of the Dioceſe where the Writ is brought, tho' the Demandant ſaid that Mulier, and born in another Dioceſe*; for he may bring his Proofs there. Br. Baſtardy, pl. 33. cites 25 Aſſ. 7.

7. Every Baſtardy, General or Special, *in Aſſiſe* alleged, ſhall be tried by Aſſiſe by the Law; Per Tank. Br. Baſtardy, pl. 36. cites 28 Aſſ. 24. In *Aſſiſe* where Iſſue is not joined of Baſtardy, but the Aſſiſe *awarded at large*, there they ſhall not write to the Biſhop to certify it, but it ſhall be tried by the Aſſiſe. Br. Baſtardy, pl. 38. cites 39 Aſſ. 4.

8. In Aſſiſe, *they were at Iſſue upon ſpecial Baſtardy*, and it was try'd by the Aſſiſe; and per Tank. every Baſtardy pleaded in Aſſiſe ſhall be try'd per Pais, and becauſe the Court ſaw by Inſpection that the *Tenant was within Age*, ſo that the Matter alleged by the Plaintiff could not be a Nient dedit of him, the Aſſiſe was taken at large, and *firſt inquired of the Bar, and* further *of the Seiſin and Diſſeiſin*, and found for the Plaintiff, and he recovered. Br. Aſſiſe, pl. 351. cites 38 Aſſ. 24.

9. Where Writ is to the Biſhop to certify whether Baſtard or Mulier, the *Parol is without Day till the Baſtardy be certified*; for the *Biſhop is Judge, and ſhall not be compelled to any Day certain.* Br. Baſtardy, pl. 16. cites 40 E. 3. 39. and 38 E. 3. li. Aſſiſe 30.

10. In Aſſiſe, Baſtardy was tried *by the Biſhop, in whoſe Dioceſe the Land is*, and *in Time of the Vacation of the Biſhoprick*, Writ ſhall iſſue to the *Guardian of the Spiritualties* to certify it; Quod Nota. Br. Baſtardy, pl. 39. cites 41 E. 3. 29.

11. In Formedon, Baſtardy was alledged *in one who was Meſne in the Conveyance*, by which the Demandant claimed, and becauſe he *was dead, and* was *no Party to the Writ*, it was tried *per Pais*, and not by Certificate of the Biſhop. Br. Baſtardy, pl. 3. cites 42 E. 3. 8.

12. In Aſſiſe the *Tenant was alledged to be born at S. in the ſame County, out of any Eſpouſals*, where he intitled himſelf as Heir; and the *Tenant ſaid that he was born within the Eſpouſals at D. in a Foreign County*, and it was tried by the Aſſiſe. Br. Baſtardy, pl. 40. cites 46 E. 3. 3.

13. In *Cui in Vita* by the Heir the *Tenant pleaded Baſtardy*; and the *Demandant alledged ſpecial Eſpouſals in another County*; Judgment if he ſhall be received to alledge Baſtardy; and the *other alledged that this amounted to Mulier*, priſt quod non, and *Writ was awarded to the Biſhop where the Land was*, and *not where the Eſpouſals were alledged.* Br. Baſtardy, pl. 7. cites 7 H. 4. 7.

(L) In what *Actions* it may be tried. [*And how it muſt be certified.*] pl. 3.

* Br. Baſtardy, pl. 14. cites 14 H. 4. 37 [but it ſhould be (36) as in Roll] S. C. ſays Nota by Hull, that Baſtardy is no Plea in Treſpaſs, but ſhall conclude to the Franktenement; for if this ſhall be a Plea, then Writ ſhall be awarded to the Biſhop for the Trial thereof, which never was ſeen in Treſpaſs; quod non negatur.——But ibid. pl. 41. cites 3 E. 4. 11. that in Treſpaſs they were at Iſſue upon Baſtardy, and it was tried by Certificate of the Biſhop. Quod nota in Action Perſonal.—— And ibid. pl. 42. ſays Note, that at this Day Iſſue taken of Baſtardy in Action Perſonal ſhall be tried by the Biſhop, as well as in Plea Real; and yet *in ancient Times* it was tried *by the Country in Action Perſonal*, and *by the Biſhop in Action Real.* Br. Baſtardy, pl. 42. cites 4 E. 4. 35.

1. IT may be tried by the Biſhop in an Action of Treſpaſs, or other Perſonal Action, as well as in Actions Real. * 14 H. 4. 36. || 19 H. 6. 17. b.

|| Fitzh. Trial, pl. 6. cites S. C.—— See Tit. Trial (P) pl. 30 & 31. S. C. and the Notes there.

* Br. Baſtardy, pl. 35. cites S. C. —Br. Certificate de Eveſque, pl. 27. cites S. C.——See Tit. Trial (E. a) pl. 1. S. C. and the Notes there.

2. It may be tried in an Aſſiſe as well as in a Præcipe quod reddat, or other Writ in the Right. 38 E. 3. 27. adjudged, * 38 Aſſ. 14. adjudged, 27 E. 3. 82. b.

Br. Certificate de Eveſque, pl. 1. cites S. C.

3. Baſtardy ought to be certified under the Seal of the Ordinary; for it is not ſufficient to be certified under the Seal of the Commiſſary. 20 H. 6. 1.

4. Baſtardy was *certified in a Replevin*, and therefore it ſeems that the Action is in the Realty, and the Certificate of Mulier between the Plaintiff in the Aſſiſe and a Stranger in the Replevin was a good *Eſtoppel between the Tenant in the Aſſiſe, who was a Stranger, and the Plaintiff* in the Aſſiſe. Br. Baſtardy, pl. 19. cites 7 H. 6. 37.

5. Where a Man is a Mulier, there muſt be a ſpecial Baſtardy certified; for that the Biſhops own ſuch a one to be legitimate; Per Holt Ch. J. 5 Mod. 420. Mich. 10 W. 3.

Fol. 362. (M) *Who* ſhall take *Advantage of the Trial* of Baſtardy. And of what Trial, and e contra.

* Br. Baſtardy, pl. 43. S P. cites

1. IF a Man be certified a Mulier by the Ordinary, this is not any Eſtoppel, becauſe he may be a Baſtard by our Law notwithſtanding; for if he was born before Marriage, and the Marriage was had

had afterwards, the Ordinary will not certify him to be a Baſtard, but a Mulier. * 18 E. 4. 29. b. 30. † 11 H. 4. 84. 18 E. 3. 33. b. 34. adjudged. 30 E. 3. 8. b. 26 Aſſ. 64. ‡ 7 H. 6. 37. But Judgment ſhall be given in the Action in which the Certificate is made, according to the Certificate, || 40 E. 3. 40. 30 E. 3. 8. b. adjudged. 18 E. 3. 34. admitted, and 34. thereafter adjudged. Contra ¶ 7 H. 6. 37. b.

18 E. 4. 28. [but miſprinted for 29 b. 30.]

† Fitzh. Baſtardy, pl. 6. cites S. C. —Br. Baſtardy, pl. 12. cites S. C.

‡ Br. Baſtardy, pl. 19. cites S. C.——Br. Certificate de Eveſque, pl. 9. cites S. C.——Br. Eſtoppel, pl. 78. cites S. C.——Fitzh Eſtoppel, pl. 21. cites S. C.

|| Br. Baſtardy, pl. 2. cites 40 E. 3. 39. S. C.

¶ Br. Eſtoppel, pl 78. cites S. C.——Br. Certificate de Eveſque, pl. 9. cites S C.——Br. Baſtardy, pl. 19 cites S. C.——Fitzh. Eſtoppel, pl. 21. cites S. C.——Br. Baſtardy, pl. 12. cites S C accordingly per Tirwhit, and therefore a *Stranger to this Record may baſtardize him.*——*Contra if* he had been *certified Baſtard* by the Biſhop; this *ſhall eſtop Privies and Strangers*; for he who is Baſtard by the Eccleſiaſtical Law is Baſtard by our Law. Ibid.——*But* Brooke ſays *Quære* of this Opinion of Mulierty; for Brooke ſays it ſeems that the Ordinary ſhall not certify at the Common Law by the Law of the Church, but by the Law of England. And Rolf relinquiſh'd the Eſtoppel, and pleaded that he was born within the Eſpouſals at D. and ſo to Iſſue. Ibid.——In Aſſiſe Baſtardy was *certified in a Replevin.* The Certificate of Mulierty between the Plaintiff in the Aſſiſe and a Stranger in the Replevin, was a good *Eſtoppel between the Tenant in the Aſſiſe, who was a Stranger, and the Plaintiff* in the Aſſiſe; and Brooke ſays ſee here that the Opinion of Tirwhit is not Law; for here it was adjudged a good Eſtoppel. Br. Baſtardy, pl. 19. cites 7 H. 6. 37.

Writ of *Entry ſur Diſſeiſin* by the Heir. The *Tenant ſaid that he was a Baſtard*, and the other ſaid that Mulier, and not Baſtard, by which it was ſent to the Biſhop to certify, and Day given to the Parties till now, and the *Biſhop certified that Mulier*, and the *Demandant pray'd Seiſin* of the Land, *and had it*, notwithſtanding that Fenner alledged that the Uſage had been in all Actions, except Dower, that the Parol ſhall be put without Day, where it is ſent to the Biſhop to certify &c. and the Plea to be revived again by Re-ſummons; and yet non allocatur, but Judgment ut ſupra. Br. Baſtard, pl. 2. cites 40 E. 3. 39.

In Mordanceſtor the *Tenant ſaid that the Demandant was born out of any Eſpouſals.* The Demandant ſaid that this is Tantamount as Baſtard, whereas he has here Certificate of the Biſhop that he is Mulier, and yet the Tenant had the Plea. Quære. Br. Baſtardy, pl. 29. cites 11 Aſſ. 20.

2. If between Strangers another be tried a Baſtard per Pais, this will not bind him who is ſo tried, becauſe he is a Stranger to the Trial, and cannot have an Attaint. 40 E. 3. 37. b. Doctor & Student 68. b.

Br. Trial, pl. 9. cites 41 E. 3. 37. [and ſo are all the Editions, but miſprinted, and ſhould be 40 E. 3. 37. b. pl. 11. by Finchden obiter.]——Fitzh. Trial, pl. 44. cites S. C. but S. P. does not appear there.

3. But otherways it is of him that is privy to the Attaint. Doctor & Student 68. b.

4. If a Man be certified a Baſtard by the Ordinary, he ſhall be perpetually bound againſt all the World to avoid [have] a contrary Certification, and becauſe it is the higheſt Trial thereof. Doctor & Student 68. and ſhall continue of Record. * 40 E. 3. 38. ‡ 11 H. 4. 84.

* Fitzh. Trial, pl. 44. cites S. C. but S. P. does not appear there.—— Br. Trial, pl 9. cites 41 [but ſhould be 40] E. 3. 37. b. S. C. & S. P.

† Fitzh. Baſtardy, pl. 6. cites S. C.——Br. Baſtardy, pl. 12. cites S. C.—— S. P. by Littleton. Br. Baſtardy, pl. 43. cites 18 E. 4. 28. [29 b. 30.]

5. And ſo if the Party, who is certified a Baſtard, is a Stranger to the Suit. 11 H. 4. 84.

Fitzh. Baſtardy, pl. 6. cites S. C. ——Br. Baſtardy, pl. 12. cites S. C.

6. [So] If a Man be certified a Baſtard by the Ordinary in a Perſonal Action, he ſhall be bound perpetually, as well as in Actions Real. 19 H. 6. 18. b.

Fitzh. Trial, pl. 6. cites Mich. 10 H. 6. 17. S. C.——

Br. Baſtardy, pl. 20. cites S. C.——Br. Villeinage, pl. 20. cites S. C.——Br. General Iſſue, pl. 13. cites S. C.

7. If

See pl. 1. and the Notes there. * There is no ſuch Folio in the Year-book.

7. If a Man be certified a Mulier by the Ordinary, in an Action between himſelf and J. S. this ſhall not bind Strangers thereto; but they may ſay that he is a Baſtard. 23 Aſſ. 5. adjudged. 27 E. 3. * 82. b. adjudged.

(N) At what *Time* the *Trial ſhall bind.*

1. If a Man be certified a Baſtard, yet this ſhall not bind before Judgment given thereupon, in an Action between him and the other. 18 E. 3. 34.

In Treſpaſs, they were at *Iſſue upon Baſtardy*, and it was *tried by Certificate of the Biſhop*, quod Nota, *in Action perſonal*; and by the beſt Opinion, *after the Certificate* the Plaintiff may be *nonſuited*; and then per Moile J. this *Certificate is no Concluſion* at all of the Baſtardy, no more than after Diſcontinuance. Br. Baſtardy, pl. 41. cites 3 E. 4. 11.

2. If the Defendant be certified a Baſtard by the Ordinary, yet the Certificate ſhall loſe its Force, if the Plaintiff be nonſuit after; for then the Certificate is not of Record. 18 E. 3. 34.

3. But after Certificate of Baſtardy in the Tenant, if the Tenant dies, by which the Writ abates, yet the Certificate ſhall ſtand in Force. 18 E. 3. 34.

(O) Baſtardy proved. When.

For by the Law of England, by Continuance of Poſſeſſion, and *dying peaceably ſeiſed*, he is adjudged Heir to his Father; and by his dying without Iſſue, the Mulier ſhall have the Land. Ibid. cites S. C.

1. *JUSTUM non eſt aliquem antenatum Mortuum facere Baſtardum, qui toto Tempore ſuo pro legitimo habebatur.* 8 Rep. 101. in Sir Richard Lechford's Caſe, cites 13 E. 1. Tit. Baſtardy, 28.

2. A Man *had Iſſue by his Feme and was divorced*, and after he *took another Feme and had other Iſſue*; the *firſt Iſſue ſued in the Spiritual Court to repeal the Divorce after the Death of his Father, and to baſtardize the Iſſue of the ſecond Feme*, and he had Prohibition; for the Title and the Deſcent were compriſed in the Libel as was agreed there. Br. Prohibition, pl. 9. cites 12 H. 7. 24.

3. But a *Sentence given for a Marriage* may be *repealed after the Death of the Parties*, and ſo ex Obliquo baſtardize the Iſſue. Jenk. 289. pl. 26.

4. The Rule that a Man ſhall not be baſtardized after his Death, holds only in Caſe of Baſtard Eigne and Mulier Puiſne, viz. ſuch a Baſtard as is born before the Eſpouſals of a Father and Mother, who marry afterwards, and ſaid that the Rule extended to no other; Per Cur. 1 Salk. 120. pl. 1. Hill. 6 W. 3. B. R. Pride v. Earl of Bath & Mountague.

(P) Where

(P) Where they ſhall take by Grant or Deviſe.

1. LORD Powis gave certain Lands to *Thomas Gray his Son, by him begotten on the Body of Jane Orwell*, yet it was a good Purchaſe and Gift to Thomas Gray, becauſe it was *his known Name*; cited by Dyer J. 3 Le. 49. pl. 69. D. 313. b. pl. 93. Trin. 14 Eliz. Gray's Caſe, S. C. & S. P. admitted.——S. C. cited per Cur. 6 Rep. 77. a.——And. 70. pl. 143. Mich. 22 & 23 Eliz. S. P. obiter.

2. H. the 8th ſeiſed of certain Lands, by Letters Patents granted them to T. Holt for Life, *Remainder to John Holt his Son* who was in Truth a Baſtard. Dyer thought it a good Purchaſe in Law, as well in the Caſe of the King as of a common Perſon, and if the King had granted the Land to *John Holt*, without naming him Son, the ſame had been a good Purchaſe; but if he had named him *John the Son of Thomas* without giving him a Surname, there the Purchaſe ſhould not be good if he were a Baſtard; becauſe he hath not *Nomen Cognitum*, as where he hath a Surname. 3 Le. 48. pl. 69. Mich. 15 Eliz. C. B. Anon. A Remainder limited to R. Son of R. is good though he be a Baſtard, if in vulgar Reputation and Conuſance he is known by ſuch Name.

6 Rep. 65. a. 67. a. cites 39 E. 3. 11.——A Baſtard ſuppoſed to be the Son of ſuch a Father, is not in Law his Son; but when he has the Reputation and Pretence of being his Son, that Pretence is enough to give the Law ſuch Notice of him, as to enable him to purchaſe by that Name; Per Holt Ch. J 7 Mod. 109. Mich. 1 Ann. B. R.

3. L. made a Feoffment to his own Uſe, and after deviſed that his Feoffees ſhould be ſeiſed to the Uſe of his *Daughter A.* who in truth was a Baſtard, and yet this is a good *Deviſe* of the Land by Intention; for by no Poſſibility they can be ſeiſed to her Uſe; cited by Doderidge. Poph. 188. as the Caſe of 15 Eliz. D. 323. D. 223. pl. 29. Paſch. 15 Eliz. Lingen's Caſe.——S. C. cited Cro. E. 358. in pl. 17.——Jenk. 239. pl. 21. S. C. and if the Will had directed an Eſtate to be made by the Feoffees to A. his Daughter, it had been good becauſe of the plain Intent of Teſtator.

4. A Man *cannot raiſe an Uſe to* a Baſtard by ſuch Name, though it comes in the Deed *by Way of Remainder*; agreed. And. 79. pl. 145. Trin. 19 Eliz. Gerard v. Worſely. Conſideration of *natural Affection*, will not raiſe an Uſe to a Baſtard; for though there is natural Affection between them, yet the *Raiſing the Uſe is a Conſtitution of the Law*, and therefore the Uſe ſhall never ariſe. Jenk. 47. pl. 90.——D. 374 pl. 16. S. C.

5. If A. has Iſſue a Baſtard and Mulier both named John, and he *gives to his Son called John*, the Baſtard ſhall take; but if to *his Son John*, the Mulier ſhall take; Per Clark J. Mo. 230. pl. 367. Hill. 29 Eliz. in the Exchequer.

6. If the *Iſſue of* a Baſtard *purchaſe Land, and dies without Iſſue.* Though the Land cannot deſcend to any Heir of the Part of the Father, yet to the Heir of the Part of the Mother it may; ſo if the Baſtard was *attainted*; for the Heirs of the Part of the Mother, make not any conveyance by the Baſtard. Arg. Noy, 159. in Caſe of the King v. Boraſton & Adams.

7. A makes *Feoffment to the Uſe of* himſelf for Life; after to ſuch Iſſue or Iſſues of the Body of M. F. from elder to elder, as were *reputed to be begotten by A.* whether lawful or unlawful; and held by all but Popham, that it is a good Remainder limited to a Baſtard; for a Son in Reputation ſuffices to make him a Purchaſor, cites 14 Eliz. D. 313. and though In the ſame Caſe reported by Croke, the Limitation was to himſelf for Life;

then of such Iſſue &c. who by common Suppoſition or Intendment *ſhould be reputed to be begotten* &c. no Iſſue being born till afterwards; though 22 Eliz. it was held that a Man cannot by Covenant raiſe a Uſe to a Baſtard, yet by Way of Limitation of Uſe on a Feoffment he may. Noy, 35. Bladwell v. Edwards.

Gawdy thought the Limitation good, though the Iſſue was *not in Eſſe* at the Time. Popham agreed that ſuch a Remainder to a Baſtard in Eſſe might be good, becauſe he is a *Perſon known*, and may be in Time reputed the Son of another, but thought it could not be good to a Baſtard before he is born, and he cannot gain the Reputation or Name at the Inſtant of his Birth, and if he cannot take then, he never ſhall after; for the Law will not expect longer, and the Limitation to one and the Iſſues of his Body, is always to be *intended lawful Iſſue*; and the Law will never regard any other. Fenner J. inclined to that Opinion, and ſaid they had conferred with divers Juſtices, and that the greater Opinion of them was, that a *Remainder to his firſt reputed Son or Baſtard* is not good; for the Law favours not ſuch a Generation, nor will ſuffer ſuch Limitation for the Inconveniencies that might ariſe thereupon. Cro. E. 509. pl. 34. Mich. 38 & 39 Eliz. B. R Blodwell v. Edwards. — Mo. 430. pl. 602 S C.

A Woman might *give Lands in Frank marriage* with her Baſtard. Noy, 35. cites Plowden.

8. If an Obligation be made to *J. S. Filio & Hæredi G. S.* where indeed he is a Baſtard; yet this Obligation is good. Bacon's Elements, 91.

9. Deviſe to a Son who is a *reputed Son* is good; Per Newdigate J. 2 Sid. 149. cites a Caſe in 1655. Sir Jo. Mitchel v. Sayers.

10. Illegitimate Son may *take by the Name* of the repured Father after he has acquired a certain Name *by Reputation*; Per Raymond J. Raym. 412. Mich. 32 Car. 2. B. R. obiter.

11. In Caſe of a Baſtard the *reputative Name* muſt be *ſhewn* to make the *Grant good*. Arg. Parl. Caſes 222. in Caſe of the King v. Biſhop of Cheſter and Pierce.

12. *A. deviſed* 3000 *l. to all the natural Children of B his Son by J. S.* Some were born before, and ſome after. Ld. C. Parker decreed, that the natural Children born after the Will ſhall not take Share of the 3000 l. for they cannot take till they have gain'd a *Name by Reputation*, and therefore if I *grant to the Iſſue of J. S. legitimate or illegitimate*, yet a Baſtard ſhall not take. Wms's Rep. 529. Hill. 1718. Metham v. the Duke of Devon.

For more of Baſtard in General, See **Deſcent, Grants, Heir, Trial,** and other proper Titles.

(A) Berwick.

Debt was brought on a Bond made at Berwick, and it was adjudged, that the Plaintiff *Nil capiat per breve*, becauſe the Court here had no Juriſdiction. Arg. Godb 387. cites 2 E. 3. Obligation 15.

1. BErwick is not *part of England*, nor governed by the Laws of England. 7 Rep. 23. b. Trin. 6 Jac. in Calvin's Caſe.

2. *Habeas Corpus* was awarded to the Mayor of Berwick, and he was fined and impriſoned for his Contempt in refuſing to obey it. Cited Cro. J. 543. pl. 3. Mich. 17 Jac. B. R.

3. *Co-*

3. *Covenant* to repair Houſes in Berwick was *tried* in Northumberland. Lev. 252. Mich. 20 Car. 2. B. R. Criſpe v. the Mayor &c. of Berwick upon Tweed. Raym. 173. S. C. reſolved for the Plaintiff. — Mod. 36. pl. 88. S. C. adjornatur. ——— Sid. 381. pl. 14. Jackſon &c. v. Mayor of Berwick, adjudged, on great Debate, for the Plaintiff. —— Vent. 58. S. C. the Court ruled the Venire to be well awarded.

4. Berwick *is part of Scotland, and bound by our Acts of Parliament*, becauſe conquered in E. 4th's Time; but the Courſe is to *name it expreſsly*, becauſe it is out of the Realm, and not like to Wales. Arg. Vent. 59. Hill. 21 Car. 2. B. R. in Caſe of Criſp v. the Mayor of Berwick.

5. Berwick upon Tweed is *not within any County*, has *no Sheriffs*, the *Mayor* there *makes, executes, and returns all Proceſs*, and, generally, their Suits there are commenced and ended in their own Courts; *but in a Cauſe of Land* there, if commenced here, there is a Suggeſtion on the Roll, that *Breve Domini Regis ibi non currit*, as it is in Wales, and on this Reaſon an *Attachment* could not be granted againſt the Mayor, becauſe no Sheriff to execute it; but *a Tipſtaff* was ſent. 2 Show. 365. pl. 355. Trin. 36 Car. 2. B. R. the Mayor of Berwick's Caſe.

For more of Berwick in General, See **Trial**, and other proper Titles.

Beyond Sea.

(A) What is. And the Effect of Perſons being beyond Sea.

1. BEing beyond Sea will *excuſe* an Heir not coming in to be admitted to a * *Copyhold*; ſo from *Outlawry*; ſo from a *Deſcent that tolls his Entry*; ſo from a *Non-claim on a Fine* by the Common Law; Per 4 Juſtices againſt one. Cro. J. 226. pl. 1. Mich. 7 Jac. B. R. Underhill v. Kelſey. 8 Rep. 99. a. Sir Richard Lechford's Caſe, S. C. adjudged —— S. P. held Cro. J. 101. pl. 32. Mich. 3 Jac. B. R. Whitton v. Williams ——— But going beyond Sea after the firſt Proclamation made will not excuſe the Heir of a Copyhold. Ibid. 100. b.

It was agreed by the Counſel for the Defendant, that if the going beyond Sea had been after the Deſcent, it would have bound the Heir. Cro. J. 101. pl. 32. in S. C. of Whitton v. Williams. ——— So if a Man be diſſeiſed, and afterwards goes beyond Sea, and a Diſcent is caſt afterwards, this ſhall toll his Entry. 8 Rep. 100. b. cites Litt. S. 440. * Cited 3 Mod. 224.

2. A. having Iſſue two Sons, B. and C. Infants, deviſed to B. 100 l. and made D. Executor. B. about 5 *Years ſince went beyond Sea*, leaving a Note that he would not return in 7 Years, but it is not known if he be living or not. C. as next of Kin, ſuggeſting B. to be dead, *takes out Adminiſtration*, and brings a Bill for the Legacy. Decreed the 100 l. and Intereſt ſince B. went, to be paid to C. — C. giving Security to repay it to B. if he ſhould ever return, which Security is to ſtand for 3 Years,

3 Years, and no longer, but the Plaintiff's own Security to ſtand for ever. Fin. R. 419. Hill 31 Car. 2. Norris v. Norris.

3. *Executor in Truſt* being gone a Soldier to the Indies, and the Plaintiff making Affidavit of it, that he knew not if he was living or dead, nor where to find him to *ſerve him with Proceſs*, ordered on Motion, that tho' he was *a neceſſary Party Defendant*, the Plaintiff might proceed againſt the other Defendants without Prejudice, for not bringing him to Hearing, and Plaintiff had a Decree. Per Jefferies C. Vern. 487. pl. 473. Mich. 1687. in a Note at the End of the Caſe of Walley v. Whaley, Gaudy and Warner.

4. *Dublin*, or any other Place in Ireland, is beyond Sea, within the Meaning of that Clauſe in the *Statute of Limitations*; Per Holt Ch. J. Show. 91. Hill. 1 W. & M. Anon.

The Defendant's being beyond Sea does not hinder or excuſe the Plaintiff for not ſuing within the 6 Years. Show. 341. Mich. 3 W & M. Cheveley v. Bond.——But now 4 & 5 Ann. cap. 16. alters the Law in this Caſe of the Defendant's being beyond Sea.——And ſee 5 Geo. 2. cap. 25. as to Proceedings in Chancery in ſuch Caſes.

5. *Defendent* being beyond Sea did not avoid the *Statute of Limitations*. Show. 98. Trin. 2 W. & M. Hall v. Wyborn.

But if there had been a *General Letter of Attorney* to one to appear in and defend Suits, the Court would have ordered ſuch Attorney to appear for the Principal, and that Service on him ſhould be good Service. Ibid.

6. A. who was *Reſident at Tunis*, *ſued J. N. at Law*, and *J. N. brought a Bill againſt A.* and had an Order, that *Service on Defendant's Attorney* ſhould be good; but Defendant's Attorney ſhall not be allowed to anſwer for the Defendant without Oath, tho' it was inſiſted that no Commiſſion could be ſent to Tunis, and that it was the ſame as if the Defendant lived in an Enemy's Country; but per Cur. the Engliſh have a Conſul at Tunis, and Commiſſions have gone there by way of Leghorn, and ſo denied the Motion. Wms's Rep. 523. Mich. 1718. Anon.

(B) Of Things done beyond Sea. And Pleadings.

In *Debt upon an Obligation*. the *Defendant ſaid that it was made Ouſter le Mere*, and pray'd that the Plaintiff be examined, and it was denied per Cur. For it was ſaid that becauſe it *bore Date at large*, without Place certain, it ſuffices, tho' it was made at Rome, or other Place, and may be alledged to be made here. Br Examination, pl. 31. cites 21 E. 4. 74.——Windham J. ſaid that a Bond *dated at Paris in France* may be laid at Paris in France *in Iſlington*; but where it is *dated at Paris in France*, *within the Kingdom of France*, it is not triable at all; and that ſo it had been held by good Opinion. 2 Keb. 315. pl. 26. Hill. 19 & 20 Car. 2. B. R. in Caſe of Freeman v. King.

1. IF an Obligation bears *Date at Cane in Normandy*, the Obligee may bring Action in England, and *declare in Cane in the County of S. in a Place called Normandy*. Quod nota bene. Br. Obligation, pl. 87. cites 48 E. 3. 2.

S. P. and the Defendant ſaid that *No ſuch Place called B in the County of Kent*; and therefore Brooke ſays it ſeems it had been good to have counted at a Place called B *in ſuch a Vill in the County of Kent*. And where the Indenture was

2. Debt upon an *Obligation*. The *Plaintiff counted that it was made at B in Kent*, *where*, in Truth, *B. is in Normandy ultra Mare*, and it was for him to ſerve in the War in France; where it was ſaid per Belk. that Cauſes of War are determinable before the Conſtable and Marſhal; but there it was admitted, that of *Deed or Contract made in England* for *Service to be done beyond Sea*, *or upon the Sea*, As to go to Rome, or to ſerve as a Mariner &c. the Action lies in England. Br. Juriſdiction, pl. 15. cites 48 E. 3. 3.

was *to ſerve in the War in France*, the Party may *ſhew how he ſerved there*, and the *other may alledge Payment without ſhewing Acquittance*. Brooke ſays, Quære if the Defendant ſays that the Plaintiff did not ſerve him, Prout &c. where this ſhall be try'd, by reaſon that the Act ſhall be done ultra Mare. Br. Dette, pl. 46. cites S. C.——Br. Lieu, pl. 16. cites 48 E. 3. 2. 3. S. C.

3. A *Bond made in France* is ſuable in England. Br Obligation, pl. 7. cites 20 H. 6. 23. and ſays this ſeems [to be] where it does not bear Date at any Place certain. So a *Bond bearing Date* at Amiens in France may be ſued in England. Jenk. 10. pl. 18. cites 6 Rep. Dowdale's Caſe.——Where the Plaintiff declared on a Bond, and ſet forth that it was made at Bourdeaux in France, this Court of B. R. never had any *Juriſdiction*, becauſe the Matter did ariſe in a Foreign Nation Carth 12. in Caſe of Jennings v Hankyn.——Jenk. 31. pl. 60. makes the Difference between Amiens *in France* and Amiens *in Regno Franciæ*; and that in the laſt Caſe it cannot be ſued in England.

Upon a Bond which bears Date in Normandy a Man ſhall not have Action here; but in Caſe of *Will dated there and proved here*, it is good. Arg. Godb. 387, 388. cites Teſtament 16. per Pole.

Generally ſpeaking the Deed, upon the Oyer of it, muſt be conſiſtent with the Declaration; but in theſe Caſes *propter Neceſſitatem*, if the Inconſiſtency be as little as poſſible, it is not to be regarded, As where a *Contract* was *of a Voyage from Fort St. George to Great Britain*, this imports Fort St. George to be different from Great Britain. The Plaintiff declared that the Defendant continued at Fort St. George *in Indibus Orientalibus*; and upon Oyer of the Deed it bore Date at Fort St. George, yet it was adjudg'd for the Plaintiff. 10 Mod. 255. Trin. 13 Ann. B. R. Parker v. Crooke.

But in the Declaration *a Place in England muſt be alledged pro Forma*. 10 Mod. 255. Parker v. Crook.——Co. Litt. S. 440. 261. b. S. P.——Jo. 68. Arg. Godb. 388. cites 1 E. 3. 1. 18. 8 E. 3. 51. and 13 H. 4. 5 & 6. and 6 R. 2. 2. and 20 H. 6. 28. 29. 20 E. 4. 1. 21 E. 4. 22.——Lutw. 950. Davis v. Yale.——Such Place ſhall be intended in England, and Judges ought to maintain the Juriſdiction of the Court, if the Caſe be not evidently out of the Juriſdiction. Lat. 5. in Ward's Caſe.

4. *In Debt upon an Obligation, that the Defendant ſhould ſet over* 18 *d. Wages by the Day of a Spire of Calice*, he *pleaded that he had done it accordingly at Calice in the County of Kent*; and Jenney imparl'd, and therefore it ſeems that upon Obligation made beyond Sea, the Plaintiff may allege the Deed to be made at the ſame Place in ſuch a County in England. Br. Count, pl. 42. cites 15 E. 4. 14.

5. If a Man be bound *to pay Money*, or ſuch like, *beyond Sea*, the Deed is ſingle, and the Condition void, becauſe it cannot be try'd in England; and where a Man pleads a Plea triable beyond Sea, this is no Plea, and the other may demur. Br. Conditions, pl. 170. cites 21 E. 4. 10. Per Brian Ch. J.

6. A *Releaſe* made beyond Sea is void. Br. Trials, pl. 58. cites 21 H. 7. 33. per Fineux Ch. J.

7. Action upon the *Caſe* was brought in London by A. B. *that whereas he was poſſeſs'd of certain Wine*, and other Stuff, *and ſhew'd certain in ſuch Ship ad Valentiam* &c. *and did not ſhew Place certain where he was thereof poſſeſs'd*, and yet well; *and alledged that the Defendant ſuch a Day, Year, and Place in London promiſed for* 10 *l. that if the ſaid Ship and Goods did not come ſafe to London, and be landed there*, that then *he ſhall ſatisfy to the Plaintiff* 100 *l.* and that after the *Ship was robb'd in the Trade upon the Sea*, by which he brought the Action for not ſatisfying, and the *Truth was that the Bargain was made beyond Sea*, and not in London; but in Action upon the Caſe upon Aſſumpſit &c. which is not local, the Place is not material no more than in Debt; for he alledged that the ſaid Goods in the Pariſh of St. Dunſtan in the Eaſt, London, before they were put to Land or diſcharged, were carried away by Perſons unknown &c. and the Action lies well in London, tho' they were loſt upon the High Sea. Br. Action ſur le Caſe, pl. 107. cites 34 H. 8.

8. *Ouſter le* Mere is a good Plea *upon the Statute of* 23 *Eliz.* Skin. 99. Hill. 35 Car. 2. B. R. in Caſe of the King v. Hurſt.

9. A *Fine was levied and acknowledged at Orleans* in France, and was certified and allow'd for good by the Common Law here in England. Godb. 262. pl. 359. Mich. 10 Jac. C. B. Coke Ch. J. cites it as allowed for good Law in Sir Robert Dudley's Caſe.

10. No *Replevin* lies for Goods taken beyond the Seas, tho' brought hither by the Defendant afterwards; per Pollexfen Ch. J. Show. 91. Hill. 1 W. & M. Nightingale v. Adams.

The Plaintiff might have declared that the Defendant *apud Fort St. David's* in the *Eaſt-Indies, viz. apud London. in Paroch. &c.* For that was only uſing *London &c.* for a Place of Trial.——10 Mod. 255, 256. Parker v. Crook.

11. If the *Contract* be *laid in London*, and a *Collateral Matter*, or the Thing contracted for, be *done beyond Sea*, you need not alledge it done here *in Warda de Cheap*; per Cur. Show. 348. Paſch. 4 W. & M. Mudge v. Bridges.

For more of Beyond Sea in General, ſee **Evidence, Trial,** and other Proper Titles.

Bills of Exchange, Notes &c.

(A) What are Bills of Exchange.

Brownl. 102. S. C. but ſeems only a Tranſlation of Yelv.

1. DEBT againſt a Merchant upon a *Bill* by him, *payable at the Feaſt of the Purification call'd Candlemas-Day*; and after Judgment for the Plaintiff it was moved in Arreſt thereof, becauſe Payment at Candlemas is not known in our Law; but Judgment was affirmed; for that amongſt Merchants ſuch Payment is known to be on the 20th [2d of] Feb. and the Judges ought to take Notice thereof for the Maintenance of Traffick. Yelv. 135. Mich. 6 Jac. B. R. Pierſon v. Pounteys.

2 Vent. 292. 295. Sarſfield v. Witherly, in Cam. Scacc. S. C. and Judgment accordingly, and ſo a Judgment in B. R. was reverſed.——Carth. 82. S. C. ſays it was agreed by all the Judgment ſhould be reverſed accordingly; and that this was upon Conſideration had of the Inconveniences which might enſue, and the Suſpicion which might increaſe among Foreign Merchants upon Bills of Exchange, if Perſons who took upon themſelves to draw ſuch Bills ſhould not be liable to the Payment thereof.———Comb. 45. S. C.———Ibid. 152. S. C.

2. A *Gentleman travelling beyond Sea* for his Education, and who never was a Merchant, draws a Bill. He is by drawing ſuch a Bill become a Trader, and within the Cuſtom of Merchants, as to Bills of Exchange. Show. 125. Mich. 1 W. & M. in Cam. Scacc. Witherley v. Sarsfield.

3. Goldſmiths Bills are govern'd by the ſame Laws as other Bills of Exchange, and every Indorſement is a new Bill; per Holt Ch. J. 1 Salk. 132. Hill. 5 W. & M. in B. R. Hill v. Lewis.

Skin. 398. pl. 32. S. C. ann the Court held it to be ill. ——4 Mod. 242. S. C. and the Pleadings;

4. Caſe upon the Cuſtom of Merchants, and declares that the Defendant *per Notam ſive Bill' ſecundum conſuetudinem, promiſed to pay 60 Guineas to the Plaintiff, if the Plaintiff ſhould be married within 2 Months*, and avers that he was married &c. The Defendant demurs. The Court inclined againſt the Cuſtom, this not being by way of Negotiation, but a Note to pay Money upon a *mere Contingency*, which by this Artifice they would make equal with a Bond, and not ſet forth any Conſideration; and they ſaid it is the Duty of the Judges to ſuppreſs

new

new Inventions. Comb. 227. Mich. 5 W. & M. B. R. Pearſon v. Garret. Judgment was given for the Defendant; for to pay Money upon ſuch a Contingency cannot be called Trading, and therefore not within the Cuſtom of Merchants.

5. The *Notes of Goldſmiths* (whether they be payable to Order or to Bearer) are always *accounted* among Merchants *as ready Caſh*, and not as Bills of Exchange. Ld. Raym. Rep. 744. at Guildhall, Trin. 7 W. 3. Taſſwell & Lee v. Lewis.

6. A Goldſmith's Note *indorſed is as a Bill of Exchange againſt the Indorſor.* Ld. Raym. Rep. 743, 744. 7 W. 3. before Holt Ch. J. at Guildhall, Taſſall & Lee v. Lewis.

7. *Bills of Exchange at firſt extended only to Merchant Strangers, trading with Engliſh Merchants*; and afterwards to Inland Bills between Merchants trading the one with the other here in England, and afterwards to all Traders and Negotiators, and *of late Time to all Perſons trafficking or not*; Per Treby Ch. J. 2 Lutw. 1585. Hill. 8 W. 3. in Caſe of Bromwich v. Lloyd.

8. *I promiſe to pay the Bearer* 20 *l. on Demand.* Holt Ch. J. ſeemed to think that this was not a Bill of Exchange; Adjornatur. 12 Mod. 380. Paſch. 12 W. & M. Carter v. Palmer.

9. A Bill drawn *payable to W. R. or Order*, was ruled to be within the Cuſtom of Merchants, and ſuch Bill may be negotiated and aſſigned by Cuſtom, and the Contract of the Parties; and an Action may be grounded on it, though it is no Specialty. 3 Salk. 67. pl. 2. Paſch. 12 W. 3. B. R. Jordan v. Barlow.

10. The Plaintiff brought an Action on a *Note* for Money *payable to the Plaintiff or Order*, and declared on the Cuſtom of Merchants, and laid a general Indebitatus; and on the general Iſſue entire Damages were given. The Court held that this is not with the Cuſtom of Merchants, and being no Specialty, no Action can be grounded upon it. It was then mov'd that being void, no Damages could be intended given for it; ſed non allocatur; for it is not a Matter inſenſible, but void in Law. 1 Salk. 129. pl. 12. Paſch. 1 Ann. B. R. Clerk v. Martin. Plaintiff declared upon a *Cuſtom among Merchants in London* trading there, that if a Merchant ſigned a Note promiſing to pay T. S. or Order ſo much &c. that he becomes bound by the Cuſtom to pay it; this Judgment was by Nil dicit, and Error being brought in B. R. the Counſel would have diſtinguiſhed this from the Caſe of **Clerk v. Martin**, which was laid generally between all Merchants, whereas this is laid as a ſpecial Cuſtom in London, and that confeſſed by the Judgment by Nil dicit; but per Holt Ch. J. this Cuſtom to oblige one to pay by Note without any Conſideration, is void and againſt Law; and Judgment was reverſed. 1 Salk. 129. pl. 13. Paſch. 1 Ann. B. R. Potter v. Pearſon. ——2 Ld. Raym. Rep. 759. S. C. and Judgment reverſed accordingly.——Ibid. 774. Trin. 1 Ann. **Burton v. Sowter**, S. P. and Judgment was ſtayed after a Verdict for the Plaintiff.

A Note was drawn thus. *I promiſe to pay to J. S. or Order, the Sum of* 100 *l. on Account of Wine had from him*; J. S. indorſes the Note to B. who brought an Action againſt the Drawer, and declared on the Cuſtom of Merchants, as on a Bill of Exchange. It was moved in Arreſt of Judgment upon the Authority of **Clerk & Martin's** Caſe; but it was anſwered, that in that Caſe the Drawer brought the Action, whereas here it is by the Indorſee; and that he that gave this Note did, by the Tenor thereof make it aſſignable, or negotiable by the Words (or Order) which amounts to a Promiſe or Undertaking to pay it to any whom he ſhould appoint, and that the Indorſement is an Appointment to the Plaintiff. The whole Court ſeemed clear for ſtaying of Judgment, and at laſt took the Vacation to conſider of it. 6 Mod. 29. Mich. 2 Ann. B. R. Buller v. Crips. ——1 Salk. 130. pl. 16. S. C. but S. P. does not fully appear.——2 Ld. Raym. Rep. 757. S. C. adjudged per tot. Cur. for the Plaintiff.

11. *Pay to me or my Order ſo much*, is a Bill of Exchange if accepted; and this is the only Way to make a Bill of Exchange, without the Intervention of a third Perſon. 1 Salk. 130. pl. 16. Trin. 2 Ann B. R. Butler v. Crips. 6 Mod. 29. Buller v. Crips, S. C. but S. P. does not exactly appear.

12. 3 & 4 *Ann. cap.* 9. *S.* 1. *All Notes in Writing made and ſigned by any Perſon &c. or by the Servant or Agent of any Corporation, Banker &c. or Trader intruſted to ſign ſuch Notes, whereby they or their Agents &c. promiſe to* A Note wrote by the Plaintiff, and ſubſcribed

by the Defendant, is a Note made and ſigned by the Defendant within this Act; for the ſigning or ſubſcribing is the Lien, and the Writing or Making is only the mechanical Part of it. 3 New. Ab. 606. cites Trin. 6 Ann. B. R. Aſh v. Baron.

to pay to any Perſon &c. his &c. Order or Bearer, any Sum mentioned in ſuch Note ſhall be conſtrued to be by Virtue thereof due and payable to any ſuch Perſon &c. to whom the ſame is made payable.

It ws a Queſtion whether on this Statute the *Want of Conſideration* of a promiſſory Note can be given *in Evidence*. Two Judges were of Opinion that it could not, but the two Senior Judges and Ld. King were of a contrary Opinion, and that this Act only turned the Proof upon the Defendant, to ſhew that no Conſideration was given for ſuch Note, which by the Statute is made Evidence, but not concluſive Evidence of the Conſideration. G. Equ. R. 154. Mich. 8 Geo. 1. Brown v. Marſh.

S. C. cited 2 Ld. Raym. Rep. 1396. —S. C. cited 8 Mod. 362. arg'. and admitted by the other Side.

13. A Note was, *I promiſe to pay 50 l. or render the Body of J. S. to Priſon before ſuch Day*; It was adjudged to be no Negotiable Note within the Act of Parliament, and that an Action could not be maintained on that Note within that Law, becauſe the Money was not abſolutely payable, but depended upon a Contingency, whether he would ſurrender J. S. to Priſon or not; cited per Cur. 2 Ld. Raym. Rep. 1362. as Mich. 1 Geo. Smith v. Boheme.

14. *I promiſe to pay to W.* 100 *l. in* 3 *Months after Date, Value received of the Premiſſes in Roſemary Lane, late in the Poſſeſſion of T. R.* Upon a Demurrer the Court held this clearly a promiſſory Note within the Stat. 3 & 4 Ann. cap. 9. and Judgment for the Plaintiff. 2 Ld. Raym. Rep. 1545. Mich. 2 Geo. Burchell v. Slocock.

2 Ld. Raym. Rep. 1361. Jenney v. Herle, S. C. and Judgment in C. B. was reverſed

15. Bill *drawn on a Caſhier of a certain Company*, and for him to pay out of the Caſh of ſuch a Company, is not a Bill of Exchange, and ſuable as ſuch; for a Bill of Exchange is not payable *out of a particular Fund*; and ſo a Judgment in C. B. was reverſed. 8 Mod. 265. Trin. 10 Geo. 1. Jenny v. Heale.

in B. R.——S. C. cited. Arg. 2 Ld. Raym. Rep. 1482.——So a Bill drawn *upon B.* requiring him *to pay C. 7 l. every Month out of the growing Subſiſtance of the Drawer*, and place it to his Account, was reſolved to be no Bill of Exchange; and ſo a Judgment in C. B. was reverſed. 10 Mod. 294. 316. Paſch. 1 Geo. 1. B. R. Joſſelyn v. Lacier.——S. C. cited per Cur. 2 Ld. Raym. Rep. 1362.——S. C. cited Arg. 2 Ld. Raym Rep. 1481. 1482.——So where it was *to pay to C. S. or Order*, 91. 10 s. *as my Quarter's half Pay by Advance from ſuch a Day to ſuch a Day following*, was adjudged in C. B. a good Bill of Exchange; and Judgment affirmed in B. R. 2 Ld. Raym. Rep. 1481. Paſch. 13 Geo. Mackleod v. Snee & al'.—Barnard. Rep. in B. R. 12. S. C.——So where it was to *pay out of the 5th Payment when it ſhould become due*, and promiſed that it ſhould be allowed, it was adjudged that an Action was not maintainable upon this Bill, as a Bill of Exchange. 2 Ld. Raym. Rep. 1563. Mich. 3 Geo. 2. Haydock v. Lynch.

16. *I promiſe to pay* to T. S. 50 l. *if J. S. doth not pay it within ſix Weeks.* Action was brought on this Note, and Verdict was for the Plaintiff; but Judgment was arreſted, becauſe the Drawer was not the original Debtor, but might be a *Debtor on Contingency*. Arg. 8 Mod. 363. Paſch. 11 Geo. 1. cites it as the Caſe of Appelby v. Biddolph.

17. There are *no preciſe Words neceſſary* to be uſed in a promiſſory Note or Bill of Exchange. 2 Ld. Raym. Rep. 1397. Trin. 11 Geo. 1. cites Raſt. 338. and ſays that *Deliver ſuch a Sum of Money*, makes a good Bill of Exchange.

2 Ld. Raym. Rep. 1396. S. C. Powis J. relied much upon the Verdict in this Caſe; but Forteſcue J. Reynolds J. and Raymond Ch. J. were of Opinion, that if the Note was

18. The Indorſee brought an Action againſt the Drawer of a Note, by which he *promiſed to account with T. S. or his Order for* 50 *l. Value received* by him &c. Per Cur. the Statute of 3 & 4 *Ann. cap.* 9. was made for the Eaſe of Trade, and it *is a remedial Law*, for which Reaſon it ſhall be extended as far as poſſible; therefore the Words in this Note, by which the Drawer *promiſes to be accountable to T. S. for* 50 *l. ſhall be conſtrued as a Promiſe to pay* the Money, and the rather, becauſe it is to be accountable to T. S. or his Order, but it is impoſſible for him to account with the Indorſee, therefore it muſt be to pay; beſides this muſt be originally either a Debt or a Truſt, and nothing appears in the Note to make it a Truſt, therefore it muſt be a Debt. As to the Objection that the

the Drawer may be a Factor, and might apply this Money for the Uſe of the Drawee; the Words in this Note will not make him a Factor. (viz) I promiſe to be accountable for ſo much Money &c. For the Money muſt be received to account as well as the Promiſe made to account; therefore the Word accountable in this Caſe, ſhall be taken to pay; and the *Difference is*, when it is to be *accountable for ſo much Money*, *Value received*, and when it is *Value received on Account*, *or*, *to Account*, *or*, *as by Account*, as it is uſual between Merchant and Factor, or Lord and Steward, and it would be dangerous to the Credit of thoſe Notes, if this ſhould not be good; therefore Judgment was given for the Plaintiff. 8 Mod. 363. 364. Paſch. 11 Geo. Norris v. Lea.

not within the Act, the Verdict could not help it; but the Note would be within the Act, or not upon the Words of the Note; and Judgment for the Plaintiff.

20. There is no Occaſion for the Words *(Value received)* to be in the Bill of Exchange itſelf; Per Cur. obiter. Barnard. Rep. in B. R. 88. Mich. 2. Geo. 2.

20. In Caſe for Money had and received to the Plaintiff's Uſe, the Defendant pleaded Non Aſſumpſit, and gave Notice to ſet off the following Bill of Exchange, directed to J. S. "Sir, at *ſix Weeks after Date* "*pay to* Benjamin Wheatley, Eſq; *or Order*, eight Guineas, for your "humble Servant, John Pierce. London, Aug. 23d. 1736." At the Trial it was objected, and agreed to by the Court, firſt, that this was not a Bill of Exchange within the Cuſtom of Merchants, nor could be taken Advantage of as ſuch, either by way of Sett-off, or by an Action brought upon it; nor would it be any ſort of Evidence of Money lent, there being *no Conſideration either appearing on the Note*, *or offered to be prov'd*, and it is nothing more than a bare Power or Authority to receive ſo much for the Plaintiff's Uſe. Secondly, that if it had amounted to a Bill of Exchange, yet the *Laches of the Defendant*, *in not demanding the Money*, *and giving Notice in Caſe of Non-payment* for ſo long a Time, would effectually diſcharge the Plaintiff; and accordingly the Plaintiff had a Verdict, at the Sittings in C. B. at Weſtminſter, before Ld. Ch. J. Willes, after Trin. Term 1742, Pierce v. Wheatley.

(B) Demandable and Payable. When. How. And of whom.

1. *Convenient Time* is according to the Uſage of Trades and Circumſtances of particular Caſes; Per Holt Ch. J. 1 Salk. 132. pl. 19. Hill & al' v. Lewis. Skinn. 410. pl. 6. Hill. 5 W. & M. in B. R. the S. C. & S. P. by Holt Ch. J.

2. The *Time of receiving Money* upon a Goldſmith's Note *is immediately*, or elſe it will be at the Peril of him who has the Note. *He who delivers over the Note will not be charged if the Goldſmith fail*, as the Drawer of a Bill of Exchange would be; but the Receiver is ſuppoſed to give Credit to the Goldſmith, and the Note is look'd upon as ready Money, payable immediately; and if he does not like it, he ought to refuſe it, but having accepted it, it is at his own Peril. Ld. Raym. Rep. 744. Trin. 7 W. 3. at Guildhall, Taſſel v. Lewis. But Note, if the Party to whom the Note is delivered, *demands the Money of the Goldſmith in* reaſonable Time, and he will not pay it, it will charge him who gave the Note. Ibid. cites Hill. 1 Ann. B. R. at Guildhall, Hopkins v. Geary.

3. There is *no Cuſtom for* the *Proteſt of Inland Bills* of Exchange, nor any certain Time aſſigned by the Cuſtom for the Payment of them, therefore *the Money ought to be demanded in reaſonable Time after it is payable*, and then if it is not paid, the Drawer will be charged. See the Statute 9 W. 3. cap. 17. Ld. Raym. Rep. 743, 744. Trin. 7 W. 3. Taſſell v. Lewis.

S P. and the Ch J. held at Gildhall, that the Day of Sight is to be taken excluſive; for the Law will not allow of Fractions in a Day.

4. A Bill was made payable 10 *Days after Sight*; Powell and Nevil J. held, that the Day ought to be included, ſo that the Day whereon the Bill was ſhewn, ſhall be reckoned one of the Ten. But Treby Ch. J. e contra; but notwithſtanding, becauſe his Brothers were of a contrary Opinion, he awarded that the Writ ſhould ſtand, and that the Defendant ſhould anſwer over. Ld. Raym. Rep. 280. Mich. 9 W. 3. Bellaſis v. Heſter. Barnard. Rep. in B. R. 303. Hill. 2 Geo. 2. Coleman v. Sayer.

5. A *Demand of a Servant* of the Drawer, who *uſed to pay Money* for him, is a Demand; Per Holt. 12 Mod. 241. Mich. 10 W. 3 in Caſe of the Governor and Company of the Bank of England v. Newman.

S. C. cited 2 Freem. Rep. 257. pl. 324. Trin. 1702. in Caſe of Crawley v. Crowcher. in which Caſe it was held and admitted, that if a Man receives a Goldſmith's Bill in Payment for Money, and he that receives the Bill *never demands it in* 3 *or* 4 *Days time* at the moſt, and afterwards the Goldſmith breaks, that this Neglect ſhall occaſion the Loſs to fall upon the Receiver; but if the *Goldſmith breaks in* 3 *Days time*, the Loſs ſhall fall upon him who gave the Bill for Payment; for altho' taking a Goldſmith's Bill is Payment Prima Facie, yet it is ſubject to that Contingency, that the Bill may be had if it be demanded in 3 Days time, and that the Ld. Keeper ſaid was the Practice in Guildhall, when he practiſed there; but in this Caſe *the Plaintiff was offered his Choice at the Goldſmith's Shop, to have either his Money or a Bill*, and he *choſe a Bill*, and the next Day the Goldſmith broke, and therefore the Loſs fell not upon the Party who paid the Money, but upon the Plaintiff; for it was his own Fault that he would not take his Money.

6. An Executor gave a Legatee a *Bill on a Goldſmith*, but the Legatee did not demand the ſame of the Goldſmith, and the *Goldſmith breaks*. It was held by Ld. Keeper, that the Loſs ſhall be to the Legatee; but if he had demanded it in convenient Time, and the Goldſmith had not paid it, but had broke, it would be no Payment, but Legatee might reſort back to the Executor for his Legacy. And it was ſaid in this Caſe, that 4 *or* 5 *Days* ſhould be a *convenient Time* for this Purpoſe. 2 Freem. Rep. 247. pl. 314. Hill. 1700. Phillips v. Phillips.

7. *Time of Demand* of foreign Bills is 3 Days, and no Allowance is to be made for Sundays and Holidays. 1 Salk. 128. pl. 9. Paſch. 11 W. 3. at Niſi Prius, per Holt Ch. J. Lambert v. Pack.

8. *Three Days of Grace* are allowable by the Cuſtom of London, as well where Bills are payable at *certain Days after Sight*, as where it is payable *upon Sight*; Per the Ch. J. at Guildhall. Bernard Rep. in B. R. 303. Hill 2 Geo. 2. Coleman v. Sayer.

9. A Queſtion was, whether 3 Days of Grace in certain are allowable *upon Inland Bills as well as* upon *Foreign* ones, *or whether only a reaſonable Time?* The common Serjeant, and the Foreman of the Jury, ſaid, that the conſtant Practice of the City was, to allow them in one Caſe as well as the other; upon which the Ch. J. ſaid, that then he would not alter it; tho' he obſerved, that he remembred two Caſes, one in Ld. Ch. J. Kelynge's Time, the other in Ld. Holt's, where they were both of the Opinion, that in Inland Bills only it is a reaſonable Time; and what that is the Jury ought to determine. Barnard. Rep. in B. R. 303. Hill. 2 Geo. 2. Coleman v. Sayer.

(C) Payable

(C) Payable to whom. In reſpect of the Words.

1. IF by Deed, Bill, or other Writing, Money be to be paid *to B's Order*, it is due to B. himſelf, and Judgment accordingly. 2 Show. 8. Paſch. 30 Car. 2. B. R. Frederick v. Cotton. Adjudged 10 Mod. 286. Hill 1 Geo. 1. B. R. ... v. Ormſton.

2 Per Cur. a Bill of Exchange, payable *to a Man and his Order, or to his Order* only, was one and the ſame. 12 Mod. 125. Paſch. 9 W. 3. Fiſher v. Pomfret. Carth. 403. S. C. adjudged accordingly. —— S. P. by Holt Ch. J. at the Sittings in London, 2 Dec. 1696. Comb. 401. Anon. —— 12 Mod. 309. Mich. 11 W. 3. S. P. per Holt Ch. J. in Caſe of Hart v. King. —— S. P. agreed. Comyns's Rep. 76. Trin. 12 W. 3. pl. 49.

(D) Where there is a Ceſty que Uſe.

1. BILL by A. *payable to B. to the Uſe of C.*—C. has only an equitable Right to the Money after it is paid to B. and C. cannot maintain an Action againſt A. for this Money, and ſo B. may indorſe and aſſign the Bill to any one, and ſuch Indorſee may bring Action againſt the Drawer. Carth. 5. Trin. 3 Jac. 2. B. R. Evans v. Cramlington. 2 Show. 509. Pl. 473. S. C. adjornatur. —— Show. 4. S. C. Paſch. 1 W. & M. adjudged accordingly, per tot. Cur. — Skinn. 264. S. C. Curia adviſare vult. —— 2 Vent. 256. 307. Cramlington v. Evans, S. C. in Cam. Scacc. and Judgment in B. R. affirmed.

(E) Of Bills payable to Bearer.

1. A By a Note under Seal, *promiſed to pay to the Bearer thereof*, upon the Delivery of the Note, 100 l. and avers, that it was delivered to A. by the Bearer thereof, and that the Plaintiff was ſo. The Court ſaid, that the Perſon ſeems ſufficiently deſcribed at the Time that it is made a Deed, which is at its Delivery; and by the Delivery he expounds the Perſon before meant; As when a Merchant promiſes to pay to the Bearer of the Note, any one that brings the Note ſhall be paid; but Jones J. ſaid, that it was the Cuſtom of Merchants that made that good. Adjornatur. 2 Show. 160, 161. Paſch. 33 Car. 2. B. R. Shelden v. Hentley.

2. Ruled, that where a Bill is drawn payable to W. R. or Bearer, an *Aſſignee muſt ſue in the Name of him to whom it was made payable*, and not in his own Name; for if the Bearer was allowed to ſue in his own Name, then a Stranger, who by Accident may find the Note, if loſt, might recover; but if it is made payable to W. R. or Order, there an Aſſignee may ſue in his own Name, becauſe the Order muſt be made by Indorſement, or the like, to ſhew the Drawer's Conſent. 3 Salk. 67. pl. 1. Paſch. 9 W. 3. C. B. Nicholſon v. Seldnith.

3. Bellamy gave a Bill of Exchange *payable to N. or Bearer*; *N.* went and *negotiated with the Bank* at the uſual Rate of Intereſt. After this the Bank received 100 l. of Bellamy, and after that demanded the Money Comyns's Rep. 57. Paſch. 11 W. 3. S. C.

and a new Trial granted, because the Bank having discounted the Bill with Allowance, it was a Purchase in them of the Bill; besides the Bill was not received at the Day when the

ney due on the Bill of a Servant of B. who did not pay it; and after Bellamy failed, and the Bank brought an Assumpsit against N. for the Money, and on General Issue a Verdict for the Plaintiff, and a new Trial granted, the Verdict being against Law; for whatsoever may be the Practice among the Bankers, the Law is that if a Bill or Note be payable to one or Bearer, and he negotiates the Bill, and *delivers it for ready Money paid* to him, *without any Indorsement* on the Bill, this is a plain *Buying of the Bill*; as of Tallies, Bank-bills &c. but if it be indorsed, there is a Remedy against the Indorsor. But Holt laid the Rule thus: If a Man gives such a Bill for *Money not due before* without Indorsement, it is a *Sale* of the Bill. 12 Mod. 241. Mich. 10 W. 3. The Governor and Company of the Bank of England v. Newman.

Bill was good, and B solvent, which Delay was Laches in the Bank.——Ld. Raym. Rep. 442. Trin. 11 W 3. S.C & S. P. held accordingly by Holt Ch. J. and that a new Trial was granted; but upon a new Trial the Jury found for the Plaintiffs.

4. If a Bill be payable to A. or Bearer, it *is like so much Money paid to whomsoever the Bill is given*, that let what Accounts or Conditions soever be between the Party who gives the Note and A. to whom it is given, yet it shall never affect the Bearer, but he shall have his whole Money. 2 Freem. Rep. 258. pl. 324. Trin. 1702. in Case of Crawley v. Crowther.

(F) Where the Words are imperfect.

1. IF *I owe to A. B.* 20 *l. to be paid in Watches*, the Action must be brought for the Money, and not for the Watches. And 117 pl. 145. Hill. 26 Eliz. Anon.

Brownl. 105. S. C. but is only a Translation of Yelv. ——Yelv. 147. S. C.

2. Memorandum that *I have received of* E. T. *to the Use of my Master J. S. the Sum of* 40 *l. to be paid at Michaelmas following.* The Bill was sealed, and, being general, charges the Servant, and no Remedy upon it against the Master. Adjudged. Yelv. 137. Mich. 6 Jac. B. R. Talbot v. Godbolt.

accordingly per tot. Cur. and this upon Conference with all the Justices in Fleet-street.

3. *But* if the Bill had recited the Repayment to have been to be made by his Master, then, per omnes, the Bill would only be a *Receipt*, and merely to another's Use; per tot. Cur. and this upon Conference with all the Justices in Fleet-street. Yelv. 147. Mich. 6 Jac. B. R. Talbot v. Godbolt.

4. I promise *to account* with T. S. or his Order *for* 50 *l.* Value received per me &c. Action lies on this Note for Indorsee against the Drawer, on the 3 & 4 *Ann.* 9. 8 Mod. 362. Pasch. 11 Geo. 1. Morice v. Lee.

(G) Drawer.

(G) Drawer. Chargeable in what Caſes.

1. IF the *Indorſement* be *void*, yet he that drew the Bill ſhall be liable to him to whoſe Uſe it was firſt made; per Cur. 2 Keb. 303. Mich. 19 Car. 2. B. R. in Caſe of Daſhwood v. Lee.

2. If the Drawer mentions it *for Value received*, then he is chargeable at Common Law; but if no ſuch Mention, then you muſt come upon the Cuſtom of Merchants only; per Holt Ch. J. Show. 5. Paſch. 1 W. & M. in Caſe of Cramlington v. Evans.

3. Bill of Exchange was *indorſed*, yet, if it be not paid, the *Drawer is liable*, and that tho' he be a Gentleman, and no Merchant. Cumb. 152. Mich. 1 W. & M. at Serjeant's-Inn, Sarſefield v. Witherly. Carth. 82. S. C.—2 Vent. 292. S. C.—2 Show. 125. S. C.

4. *Pay to A. or his Order 40 l. and place it to my Account, Value received.* The Money was not demanded till the Action (which was an *Indebit' Aſſumpſit*) was brought againſt the Drawer, and which was 2 Years after the Bill given. Holt Ch. J. upon Conſideration, held that ſuch a Note ſhould be deem'd Payment, and that the Plaintiff was ſatisfied with the Merchant as his Debtor, if he did not *within convenient Time reſort back* to the Drawer; and keeping the Bill ſo long was an Evidence that he thought the Merchant good at that Time, and that he agreed to take him as his Debtor. Show. 155. Paſch. 2 W. & M. Darrach v. Savage.

5. If the *Indorſee* of a Bill *accepts but 2 d. from the Acceptor*, he can never after reſort to the Drawer. Ld. Raym. Rep. 744. Trin. 7 W. 3. Taſſel v. Lewis.

6. A gave to B. a *Bill of Exchange for Value received. B. aſſigns it to C. for an honeſt Debt. C. brings an Indebitatus Aſſumpſit* on this againſt A. *and had Judgment*; on which *A. brings his Bill to be relieved in Equity* againſt this Judgment, *becauſe there was really no Value received at the giving this Bill, and C. would have no Prejudice, who might ſtill reſort to B.* upon his original Debt. It was anſwered that A. might be relieved againſt B. or any claiming as Servant or Factor of or to the Uſe of B. But the Chancellor held that C. being an honeſt Creditor, and coming by this Bill fairly, for the Satisfaction of a juſt Debt, he would not relieve againſt him, becauſe it would tend to deſtroy Trade, which is carried on every where by Bills of Exchange, and he would not leſſen an honeſt Creditor's Security. Comyns's Rep. 43. pl. 28. Mich. 9 W. 3. Anon.

7. If the *Party*, to whoſe Hands a Bill of Exchange comes, *neglects to receive* the Money *from the Acceptor*, there he ſhall not reſort to the firſt Drawer, becauſe he hath relied on the Acceptor, the firſt *Drawer* being *only chargeable by Cuſtom or Contract in Law.* 12 Mod. 203. Trin. 10 W. & M. at Guildhall. Clerk v. Mundall.

8. A. drew a *Bill on B. payable to C. in 3 Days. B. broke. C. kept the Bill 4 Years, and then brought Aſſumpſit againſt A.* Treby Ch. J. held that when one draws a Bill of Exchange he ſubjects himſelf to the Payment, if the Drawee refuſes either to accept or pay; but then if the Bill is not paid in convenient Time, the Perſon to whom it is payable ſhall *give the Drawer Notice* thereof; for otherwiſe the Law will imply that the Bill was paid, becauſe there is a Truſt between the Parties, and it may be injurious to Commerce if a Bill may riſe up to charge the Drawer at any Diſtance of Time, when in the mean time all Accompts may have been adjuſted between them. 1 Salk. 127. pl. 7. Mich. 10 W. 3. at Guildhall. Allen v. Dockwray.

9. *In Foreign Bills* of Exchange the Proteſt *makes the Drawer liable*, and *Notice* ſhould be given of the Proteſt to the Drawer in *convenient Time*. 12 Mod. 309 Mich. 3 W. 3. Hart v. King.

10. It was agreed that an *Acceptance* or Negotiation in England, *after a Bill becomes payable*, ſhall bind the Acceptor or Indorſor, tho' not perhaps the original Drawer. 12 Mod. 410. Trin. 12 W. 3. in Caſe of Mitford v. Walcot.

11. A. *draws a Bill* of Exchange *in Payment*, and the Party does *not call* for the Money from the Drawee *in convenient Time*, and he *fails*, he ſhall then come upon the Drawer. 12 Mod. 509. Paſch. 13 W. 3. coram Holt Ch. J. at Guildhall. Anon.

12. The Defendant being a Captain of a Ship, took ſeveral Goods for the Uſe of the Ship from the Plaintiff, who ſent his Servant with a Bill to him for the Money. The Defendant orders the Servant to write him a Receipt for the Money, which he did, and thereupon he gives him *a Note upon a 3d Perſon, payable in 2 Months*. The Maſter ſent ſeveral times to the 3d Perſon to preſent him the Note, but *could not get Sight of him within the Time at which the Money was payable*. The *Party breaks*, and now this Action is brought for the Money againſt the Captain. All this appearing on Evidence, and that the Captain went to Sea next Day after he gave the Note, Trevor Ch. J. directed for the Plaintiff. 6 Mod. 147. Paſch. 3 Ann. B. R. Popley v. Aſhley.

13. And per ipſum, if a Man gives *a Note upon a 3d Perſon in Payment*, and *the other takes it abſolutely as Payment*, yet *if the other knew the 3d Perſon* breaking, or *to be in a failing Condition*, and the Receiver of the Note uſes all reaſonable Diligence to get Payment, but cannot, *that is a Fraud*, and therefore no Payment, and here was no Laches in the Plaintiff; for the Party failed before the Money was payable, and the Captain was gone to Sea, ſo he could not come back to him to give him Notice. 6 Mod. 147. Paſch. 3 Ann. B. R. Popley v. Aſhley.

14. *But if* a Man takes a Note, and *after it's payable makes no Demand*, and that he might be paid if he had been diligent enough, there if the Party, on whom the Note is, fails, it is at his Peril that took the Note. 6 Mod. 147, 148. Paſch. 3 Ann. B. R. Popley v. Aſhley.

15. If a Bill of Exchange be not paid by the Indorſor, the Drawee muſt give *Notice of Non-payment to the Drawer* before he brings an Action againſt him. 8 Mod. 43. Paſch. 7 Geo. 1. Lawrence v. Jacob.

(H) Indorſor. In what Caſes liable. What Indorſee muſt do and prove.

1. A. *Drew a Bill of Exchange upon B. payable to C.* Then *B. accepts* the Bill. *C. indorſes it to D.* Now by this Indorſement by C. to D. *B. is diſcharged of any Payment as to C.* and if *D. indorſes it* over *to E.* then *B. is diſcharged of any Payment to D.* But if *D. pays the Money to E.* then *D. by this Payment becomes again intitled to receive the Money of B.* and at ſuch Time no other, whether E. or C. is intitled to bring any Action againſt B. but D. only. So if C. pays the Money to D. then B. is diſcharged as to D. but C. becomes newly intitled, and B. is again liable as to him, but diſcharged againſt D. and E. See Lutw. 885. b. 888. b. 1 Jac. 2. in Cam. Scacc. Death v. Serwonters.

2. *Recovery*

2. *Recovery by Indorſee againſt the Drawer, without Satisfaction*, was adjudged in B. R. to be a Bar to an Action brought by him againſt a *mean Indorſor*; but this Judgment was afterwards reverſed in the Exchequer-Chamber. Cumb. 4. Mich. 1 Jac. 2. and ibid. 32. Mich. 2 Jac. 2. Claxton v. Swift. 3 Mod. 86. S. C. adjudg'd in B. R. by 3 Juſtices to be a Bar, but the Ch. J. e contra.——2 Show. 441. pl 404 S. C. adjornatur.——Ibid. 494. pl. 462. S. C. adjudged by 3 Judges for the Defendant, but reverſed afterwards in Cam. Scacc.——Skin. 255. pl. 3. Mich. 2 Jac. 2. B. R. the S. C. and the Plea ruled good by 3 Juſtices.——But Lutw. 878 882. b. S. C. ſays the Judgment was now reverſed, becauſe there was not any Satisfaction; for the Court were of Opinion that this Caſe differs from the Caſe of 2 Treſpaſſors, and is rather to be reſembled to 2 Debtors by a joint and ſeveral Obligation, becauſe by the Cuſtom the firſt Drawer of the Bill, and every Indorſor thereof, is liable to the Payment of a Sum certain to the laſt Indorſor, tho' the Action be to recover by way of Damages.

3. Ruled that where a Bill is drawn *payable to W. R. or Order*, and he *indorſes it to B. who indorſes it to C.* and he *indorſes it to D.* the laſt Indorſee may bring an Action againſt any of the Indorſors, becauſe every Indorſement is a new Bill, and implies a Warranty by the Indorſor that the Money ſhall be paid. 3 Salk. 68. pl. 3. 5 W. 3. B. R. Williams v. Field. Skin. 343. pl. 11. Anon. ſeems to be S. C. & S. P. accordingly.

4. M. a Goldſmith drew 2 *Bills on J. S.* payable to L. the Defendant, who on the 19th. of October *indorſed* them *to H. the Plaintiff. J. S. accepted the Bills, and paid* by the Order, and on Account of L. 800 *l. in Money, and gave another Bill for the Reſidue.* Afterwards, *the ſame Day, H. the Plaintiff, being alſo a Goldſmith, received Money of M. upon other Bills, and might have received the Money on this Bill, but* did not, for H. did not demand it, and *the Night following M. broke.* The Queſtion was, whether L. the Defendant, who was the Indorſor, is liable? Holt Ch. J. held, that by the Acceptance of this Bill by the Plaintiff, the Indorſor was not diſcharged; for while the Bill is in Agitation, every Indorſor is as much liable as the firſt Drawer, and cannot be diſcharged by the Acceptance of the Bill, without actually paying of the Money; but by Cuſtom the Indorſor is only liable in Default of the firſt Drawer, but if there is any *Neglect in the Indorſee to receive it in convenient Time*, and if within that Time the Drawer becomes inſolvent, then the Indorſor is diſcharged. 1 Salk. 132. pl. 19. Hill v. Lewis. Skin. 410. pl. 6. Hill. 5 W. & M. in B. R. S. C. Holt Ch. J. ſaid the Law had not defined what ſhall be a convenient Time to demand the Money on a Goldſmith's Bill; but he referr'd that to the Judgment of the Jury, who were Merchants; but that upon Foreign Bills three Days were allow'd.

5. Tho' a Bill be *without the Words (or to his Order,)* yet the Indorſement of ſuch Bill is good, or of the ſame Effect between the Indorſor and Indorſee, to make the Indorſor chargeable to the Indorſee; per Holt Ch. J. 1 Salk. 133. in Caſe of Hill v. Lewis. Tho' a Bill payable *to J. S. or Bearer*, be not indorſeable, yet if it be indorſed, the Indorſor ſhall be charged; for every Indorſement is as a new Bill; per Holt Ch. J. Skinn. 411. pl. 6. Hill. 5 W. & M. in B. R. the S. C.

6. *Blank Indorſement* does not actually *transfer* the Property without ſome further Act; per Holt Ch. J. 1 Salk. 126. pl. 4. Paſch. 10 W. 3. B. R. Clark v. Pigot. 12 Mod. 192. S. C. at Guildhall.—1 Salk. 130. pl. 15. Paſch. 2 Ann. B. R. Lucas v. Haines, S. P.

7. *Indorſee of Part* of the Sum in a Bill of Exchange cannot bring *Action*, without ſhewing the other Part to be ſatisfied. 1 Salk. 65. pl. 2. Mich. 10 W. 3. B. R. Hawkins v. Cardee. Becauſe by this Means the Defendant would be ſubject to as many Actions as the Perſon, to whom the Note was given, ſhould think fit, and that upon ſingle Contract. Carth. 466. S. C——12 Mod. 213. Hawkins v. Gardiner, S. C. & S. P.——Ld. Raym. Rep. 360. S. C. adjudged per tot. Cur.

8. If

12 Mod. 244. Lambert v. Oakes, Mich. 10 W. 3 S. P. and ſeems to be S. C.

8. If a Man *indorſes his Name* on the Back of a Bill *Blank*, he puts it in the Power of the Indorſee to make what Uſe of it he will; and he may uſe it as an *Acquittance* to diſcharge the Bill, or as an *Aſſignment* to charge the Indorſor. 1 Salk. 127. pl. 9. Paſch. 11 W. 3. at Nili Prius, per Holt Ch. J. Lambert v. Pack.

——Ld. Raym. Rep. 443. Paſch. 11 W. 3. S. C. & S. P. accordingly.

* The Indorſement, tho' upon Diſcount, will ſubject the Indorſor to an Action,

9. In Caſes of Bills *purchaſed at a Diſcount*, this is the Difference; if it be a Bill payable *to A. or Bearer*, 'tis an abſolute Purchaſe; but if to A. * *or Order*, and 'tis *indorſed Blank*, and fill'd up with an Aſſignment, the Indorſor muſt *warrant* it as much as if there had been no Diſcount. 1 Salk. 127. Paſch. 11 W. 3. per Holt Ch. J. Lambert v. Pack.

because *it is a conditional Warranty* of the Bill, and makes a new Contract in caſe the Perſon, on whom it was drawn, does not pay. 12 Mod. 244. Lambert v. Oakes.——Ld. Raym. Rep. 443. 444. S. C. & S. P. accordingly by Holt Ch. J.

10. It was agreed, that an *Acceptance* or Negotiation in England *after a Bill becomes payable* ſhall bind the Acceptor or Indorſor, tho' not perhaps the original Drawer; and for this was quoted Pigot and Jackſon's Caſe in B. R. Hill. 9 W. 3. 12 Mod. 410. Trin. 12 W. 3. in Caſe of Mitford v. Walcot.

1 Salk. 126. pl. 14 S. C. but S. P. does not appear.——3 Salk. 400. S. C. but S. P. does not appear.

11. If a Man writes on the Back of a Bill of Exchange, *this is to be paid to J. S.* or, *the Contents* of this Bill is to be paid to J. S. and ſets his Hand to it, it will be a good *Indorſement*; Per Holt Ch. J. 7 Mod. 87. Mich. 1. Ann. B. R. in Caſe of Eaſt v. Eſſington.

12. *A. draws* a Bill *upon B. who had Effects enough in his Hands to anſwer the Bill, which* ſome time after *is proteſted*, whereupon *the Bill is indorſed to A. the Drawer, who brings an Action as Indorſee*; Per Parker Ch. J. at Nili Prius, there being Effects, the Acceptance was not *upon the Honour of the Drawer*, and ſo the Action is well brought; for when a Merchant draws a Bill on his Correſpondent, who accepts it, this is Payment; for it makes him Debtor to another Perſon, who may bring his Action; ſo this is a Payment, as may be ſet off upon a former Account, and pleaded in Bar of ſuch Action; but if there were *no Effects*, the Action would not lie, for it would have been an Acceptance upon Honour only, and the Money would be recovered only to be recovered again. 10 Mod. 36. Trin. 10 Ann. B. R. Louviere v. Laubray.

13. If a Note be *payable to a Feme ſole, or Order, and ſhe* afterwards marries, her Husband is the proper Perſon to indorſe this Note; Per Parker Ch. J. 10 Mod. 246. Trin. 13 Ann. B. R.

The Queſtion was, whether ſuch Indorſement by C. to D. will amount to a new Bill to charge the Indorſor? Dubitatur & Adjornatur. Comb 176. Mich. 3 W & M. in B. R. Duckmannee v. Keckwith.

14. A. gave a promiſſory Note, payable *to B. or Order*, *B. aſſigns it* to C. and C. aſſigns it to D. *without ſaying to him, or Order*. Reſolved per tot. Cur. that this is good; for if the original Bill was aſſignable, (as it will be if payable to one, or his Order) then to whomſoever it is aſſigned, he has all the Intereſt in the Bill, and may aſſign it as he pleaſes; for the Aſſignment to C. is an abſolute Aſſignment to him, which comprehends his Aſſigns, and therefore nothing is done when the Bill is aſſigned but indorſing the Name of the Indorſor, upon which the Indorſee may write what he will, and at a Trial when the Bill is given in Evidence, the Party may fill up the Blanks as he pleaſes. Comyns's Rep. 311. pl. 160. Mich. 5 Geo. 1. C. B. Moor v. Manning.

15. A *Goldſmith's Note* was *given in Part of Payment* of Money *on a Saturday*, but was *not offered to the Drawer till Monday Morning* after, when the *Indorſee ſent the Note by his Servant to the Drawer, without any Order to ſtay, but only to demand the Money*; and the Servant accordingly offered the Note to the *Caſhier of the Drawer*, who *cancell'd it, and deſired the Servant to call again in half an Hour*, for that the Drawer was gone to the Bank to receive Money. The Servant went away, and returned within the Time, and afterwards called twice more, and then went to his Maſter, and told him the Goldſmith could not pay it; whereupon the *Maſter* went himſelf, and finding the Note cancell'd, ſo that he had no Remedy, he *procur'd a new Note of the ſame Date with the original Note, and for the ſame Sum.* This is no new Credit given to the Drawer, but that the Indorſor is ſtill liable. 9 Mod. 60. Mich. 10 Geo. 1. Mead v. Caſwell.

16. 9 & 10 *W.* 3. *cap.* 17. puts *Inland Bills* of Exchange upon the ſame Footing with Foreign Bills, where the Money is recoverable by the *Cuſtom among Merchants upon ſigning ſuch Bills*, and the Statute 3 & 4 *Annæ cap.* 9. puts *Promiſſory Notes* on the ſame Footing with Inland Bills, and enacts, that *the Aſſignee or Indorſee may maintain an Action againſt the Drawer or Indorſor, and recover Damages &c.* and therefore it was inſiſted, that an Action of *Debt* will not lie, becauſe Damages are never recovered in Debt; But per Cur. if Plaintiff had declared on an *Indebitatus Aſſumpſit*, he might have recovered in Damages. 8 Mod. 373. Trin. 11 Geo. 1. Welſh v. Creagh.

17. Action was brought againſt the Indorſor *of a Promiſſory Note*, and the Plaintiff had Judgment. 8 Mod. 307. Mich. 11 Geo. 1. Elliot v. Cowper.

(I) Acceptance. What is a good Acceptance.

1. IF a Bill of Exchange be tendered, and the Party ſubſcribes *Accepted*, or, *Accepted by me A. B.* or, being in the Exchange, ſays, *I accept the Bill, and will pay it according to the Contents*, this amounts, without all Controverſy, to an Acceptance. Molloy, Lib. 2. Cap. 10. S. 16.

2. A ſmall Matter amounts to an Acceptance, ſo that there be a right Underſtanding between both Parties; As, *Leave your Bill with me, and I will accept it*; or, *Call for it To-morrow, and it ſhall be accepted*, that does oblige as effectually by Cuſtom of Merchants, and according to Law, as if the Party had actually ſubſcribed or ſigned it (which is uſually done.) Molloy, Lib. 2. Cap. 10. S. 20.

3. But if a Man ſhall ſay, *Leave your Bill with me, I will look over my Accounts and Books between the Drawer and me, and call To-morrow, and accordingly the Bill ſhall be accepted*, this ſhall not amount to a compleat Acceptance; for this Mention of his Books and Accounts, was really intended to ſee if there were Effects in his Hands to anſwer, without which, perhaps, he would not accept of the ſame; and ſo it was ruled by Ld. Ch. J. Hale at Guildhall. Molloy, Lib. 2. cap. 10. S. 20.

4. Where a Bill of Exchange is payable **to A's Order*, that is to himſelf if he makes no Order, and if the Party *underwrites* the Bill viz. Preſented ſuch a Day, or *only the Day of the Month*, it is ſuch an Acknowledgment of the Bill as amounts to an *Acceptance*; Per Holt Ch. J. and this by the Jurors was declared to be common Practice. Cumb. 401. Per Holt Ch. J. at the Sittings in London, 2 Dec. 1696. Anon.

* 2 Show. 8. pl. 5. Paſch. 30 Car. 2. B. R. Frederick v. Cotton, S. P. reſolved.

Ld Raym. Rep 175. S. C. & S. P. admitted, and Judgment for the Plaintiff.

5. *Acceptance* of Bill upon two *by one Partner*, binds both if it concerns the joint Trade; but otherwiſe if it concerns the Acceptor only in a diſtinct Intereſt and Reſpect. 1 Salk. 126. pl. 3. Hill. 8 W. 3. B. R. Pinkney v. Hall.

——S. P. by Holt Ch. J. 12 Mod. 345. Mich. 11 W. 3. Anon.

6. Bill drawn by A. on B. and B. accepts it by Indorſement, thus, *(I do accept* this Bill, *to be paid half in Money, and half in Bills.)* It was alleged, that B's Writing on the Bill was ſufficient to charge him with the whole Sum; but it was proved by divers Merchants, that the Cuſtom among them was quite otherwiſe, and that there might be a *Qualification* of an Acceptance; For he that may refuſe the Bill totally, may refuſe it in Part; but he to whom the Bill is due, may refuſe ſuch Acceptance, and proteſt it ſo as to charge the firſt Drawer, and tho' there be an Acceptance, yet after that he has the ſame Liberty of charging the firſt Drawer as before he had. Cumb. 452. Trin. 9 W. 3. B. R. Petit v. Benſon.

12 Mod. 410. Trin. 12 W. 3. S. C adjudged for the Plaintiff.

7. *Acceptance after the Time of Payment elapſed*, and a Promiſe then to pay the Money ſecundum Tenorem Billæ præd' is good, and amounts to a Promiſe to pay the Money generally. 1 Salk. 129. pl. 11. 12 W. 3. B. R. Mitford v. Wallicot.

Ld. Raym. Rep. 574. S. C. adjudged. ——It amounts to a Promiſe to pay the Money *preſently*. 12 Mod. 212. Mich. 10 W. 3. Jackſon v. Pigot. ——Carth. 459. S. C. and as for the Words Secundum Tenorem & Effectum Billæ, the Effect of the Bill is the Payment of the Money, and not the Day of Payment; or, at the moſt, it is only Surpluſage in the Declaration; and Judgment for the Plaintiff. ——Ld. Raym. Rep. 365. S. C. adjudged for the Plaintiff.

8. If Bill be drawn on one at Amſterdam, and he *does not care to accept* it, *but gets one here to do it*, the Party need not acquieſce; but if he does, the Party here is bound; Per Cur. 12 Mod. 411. Trin. 12 W. 3. in Caſe of Mitford v. Walcot.

9. A Bill of Exchange was directed to A. or in his Abſence to B. and begun thus, viz. Gentlemen, Pray pay. The Bill was tendered to A. who promiſed to pay it as ſoon as he ſhould ſell ſuch Goods. In Action for Non-payment, it was objected that this was a *conditional Acceptance*; but here the *Action being by an Executor*, and upon Debt laid to be due to Teſtator, Holt Ch. J. held it neceſſary to *prove that the Acceptance was in the Teſtator's Life-time*. 12 Mod. 447. Paſch. 13 W. 3. Anon.

1 Salk. 130. pl. 14 S. C. & S. P. mentioned, and ſeems admitted.

10. Bill of Exchange may be *accepted* by *Parol*, but not *transferred* otherwiſe than by Writing on the Back, and that transfers the Property by the Cuſtom of Merchants. 7 Mod. 87. Mich. 1 Ann. B. R. Eaſt v. Eſſington.

3 Salk. 400. S. C. but S. P. does not appear. ——S. P. by Holt Ch. J. as to the Acceptance. 12 Mod. 345. Mich. 11 W. 3. Anon.

11. A Foreign Bill was drawn on the Defendant, and being returned for Want of Acceptance, the Defendant ſaid, That *if the Bill came back again he would pay it*; this was ruled a good Acceptance. 3 New Abr. 610. cites Mich. 6 Geo. 1. B. R. Car v. Coleman.

12. The Drawee wrote a Letter to him in whoſe Favour the Bill was drawn, that *if he would let him write to Ireland firſt he would pay him*; and this was held a good Acceptance. 3 New Abr. 610. cites Mich. 12 Geo. 1. coram Rayn. Ch. J. at Niſi Prius, Wilkinſon v. Lutwich.

(K) Acceptor.

(K) Acceptor. Liable in what Caſes.

1. ACCEPTOR of a Bill *drawn for a Sum won at Gaming* more than the Statute allows, may plead the Statute againſt Gaming againſt the Perſon himſelf, but not perhaps againſt any Indorſee for Value received. Carth. 356. Trin. 7 W. 3. B. R. Huſſey v. Jacob. 5 Mod. 175. S. C. adjudged for the Defendant. ——— 1 Salk. 344. pl. 2. S. C. held accordingly. ——— 12 Mod. 96. S. C. adjudged accordingly.

2. It was agreed that an *Acceptance* or Negotiation in England *after Bill becomes payable*, ſhall bind the Acceptor or Indorſor, though not perhaps the original Drawer. And for this was quoted Pigot & Jackſon's Caſe in B. R. Hill. 9 W. 3. though it were an Acceptance to pay Juxta tenorem Bill' præd' as here; Arg'. 12 Mod. 410. Trin. 12 W. 3. Mitford v. Walcot.

(L) Where the Acceptance is for the Honour of the Drawer or Indorſor.

1. IN Caſe upon a Bill of Exchange, the Plaintiff *ſet forth a Cuſtom inter Mercatores & alias Perſonas*, that if a Bill is indorſed and accepted by a Perſon upon whom it is drawn, if any other Merchant will pay the Money to the Indorſee, for the Honour of the Indorſor, then the firſt Drawer is chargeable to him; that F. the Defendant drew a Bill upon J. S. for 100 l. payable to J. D. that J. S. accepted the ſaid Bill, and J. D. indorſed it to M. L. and that R. the Plaintiff, paid the Money to the ſaid M. L. for the Honour of the ſaid J. D. the Indorſor, and that thereupon F. the Drawer became liable to him, but had not paid the Money, ad Damnum &c. The Plaintiff had Judgment by Nil dicit &c. but it was reverſed upon a Writ of Error in the Exchequer Chamber, becauſe the *Cuſtom was laid too general*; for it extended not only to Merchants, but to all other Perſons whatſoever. Lutw. 891. a. 892. b. Mich. 2 Jac. 2. in Cam. Scacc. Fairly v. Roch.

2. R. *drew a Bill of Exchange on S. payable to B. S. refuſed to accept it*, whereupon *B. proteſted it. L. for the Honour of R. gave a Note to pay the Money at the Day* if not paid by R. Afterwards *B. indorſed L.'s Note to C. for Value received*; *C. in like Manner indorſed it to D. and he to E. and he to F. all for Value received.* At the Day of the Return *S. ſtill refuſed to accept the Bills*, whereupon *L.'s Bill was proteſted.* Then *M. & N. hearing of the Proteſt of L.'s Bill, pay the Money for the Honour of B. But in Action* by M. & N. *againſt L.* the *Declaration does not ſay that they paid it to F. nor to whom they paid it, but only Generally* that they paid it. This Matter was aſſigned for Error, and that for what appears it might be paid not to F. the laſt Indorſee, to whom alone it was due, but to another, and if ſo the Defendant remains ſtill liable as to him. But per Cur. after Verdict, it ſhall be intended that the Payment was to the right Perſon, eſpecially it being laid to be Ex Parte of the Plaintiff, which could not be if it had been paid to a Stranger; and ſo Judgment in B. R. was affirmed in Cam. Scacc. Carth. 129. Paſch. 2 W. & M. Brunetti v. Lewen. Lutw. 896. a. 899. a. Lewin v. Brunetti, in the Exchequer Chamber, S. C. and after ſeveral Arguments Judgment was affirmed; Pollexfen Ch. J. hæſitante.

3. If

3. If *A. draws* a Bill *on B. who will not accept* it, and C. offers to accept it for the Honour of the Drawer, the *Drawee* need not acquiesce, but may protest; but if he *does acquiesce*, C. is bound; Per Cur. 12 Mod. 410. Trin. 12 W. 3. Mitford v. Walcot.

(M) Time of Demand and Protesting.

1. A. Draws a Bill upon B. to the Use of C. Upon Non-payment C. *protests* the Bill. He cannot *sue* A. unless he gives him Notice that the Bill is protested, for A. may have the Effects of B. in his Hands by which he may satisfy himself. Vent. 45. Mich. 21 Car. 2. B. R. Anon.

2. After Verdict it was moved for a new Trial, that the *Protest was not on the Day the Money became due*; but Twisden J. said it had been ruled that if a Bill of Exchange be denied to be paid, the Protest *must be in a reasonable Time, and that is within a Fortnight*; but that the Debt is not lost by not doing it by the Day; and a new Trial was denied. Mod. 27. pl. 72. Mich. 21 Car. 2. B. R. Butler v. Play.

If a Bill be *accepted*, the Protest must be at the Day of Payment.

3. *Time of protesting* Bills of Exchange to make the Drawer liable, is * at the End of 2 Months. Cumb. 152. Mich. 1 W. & M. in B. R. Sarsefield v. Witherly.

If at *Sight*, then at the 3d Day of Grace, and a Bill *negotiated after Day of Payment*, is as a Bill at Sight; agreed by Merchants. Show. 164. Trin. 2 W. & M. in Case of Dehers v. Harriott.

* This was said by Merchants to be the Custom of *France*, and that in *Holland* it must be in so many Posts. Show. 165.

4. A Bill of Exchange is made payable to A. A. indorses it to B. B. indorses it to C. the Bill is *protested* for Non-payment; B. may bring an *Action* on this Bill, *notwithstanding his Indorsement*. Show. 163. Trin. 2 W. & M. Dehers v. Harriott.

5. Some Merchants said that if a Bill be *negotiated by Indorsement* after the Bill is payable, there is *no need of* a Protest at all. Others, that a Protest must be in some *convenient Time*. Show. 164. Trin. 2 W. & M. in Case of Dehers v. Harriott.

6. All the Merchants agreed that if a *Bill is lost*, and the Drawer might be resorted to for a new Bill, then no Protest could be *upon a Copy*; but where a Bill is lost, and no new one can be had, and the Party did not insist to have the original Bill, but refused Payment for another Reason, there such Protest made upon a Copy for Non-payment is good. Show. 164. Trin. 2 W. & M. in Case of Dehers v. Harriott.

12 Mod. 15. Meggaddow v. Holt, S. C. adjudged for the Plaintiff. —But per Holt Ch. J. if he don't tender and protest at the Day, and there be a Break in the mean time, the Party loses his Money; secus if no particular Damage. Show. 319. Mogadara v. Holt.

7. If there be no Accident happening or intervening by the *Party's breaking* &c. the Drawer is chargeable, tho' the *Presenting and Protest* of the Bill were *after the Day*; for by the Law of Merchants it need not be tender'd within the Time; per Eyre J. and not denied, and Judgment pro Quer. Show. 318. Mich. 3 W. & M. Mogadara v. Holt.

Skin. 410, 411. pl. 6. Hill. 5 W. & M. in B. R. the S. C. & S. P. by Holt Ch. J. but for a Goldsmith's Bill he said he did not know any definite Time.

8. Indorsee of Foreign Bills need not *demand Payment* till the three Days allow'd are expired, and after the 3 Days the Indorsee may *protest it*; and it seems the same Time of 3 Days ought to be allow'd for Inland Bills; per Holt Ch. J. 1 Salk. 132. Hill & al' v. Lewis.

9. The

9. The Cuſtom of Merchants is, that if *B. upon whom a Bill of Exchange is drawn, abſconds before the Day of Payment*, the Man to whom it is payable may proteſt it, to have better Security for the Payment, and to give Notice to the Drawer of the abſconding of B. and after the Time of Payment is incurr'd, then it ought to be proteſted for Non-payment the ſame Day of Payment, or after it; but no Proteſt for Non-payment can be before the Day that it is payable. Proved by Merchants at Guildhall, Trin. 6 W. & M. before Treby Ch. J. and the Plaintiff was nonſuited, becauſe he had declared upon a Cuſtom to proteſt for Non-payment before the Day of Payment. Ex Relatione m'ri Place. Ld. Raym. Rep. 743. Anon.

10. In Caſe of *Foreign Bills of Exchange* the Cuſtom is, that 3 *Days are allow'd for Payment* of them; and if they are not paid upon the laſt of the ſaid Days, the Party ought immediately to proteſt the Bill, and return it, and by this Means the Drawer will be charged; but if he does not proteſt it the laſt of the 3 Days, which are called the Days of Grace, there, altho' he upon whom the Bill is drawn fails, the Drawer will not be chargeable; for it ſhall be reckon'd his Folly that he did not proteſt &c. but if it happens that *the laſt Day of the ſaid 3 Days is a Sunday or great Holiday*, as Chriſtmas-Day &c. upon which no Money uſed to be paid, there *the Party ought to demand the Money upon the 2d Day*; and if it is not paid, he ought to proteſt the Bill the ſaid 2d Day, otherwiſe it will be at his own Peril; for the Drawer will not be chargeable. Merchants in Evidence at a Trial at Guildhall, Trin. 7 W. 3. before Holt Ch. J. ſwore the Cuſtom of Merchants to be ſuch, which was approved by Holt Ch. J. Ld. Raym. Rep. 743. Taſſall & Lee v. Lewis.

11. If a Foreign Bill be drawn on an Engliſh Merchant, payable at ſo many Days Sight, tho' the *Days incurr without any Notice given to the Party on whom* 'tis drawn, yet that Bill, according to the Cuſtom of Merchants, may be proteſted, and thereby Recourſe had to the firſt Drawer for the Money, which Holt Ch. J. thought unreaſonable, becauſe the Drawer ought not to lie at the Mercy of him that has the Bill &c. Cumb. 451. Trin. 9 W. 3. B. R. Anon.

12. If a Bill be drawn for like Value received, and this is proteſted, an *Indebitatus Aſſumpſit* lies againſt the Drawer; per Shower. Cumb. 451. Trin. 9 W. 3. B. R. Anon.

13. *9 & 10 W. 3. cap 17. S. 1. All Inland Bills of Exchange of 5 l. or upwards, in which the Value ſhall be expreſs'd to be received, drawn payable at a certain Number of Days &c. after the Date thereof, may after Acceptance, (which ſhall be by underwriting under the Party's Hand) and the Expiration of 3 Days after the ſame ſhall be due, be proteſted by a Notary Publick, or, in Default of ſuch Notary Publick, by any other ſubſtantial Perſon of the Place before 2 Witneſſes, Refuſal or Neglect being firſt made of the Payment.*

14. *S. 2. Which Proteſt ſhall be notified within 14 Days after to the Party from whom the Bills were received, who (upon producing ſuch Proteſt) is to repay the ſaid Bills with Intereſt and Charges from the Proteſting; for which Proteſt there ſhall not be paid above 6 d. and in Default of ſuch Proteſt, or due Notice within the Day limited, the Perſon ſo failing ſhall be liable to all Coſts, Damages, and Intereſt.*

15. A Bill of Exchange was proteſted, and *loſt*, and Action brought againſt the Drawer; and it was proved that *the Defendant had own'd he had drawn the Bill*, and held good by Holt; and he ſaid that this being an *Outlandiſh Bill*, the Drawer was made liable by the Proteſt; but *no Proteſt neceſſary in Caſe of an Inland Bill*; and that to make a Bill payable to one's Order, was the ſame as if it were to him or Order; and he ſaid that if Defendant could make it appear that he was at any Damage for *Want of Notice of the Proteſt*, As if Drawee had failed in the mean

time &c. it would be incumbent upon the *Plaintiff* to *prove Notice given of the Proteſt in convenient Time.* 12 Mod. 309. Mich. 11 W. 3. Hart v. King.

1 Salk. 129. pl. 11. S. C. but S. P. does not appear.

16. If a Bill be *accepted at Amſterdam*, and *no Houſe named where* the Payment is to be, the Party need not acquieſce to it, but may proteſt the Bill; but if he will acquieſce, it is well enough; per Cur. 12 Mod. 410. Trin. 12 W. 3. in Caſe of Mitford v. Walcot.

6 Mod. So. S. P but now by the *Stat.* 9 & 10 *W.* 3 17. a Proteſt is

17. All the *Difference* between *Foreign and Inland Bills* is, that Foreign Bills muſt be proteſted before a Publick Notary, before the Drawer may be charged; but Inland Bills need no Proteſt; per Holt Ch. J. 6 Mod. 29. Mich. 2 Ann. B. R. in Caſe of Buller v. Crips.

directed in Caſe of Inland Bills; but that *is only for the Benefit of the Drawer, to give formal Notice that the Bill is not accepted, or accepted and not paid*; and the *Damages in the ſaid Statute* are only meant of Damages by being longer kept out of his Money by Non-payment of Drawee than the Tenor of the Bill purported, and not of Damages for the original Debt. Mich. 2 Ann. B. R. Brough v. Perkins.—3 Salk. 69 pl. 6. S. C.

In *Inland* as well as Foreign Bills of Exchange the Perſon to whom 'tis payable muſt give convenient *Notice of Non payment* to the Drawer; for if by his Delay the Drawer receives Prejudice, the Plaintiff ſhall not recover A *Proteſt* on Foreign Bills was Part of its Conſtitution, On Inland Bills a Proteſt is neceſſary by 9 & 10 *W.* 3. 17. but was not at Common Law; but the Statute does not take away the Plaintiff's Action for *want of a Proteſt*, nor does it make ſuch Want a Bar to the Plaintiff's Action; but this Statute ſeems only, in caſe there be no Proteſt, to deprive the Plaintiff of *Damages* or *Intereſt*, and to give the Drawer a Remedy againſt him for Damages if he makes no Proteſt. 1 Salk. 131. pl. 17. Mich. 2 Ann. B. R. Borough v. Perkins.———3 Salk. 69. pl. 6. S. C. held by Holt Ch. J. and Powell J. accordingly, and that ſince that Statute a Proteſt was never ſet forth in the Declaration.—— 6 Mod. So. S. C. and Holt ſaid that the Act is very obſcurely and doubtfully penn'd, and that they ought not by Conſtruction upon ſuch an Act to take away a Man's Right; to which the whole Court agreed.—— 2 Ld. Raym. Rep. 992. Brough v. Parkings, S. C. according to 3 Salk. 69. ſupra, and Judgment in C. B. affirmed.

18. 3 & 4 *Ann. cap.* 9. *S.* 4. *In caſe the Party on whom an Inland Bill of Exchange ſhall be drawn, ſhall refuſe to accept the ſame by underwriting the ſame, the Party to whom payable ſhall cauſe ſuch Bill to be proteſted for Non-acceptance, as in Caſe of Foreign Bills, for which Proteſt ſhall be paid 2 s. and no more.*

19. *S.* 6. *No ſuch Proteſt ſhall be neceſſary for Non-payment, unleſs the Value be expreſs'd in ſuch a Bill to be received, and unleſs the Bill be drawn for 20 l. or upwards, and the Proteſt ſhall be made for Non-acceptance by Perſons appointed.*

20. *S.* 7. *If any Perſon accept ſuch Bill of Exchange in Satisfaction of any former Debt, the ſame ſhall be eſteemed a full Payment, if he doth not his Endeavour to get the ſame accepted and paid, and make his Proteſt for Non-acceptance or Non-payment.*

(N) Actions.

(N) Actions. What Actions lie.

1. AN Action of *Debt* will not lie *upon a Bill of Exchange accepted*, againſt the Acceptor; but a *ſpecial Action of the Caſe* muſt be brought againſt him; becauſe the Acceptance does not create a Duty no more than a Promiſe by a Stranger to pay &c. if the Creditor will forbear his Debt; and he that drew the Bill continues Debtor, notwithſtanding the Acceptance, which makes the Acceptor liable to pay it, and the Cuſtom does not extend ſo far as to create a Debt, but only makes the Acceptor Onerabilis to pay the Money; wherefore, and becauſe no Precedent could be produced, that an Action of Debt had been brought upon an accepted Bill of Exchange, Judgment was arreſted. Hard. 485. 487. Hill. 20 & 21 Car. 2. in the Exchequer, Anon. [but ſeems to be Milton's Caſe.] S. C. cited by Rainsford J. as Milton's Caſe, lately adjudg'd in Scacc. and ſays, that tho' Hale Ch. B ſaid it were well if the Law were otherwiſe, yet we all agreed that a Bill of Exchange accepted &c. was indeed a good Ground for a ſpecial Action upon the Caſe, but that it did not make a Debt; firſt, becauſe the Acceptance is only conditional on both Sides. If the Money be not received, it returns back upon the Drawer, and he remains liable ſtill, and this only collateral. 2dly, Becauſe Onerabilis does not imply Debt. 3dly, Becauſe the Caſe is Primæ Impreſſionis, and there is no Precedent for it. Mod. 286. pl. 3. Trin. 29 Car. 2. B. R. in Caſe of Brown v. London.

In Caſe the Plaintiff declared upon the Cuſtom of Merchants, and that T. S drew a Bill of Exchange upon the Defendant to pay to the Plaintiff, which he accepted, and has not paid, *and likewiſe* upon *an Indebitatus*, for that the Defendant had accepted it. It was inſiſted in Arreſt of Judgment, that an Indebitatus Aſſumpſit would not lie, but an Action on the Caſe only, and of that Opinion were Hale and Rainsford, who ſaid it was ſo adjudged in the Exchequer ſince the King's Reſtoration, and ſo Judgment was ſtay'd, hæſitante Twiſden; for he conceived that the Cuſtom made it a Debt by him that accepted the Bill Vent. 152. Mich. 23 Car. 2. B. R. Brown v. London.——— Freem. Rep. 14. pl. 13. S. C. accordingly.——— Mod. 285, 286. pl. 32. S. C. adjornatur.——2 Lutw. 1594. in Caſe of Bellaſyſe v. Heſter, it was ſaid by Powell J. that an Indebitatus Aſſumpſit does not lie upon a Bill of Exchange, and the Reporter obſerves, that at this Time it was not denied by the other Juſtices, and cites the Caſe of Brown v. London, wherein Judgment in like Caſe was arreſted after Verdict, as reported by Levins 298. and ſays it has been adjudged after Verdict, that Action of Debt does not lie upon a Bill of Exchange, and cites Hardr. 485.

2. *Aſſumpſit* lies on a Bill of Exchange accepted; Per Cur. obiter. Vent. 298. Mich. 28 Car. 2. B. R. in Caſe of the City of London v. Goree. An *Indebitatus* Aſſumpſit does not lie upon a Bill of Exchange, as it has been ruled in divers Caſes, but *againſt a Drawer for Value received* there it would lie; but this is for the apparent Conſideration. Skin. 346. Hodges v. Steward.

3. A *General Indebitatus Aſſumpſit* does not lie on a Bill of Exchange, but the Party ought to declare ſpecially on the Cuſtom of Merchants. 2 Show. 9. pl. 5. in a Nota there, Trin. 30 Car. 2. B. R. Frederick v. Cotton. And cites 6 Mod. 129, 131. 1 Lev. 298. 3 Lev. 118. 1 Lutw. 180.

4. A *General Indebitatus Aſſumpſit* will not lie upon a Bill of Exchange for *want of Conſideration*, but Bill is but Evidence of a Promiſe, and ſo but Nudum Pactum, and therefore he ought to bring a *ſpecial Action upon the Caſe*, upon the Bill and Cuſtom of Merchants, or elſe a *general Indebitatus Aſſumpſit for Money received to his Uſe*; Per Holt Ch. J. Mod. 37. Paſch. 5 W. & M. Hodges v. Steward. 1 Salk. 125. pl. 2. S. C. held accordingly.——— Skinn. 346. 12 S. C. ſays, that S P. was oftentimes ſaid in this Caſe.——Comb. 204. S C. ſays, that ſuch Action lies not againſt the Acceptor, tho' accepted under Hand.——3 Salk. 68. S. C. but S. P. does not appear.

5. *Trover* for a Bank Bill loſt will lie againſt a *Stranger that found it*, tho' the Payment to him would have indemnified the Bank; but it lies not againſt the Aſſignee of the Finder, by reaſon of the Courſe of Trade, which creates a Property in the Aſſignee or Bearer. 1 Salk. 126. Anon. coram Holt Ch. J. at Guildhall.

6. *In-*

6. *Indebitatus Aſſumpſit* lies not *againſt the Acceptor* of a Bill of Exchange, becauſe his *Acceptance is but a collateral Engagement*; but it *lies againſt the Drawer* himſelf, for he was really a Debtor by the Receipt of the Money, and *Debt* will lie againſt him. 1 Salk. 23. pl. 3. Hill. 8 W. 3. B. R. Hard's Caſe.

3 Salk. 67, 68 pl. 2. Paſch. 12 W. 3. B.R. the S. P.

7. If a Bill be drawn *payable to J. S. or Bearer*, the Bearer cannot bring the Action; but if it be to J. S. or Order, the Indorſee may, and ſo reſolved between Hodges and Steward in B. R. Cumb. 466. Hill. 10 W. 3. B. R. Coggs's Caſe.

(O) Pleadings.

Litt. Rep. 363. Finch Serj. cites S. C but there is an Omiſſion of the Word (Not) before the Word (Merchants) and ſo ſeems to be miſprinted.

1. FINCH Serj. ſaid that 6 Car. in B. R. it was ruled upon Bill of Exchange, between *Party and Party not Merchants*, that there cannot be a Declaration upon the Law of Merchants; but there may be a Declaration upon the Aſſumpſit, and give the Acceptance of the Bill in Evidence. Het. 167. Paſch. 7 Car. C. B. Eaglechild's Caſe.

2. In Aſſumpſit the Plaintiff declared that the *Cuſtom* of Merchants is, *if one, for Wares delivered to him or his Factor, makes a Bill of Exchange directed to a Merchant, and he to whom it is directed accepts of it, and after refuſes to pay, and this is proteſted* before a Publick Notary, *then he, who delivered the Bill, is bound to pay it*; and alleges that he delivered ſuch Wines in France to J. S. the Factor of B. and he thereupon delivered a Bill of Exchange for the Money to J. N. who accepted it, and had not paid it; and found upon Non Aſſumpſit for the Plaintiff. It was aſſign'd for Error that this Action is grounded upon the Cuſtom of Merchants, and it is *not ſhew'd that the Plaintiff was a Merchant at the Time of the Bill* of Exchange deliver'd; but becauſe he is *named Merchant* in the Declaration, *and the Bill is for Merchandizes ſold*, it ſhall be intended he was a Merchant at that Time, and ſo Judgment affirmed. Cro. J. 301, 302. pl. 5. Paſch. 9 Car. B. R. Barnaby v. Rigault.

3. In an Action by the Perſon to whom the Bill was made payable, it was objected, that the *Averment is only that he did indorſe the Bill*, but does *not ſay that he delivered it*, and ſo not within the Cuſtom; ſed non allocatur; for the Indorſement is the transferring the Intereſt, and the Action is not brought by the Aſſignee, in which Caſe it muſt be alleged, that it was alſo delivered; Per Cur. But now neither Indorſement nor Delivery is needful; but per Windham, there is no Failure of Payment, unleſs the Bill were delivered. 2 Keb. 303. pl. 96. Mich. 19 Car. 2. B. R. Daſhwood v. Lee.

4. In Caſe on Cuſtom of Merchants, on accepting Bill of Exchange from Paris; the Defendant demurred after Iſſue offered on Payment, and excepted, that *no Time appears when the Bill was payable, being only on Double Uſance, and no particular Cuſtom alleged that Double Uſance ſignifies two Months*; ſed non allocatur, it being a known Term among Merchants that Uſance is a Month, double two Months, and being *averred he had not paid in two Months*, it is well enough, and Judgment for the Plaintiff, the Defendant having waived Advantage hereof by pleading Payment; but by Twiſden J. had it been *on Demurrer to the Declaration, the Plaintiff ſhould aver a particular Cuſtom that Uſance ſignifies a Month* &c. 3 Keb. 645. pl. 60. Hill. 27 & 28 Car. 2. Smart v. Dean.

5. De-

5. Demurrer to a Declaration on a Bill of Exchange, becauſe it ſays only *that the Party to whom* it was directed *did not accept it*, but *ſays, not that it was ſhewn or tendered to him*, and the Demurrer allowed, for elſe it would be in the Plaintiff's Power to charge the Drawer, when perhaps the Drawee was ready to pay the Money according to the Tenor of the Bill had it been tender'd to him. 2 Show. 180. pl. 179. Hill. 33 & 34 Car. 2. B. R. Mercer v. Southwell.

6. *Caſe* on a Bill of Exchange *againſt the Drawer*, the Bill not being paid and payable to J. S. *or Bearer*. Plaintiff brings the Action as Bearer, and on Evidence ruled per Ld. Pemberton, that he *muſt intitle himſelf to it on a valuable Conſideration*, tho' among Bankers they never make Indorſements in ſuch Caſe, for if it comes to the Bearer by Caſualty or Knavery, he ſhall not have the Benefit of it. 2 Show. 235. pl. 234. Mich. 34 Car. 2. B. R. Hinton v. . . . . .

7. In an Action on the Caſe on a Bill of Exchange, alleging the Cuſtom, and that the Bill was drawn ſuch a Day &c. but Exception was taken, that *the Date of the Bill was not ſet forth*, yet held per tot. Cur. that it was well enough, and they would intend it dated at the Time of drawing it. 2 Show. 422. pl. 389. Hill. 36 & 37 Car. 2. B. R. De la Courtier v. Bellamy.

8. In Debt upon a Bill of Exchange by an Indorſee, the Plaintiff had Judgment. It was aſſign'd for Error, that the Plaintiff had *not averr'd* in his Declaration *that the Value was received by the Drawers of the Bill*; ſed non allocatur; for it lies not in his Mouth to ſay ſo, and it is not material to him whether it was paid to them or not, and therefore Judgment was affirmed. Lutw. 885. b. 889. a. 1 Jac. 2. in Cam. Scacc. Death v. Serwonters.

9. Action ſur le Caſe on a Bill of Exchange brought againſt the Acceptor by the Plaintiff as Adminiſtrator to the Party to whom the Bill was payable, on the Cuſtom of Merchants; and Breach was aſſigned præd' tamen *the Defendant ad vel poſt præd. Diem*, viz. *the Day of Payment non ſolvit nec aliqualiter pro eiſdem hucuſque contentavit.* Demurrer to the Declaration, becauſe he did ſay Non ſolvit at or before the Day, and a Payment before the Day is a Payment at the Day; but held good per Cur. becauſe ſaid *hucuſque non* &c. Judgment pro Quer. 2 Show. 437. pl. 400. Mich. 1 Jac. 2. B. R. Hilman v. Law.

10. Caſe on a Bill of Exchange founded on the Cuſtom of Merchants, alleging that if a Bill by a Merchant or Trader be indorſed payable to a Merchant or Bearer, then &c. and doth not *aver the Plaintiff to be a Merchant* or Trader, held naught on Demurrer. 2 Show. 459. pl. 426. Hill. 1 & 2 Jac. 2. B. R. Burman v. Puckle.

Comb. 9. S. C. it was objected that the Cuſtom was laid Mercatori vel alicui al' Perſonæ (omitting the Words Commercio utenti;) and Withens J. ſaid that all the Precedents are Commercio utent' except one, which paſs'd ſub ſilentio. Judgment arreſted, Niſi &c.

11. In *Covenant to pay ſo much* Money *to the Plaintiff or his Aſſigns as ſhould be drawn on the Defendant by a Bill of Exchange*, and the Breach was aſſigned in Non-payment. The Defendant *pleaded that the Plaintiff, ſecundum Legem Mercatoriam, did aſſign the Money to be paid to A. who aſſigned it to B. to whom the Defendant paid* 100 *l. and tendered the reſt.* Upon Demurrer it was objected that the Plea was ill, becauſe the Defendant did *not ſet forth the Cuſtom of Merchants in particular*, without which the Aſſignments are void, of which Cuſtom the Court cannot take judicial Notice, but it muſt be pleaded; and the Court were of Opinion that the Plea was not good. 3 Mod. 226. Trin. 4 Jac. 2. B. R. Carter v. Dowrith.

Carth. 83. Mich. 1 W. & M. the S. C. [in Cam. Scacc.] the Court ſeemed of Opinion that they ought to take Notice of the Law of Merchants, becauſe 'tis Part of the Law of the Land, and eſpecially of this Cuſtom concerning Bills of Exchange, becauſe it is the moſt general amongſt all their Cuſtoms, and the Judgment was reverſed ——— Show. 127. S. C. in Error in the Exchequer-Chamber, the Court held the Plea good, and Judgment was reverſed.

12. Caſe &c. upon a Bill of Exchange, wherein the Plaintiff *ſet forth the Cuſtom in London* among Merchants and others dwelling there, that if any Merchant ſhould draw a Bill of Exchange directed to another, requiring him to pay a Sum of Money, and if that Perſon did accept the Bill, then he became liable to pay the Money ſecundum Acceptationem præd' that one King drew a Bill at Sandwich upon the Defendant to pay 8 l. to the Plaintiff, and that the Defendant accepted the Bill, but had not paid the Money. Exception was taken that the Acceptor is to pay ſecundum Acceptationem ſuam, and *no Time is mentioned in the Bill itſelf when the Money was to be paid*, nor has the Plaintiff ſet forth that the Defendant accepted it to pay it at Sight, or at any certain Time, and ſo it might be that the Time of Payment was not paſt before the Action brought, and this was held a good Exception; but by Conſent the Plaintiff was to amend his Count. Ludw. 231. 233. Mich. 4 Jac. 2. Ewers v. Benchkin.

13. C. drew a Bill of Exchange upon R. and Company in Oporto *for* 1000 *Mille Rees*, upon the 6th of Auguſt, payable 30 Days after Sight, and upon the 14th of Auguſt the *King of Portugal leſſened the Value* of the Mille Rees 20 *l. per Cent.* ſo that it was impoſſible to have Notice. The Bill was preſented for Acceptance, with the Advance of 20 l. per Cent. R. was *ready to accept and pay at the current Value, but not with the Advance*, and therefore there was a Proteſt for Non-acceptance, and an Action was brought againſt the Drawer. It was ruled by Holt Ch. J. that here, there not being Notice, the Bill ought to be paid according to the antient Value; for the King of Portugal may not alter the Property of a Subject of England, and therefore this Caſe differs from the Caſe of Mix'd Monies in Davis's Reports; for there the *Alteration* was *by the King of England*, who has ſuch a Prerogative, and this *ſhall bind his own Subjects*. Skin. 272. pl. 1. Trin. 1 W. & M. in B. R. Du Coſta v. Cole.

2 Vent. 295. S. C. but S. P. does not appear —Show. 125. S. C. & S. P. and ſo if it had been proteſtari cauſavit viz. the Proteſt would have been good Evidence of it.——Carth. 82. S. C. but S. P. does not appear.

14. In Aſſumpſit upon a Bill of Exchange the Plaintiff averr'd that the Defendant drew the Bill, and that the ſame was refuſed, and that he *proteſtavit ſive proteſtari cauſavit* at ſuch a Time &c. It was objected that this was uncertain; ſed non allocatur; for if he had pleaded Quod proteſtavit, he might have given in Evidence that the Publick Notary did it. Comb. 152, 153. Mich. 1 W. & M. at Serjeant's-Inn in Fleet-ſtreet. Sarſefield v. Witherly.

15. The Law of Merchants is, that if he who has ſuch a Bill does *lapſe his Time*, and does *not proteſt, or make his Requeſt*, if any Accident happens by this Neglect in Prejudice to the Drawer, he hath loſt his Remedy againſt him; but if ſuch a Thing had happen'd, it ought to have come of the other Side; and not being ſo, we muſt adjudge on the Declaration. It is not neceſſary to ſhew the Cuſtom of Merchants, but neceſſary to *ſhew how the Uſance ſhall be intended*, becauſe it varies as Places do. 12 Mod. 16. Hill. 3 W. & M. Megadow v. Holt.

16. The Plaintiff *declared on a Special Cuſtom in London, for the Bearer to have this Action*; to which the *Defendant demurr'd, without traverſing the Cuſtom*; ſo that he confeſs'd it, whereas in Truth there was no ſuch Cuſtom; and the Court was of Opinion that, for this Reaſon, Judgment ſhould be given for the Plaintiff; for tho' the Court is to take Notice of the Law of Merchants, as Part of the Law of England, yet they cannot take Notice of the Cuſtom of particular Places; and the Cuſtom in the Declaration being ſufficient to maintain the Action, and that being confeſs'd, he has admitted Judgment againſt himſelf. 1 Salk. 125. pl. 2. Paſch. 3 W. & M. B. R. Hodges v. Steward.

17. In

17. In Caſe on a Bill of Exchange the Plaintiff ſet forth the *Cuſtom of Merchants, but brought not his Caſe within it*; yet if by the Law of Merchants he has a Right to his Action, the ſetting forth the Cuſtom ſhall be rejected as Surpluſage. Show. 318. Mich. 3 W. & M. Mogadara v. Holt. 12 Mod. 15. 16. Hill. 3 W. 3. Meggadow v. Holt, S. C. adjudged for the Plaintiff,

and held that it is not neceſſary to ſhew the Cuſtom of Merchants; but it is neceſſary to *ſhew* how *the Uſance* ſhall be intended, becauſe it varies as Places do.

It is ſufficient to ſay that ſuch a Perſon, *ſecundum Uſum & Conſuetudinem Mercatorum*, drew a Bill; and the ſetting forth the Cuſtom is Surpluſage; for this Cuſtom of Merchants, concerning Bills of Exchange, *is Part of the Common Law, of which the Judges will take Notice ex Officio.* Carth. 270. Paſch. 5 W. & M. in B. R. Williams v. Williams.

18. Action ſur le *Caſe by an Indorſee againſt the firſt Drawer* of a Bill of Exchange. The Defendant pleaded that the Indorſor, at the Time of the Indorſement, *was a Bankrupt.* Demurrer. Per Cur. this is a good Plea in Bar; for a Bankrupt is diſabled to aſſign a Bill; but then he ought to have pleaded a *Commiſſion taken out*, wherefore Jud' pro Quer. 12 Mod. 50. Hill. 5 W. & M. Batterſon v. Goodwin.

19. In Action upon a Bill of Exchange there *is no need to allege any Cuſtom*; per Treby Ch. J. & non negatur by any of the other Juſtices. 2 Lutw. 1585. Hill. 8 W. 3. in Caſe of Bromwich v. Loyd. 2 Lutw. 1594. Trin. 9 W. 3. in Caſe of Bellaſyſe v.

Heſter, the Reporter ſays Nota, that in the Declaration in the principal Caſe no Cuſtom at large for Bills of Exchange is alleged, but only that the *Defendant negotiating &c. ſecundum Uſum Mercatorum fecit Billam &c.* and no Exception was taken to it.

20. Bills of Exchange are of ſo general Uſe and Benefit, that upon an Indebitatus Aſſumpſit a Bill of Exchange *may be given in Evidence* to maintain the Action; per Treby Ch. J. and Powel J. ſaid that upon a general Indebitatus Aſſumpſit, for Monies received to the Uſe of the Plaintiff, a Bill of Exchange may be left to the Jury to determine whether it was for Value received or not. 2 Lutw. 1585. Hill. 8 W. 3. in Caſe of Bromwich v. Loyd.

21. In Caſe on a Bill of Exchange the Plaintiff ſet forth the Cuſtom of Merchants &c. and that one J. P. drew a Bill upon the Defendant, payable to the Plaintiff; that the Bill was preſented to the Defendant, who *accepted it upon Condition to pay it by a Bank-Bill*, to which the Plaintiff agreed; and that the Defendant, in Conſideration thereof, *promiſed to pay the Money in a Bank-Bill, which ſhould be of good and old Date*, and aſſigns the *Breach in giving him a Bank-Bill payable to one Philips or Bearer, dated 1 July 1696, in which the Defendant had no manner of Property or Intereſt, ſo that the Plaintiff could not, nor can as yet receive the Money.* After Verdict it was *moved* in Arreſt, *that the Breach* was not well aſſign'd; for it *ought to be aſſigned in the ſame manner as the Promiſe was made*, viz. that he did not pay the Money in a Bank-Bill of good and old Date; and alſo for want of averring that the Bill made by P. &c. was made according to the Cuſtom of Merchants, purſuant to the Cuſtom alleged in the Declaration to this Purpoſe. Sed non allocatur; for it ſhall be ſo intended. Lutw. 277. Hill. 8 W. 3. Mannin v. Cary.

22. A Bill *accepted for Money won at Play.* The Acceptor may well *plead the Statute* in Bar; for tho' the Acceptance makes a new Contract, yet it ſtands on the former Conſideration; and if this Plea ſhould not be good, the Statute would be eluded. Indeed if the Plaintiff had *indorſed* the Bill *over Bona Fide to another, who was ignorant of the Iniquity*, the Statute could not have been pleaded againſt ſuch an Indorſee; but ſure it may againſt him who is Party to the Wrong. Jud' pro Defendant. 12 Mod. 96, 97. Trin. 8 W. 3. Huſſey v. Jacob. 5 Mod. 175. S. C. adjudged accordingly. — Carth. 356. S. C. adjudged accordingly. — 1 Salk. 342 pl. 2. S. C. held accordingly.

23. An

23. An Action on the Case was brought on a Bill of Exchange; to which the Defendant pleaded, *that after the Acceptance of the Bill, he gave a Bond in Discharge thereof*; and upon Demurrer to this Plea, it was objected that it amounted to the general Issue, for the Debt upon the Bill being extinguished by the Bond, the Defendant *ought to have pleaded Non-assumpsit, and* to have *given the Bond in Evidence*; and the Court seemed of that Opinion, but by consent the Defendant did plead the general Issue. 5 Mod. 314. Mich. 8 W. 3. Hackshaw v. Clerke.

24. In Case on a Bill of Exchange drawn upon 2 Partners in Trade, and which was accepted by one only. Exception was taken to the Declaration, because it was *per consuetudinem Angliæ &c.* and therefore ill, because the Custom of England is the Law of England, of which the Judges ought to take Notice without pleading, sed non allocatur; for though heretofore this has been allowed, yet of late Time it has always been over-ruled; and in an Action against a Carrier, it is always laid per consuetudinem Angliæ &c. Ld. Raym. Rep. 175. Hill. 8 & 9 W. 3. Pinkney v. Hall.

25. Another Exception was, that though *lex Mercatoria* is Part of the Law of England, yet it is but a particular Custom among Merchants; and therefore it *ought to be shewn in London or some other particular Place*, sed non allocatur; for the Custom is not restrained to any particular Place. And Hardr. 485. it is laid as here. Ld. Raym. Rep. 175. Hill. 8 & 9 W. 3. Pinkney v. Hall.

26. Another Exception was, that it is *not said, that* the said *J. S. promised for the Defendant and himself upon the Account of Trade*, and it may be that this was for Rent or some other Thing for which the Partner is not liable. Sed non allocatur; for the Plaintiff having declared so specially upon the Custom, it shall be *intended this was for Merchandizing, especially since the Defendant has demurred generally.* And if the Case had been otherwise, the Defendant might have pleaded it. Ld. Raym. Rep. 175. 176. Hill. 8 & 9 W. 3. Pinkney v. Hall.

27. Another Exception was, that the Declaration is, that Hutchins *indorsavit billam prædictam solubilem to the Plaintiff* which is nonsence, for it ought to be that he indorsed the Bill, that the Defendant should pay &c. sed non allocatur; and Judgment given for the Plaintiff. Ld. Raym. Rep. 176. Hill. 8 & 9 W. 3. Pinkney v. Hall.

28. Assumpsit upon a Bill of Exchange. The Plaintiff *declares that secundum consuetudinem et usum Mercatorum, the Acceptor is bound to pay* &c. *without shewing the Custom at large*, and the Defendant demurred; and it was adjudged for the Plaintiff; and per Cur. it is a better Way than to shew the Whole at large. Ld. Raym. Rep. 175. Hill. 8 & 9 W. 3. Soper v. Dible.

29. In an Action on a Bill of Exchange, unless the Plaintiff *declares upon a Custom to support the Assumpsit according to the common Form*, the Action will not be maintainable; Per Powell J. Ld. Raym. Rep. 281. Mich. 9 W. 3.

30. The Plaintiff *declared upon the Custom of Merchants in London, (viz.) in the Parish of St. Mary le Bow*, that *if any Person residing and trading there subscribe a Note for Money payable on Demand, the Subscriber becomes chargeable to pay the same*; and that the *Defendant signed a Note payable to the Plaintiff for 20l. 10s. on Demand.* The Defendant pleaded that at the Time of making the Note, he resided at Brentford in Middlesex, absque hoc, that he resided and traded in London; and upon Demurrer it was objected, that the Plaintiff had *not set forth where the Note was made*; sed non allocatur; because it shall be intended at St. Mary le Bow, for he set forth that the Defendant apud London, in the Parish aforesaid, residen' & commercia haben' fecit notam, and therefore all must be intended the same Place; and the Plaintiff had Judgment by the Opinion

nion of the whole Court. 2 Lutw. 1582, 1585. Hill. 9 & 10 W. 3. Bromwich v. Lloyd.

31. *Actions for Part of the Sum* in a Bill of Exchange, lies not without ſhewing the other Part to be ſatisfied. 1 Salk. 65. pl. 2. Mich. 10 W. 3. B. R. Hawkins v. Cardee. Carth. 466. S. C. this was on an Indorſement ordering Part of the Bill to be paid to Plaintiff.——12 Mod. 217. Hawkins v. Gardiner, S. C.—— Ld. Raym. Rep. 360. S. C. adjudged per tot. Cur. that the Declaration is ill; for a Man cannot apportion a perſonal Contract ſo as to make the Defendant liable to 2 Actions, where by the Contract, he is liable only to one.——The whole Court were of Opinion that Judgment ought to be enter'd for the Defendant; but upon Importunity, leave was given to the Plaintiff to diſcontinne upon Non-payment of Coſts.

32. *Aſſumpſit* on a Bill of Exchange *againſt the Acceptor*, wherein the Plaintiff declares that one Dunkin of Briſtol, the *25th of March* 1696 drew a Bill of Exchange *on the Defendant*, *payable* to the Plaintiff within a Month; that 16 *of May* 1697 the *Defendant accepted* the Bill *and promiſed to pay ſecundum tenorem & effectum Billæ*. On Non-aſſumpſit pleaded and Verdict pro Quer' it was moved in Arreſt of Judgment that the Aſſumpſit was impoſſible, becauſe made a Year after the Time of the Bill, to pay the Money according to the Bill. But Judgment was given for the Plaintiff, for it appearing on the Declaration, that the Acceptance of the Bill was after the Day of Payment, the ſecundum tenorem & effectum, muſt be underſtood *to pay* the Bill *preſently*; but if it had appeared on the Declaration, that the Acceptance was before the Day of Payment by the Bill, there upon the Evidence, an Acceptance after would have maintained the Action. 12 Mod. 212. Mich. 10 W. 3. Jackſon v. Pigot. Ld. Raym. Rep. 364. Mich. 10 W. 3. S. C. adjudged for the Plaintiff. —— Carth. 459. S. C. and as for the Words ſecundum tenorem & effectum Billæ; the Effect of the Bill is the Payment of the Money, and not the Day of Payment, and at the moſt it is only Surpluſage in the Declaration; and Judgment for the Plaintiff.

33. There were 3 *Bills* of Exchange drawn *for the ſame Sum* to pay (*the other Bills not being paid*) Plaintiff proteſted the 2d Bill, and brought his Action and declared on Non-payment of the ſaid 2d Bill, and had Judgment by Default; and upon a Writ of Inquiry intire Damages; and now it was moved in Arreſt of Judgment, becauſe *it was not averred in the Declaration, that the 1ſt and 3d was not paid*, and that it ought to be averred, becauſe the Bills were conditional, viz. to pay the 2d if the 1ſt and 3d was not paid. But it was anſwered that the Allegation, that the Money in Billa prædicta mentionat' was not paid, did ſupply the Want of that Averment, becauſe the Sum was the ſame in all the Bills; and Judgment was for the Plaintiff. Carth. 510. Hill. 11 W. 3. B. R. Starke v. Cheeſman. 1 Salk. 128. pl. 10. S. C. but S. P. does not appear.—Ld. Raym. Rep. 538. S. C. but S. P. does not appear.

34. In Caſe upon a Bill of Exchange, the Plaintiff had Judgment by Default; it was moved in Arreſt that to intitle the Plaintiff to a Proteſt, the *Declaration only ſaid that the Perſon upon whom the Bill was drawn non fuit inventus* in ſo long a Time, *without ſhewing that they had made Inquiry after him*; but it was anſwered, that it was according to the Cuſtom among Merchants, and according to the common Form in ſuch Caſes; and the Plaintiff had Judgment. Carth. 509, 510. Hill. 11 W. 3. B. R. Starke v. Cheeſman. 1 Salk. 128. pl. 10. S. C. but S. P. does not appear.—Ld. Raym. Rep. 538. S. C. but S. P. does not appear.

35. An Indeb' Aſſump' upon a Bill of Exchange by Domingo Franca; it appeared upon the Declaration that there were *ſeveral Indorſements*, and the Action was brought by the *firſt Indorſor*, who *ſtruck off the ſeveral Indorſements* and brought Action for Non-payment; the Bill did ſpecify *value received* of the Plaintiff. Holt ſaid, if the Action had been *upon the Cuſtom*, in this Caſe the Way had been for the Plaintiff to get the laſt Indorſee to *indorſe it to him*, for him to bring Action as Indorſee; but this Action he ſaid well lay, for the Bill was given as a Security for Money, and without Doubt it was a Debt. 12 Mod. 345. Mich. 11 W. 3. Anon.

36. Then it was argued that the Declaration *ſhews a Proteſt for want of Payment, when it was* in Truth *for Want of Acceptance* as appeared by the Proteſt, yet it was ruled well; becauſe this was *not upon the Cuſtom*, but a plain Debt, and one might bring *Debt or Indebitatus Aſſumpſit* upon a Bill of Exchange, becauſe it is in the Nature of a Security. 12 Mod. 345. Mich. 11 W. 3. Anon.

Carth. 509, 510. S. C. and objected that it was not laid that the Defendant promiſed to pay the Money to them after the Proteſt made, or that he had any Notice of the Proteſt; but adjudged for the Plaintiff.——Ld. Raym. Rep. 538. S. C. adjudged for the Plaintiff; becauſe the Drawing the Bill was an actual Promiſe.

37. In an Action againſt the Drawer; the Plaintiff declared on the Cuſtom of Merchants, and *ſet forth that the Drawee refuſed to pay, per quod Onerabilis devenit* &c. but *laid no expreſs Promiſe*; after Judgment by Default, and a Writ of Inquiry, it was moved in Arreſt, that the Declaration had ſet forth the Cuſtom, but not an expreſs Promiſe to pay. But it was anſwered that it is *ſufficient to count upon the Cuſtom*; becauſe the Cuſtom makes both the Obligation and Promiſe; and Holt Ch. J. held that the Drawing the Bill is an expreſs Promiſe; and Judgment for the Plaintiff. 1 Salk. 128. pl. 10. Mich. 11 W. 3. B. R. Starkey v. Cheeſeman.

38. *Tho' an Acceptance was within the* 3 *Days of Grace*, viz. the laſt Day, within which Time Payment *is good, and no Proteſt for want of Payment can be made, unleſs the ſaid Days are elapſed*, yet it is a Breach not to have paid the Money within the Uſance, and the Plaintiff has *no need to ſay in his Declaration* upon a Bill of Exchange, *that he did not pay* the Money *within the Days of Grace*; but if the Fact was, that it was then paid, it ought to be ſhewn of the other Side; Per Sir Barth. Shower, Arg. and Holt Ch. J. and Northey, agreed the ſame to be ſo. Ld. Raym. Rep. 574, 575. Trin 12 W. 3. Mutford v. Walcot.

39. If a Bill is accepted, it is not neceſſary to allege any Promiſe of Payment; for the *Acceptance is an actual Aſſumption, and the Declaration need not to allege more*; and tho' where the Bill was drawn payable at Amſterdam, ſome Houſe where the Money ought to be paid at Amſterdam ſhould be named, or otherwiſe the Party may proteſt the Bill, yet if it is accepted, the Acceptor becomes liable thereby. Comyns's Rep. 75. pl. 49. Trin. 12 W. 3. Gregory v. Walcup.

40. A Bill of Exchange was *directed to A. or in his Abſence to B.* and began thus: *Gentlemen, Pray pay.* The Bill was tender'd to A. who *promiſed to pay it as ſoon as he ſhould ſell ſuch Goods*; and in an Action againſt him for Non-payment, the Declaration was of a Bill directed to him, without taking any Notice of B. and Holt held it well. 12 Mod. 447. Paſch. 13 W. 3. Anon.

7 Mod. 86. S. C. the Court ſaid, that however it might have been on Demurrer, it will be well after Verdict; for if the 2d or 3d were paid, there had been no Promiſe at all; for the Promiſe is conditional to pay this, if the 2d or 3d be not paid, and therefore if the 2d or 3d were paid, they could not find for the Plaintiff. —— 2 Ld. Raym. Rep. 810. S. C. adjudg'd for the Plaintiff.

41. A Bill of Exchange was thus: *Pray pay this my firſt Bill of Exchange, my 2d and 3d not being paid.* In the Declaration the Indorſement was ſet forth thus, viz. that the Drawer [Drawee] indorſavit ſuper Billam illam Content' Billæ illius ſolvend' to the Plaintiff, without ſetting forth that the Bill was ſubſcribed. It was moved in Arreſt of Judgment, that there was *no Averment, that the 2d and 3d Bill was not paid*, which is a Condition precedent; but per Cur. that muſt be intended, for the Plaintiff could not otherwiſe have had a Verdict, and therefore this Indorſement likewiſe aided by their finding Quod Aſſumpſit. 1 Salk. 130. pl. 14. Mich. 1 Ann. B. R. Eaſt v. Eſtington.

1 Salk. 131. pl. 17. Mich. 2 Ann. B. R. the S. C. & S. P. by Powell J.

42. Since the Statute of 9 & 10 W. 3. cap. 17. a *Proteſt* was never *ſet forth in the Declaration*; Per Holt Ch. J. and Powell J. 3 Salk. 69. pl. 6. in Caſe of Borough v. Perkins.

43. An

43. An *Aſſumpſit was brought* by one B. againſt C. on a Foreign Bill of Exchange *to pay*, according to the Cuſtom of Merchants, ſo much Money *at 2 Uſances, viz. at Amſterdam*, but it did not appear what the Time of thoſe Uſances was. Holt Ch. J. ſaid, he would take Notice of the Cuſtom of Merchants, but not of that at Amſterdam or Venice &c. In ſuch Caſe, you *muſt ſet forth the Cuſtom* in your Declaration. 11 Mod. 92. pl. 18. Trin. 5 Ann. B. R. Buckley v. Cambden.

Plaintiff muſt ſhew what the Uſances are; for the Court cannot take Notice of Foreign Uſances which vary, being longer in one Place than in another. 1 Salk. 131. pl. 18. Hill. 7 Ann. B. R. Buckley v. Cambell.

44. A Bill of Exchange was drawn payable to A. but has *no Day mentioned when it ſhould be paid*. A. on Sight of the Bill, promiſed to pay it on the 18th of April. It was objected, that the Action muſt be founded on the new Agreement, and not on the Cuſtom of Merchants; But per Powell J. the Cuſtom of Merchants is by the Acceptance, and Promiſe to pay at ſuch a Time is good, and he is bound by the Cuſtom of Merchants by the Acceptance to pay at the Time appointed, and therefore the Declaration on the Cuſtom of Merchants is good; and if it ſhould not bind on the Cuſtom of Merchants, it would not bind at all; becauſe no Indebitatus Aſſumpſit lies on the Acceptance; and Judgment for the Plaintiff, Niſi, by 3 Judges, abſente Holt. 11 Mod. 190. pl. 5. Mich. 7 Ann. B R. Walker v. Atwood.

45. In *Action againſt the 2d Indorſor* of a Promiſſory Note, the Plaintiff *declared without any Averment, that the Money was demanded of the Drawer or the 1ſt Indorſor*. This was moved in Arreſt of Judgment, but held good, becauſe the Indorſor charges himſelf in the ſame Manner as if he had originally drawn the Bill. 1 Salk. 133. pl. 20. Trin. 9 Ann. B.R. Harry v. Petit.

But it was held e contra. 1 Salk. 126. pl. 6. Mich. 10 W. 3. by Holt Ch. J. at Guildhall, and that the Indorſee cannot ſue the Indorſor, unleſs he firſt endeavours to find out the Drawer, to demand it of him, and ſuch Endeavour muſt be ſet forth in the Declaration. Anon.

46. An Action was brought againſt the Indorſor of a Promiſſory Note, wherein the Plaintiff declared, *that one Coates fecit Notam in Writing*, by which he promiſed to pay to the Defendant, or Order, ſo much Money &c. that the Defendant indorſed this Note to the Plaintiff, and that licet he demanded the Money de eodem Coates, he did not pay it. The Defendant demurred ſpecially, for that the Plaintiff did *not ſet forth, that Coates, of whom the Money was demanded, was the ſame Coates who drew the Bill*; to which it was anſwered, that the Declaration ſets forth, that the Note was made by one Coates, and that the Plaintiff *demanded the Money de eodem Coates*, which is a good and certain Averment, that he was the ſame Perſon, and the Court was of that Opinion. 8 Mod. 307. Mich. 11 Geo. Elliott v. Cowper.

47. Then it was objected, that *the Statute*, which gives Credit to ſuch Notes, and a Remedy to recover on them where there was none at Law, *enacts, that all Notes ſigned* by any Perſon &c. and it does not appear by this Declaration, that Coates ſigned this Note. To which it was anſwered, that the Plaintiff ſet forth that Coates *fecit Notam*, which *implies ſigning it*. The Plaintiff had Judgment. 8 Mod. 307. Mich. 11 Geo. Elliott v. Cowper.

2 Ld. Raym. Rep. 1576. S.C. and Forteſcue J. cited the late Caſe of Taylor v. Dobbins, as exactly this Caſe in Point, wherein, notwithſtanding this very Exception, the Plaintiff had Judgment, becauſe it was ſaid fecit Notam ſuam per quam promiſit ſolvere, which implied, that it was ſigned by the Defendant, which Caſe Pratt Ch. J. remembered, and Judgment was given for the Plaintiff

So where the Declaration was, that the Defendant made the Note for himſelf and Partner, and ſubſcribed it with his own Hand, whereby Defendant promiſed for himſelf and Partner to pay, the Court held it very good; for this ſhews ſufficiently that he ſigned it for himſelf and Partner, and Judgment for the Plaintiff. 2 Ld. Raym. Rep. 1484 Trin. 13 Geo 1. and 1 Geo. 2. Smith v. Jarves.

Barnard. Rep. in B.R. 87 Eveskyn v. Merry, S.C. held accordingly.

48. A Bill of Exchange need not be *expreſsly averred to be within the Cuſtom of Merchants*, but if, as ſet out in the Declaration, it appears to be within the Cuſtom, it is ſufficient. 2 Ld. Raym. Rep. 1542. Mich. 2 Geo. 2. Ereskine v. Murray.

Barnard. Rep. in B. R. 87. Eveskyn v. Merry, S. C. the Court ſaid, that indeed the Stat. 9 & 10 W. 3. cap. 17. required the Acceptance to be in Writing, where a Perſon would take Benefit of that Act, but it does not require in general, that the Acceptance ſhall be by Underwriting; but ſays, that the Court ſeemed to think, that a Signing is neceſſary to be laid in an Action upon a Promiſſory Note, to bring the Plaintiff within the Stat. 3 & 4 Ann. cap. 9 which requires it; but they doubted whether a Bill of Exchange ſhall not be conſidered as a technical Word, and conſequently will include the Circumſtances of Signing, and affirm'd the Judgment.

49. Plaintiff declared, that M. made his Bill of Exchange in Writing to E. the Defendant directed, and by the ſaid Bill requeſted the ſaid E. on ſuch a Day, to pay to M. the Plaintiff, or Order, 200 l. pro Valore in Manibus ipſius E. de Denariis accommodatis de eodem M. that E. accepted the Bill, and promiſed to pay &c. Plaintiff had Judgment by Nil dicit, and in Error brought Exception was, that it was *not averred that the Bill was ſigned.* But as to this it was anſwered, That it is *alleged that the Plaintiff made his Bill of Exchange in Writing, directed to the ſaid E. and by the ſaid Bill requeſted*, which neceſſarily implies the Plaintiff's Name wrote in the Bill, elſe he could not requeſt, and the ſaying he made the Bill in Writing, imports, that he, or ſomebody by his Authority, wrote, which is all one, and imports aſſigning, if it be neceſſary in Caſe of Inland Bills of Exchange; and ſuch a Way of declaring was held ſufficient in Caſe of Promiſſory Notes, where the Stat. 3 & 4 Ann. cap. 9. requires, that the Party that makes the Bill, or ſome Perſon intruſted by him, ſhould ſign it. (See Elliot v. Cooper, ſupra.) And another Exception was, for that it was De Denariis accommodatis (de eodem M.) whereas it is Nonſenſe, and ſhould be (per eundem M.) But the Court held, that Pro Valore in Manibus ipſius E. had been ſufficient, and that the other Words might be rejected as Surpluſage, and they held, that the Meaning was, (lent by the ſaid M.) tho' the Latin might not be ſo correct. And Judgment in C. B. was affirmed in B. R. 2 Ld. Raym. Rep. 1542. Mich. 2 Geo. 2. Ereskine v. Murray.

50. The Plaintiff declar'd, *that A. and B. fecit quandam Notam ſuam in Scriptis vocatam a Promiſſory Note, & eandem Notam adtunc & ibidem cum Manu ſua propria &c. jointly or ſeparately, promiſed to pay* 1100 *l. for Value received.* There was Verdict and Judgment for the Plaintiff. It was aſſigned for Error, that the Note is laid to be made by 2 Perſons, A. and B. and the Verb is fecit in the ſingular Number, ſo that does not appear to be made by A. againſt whom the Action was brought, but it might be made by B. and it does not appear to make A. liable by his Signing; neither does the Note import, that they promiſed ſeverally; for it ought to have been, that they promiſed jointly and ſeparately. And Judgment for theſe Reaſons was reverſed. 2 Ld. Raym. Rep. 1544. Mich. 2 Geo. 2. Neale v. Ovington.

(P) Evidence.

3 Salk. 68. pl. 4. S. C. in much the ſame Words. ——12 Mod. 203. Trin.

1. A Gives to B. a Bill of Exchange on C *in Payment of a former Debt*, this will not be allowed as Evidence on Non Aſſumpſit unleſs paid, tho' B. kept it in his Hands long after it was payable; for a Bill ſhall never go in Payment of a precedent Debt, unleſs it be part of

of the Contract that it ſhould do ſo. 1 Salk. 124. pl. 1. coram Holt Ch. J. at Guildhall, 3 W. & M. Clark v. Mundal. 10 W & M. at Guildhall, S. C. & S. P. ruled accordingly.

2. In Caſe upon a Bill of Exchange upon the Evidence at the Trial before Holt Ch. J. at Guildhall, Nov. 23. Mich. 12 W. 3. the Caſe was thus: *A. drew a Bill of Exchange upon B. payable to C. at Paris. B. accepted the Bill. C. indorſed it, payable to D.—D. to E.—E. to F.—F. to G.*—G. demanded the Bill to be paid by B. and upon Non-payment *G. proteſted it* within the Time &c. and then *G. brought an Action againſt D.* and it was well brought, and he recovered. Afterwards *D. brought an Action againſt B.* and tho' D. produced the Bill and the Proteſt, yet becauſe he *could not produce a Receipt for the Money paid by him to G. upon the Proteſt*, as the Cuſtom is among Merchants, as ſeveral Merchants upon their Oaths affirmed, he was Nonſuit. But Holt ſeemed to be of Opinion, that if he had *proved Payment by him to G.* it had been well enough. Ld. Raym. Rep. 742, 743. Mendez v. Carreroon.

3. Indorſee need not *prove* the Drawer's Hand, becauſe tho' it be a *forged Bill*, the Indorſor is bound to pay it. 1 Salk. 127. pl. 9. Paſch. 11 W. 3. coram Holt at Guildhall. Lambert v. Pack. 12 Mod. 244. Mich. 10 W. 3. at Guildhall, coram Holt Ch. J. Lambert v. Oakes, S. P. and ſeems to intend S. C.——Ld. Raym. Rep. 443, 444. S. C. & S. P. accordingly.

4. Indorſee muſt prove that he *demanded* it of the Drawer, or him on whom it was drawn, and that he refuſed to pay it, or that he ſought him, and *could not find him*; for otherwiſe he cannot reſort to the Indorſor. 1 Salk. 127. pl. 9. Paſch. 11 W. 3. coram Holt at Guildhall. Lambert v. Pack. He muſt prove that he demanded, or did his Endeavour to demand it of the Drawer before he can ſue upon the Indorſement. 12 Mod. 244. Mich. 10 W. 3. Lambert v. Oakes, S. C.—Ld. Raym. Rep. 443. S. C. & S. P.

5. The *Demand* muſt be proved *ſubſequent to the Indorſement*; for if it was precedent, he could only act as Servant to the Indorſor, and ſo the Demand inſufficient to charge the Indorſor. 1 Salk. 127. pl. 9. Paſch. 11 W. 3. coram Holt Ch. J. at Guildhall. Lambert v. Pack. 12 Mod. 244. Lambert v. Oakes, S P. and ſeems to be S. C.——Ld. Raym. Rep. 443. S. C. & S. P.

6. If the *Action* be brought *againſt the Indorſor*, it is not neceſſary to *prove the Hand of the Drawer*; for though it be forged, the Indorſor is liable; per Holt Ch. J. at Guildhall. Ld. Raym. Rep. 443, 444. Paſch. 11 W. 3. Lambert v. Oakes.

7. Plaintiff to ſhew a Proteſt, produced an *Inſtrument atteſted by a Notary Publick*; and tho' it was inſiſted upon that he ſhould *prove this Inſtrument*, or at leaſt *give ſome Account how he came by it*, Holt ruled it not to be neceſſary; for that, he ſaid, would deſtroy Commerce and publick Tranſactions of this Nature. 12 Mod. 345. Mich. 11 W. 3. at Niſi Prius, coram Holt. Anon.

8. If a Man has a Bill of Exchange, he may *authorize another to indorſe his Name* upon it *by Parol*; and when that is done, it is the ſame as if he had done it himſelf; per Holt Ch. J. 12 Mod. 564. Mich. 13 W. 3. at Niſi Prius. Anon.

9. Action on a Bill of Exchange, being *by an Executor*; and upon a Debt laid to be due to Teſtator, he held it neceſſary to *prove the Acceptance was in the Teſtator's Time*; per Holt Ch. J. 12 Mod. 447. at Niſi Prius, coram Holt, Paſch. 13 W. 3. Anon.

10. If a Man gives a Note for Money payable on Demand, he needs not prove any *Conſideration*. 2 Freem. Rep. 257. pl. 324. ſays it was ſo held, and that the Practice is ſo. Trin. 1702. Crawley v. Crowther.

11. Plaintiff had a Bill of Exchange drawn on the Defendant, which he *indorſed, and delivered to J. S. who went to the Dejendant to get it accepted. J. S. left it with him, and it was afterwards loſt*; thereupon the Plaintiff brought Trover. The Court were all of Opinion, that the bare Indorſement, without any other Words purporting an Aſſignment, does not make an Alteration of the Property; for it may ſtill be filled up either with a Receipt or an Aſſignment, and conſequently *J. S. is a good Witneſs.* 1 Salk. 130. pl. 15. Paſch. 2 Ann. B. R. Lucas v. Haines.

12. Whether the *Want of a Conſideration of a Promiſſory Note* can be given in Evidence on the Statute of 3 & 4 Ann. cap. 9. ſee G. Equ. Rep. 154. Mich. 8 Geo. 1. Brown v. Marſh.

13. As to *Notice given by the Indorſee to the Acceptor* before he commenced his Action, that he muſt provide the Money it was offer'd in Evidence, that he gave him Notice by ſending him a Letter to do ſo. But the Ch. J. ſaid that he did not think the bare ſending a Letter to the Poſt-Houſe would be ſufficient Evidence of Notice, without ſome further Proofs of the Acceptor's receiving it; and beſides he ſaid that generally a Perſonal Demand is expected. Barnard. Rep. in B. R. 199, 200. Trin. 2 Geo. 2. Dale v. Lubeck.

14. To prove an *Indorſement over* of a Bill of Exchange, it was offer'd that the *Defendant had himſelf confeſs'd that he was come to Town to haſten on the Trial of an Action that was brought againſt him, upon an Indorſement that he had made on a Bill of Exchange.* And the Counſel ſaid that this very Cauſe was brought down by Proviſo; ſo that it is ſtrong Evidence that it is for the ſame Matter; and the Ch J. at the Sittings at Guildhall, allow'd this to be good Evidence of the Indorſement. Barnard. Rep. in B. R. 199. Trin. 2 Geo. 2. Dale v. Lubeck.

(Q) Recovered. What. Damages &c.

Drawee accepts the Bill, and ſome time *after proteſts it*, and thereupon the Bill *is indorſed to the Drawer*, who brought

1. INtereſt *on* a Bill of Exchange *commences* from Demand made, and therefore, if there was no Demand made till Action brought, the Defendant may plead Tender and Refuſal, and Uncore Priſt, and ſo diſcharge himſelf of Intereſt; but if it be *the Defendant's Fault that the Demand could not be made*, As if he were *out of the Kingdom*, there Want of Demand ought not to prejudice the Plaintiff; per Cur. 6 Mod. 138. Paſch. 3 Ann. B. R. Anon.

Action as Indorſee, and held well, and Intereſt was ruled to be paid *from the Time of the Proteſt.* 10 Mod. 36. Trin. 10 Ann. B. R. Louviere & Laubray.

Since this Statute it has been adjudged that an Indorſee of an Inland Bill of Exchange may maintain an Action againſt the Acceptor, on a Parol Acceptance, as to

2. 3 & 4 *Ann. cap. 9. S. 5. No Acceptance of ſuch Inland Bill ſhall charge any Perſon, unleſs underwritten or indorſed; and if not ſo underwritten or indorſed, no Drawer to pay Coſts, Damages, or Intereſt, unleſs Proteſt be made for Non-acceptance, and within 14 Days after Proteſt the ſame be ſent, or Notice thereof given to the Party from whom ſuch Bill was received, or left in Writing at his uſual Place of Abode; and if ſuch a Bill be accepted, and not paid within 3 Days after due, no Drawer ſhall pay Coſts, Damages, or Intereſt thereon, unleſs Proteſt be made and ſent, or Notice given as aforeſaid; nevertheleſs the Drawer ſhall be liable to Payment of Coſts, Damages, and Intereſt, if any one Proteſt be made for Non-acceptance or Non-payment, and Notice be ſent, given, or left.*

the principal Sum, tho' not as to Intereſt and Coſts; for the Act being made to give a further Remedy for

for Intereſt, Damages and Coſts againſt the Drawer, cannot be ſuppoſed to take any Advantage from the Payee which he had before, and therefore the true Conſtruction of the Act is, that to charge the Drawer with Intereſt and Coſts, the Drawee muſt refuſe to accept it in Writing; nevertheleſs if he accepts the Bill by Parol, he is liable to the principal Sum in the Bill as he would have been before the Act. 3 New Abr. 611. cites Mich. 8 Geo. 2. B. R. Lumley v. Palmer.

(R) Remedy for Bills loſt.

1. A Bill of Exchange was accepted by the Drawee, by underwriting his Name; but the Perſon to whom it became payable by Indorſement, loſt or miſlaid it; and the Drawee refuſing Payment, the Indorſee exhibited his *Bill in Chancery, ſetting forth the Refuſal, and that he offered to give Security to the Defendant to indemnify him, and annex'd an Affidavit to the Bill of the Loſing or Miſlaying it.* This being confeſs'd by the Anſwer, it was objected that it did not appear by the Plaintiff's Affidavit that he had not aſſign'd the Bill to another; but decreed that Defendant pay the Money, the Plaintiff giving Security to indemnify the Defendant, as the Maſter ſhall think reaſonable, againſt any Perſon that may hereafter demand the ſame. Fin. Rep. 301. Paſch. 29 Car. 2. Terceſe v. Geray.

2. 9 & 10 *W.* 3. *cap.* 17. *S.* 3. Enacts that *if any Inland Bills of Exchange for 5 l. or upwards for Value received, drawn payable at a certain Number of Days &c. after the Date thereof, be loſt or miſcarry within the Time limited for Payment of the ſame, the Drawer of the ſaid Bills ſhall give other Bills of the ſame Tenor, Security being given (if demanded) to indemnify him, in Caſe the ſaid Bills ſo loſt, or miſcarried, be found again.*

3. A Bank Bill *payable to A. or Bearer* was loſt, and *found by B. a Stranger.* B. for a valuable Conſideration transferred it to C. who got a new Bill in his own Name; Holt. Ch. J. held that A. may have *Trover* againſt B. who found the Bill, becauſe he had no Title, though the Payment to B. would have indemnified the Bank, but not againſt C. to whom it was aſſigned, by reaſon of the Courſe of Trade, which creates a Property in the Aſſignee or Bearer. 1 Salk. 126. pl. 5. at Guildhall coram Holt Ch. J. Mich. 10 W. 3. Anon.

4. By 3 & 4 *Ann. cap.* 17. *S.* 2. *Actions* to be brought upon Notes mentioned in the Statute, *ſhall be brought within the Time appointed for bringing Actions by the Statute of* 21 *Jac. cap.* 16.

5. If a Promiſſory Note be *indorſed* and afterwards *loſt*, and *paſſed in Way of Trade* to a 3d Perſon for a valuable Conſideration, the Indorſee may have *Trover* for the Note againſt the third Perſon; Per Baron Price, which the other Barons did not deny. 9 Mod. 47. Trin. 9 Geo.

(S) Equity.

1. A Requeſted B. to let him have 50 l. in London, and he would draw a Bill on C. in the Country, *to repay it to B. as ſoon as B. ſhould return Home.* B. gave 2 Bills to A. one for 20l. and another for 30l. payable at 20 Days Sight, which the *Drawee accepted.* On B's Return, *Drawee in the Country refuſed to pay A's Bill.* B. on this, writes to *ſtop Payment* of his Bills, but one was paid before, but the Drawee refuſed to pay A. the other. Decreed A. to pay back the 20 l. received, and a perpetual Injunction againſt A. for the other 30 l. Fin. R. 356. Paſch. 30 Car. 2. Hill and Penſord v. Baker.

2. Bill

2 Freem. Rep. 112. pl. 123. S. C. but not fully S. P.

2. Bill for Relief againſt a *Bill of Exchange*, on Pretence of its being gained by Threats or Menaces, is not proper for Equity, it being a Matter at Law, and *Dureſs* a good Plea there; but being *gain'd by Fraud*, and for a fictitious Conſideration, it was relieved Per Commiſſioners. 2 Vern. 123. pl. 123. Hill. 1690. Dyer v. Tymewell.

For more of Bills of Exchange in General, See **Payment**, (A) and other Proper Titles.

(A) Blanks.

1. IF Spaces are left for the Addition of the *Pariſh* and ſuch Things in the *Record*, this the Judges cannot amend; for its out of their Knowledge. Arg'. Savil. 87. 88. pl. 165. Paſch. 28 Eliz.

2. Blank left in a *Bond* for the *Chriſtian Name of the Obligor*, who ſubſcribed his Chriſtian Name, is good. Cro. J. 261. pl. 22. Mich. 8 Jac. B. R. Dobſon v. Keyes.

3. If a Man be bound *to pay to (Blank)* and ſeals it, and *afterwards a Name is put in* this is not a good Bond; Per Jones J. 2 Show. 161. pl. 146. Paſch. 33 Car. 2.

4. Blanks were *filled up after the Execution* of a Deed, and the Deed not read again to the Party nor re-ſealed, and executed; yet held a good Deed. 2 Ch. Rep. 410. 3 Jac. 2. Paget v. Paget.

5. If a *Judgment* is *entered on the Roll* with Blanks, they may be filled up without Notice within the Year. Cumb. 71. Hill. 3 & 4 Jac. 2. Anon.

6. Debt upon a *Bond*; and upon Oyer the Defendant demurred, and ſhewed for Cauſe that the Bond was void, being *Noverint* univerſi &c. me J. S. teneri & firmiter *obligari Richardo de Woodſtreet* &c. *Solvend' eidem Richardo Biſhop.* But the Court held the Bond good and gave Judgment for the Plaintiff. 11 Mod. 275. pl. 23. Hill. 8 Ann. B. R. Biſhop v. Morgan.

7. On the *Aſſignment of a Promiſſory Note* payable to one or Order, nothing is done but indorſing the Name of the Indorſor, upon which the Indorſee may write what he pleaſe; and *at a Trial*, when the Bill is given in Evidence, the *Party may fill up the Blanks* as he pleaſes. Comyns's Rep. 311. pl. 160. Mich. 5 Geo. 1. C. B. Moor v. Manning.

Blood Corrupted.

(A) In what Caſes.

Br. Forfeiture de Terres, pl. 89. cites S. C.

1 IF the Father has 2 *Sons*, and *the Eldeſt has Iſſue a Daughter, and commits Felony in his Father's Life*, and confeſſes the Felony, and *becomes an Approver, and takes his Clergy*, and is put to the Priſon of the

the Ordinary, and there *dies*, and *after the Father dies*, the Daughter ſhall have the Land, and not the Uncle, becauſe the eldeſt Son *was not attainted, by Reaſon that no Judgment of Death was given*; for by ſuch Judgment the Land ſhall Eſcheat, by Reaſon of the Attainder of the eldeſt Son, who cannot take it. Br. Diſcent. pl. 44. cites 8 E. 1. and Fitzh. Aſſiſe, 421.

2. Being a *Felo de ſe* is no Corruption of Blood; for Corruption of Blood cannot be without *Attainder in Fact*; agreed by all the Juſtices. Pl. C. 261. b. Mich 4 & 5 Eliz. Hales v. Pettit. Hawk. P. C. 68 cap 27. S. 8. S. P.

3. Attainder of *Hereſy or Premunire* works no Corruption of Blood. Co. Litt. 391. a.

4. By an Attainder of *Piracy* on Stat. 28 H. 8. cap. 15. there is no Corruption of Blood. 3 Inſt. 112. No Attainder of Piracy wrought Corruption of Blood at the Common Law. 1 Salk. 85. pl. 1. at the Old Baily 1696. in Caſe of the King v. Morphes. ——Attainder for Piracy corrupts not the Blood, inaſmuch as the Statute only ſays that the Offender ſhall ſuffer ſuch Pains of Death &c. as if he were attainted of a Felony at Common Law; but ſays not that the Blood ſhall be corrupted. Hawk. Pl. C. 99. cap. 37. S. 8.——Where the Proceedings are by the *Civil Law*, a Condemnation for a capital Offence cauſes neither Forfeiture of Lands nor Corruption of Blood; for Corruption of Blood can be cauſed only by a Judgment by Courſe of the Common Law. 2 Hawk. Pl. C. cap. 4. S. 10. and cap. 23. S. 12.——S. P. Hale's Hiſt. of Pl. C. 354, 355. cap. 27. but ſays if there be an *Attainder of Treaſon or Felony done upon the Sea, upon this Statute of 28 H. 8. by Jury, according to the Courſe of the Common Law*, it ſeems that the Judgment thereupon works a Corruption of Blood, becauſe the Commiſſion itſelf is under the Great Seal, warranted by Act of Parliament, and the Trial is according to the Courſe of the Common Law, and therefore the Proceedings and Judgment thereupon is of the ſame Effect as an Attainder of Foreign Treaſon by Commiſſion upon the Statute of 35 H. 8. cap. 2. or any other Attainder by the Courſe of the Common Law; and with this agrees Co. Litt. S. 745. pag. 391. Nay I think farther, that if the Indictment of Piracy before ſuch Commiſſioners upon the Statute of 28 H. 8. be formed as an Indictment of Robbery at Common Law, viz. Vi & Armis & Felonice &c. that he might be thereupon attainted, and the Blood corrupted; for whatever any ſay to the contrary, it is out of Queſtion that Piracy upon the Statute is Robbery, and the Offenders have been indicted, convicted, and executed for it in B. R. as for a Robbery, as I have elſewhere made it evident. But indeed if the Indictment before theſe Commiſſioners run only according to the Stile of the Civil Law, viz. Piratice deprædavit, then the Attainder thereupon, upon the Statute of 28 H. 8. tho' it gives the Forfeiture of Lands and Goods, corrupts not the Blood; and ſo are thoſe 2 Books of the ſame Author, Co. P. C. cap. 49. and Co. Litt. S. 745. to be reconciled, which, without this Diverſity, would be contradictory; & cites Hill. 13 Car. B. R. Hilliar v. Moore.

5. 1 *Jac.* 1. *No Attainder for* Bigamy *ſhall work any Corruption of Blood, Loſs of Dower, or Diſheriſon of the Heirs.*

6. 21 *Jac.* 1. *S.* 26. *It is Felony without Benefit of Clergy to* acknowledge, or procure to be acknowledged, any Fine, Recovery, Deed, inrolled Statute, Recognizance, Bail, or Judgment *in the Name of any Perſon not privy or conſenting thereunto; howbeit this Offence ſhall not corrupt the Blood.*

7. Where a *Statute ſaves the Land to the Heir*, it ſo far prevents the Corruption of Blood. Hawk. Pl. C. 107. cap. 40. S. 5.

8. An Attainder of *Treaſon* works Corruption in all Caſes wherever the Treaſon be done, except only *Attainders before the Conſtable, Marſhal*, or *Admiral*; the Reaſon whereof was, becauſe there could be no Record made of it, but here there is. (This was Attainder of Treaſon by Commiſſion on 28 H. 8. 15.) 1 Salk. 85. pl. 1. at the Old Baily 1696. The King v. Morphes.

(B) Who ſhall be barr'd.

1. WHERE *a Father is ſeiſed in Fee*, and the *Son is attainted in the Life of the Father*, and the *Father dies*, and the Son ſurvives, there no other ſhall have the Land as Heir; but the Lord ſhall have the Writ of Eſcheat, ſuppoſing that the Tenant died without Heir; per Newton. Br. Diſcent, pl. 12. cites 22 H. 6. 38.

At the Parliament 1ſt H. 4. Numb. 132. *Petition of the Commons was*, that the Attainder of the eldeſt Son in the Life of his Father, ſhould not be a Bar to the youngeſt, and anſwer'd *currat Communis Lex.* Ex Lib. Mr. Hackwel, D. 48. pl. 16. Marg.——Prynn's Abr. of Cotton's Records, 396. cites the ſame Petition and Anſwer.——S. P. of Collateral Deſcents of Lands in Fee-ſimple, where the eldeſt Son dies without Iſſue, living the Father, the younger ſhall inherit the Father, becauſe he needs not mention the elder Brother in conveying of his Title; but if the elder ſurvive his Father but a Day, and dies without Iſſue, the younger cannot inherit, becauſe the Corruption of the Blood in the elder Son ſurviving the Father, impedes the Deſcent. Hale's Hiſt. Pl. C. 356, 357. cap. 27. cites 31 E. 1. Bar 315. But ſays that otherwiſe it is in caſe the eldeſt Son had been an Alien born; for then, notwithſtanding ſuch alien Son were living, the Land will deſcend from the Father to the youngeſt Son born a Denizen.

2. A Man hath *Iſſue 2 Sons*, and the *eldeſt in the Life of the Father is attainted of Felony, and dies, living the Father*, and after the *Father dies ſeiſed of Land in Fee.* If the Land ſhall eſcheat or not was the Queſtion; and 'twas held by Brown, Coningsby, Molineux and Hales, that the Land ſhall enure to the youngeſt Son as Heir to his Father, if the *eldeſt had no Iſſue alive*; but if he had Iſſue alive, (ſo that he is inheritable by the Law, if 'twas not for the Attainder) the Land ſhall eſcheat to the Lord, and ſhall not go to the youngeſt Son. Quod nota, pro diverſitate Legis. D. 48. a. pl. 16. Mich. 32 H. 8. Anon.

3. A Man *infeoff'd* ſeveral *to the Uſe of his Wife for Life*, and after to the Uſe *of the Heirs Male of his Body*, and has a Son, and after was attainted of Treaſon Anno 29 H. 8. and the *Wife died*; and it was held that *the Son* ſhall have Ouſter le Main, as *a Purchaſor by the Name of Heir Male, and not* as *Heir.* Quære. Br. Diſcent, pl. 1. cites 37 H. 8.

Hale's Hiſt. Pl. C. 357. cites S. C.

4. *A. and B. are Brothers. A. is attainted*, and *has Iſſue C. and dies*, and *C. purchaſes* Lands, *and dies without Iſſue.* B. his Uncle ſhall not inherit; for A. who was the *Medius Anceſtor was diſabled*; per Hale Ch. J. Vent. 416. cites 3 Inſt. 241. Courtney's Caſe.

Br. Deſcent, pl. 23. S. C. cites 29 Aſſ. 61.

5. Where the *Iſſue in Tail is outlaw'd of Felony in the Life of the Anceſtor, and gets a Pardon in the Life of the Anceſtor*, he may enter after the Death of his Anceſtor as Heir in Tail; *contra of Fee-ſimple.* But if the Anceſtor dies before the Pardon, then it ſeems, by Thorpe, that the Heir in Tail cannot enter. The Reaſon ſeems to be inaſmuch as the King ſhall have the Land during the Life of the Outlaw. Br. Forfeiture de Terre, pl. 37.

D. 274. a. b. pl. 40. Paſch. 10 Eliz. Grey's Caſe.—— S. C. cited Jo. 460.

6. The *younger Brother hath Iſſue, and is attaint* of Treaſon, and dies. The elder Brother, having a Title to a Petition of Right, dies without Iſſue. Without a Reſtitution the other Brother's Son hath loſt that Title; for tho' that Title were in an Anceſtor that was attainted, yet his Father that is the Medium, whereby he muſt convey that Title, was attainted, and ſo the Deſcent is obſtructed. Vent. 425. per Hale Ch. B. cites 10 Eliz. D. 274. Graves's Caſe.

But if the *Wife died before Entry*, after the Death of the Baron, the Iſſue is barr'd, and the King

7. *Baron and Feme, Tenants in Tail* of Lands of the Inheritance of the Anceſtors of the Feme, have Iſſue a *Son*, who has Iſſue a Son, *Grandſon* to the Baron and Feme. The Baron dies. His *Son commits Treaſon*, and is executed, the *Feme ſurviving.* Per Ld. Treaſurer & omnes Barones, the Grandſon has good Title after the Death of the Feme, and the Land is not forfeited by the Attainder of the Son, he being executed in the Life of the Grandmother, who only as long as ſhe lived was Tenant

nant in Tail, and the Land descended to the Grandson as Cousin and Heir of the Body of the Feme the Grandmother. Cro. E. 28. pl. 12. Pasch. 26 Eliz. in Cam. Scacc. Mantell v. Mantell. has Right to the Land, because the Issue cannot claim as Heir to them both; for by the Father he is barr'd. Arg. Godb. 312. cites 8 Rep. 72.

8. If the *eldest Son kills his Father*, the youngest shall have an *Appeal* against his Brother; and yet if his Brother be *attainted* at his Suit, he shall never inherit his Father's Lands. Arg. Noy 165. cites it as agreed by all the Judges in 26 Eliz.

9. Where one is attainted of *Treason or Felony*, this is absolute and perpetual Disability by Corruption of Blood for any of his Posterity to claim any Hereditament in Fee-simple, or as Heir to him or to any other Ancestor paramount him. 11 Rep. 1. b. 39 Eliz. Ld. Delaware's Case. Where the *Person under whom another ought to make his Conveyance*, is barr'd, in such Case such other is barr'd. Arg. Lat. 73. cites 31 E. 3. Fitzh. Descent, 17. and Bar 15.

10. But the *Heir in Tail*, in Case of Felony or Murder by the Father, shall have the Land, and the Blood is not corrupted; but it is otherwise in Case of Treason by the Statute 26 H. 8. Jenk. 82. pl. 60. When *Tenant in Tail* is attainted of Treason, his Blood is not corrupted. Arg. Godb. 305. cites 3 Rep. 10 Lumley's Case, and says, that the Statute 33 H. 8. 20. is the first Statute which vests Lands forfeited for Treason in the King without Office found, so as according to the Ld. Lumley's Case, 3 Rep. 10. before this Statute of 33 H. 8. 20. the Land did descend to the Issue in Tail. Godb. 305. in Case of Sheffield v. Ratcliff.

The Statutes of 26 and 33 H. 8. subject Estates Tail to the Forfeiture by Attainder of Treason, and so the Law stands at this Day, notwithstanding the Statute of 1 E. 6. and the Statute of 1 Mar. But yet these Acts are not absolutely a Repeal of the Statute of Donis Conditionalibus, for notwithstanding the Forfeiture of the Lands entailed by the Attainder, yet the Blood is not corrupted as to the Issue in Tail; and therefore if the Son of the Donee in Tail be attainted of Treason in the Life of the Father, and die, having Issue, and then the Father dies, the Estate shall descend to the Grand-child, notwithstanding the Father's Attainder; but otherwise it would have been in Case of a Fee Simple. Hale's Hist. Pl. C. 356. cites 3 Co. Rep. 10. b. Dowtie's Case. —— Jenk. 82. pl. 60. S. P. and cites S. C.

11. Where a *Remainder* is limited *to the right Heirs of J. S.* and J. S. afterwards is attainted, his Heir shall not take; for his Blood is corrupted, and he is Issue only, and not Heir. Jenk. 82. pl. 60. Jenk. 203. pl. 27. S. P.

12. If Corruption of the Blood of the Father disables the Course of Descent and Inheritance between the *Brother and the Father?* Mo. 569. pl. 775. Pasch. 41 Eliz. in the Exchequer, Countess of Warwick's Case. No Judgment That it does not. Cro. J. 539 cites it as adjudged 41 Eliz. in Holbie's Case. —— Noy 158. &c. S. C. by the Name of the King v. Borafton and Adams, alias Altonwood's Case. —— 4 Le. 5. pl. 21. Sir Tho. Hobbie's Case. —— And see the Argument of Hale Ch. B. in Case of Collingwood v. Pace. Vent. 413. to 430.

13. Land is given *to A. and the Heirs Males of his Body*, Remainder *to the Heirs Females* of his Body. If the *Father commits Treason*, both Heir Male and Female are barr'd; for they both claim by the Father. But if *the Heir Male, after his Father's Death, is attainted* of Treason, the King shall have the Lands as long as he has Issue Male of his Body, and *if he dies without Issue*, the *Heir Female shall have the Lands*; for she claims by the Father, and not by the Brother. Arg. Godb. 311. cites Litt. 719

14. If there be *Grandfather*, *Father*, *and Son*, and the *Grandfather and Father have divers other Sons*, and the *Father is attainted of Felony*, *and pardoned*, yet the Blood remains corrupted, not only above him, and about him, but also to all his Children born at the Time of the Attainder. Co. Litt. 392. a. In all Cases, (but only in Cases of Entails) Attainder of Treason or Felony corrupts the Blood upward and downward, so that no Person that must make his Derivation of Descent to or through

through the Party attaint, can inherit; As if there be Grandfather, Father, and Son, and the Father is attainted, and dies in the Life of the Grandfather, the Son cannot inherit the Grandfather. Hale's Hiſt. Pl. C. 356.

Mo. 815. pl. 1103. in the Star-Chamber, S. C. ſays, But Nota, that for ſundry vehement Preſumptions of Forgery of the ſaid Deed, the Deed was cenſur'd and damn'd, but no Perſon cenſur'd.

14. Reſolved by the two Chief Juſtices, and the Chief Baron, that whereas P. had *covenanted* by Indenture *for natural Affection, to ſtand ſeiſed to himſelf for Life*, the *Remainder for Life to F.* the eldeſt Son of his Brother, the *Remainder to the firſt Son of* the ſaid *F.* and ſo to the 8th Son &c. the *Remainder to the right Heirs of P.* and P. is *attainted of Treaſon*, and executed *before the Birth of any Son to F.* that the Sons born after are all utterly barr'd by that Attainder, and the King ſhall have the Fee diſcharged of all the Remainders limited to the Sons not yet born. Noy 102. Trin. 9 Jac. Sir Tho. Palmer's Caſe.

The Wife is Tenant in Tail in this Caſe, yet the Land is forfeited againſt the Iſſue, tho' it be but a Poſſibility, for the whole Eſtate is in the Wife; but the Reaſon is, becauſe it was *once coupled with the Poſſeſſion.* Arg. Godb. 325. cites 9 Rep. Beaumont's Caſe.

15. *Husband and Wife, Tenants in Tail*, if *one is attaint of Treaſon*, the Land ſhall not deſcend to the Iſſue; becauſe he cannot make Title as Heir to them both. Arg. Godb. 312. cites 9 Rep. 140. [Paſch. 10 Jac. in the Court of Wards, in Beaumont's Caſe.]

H. ſeiſed of Lands for 3 Lives was *attainted on the Statute 8 & 9 W. 3. of Treaſon, for counterfeiting the Coin, by which Statute Corruption of Blood is ſaved.*

16. It is not the *Corruption of Blood* that brings the Land to the King, for then Reſtitution of Blood would reſtore the Land to the Perſon attainted, and his Heirs, which it does not, tho' it be by Parliament, as appears by all the Acts of Reſtitution in Blood only, and the Land is forfeited by Attainder ipſo facto, ſo that the *Lord* may enter by Force of the *Forfeiture*, which gives the Title againſt him for the whole Eſtate, ſo that the Heir is involv'd in him, and the Deſcent intercepted and prevented by the Eſtate given away by the Forfeiture, not by the Corruption of Blood. Hob. 347. 13 Jac. in the Exchequer, by Hobart Ch. J. in Caſe of Sheffield v. Ratcliffe. The Queſtion was, whether the Lands were forfeited to the King, who had given the ſame, as forfeited, to Baron Lovel, who brought a Bill in the Exchequer to redeem, and had a Decree? On an Appeal to the Houſe of Lords, the Judges held, that *in Felony the Forfeiture to the Lord is only by way of Eſcheat, Pro Defectu Tenentis, but in Treaſon the Lands came to the King as an immediate Forfeiture, which was a diſtinct Penalty from Corruption of Blood*, for the Corruption may be ſaved, and the Forfeiture ſtill remain, & Vice Verſa, and therefore the Lands forfeited in the principal Caſe. 1 Salk. 85. pl. 2. Hill. 8 Ann. in Dom. Proc. Sir Selathiel Lovel's Caſe.

17. If the *Mother* had been *attainted*, the *Uncle could not inherit the Son's Land*, & ſic e converſo, becauſe the Uncle to the Son, and the Son to the Uncle, in their Conveyance, muſt needs mention the Mother. Arg. Noy 165. in Caſe of Boraſton v. Adams, [alias, Hobby's Caſe.]

4 Le. 5. pl. 21. S. C. accordingly. ——S. C. cited Cro. J. 539. in pl. 7. ——S. C. cited Hale's Hiſt. Pl. C. 357. ——Noy 158. the King v. Boraſton, Adams, alias Altonwood's Caſe, S. C ——S. C. cited Vent. 425 per Hale Ch. B. in Caſe of Collingwood v. Pace, and that it was ruled, that notwithſtanding the Attainder, the Siſter ſhould inherit, becauſe the *Deſcent between the Brother and Siſter was immediate*, and the Law regards not the Diſability of the Father.

18. *A. has Iſſue, Son and Daughter*, A. is *attaint*; the *Son purchaſes*, and *dies without Iſſue*; the Daughter ſhall inherit to her Brother; for tho' ſhe was born before the Attainder, and there was lawful Blood, and hereditable between them, which was not loſt by the Corruption after; and upon the Grounds which Littleton puts, if Son purchaſe, and has no Heir of the Part of the Father, the Heir of the Part of the Mother ſhall have it; ſo here, tho' there be no lawful Blood between the Son and the Daughter by the Father, yet of the Part of the Mother is lawful Blood. Palm. 19. Trin. 17 Jac. Hobby's Caſe.

And

And as to the Case above, Hale Ch. B. said, If it be objected, that in that Case the *Mother was not attainted*, which might preserve the legal Blood between the Brother and Sister, I answer, That that would not serve, admitting the Disability of the Parents were not at all considerable; for if it disable the Blood of the Father which is derived to the Son, it would infallibly destroy the Descent to the Sister, for she inherits her Brother in the Capacity of Heir to the Part of the Mother, if by the Attainder she had been disabled to take as Heir by the Father's Blood. 49 E. 3. 12. If the *Heir on the Part of the Father be attainted*, the *Land shall escheat*, and shall never descend to the Heir of the Mother, because, notwithstanding the Attainder, the Law looks upon it as in Esse; *but otherwise* it is *in Case of an Alien*, for if the Son purchase Land, and hath no Kindred on the Part of his Father, but an Alien, it shall descend to the Heir on the Part of the Mother; and altho' the Blood both of the Father and the Mother were in the Sister, yet if she were disabled in the Blood of her Father by his Attainder, she could never intitle herself by the Blood of her Mother. Vent. 426. in Case of Collingwood v. Pace.

19. A. *devises* that the *Heir of B. shall sell his Land*; *B. is attainted* of Felony *in the Life-time of A.*—A. dies. The eldest Son of B. cannot sell this Land, for he is not Heir. The Blood is corrupted; he is the Issue of B. The Word Heir will not serve for a Name of Purchase, if he be not *lawful Heir*, nor the Word *Issue*. The Word *Son*, *or Daughter* will, or reputed Son or Daughter, in the Case of a Feoffment, as well as of a Will, altho' they be Bastards. Jenk. 203. pl. 27.

20. *Duplicatus Sanguis* is not necessary in Descents or Purchases; As where a Man is *seised in Right of his Wife*, an Heiress, and has Issue, and the Husband is attainted, and the Wife dies, and the Husband dies, this Son shall have the Land. Jenk. 203. pl. 27. An *attainted Person marries an Heiress*, and has Issue by her, the Issue shall inherit; for the Marriage was lawful, and he only claims from the Mother. Jenk 3. in pl. 2 — 2 Hawk. Pl. C. 457. cap. 49. S. 49 says, it seems to be the better Opinion, that where a Person hath Issue by a Woman seised of Lands of Inheritance, such Issue may inherit the Mother, tho' he had never any inheritable Blood from the Father. —— And Ibid. Marg. (i) cites several modern Books, and then says, That this appears from 13 H. 7. cited S. P. C. 196. and abridged Br. Tenant by the Curtesy, pl. 15. and wherein it is held, That if the Husband of an Inheritrix have Issue, and be attainted of Felony, and pardoned, he shall not be Tenant by Curtesy by reason of the Issue born before the Pardon, but by reason of Issue born after he shall; from whence it necessarily follows, that such Issue must be inheritable to the Wife; Also it is admitted, Co. Litt. 84. b. that the Issue of an Inheritrix by an Alien, or a Person attainted, may be in Ward, which could not be, unless he could inherit the Mother; and. cites Cro. J. 539. Litt. Rep. 28. 1 Lev. 59, 60. but says, that the contrary was anciently holden.

21. *Father is attainted* of Felony *in the Life of the Grandfather*, and dies, leaving a Son. Then Grandfather dies. The Land shall escheat; for the Son must make his Descent by the Father, which he cannot; but if the *eldest Son* had been attaint in the Life of the Father, and died without Issue in his Father's Life, the second Brother might inherit; but if the eldest Son had *survived* the Father and died after without Issue, the younger Brother should not inherit; Per Berkley J. Cro. C. 435. in pl. 4. Hill. 11 Car. B. R. But if the Grandfather be * *Tenant in Tail*, and the Father be attainted *of Treason*, and dies, and then the Grandfather dies, the Land shall descend to the Grandson, notwithstanding the 26 *H.* 8. 13. which gives a Forfeiture of the Lands of the Person attainted. See 8 Rep. 166. Digby's Case. — Jenk. 287. — Hob. 343. in Case of Sheffield v. Ratcliff.

At the Parliament 1 H. 4. the Commons petitioned, That the Attainder of the eldest Son in the Father's Life should not be a Bar to the youngest, and it was answer'd, Currat Communis Lex. D. 48. Marg. pl. 16. cites Mr. Hackwell. * The Corruption of Blood upon this Statute is only where the Traitor has Estate Tail in the Land. Jenk. 82. pl. 60. says. it was so adjudg'd in Ld. Lumley's Case.

22. The Impediment of an *Ancestor that is not Medius Ancestor* between the Persons from whom, and to whom, will not impede the Descent; Per Hale Ch. J. Vent. 416. in Case of Colingwood v. Pace.

23. In *immediate Descents* there can be *no Impediment but* what arises *in the Parties themselves*; As, the *Father seised* of Lands, the *Impediment* that hinders the Descent *must be either in the Father or the Son*; as if the Father or the Son be attaint, or an Alien. In immediate Descents, a Disability of being an Alien, or Attaint in him that is called a *Medius Ancestor*, will disable a Person to take by Descent, tho' he himself has no such Disability. As in *lineal* Descents, if the *Father* be *attaint*, or an Alien, See Hale's Hist. Pl. C. 356. 357. cap. 27. —— Tho' the Father is *Medium defluens Sanguinis*, yet he is *not* the

Medium differens *Hæreditatis.* 3 Salk. 129. pl. 4. cites S. C. & Co. Litt. 8. a.

Alien, and hath *Iſſue a Denizen* born, and dies in the Life of the Grandfather; and the *Grandfather dies ſeiſed*, the Son ſhall not take, but the Land ſhall eſcheat. In *collateral* Deſcents, * A. and B. Brothers, A. is an Alien, or attainted, and has Iſſue C a Denizen born. B. purchaſes Lands, and dies without Iſſue, C. ſhall not inherit; for A. (which was the Medius Anceſtor, or Medium differens of this Deſcent) was incapable; Per Hale Ch. B. 1 Vent. 415, 416. in Caſe of Collingwood v. Pace.

25. A. *Tenant for Life, Remainder to his Wife for Life*, Remainder to the 1ſt, 2d, &c. *Sons in Tail*, Remainder to the right Heirs of A.——A. *commits Treaſon*, and then has a Son, and then is attainted. Held that whether the Son is born before or after the Attainder, the *contingent Remainder* to him was not diſcharged by the Veſting in the Crown during the Life of A. becauſe of the Wife's Eſtate, which is ſufficient to ſupport it. 2 Salk. 576. pl. 1. Paſch. 6 W. & M. in B. R. Corbet v. Tichbourn.

(C) Blood Corrupted. Reſtored. And Reſtitution of what on Reverſal of Attainders.

Br. Diſcent, pl. 55.

1. IF the *eldeſt* Son who *is attainted* of Felony, *gets a Pardon in the Life of the Father*, and the *Father dies*, the Land ſhall eſcheat; for the Pardon cannot avoid the Corruption of the Blood; and therefore 'tis uſed at this Day to have *Reſtitution of the Blood by Act of Parliament*; for the King may reſtore the Land, but not make the Heir to inherit unleſs by Parliament. Br. Diſcent, pl. 44. cites 8 E. 1.

2. He who is a *Clerk Convict in the Life of his Father*, and after *gets a Pardon*, he may inherit after the Death of his Father. Br. Diſcent, pl. 42. cites 15 E. 2. and Fitzh. Corone, 382.

3. If the *Iſſue in Tail* be *outlawed* of Felony in the Life of the Anceſtor, and *gets a Charter of Pardon in the Life of the Anceſtor*, he may enter; nevertheleſs if the Charter had been after the Death of the Anceſtor, then it ſeems that the King ſhall have the Profits during his Life. But per Aſcue and Wyche, if the Pardon be in the Life of the Anceſtor, or at any Time after, the Iſſue in Tail ſhall have the Land. But Thorp ſtrictly charged the Jury to find if the Pardon was in the Life of the Anceſtor or after; for if after, then the King ſhall have the Land during his Life, as it ſeems. Br. Diſcent, pl. 23. cites 29 Aſſ. 61.

4. *Land was aſſured to S. by Act of Parliament, viz. a Manor*, and after a *Tenant who held of it in Chivalry died*, and after *S. was attainted of Treaſon, and the Act reverſed by Parliament in all Points, ſaving the Titles of thoſe who did not claim by the firſt Act, which is now reverſed by this laſt Act*; and the *King ſeiſed the Manor and granted it to his Mother.* Quære if the Patentee ſhall have the ſaid Ward, and by all the Juſtices in Effect ſhe ſhall have it, becauſe the firſt Act is reverſed in all Points, notwithſtanding it be only a Chattel veſted, and that all the meſne Occupiers ſhall be charged of the Profits. Quod Quære; for it ſeems to be no Law. Br. Parliament, pl. 39. cites 3 H. 7. 15.

Br. Relation, pl. 44. cites S. C. but leaves it a Quære if thereby meſne Actions which

5. In Treſpaſs a Man was *attainted* of Treaſon *by Act of Parliament, and after he was reſtored by another Parliament, and the Attainder annull'd, and that it ſhould be void as if no Act had been*, and ſhould be as ample and available to him as if no Act of Attainder had been; and *he who was reſtored did Treſpaſs upon the Land meſne between the Attainder and the Reſtitution*; and the *Patentee who had Patent of the Land after the Attainder*,

tainder, brought Treſpaſs, and the *other pleaded the Act of Reſtitution.* Per Keble, the Action lies well; for where Judgment is reverſed by Error, the Party ſhall not puniſh meſne Treſpaſs, or have the meſne Profits, unleſs by ſpecial Judgment, and ſuch Words are not here in the Act of Reſtitution; but Fineux contra, and took a great *Diverſity where the Repellance affirms the firſt Aſſurance*, and *where it diſaffirms it*, as Leaſe for Years, which is determin'd after, or Feoffments upon Condition, and the Entry for the Condition broken &c. thoſe affirm the Poſſeſſion, contra of Reverſals of Judgments by Error, or by Parliament, or Entry by elder Title, and yet it ſeems that the meſne Acts executed ſhall not be reformed. Per Fiſher, if *Treſpaſs is done againſt the Heir, and after the elder Brother is deraign'd*, yet Treſpaſs lies for the firſt Heir; for it is an Action veſted; Per Vaviſor, thoſe Words in the Act, that all ſhall be void and as if no Attainder had been, ſhall be intended from this Time forth, from the making of the Act of Reſtitution, and ſhall not have Relation to meſne Acts executed or veſted before; and Davers & Hales accorded. Br. Parliament, pl. 41. cites 4 H. 7. 10. are veſted, ſhall be avoided.

6. *And if a Villein had purchaſed, and the Patentee entered before the Reſtitution*, he who is reſtored after ſhall not have his Perquiſite which is veſted; Per Davers & Hales. Ibid. Br. Relation, pl. 44. cites S. C. & S. P. by Hawes, that the Patentee ſhall retain them.

7. *So* of *Wards veſted*, and of *Preſentments of Clerks* who are *inducted*, and ſhall not extend to meſne Acts veſted; and 5 were with the Action, and 6 againſt it, and ſo it was relinquiſhed. But Brooke ſays it ſeems to him that the beſt Opinion in Reaſon is with the Plaintiff, becauſe it was an Action veſted in him before. Ibid.

8. *Lord and Tenant*; the *Tenant is attainted of Treaſon by Parliament*, and after the King by *Parliament reſtores him or his Heir, as if no Attainder had been*; there the *Seigniory* which was extinct is *revived*; Quod nota. Br. Extinguiſhment, pl. 47. cites 31 H. 8.

9. If a Man is *attainted of Treaſon*, the *King may reſtore the Heir to the Land by his Patent of Grant; but he cannot make the Heir to be Heir of the Blood*, nor to be reſtored to it *without Parliament*. Note the Difference; for it is in Prejudice of others. Br. Reſtitution, pl. 37. cites 3 E. 6.

10. If a Man be attainted of Felony, being ſeiſed of Land, and after *get a Pardon and purchaſes other Land*, the Heir ſhall inherit the laſt Land, for the Wife ſhall be endowed. Br. Diſcent, pl. 54. cites N. B.

11. Note, that the Corruption of Blood *cannot be purged by Grant; nor Pardon of the King nor otherwiſe, unleſs by Act of Parliament*; for the King cannot make an Heir who is not inheritable by the Law of the Realm; Quod nota. And the King may make an Alien Denizen, but he cannot make him Heir; for he may not prejudice another who is Heir, nor the Lord in his Eſcheat; and ſo all Reſtitutions to the Name of Heir are by Parliament. Br. Diſcent, pl. 57. cites Dr. & Stud. Lib. 1. 3 Inſt. 240, 241. cap. 106. S. P.

12. Note, by Bromely & Portman, if a Man be attainted of Treaſon or Felony, and the *King pardons him*, and *after he purchaſes Lands* in Fee, *and takes a Wife and hath Iſſue*, and dies, the Iſſue ſhall inherit; for by the Pardon he was well enough reſtored to his Blood; for he is by it enabled to purchaſe, and need not to this Purpoſe have Reſtitution; and *this Reaſon ſerves for the Iſſue had before the Attainder and Pardon.* Dal. 14. pl. 3. Anno 1 Mar. cites Stanford, Fol. 196. Trin. 9 H. 5. 9. S. P. accordingly, but if he had Iſſue born before the Attainder, and that Iſſue is living at his Death, an after born Son ſhall not inherit; but if ſuch prior-born Son dies in the Life of the Father, then the after-born Son ſhall inherit; becauſe he was not in being while his Father's Attainder ſtood in Force, but was born after the Purging of the Crime and Puniſhment by the Pardon Hale's Hiſt. Pl. C. 358. cap. 27 cites Litt. S. 747.

13. *But*

13. *But* if there are *Grandfather, Father and Son*, and the *Father is attainted* of Treaſon or Felony, *and dies*, in this Caſe the Son ſhall not demand the Land as Heir to the Grandfather, notwithſtanding that the Father had his Pardon; for the *Bridge is broken*, and as the Father himſelf is barred, ſo is the Son; Per Bromley & Portman. Anno 1 Mar. Quod nota. Dal. 14. pl. 3. cites Stamford, Fol. 196. Trin. 9. H. 5. 9.

S. C. cited by Jones J. Arg. Jo. 490. and ſays that the Juſtices certified the Queen, that it was great Equity and Conſcience to relieve the Son. — S. C. as to the firſt Point, cited by the Name of Gray's al' Graves's Caſe, by Hale Ch. B. Vent. 416. 425.—S. C. cited by Berkley J. Cro. C. 543. pl. 8. as to the S. P.——S. C. cited 3 Inſt. 240. cap. 106.

14. The *elder Brother had ſome Cauſe for a Petition of Right for Lands. B. the younger Brother had Iſſue, and was attainted of Treaſon and executed. A. died without Iſſue.* The Queſtion was whether the Son of B. was *barred of his Petition of Right* by the ſaid Attainder; and it ſeems he is, ſo long as the Attainder remains in Force. But afterwards *the Son of B. is reſtored in Blood by Parliament as Heir to his Father*, by theſe Words, (viz.) *That he and his Heirs ſhall be enabled only in Blood as Son and Heirs of his Father, and ſhall have and enjoy all ſuch Lands which ſhall deſcend, remain, or revert from any collateral Anceſtor of his ſaid Father, as if the Attainder had not been had, ſaving to the King the Lands in his Hands, or of any other, by reaſon of the Attainder.* It ſeems that by theſe Clauſes, the Intent of the King and Parliament was to reſtore and enable him to have his Petition of Right as Heir to his Uncle. D. 274. pl. 40. Paſch. 10 Eliz. Anon.

Tho' ſuch Pardon does not reſtore the Blood, yet as to Iſſue born after, it has the Force of a Reſtitution. Hale's Hiſt. Pl. C. 358. cap. 27.

15. If a Man be attainted of Treaſon or Felony, tho' he be born in Wedlock, he can be Heir to no Man, nor any Man Heir to him Propter Delictum; for that by his Attainder his Blood is corrupted, and this Corruption of Blood is ſo high, as it *cannot abſolutely be ſalved and reſtored but by Act of Parliament*; for tho' the Perſon attainted obtain his Charter of Pardon, yet that doth not make any to be Heir, whoſe Blood was corrupted at the Time of the Attainder, either downward or upward. Co. Litt. 8. a.

Hale's Hiſt. Pl. C. 358. cap. 27. S. P. and that a Reſtitution in Blood may be ſpecial and qualified; but that generally a Reſtitution in Blood is conſtrued liberally and extenſively. —As where King H. 3. was *intitled* &c. *to the Lands of William* de Albo Monaſterio *by* his *Attainder*, and *granted the ſame* to Robert de Mares and his Heirs, *donec eas reddiderit rectis hæredibus*, per voluntatem ſuam, vel per pacem. And albeit, *at the making of this Grant, William* de Albo Monaſterio (*being dead*) *could have*, in reſpect of the Attainder and Corruption of Blood, *no right Heir*; yet becauſe it was to make Reſtitution, it had a moſt benign Interpretation. 3 Inſt. 241. cap. 106.

16. Of Reſtitutions *by Parliament* ſome be *in Blood only*, (that is, to make his Reſort as Heir in Blood to the Party attainted, and other his Anceſtors, *and not to any Dignity, Inheritance of Lands &c.*) and this is a Reſtitution *ſecundum quid*, or in Part; and *ſome be general* Reſtitutions, *to Blood, Honours, Dignities, Inheritance, and all that was loſt by the Attainder*; and that is Reſtitutio in Integrum, with an Addition ſometimes that it ſhall be lawful for the Party reſtored, and his Heirs, to enter &c. Of the firſt you may read in Dier 10 Eliz. Fo. 274. in Petition; and Rot. Par. 23 Eliz. of the Earl of Arundel &c. Of the 2d you may read 15 Ed. 3. Tit. Petition 2. 3 H. 7. Fo. 15. a. 10 H. 7. 22, 23. Pl. Com. Fo. 175. Rot. Par. 13 H. 4. Nu. 20. &c. Of both of them you may read plentifully in our Books and Parliament-Rolls, and divers of them with Addition of Entry. See 1 H. 8. Kelw. 154. Sir Will. Odehal's Caſe; 4 H. 7. 7. Lord Ormond's Caſe; Rot. Parl. 11 H. 4. Nu. 42. Rich. de Haſting's Caſe; and Rot. Parl. 14 Ed. 4. Nu. 4. Sir John Forteſcue's Caſe, attainted of Treaſon in 1 E. 4. &c. 3 Inſt. 240. cap. 106.

In Reſtitutions the *Party is favour'd, and not the King*, and his Prerogative has no Exemption; per Dyer Ch. J. Pl. C. 252. a. Trin. 4 Eliz. in Caſe of Willion v. Ld. Berk'ley.——3 Inſt. 241. cap. 106. S. P.

17. If

17. If a Perſon attainted is reſtored to his Blood, this *does not reſtore his Land*; for the Attainder has 2 Effects, viz. to corrupt the Blood, and to give a Forfeiture of all his Eſtate both Real and Perſonal to the King. Jenk. 287. pl. 21.

18. Upon Reverſal of Attainders there is no Reſtitution of *Money paid* to the King, becauſe the Barons cannot in ſuch Caſe controul the Treaſury, and what is once paid into the Treaſury cannot be got out again; per Treby Ch. J. 5 Mod. 49. Trin. 7 W. 3. in Caſe of the King v. Hornby.—Per Holt Ch. J. ibid. 61. S. P.

19. Reſtitution of Blood, in its true Nature and Extent, can only be by Act of Parliament. Hale's Hiſt. Pl. C. 358.

20. *A. has Iſſue B.* a Son, and is attaint of Treaſon, *and dies. B. purchaſes Land* in Fee-ſimple. *B. by Parliament is reſtored only in Blood*, and enabled as well to be Heir to A. as to all other Collateral Lineal Anceſtors, provided it ſhall not reſtore B. to any of the Lands of A. forfeited by the Attainder. *B. dies without Iſſue.* It was ruled that *the Land of B. ſhall deſcend to the Siſters of A. as Aunts and Collateral Heirs of B.* 1ſt, becauſe the Corruption of Blood by the Attainder is removed by the Reſtitution. 2dly, altho' the Words of the Act of Reſtitution be to reſtore B. only as Heir to A. &c. yet this doth not only remove the Corruption of Blood, and reſtore him and his Lineal Heirs in Blood, but alſo his Collateral Heirs, and removes that Impediment which would have hinder'd the Deſcent to them. Hale's Hiſt. Pl. C. 258, 259; cites Co. P. C. cap. 106. Courtney's Caſe.

And it is ſaid that it had been ſufficient if the Act had reſtored and enabled him in Blood only, as Heir to his Father; and that thereby he and his Heirs, as well Collateral as Lineal, ought to make their Deſcent from A. (for there was the Stop and Corruption) and from all other the Anceſtors of the ſaid B. Lineal or Collateral; and, ex abundanti, the other Clauſe is added for the more Manifeſtation thereof. 3 Inſt. 242. cap. 106.

For more of Blood Corrupted in General, ſee **Forfeitures**, and other Proper Titles.

(A) Blunders.

1. IF a Man *releaſes to me all Actions which I have againſt him*, where the Intent may be to releaſe all the Actions which he had againſt me, yet it ſhall not be ſo taken againſt the expreſs Limitation; for *Words make Plea*. Otherwiſe of a *Solvendum*. Arg. Roll Rep. 367. cites 14 E. 4. 2.

'Tis a good Releaſe to me, and the other Words are void. Jenk. 198. pl. 12. cites 9 E. 4. 42. 14 E. 4. 2. D. 56. Kelw. 162. 174. Hob. 274.

2. Condition of a Bond, that *if A. pay B. 20 l. of lawful Engliſh Money, which ſhall be in the Year of our Lord* 1599, (the Bond was made in 1593,) *in and upon the 13th Day of October next enſuing the Date hereof*, that then &c. Adjudged that the Payment was to be made in 1599, and not before. Cro. E. 420. Mich. 37 & 38 Eliz. B. R. Sharplus v. Hankinſon.

3. *Bill of Sale* of a Ship by A. to B. was made *to A. the Vendor*, to ſecure the Payment of 400 l. and ſo the Vendor *ſold to himſelf*; but relieved

Vern. 263. pl. 257. S. C. but S P. does not appear.

lieved in Equity. Fin. Rep. 206. Paſch. 27 Car. 2. Degelder v. Depeiſter & Monday.

4. *Interpretatio fienda eſt ut res valeat.* Jenk. 198. pl. 12.

For more of Blunders in General, ſee **Miſtake of Words, Nonſenſe, Obligations,** (M) (N) and other Proper Titles.

(A) Books and Authors.

1. 8 *Ann. cap.* 19. *S.* 1. *THE Author of any Book not yet printed, and his Aſſigns, ſhall have the ſole Liberty of printing it for* 14 *Years, to commence from the Day of publiſhing thereof; and if any Perſon, within the ſaid Time, ſhall print, reprint, or import any ſuch Book without the Conſent of ſuch Proprietor in Writing, ſigned in the Preſence of* 2 *credible Witneſſes, or ſhall knowingly publiſh it without ſuch Conſent, the Offender ſhall forfeit the Books and Sheets to the Proprietor, who ſhall forthwith damask and make them waſte Paper, and ſhall forfeit* 1 *d. for every Sheet found in his Cuſtody, either printed or printing, one Moiety to the Crown, the other to him who will ſue in any Court at Weſtminſter.*

2. *S.* 2. *No Bookſeller, Printer, or other Perſon ſhall be liable to theſe Forfeitures by printing or reprinting any Book without Conſent, unleſs the Title to the Copy of the Book ſhall, before ſuch Publication, be enter'd in the Regiſter Book of the Company of Stationers, as uſual, at the Hall of the ſaid Company; and unleſs the Conſent of the Proprietor be enter'd, paying* 6 *d. for each Entry, which Regiſter-Book may at all ſeaſonable Times be inſpected without Fee; and the Clerk of the Company of Stationers, when required, ſhall give a Certificate of ſuch Entry; for which Certificate he ſhall have* 6 *d.*

3. Bill to be quieted in the Enjoyment of the Right of ſole printing Dr. Prideaux's Book, call'd Directions to Church-Wardens, and for a perpetual Injunction againſt the Defendant to prevent his printing and publiſhing the ſame. The Plaintiffs claim the ſole Right of Printing, by Grant of the Copy from the Author, per Stat. 8 Ann. Fol. 261. The *Defendant claims a Title under the original Printer of the Book, to whom the Author firſt deliver'd the Copy to be printed.* Per Ld. C. Macclesfield, the bare Delivery of the Copy by the Author to be printed, doth not deveſt the Right of the Copy out of the Author; but is only an Authority to the Printer to print that Edition, and the Author may afterwards grant the Right of the Copy to another Perſon. And a perpetual Injunction was granted againſt the Defendant not to print and publiſh the ſaid Book. MS. Rep. Mich. 9 Geo. Canc. Knaplock & Tonſon v. Curle.

4. A Bill was brought by the Plaintiff as Aſſignee of the Copy of the Dunciad againſt the Defendants, for an *Injunction to ſtay them from printing and ſelling the Dunciad*, and to be quieted in the Enjoyment of the ſole printing of that Book for 14 Years, according to Stat. 8 Ann. cap. 19. And upon filing the Bill, and upon an *Affidavit that the Plaintiff had purchaſed, or legally acquired the Copy* of that Book, an Injunction was granted Niſi Cauſa. It was ſhew'd for Cauſe, that the Plaintiff had not ſet forth a good Title to the ſole Printing of this Book, either in the Bill or in the Affidavit upon which the Injunction was granted; for he only

only says that he has purchased or legally acquired the Copy, *but does not say of the Author, or who was the Author*; and by the Statute the Author, or the Assignee of the Author, are only intitled to the sole Right of printing the Book, and no other Person; and it is not sufficient to say he purchased or legally acquired the Copy, without saying he purchased it of the Author. King C. allow'd the Cause, and dissolved the Injunction, Trin. 2 Geo. 2. Gilliver v. Snaggs. Afterwards in the same Term, an Injunction was granted in the **Case of Gay**, Author of the Sequel of the Beggar's Opera, against publishing and selling that Book, upon a Bill founded upon Stat. 8 Ann. cap. 19.

For more of Books and Authors in General, see **Prerogative**, (D. e. 2) and other Proper Titles.

(A) Bottomry-Bonds.

1. A Ship going in the *Fishing-Trade to Newfoundland*, (which Voyage must be performed in 8 Months) the *Plaintiff gave the Defendant 50 l. to repay 60 l. upon the Return of the Ship to Dartmouth; and if by Leakage or Tempest she should not return in 8 Months, then to pay the principal Money, viz. 50 l. only; and if she never returned, then he should pay nothing.* All the Court held that this is no Usury within the Statute; for if the Ship had stay'd at Newfoundland 2 or 3 Years, he was to pay but 60 l. upon the Return of the Ship, and if she never return'd, then nothing; so as the Plaintiff ran a Hazard of having less than the Interest which the Law allows, and possibly neither Principal nor Interest. Cro. J. 208. pl. 3. Trin. 6 Jac. B. R. Sharpley v. Hurrell.

S. C. cited by Doderidge J. Cro. J. 508, 509. pl. 20. by the Name of Dartmouth's Case, where one went to Newfoundland, and another lent him 100 l. for a Year, to victual his Ship; and if he return'd with the Ship, he was to have so many 1000 of Fish, and express'd at what Rate, which exceeded the Interest allowed by the Statute; and if he did not return, then he should lose his Principal; and adjudged no Usury.

2. Debt upon Bond of 300 l. conditioned that *if such a Ship sailed to Surat* in the East-Indies, *and returned safe* to London, *or if the Owner and his Goods returned safe* &c. then the *Defendant should pay to the Plaintiff the principal Sum of 300 l. and also 40 l. for every 100 l. But if the Ship should perish by any unavoidable Casualty of the Sea, Fire or Enemies*, to be proved by sufficient Evidence, then the *Plaintiff was to have nothing.* The Question was, whether this was an usurious Contract? Adjudged that it was not, and that it was a good Bottomry Contract; Bridgman Ch. J. *distinguished between a Bargain and a Loan*; for where the Bargain is plain, and the Principal is in Hazard, it cannot be said within the Statute of Usury; but 'tis otherwise of a Loan, where it is intended that the Principal is in no Hazard; and adjudged per tot. Cur. for the Plaintiff, that this Contract is not usurious. Sid. 27. pl. 8. Hill. 12 Car. 2. C. B. Soome v. Gleen.

Lev. 54 55. Hill. 13 & 14 Car. 2. B. R. Sayer v. Glean, S. C. resolv'd a good Bottomry Bond, and tolerable by the Use of Merchants, and allowable for the great Perils of the Sea; and Judgment for the Plaintiff.

3. Debt upon Bond, conditioned to pay so much if the Ship W. return within 6 Months from Ostend to London, (which was more than the lawful Interest of the Money) and if she did not return &c. then the Bond

Bond to be void. The Defendant *pleaded*, that there was a *corrupt Agreement* between him and the Plaintiff, and that at the Time of making the ſaid Bond, it was corruptly agreed between them, that the Plaintiff ſhould have no more than lawful Intereſt in caſe the Ship ſhould ever return, and averred that the Bond was entered into by Covin, to evade the Statute of Uſury and the Penalty thereof; upon this Averment the Plaintiff took Iſſue, and the Defendant demurred, for that the Plaintiff did not traverſe the corrupt Agreement, and that the Averment is but the Reſult thereof. Hale Ch. B. held clearly that this Bond is not within the Statute; for it is the common Way of Inſurance, and if this were void by the Statute of Uſury, Trade would be deſtroyed; and that it is not like the Caſe where the Condition of the Bond is to pay ſo much Money if ſuch Perſon be then living; for there is a Certainty of that at the Time, but it is altogether incertain whether the Ship ſhall ever return or not. But he agreed that the Averment was well taken, becauſe it diſcloſes the Manner of the Agreement. And though the corrupt Agreement might have been traverſed, yet the Averment is traverſable too; and the Demurrer to the Replication naught. Hard. 418. pl. 4. Paſch. 17 Car. 2. in the Exchequer, Joy v. Kent.

4. The Plaintiff entered into a penal Bond of Bottomry *to pay* 40*s. per Month for* 50 *l.* The *Ship was to ſail from Holland to the Spaniſh Iſlands, and ſo to return for England; if ſhe periſhed, the Plaintiff loſt his* 50*l.* She went accordingly to the Spaniſh Iſlands, took in Moors at Africk, and upon that Occaſion *went to Barbadoes, and then periſhed at Sea.* The Plaintiff being ſued on the Bond for the Penalty, ſought Relief in Chancery, pretending the Deviation was on Neceſſity; the Bill was diſmiſſed ſaving as to the Penalty. 2 Chan. Caſes, 130. Mich. 34 Car. 2. Anon.

5. The Plaintiff was *bound* in Conſideration of 400 l. as well *to perform the Voyage within* 6 *Months, as at the* 6 *Months End to pay the* 400*l. and* 40*l. Premium, in caſe the Veſſel arrived ſafe*, and was not loſt in the Voyage. It fell out that the *Plaintiff never went the Voyage*, whereby his Bond became forfeited, and he now preferred his Bill to be relieved; and upon a former Hearing, in regard the Ship lay all along in the Port of London, and ſo the Defendant run no Hazard of loſing his Principal, the Lord Keeper thought fit to decree, that the Defendant ſhould loſe the Premium of 40 l. and be contented with his Principal and ordinary Intereſt; and now upon a Re-hearing, he confirmed his former Decree. Vern. 263. pl. 257. Mich. 1684. Deguilder v. Depeiſter.

6. The Plaintiff *lent* 500*l. upon the Hull* of a Ship, and *Defendant covenanted to pay, if the Ship went from London to Bantam, and returned from thence directly to London within* 12 *Months,* 550*l. if from London to Bantam, and from thence to China or Formoſa, and returned to London within* 24 *Months,* 650 *l. and if* ſhe returned *not within* 24 *Months, then to pay* 5 *l. per Month above* 650*l. till* 36 *Months; and if* ſhe return *not within* 36 *Months, then to pay* 710*l. unleſs it can be proved by Wildy* (the Defendant) *that the Ship returned not, but was loſt within* 36 *Months.* The Ship *went from London to Bantam, and from thence to Surat, and other Parts, and ſo returned to Bantam; and in her Voyage from Bantam to London was loſt within* 36 *Months,* and the Plaintiff hereupon brought Debt upon the Obligation; and this was the Fact after long and intricate Pleading, which appeared upon a Demurrer. The Court inclined, that by reaſon of the *Deviation*, the Party was well intitled to his Money &c. but adviſare vult; and afterwards Mich. 36 Car. 2. B. R. adjudged accordingly. Skin. 152. pl. 1. Hill. 35 & 36 Car. 2. B. R. Weſtern v. Wildy.

7. Caſe on a Bill of Lading, on *Condition that the Defendant ſhall deliver ſo much Gold, the Perils of the Sea excepted.* The Defendant pleads Piracy, to which the Plaintiff demurs; Per Cur. Piracy is one of the Dangers

Dangers of the Sea ; and Judgment for the Defendant. Comb. 56, 57. Trin. 3 Jac. 2. B. R. Barton v. Wollifford.

8. A Part-owner of a Ship borrowed Money of the Plaintiff upon a Bottomry Bond, *payable on the Return* of the Ship from the Voyage ſhe was then going on the Service of the Eaſt-India Company, and the Eaſt-India Company *broke up the Ship in the Indies* ; and the *Owners* brought their Action againſt the Company and *recovered Damages*, but they did not amount to a full Satisfaction ; and the *Obligee brought his Bill to have his proportionable Satisfaction* out of the Money recovered; but his Bill was diſmiſſed, and he left to recover as well as he could at Law ; for a Court of *Equity will never aſſiſt a Bottomry Bond*, which carries an unreaſonable Intereſt. Abr. Equ. Caſes, 372. Mich. 1701. Dandy v. Turner.

9. Bill to be relieved againſt a Bottomry Bond &c. with Condition that if the Ship Suſannah, bound for the Eaſt-Indies, ſhall return to London within 36 Months, or if the Ship does not return within 36 Months, not being taken or loſt by inevitable Accident within that Time, then the Money to be paid &c. *The Ship was detained in Port Surat in India by Embargo by the Great Mogul, ſo that the Ship could not ſail from Surat till after the 36 Months were elaps'd, and in her return home was taken by the French* ; but being after the 36 Months, the Bond was forfeited ; but there being no Fault in the Maſter, and the Voyage delay'd by inevitable Accident, (viz.) by Embargo by the Great Mogul, the Bill pray'd to be relieved againſt the Penalty of the Bond. Per Harcourt Ch. I cannot relieve in this Caſe againſt the expreſs Agreement of the Parties ; but if the Defendant had inſured this Money upon the Ship, the Plaintiff ſhall have the Benefit of the Inſurance, upon allowing the Defendant the Charges of the Inſurance, if the Plaintiff pays the Money within 3 Months ; Bill to be diſmiſt without Coſts. MS. Rep. Paſch. 12 Ann. in Canc. Ingledew v. Foſter.

10. Hallhead had inſured for Hutchinſon and Plaintiffs his Aſſignees on the Ship Eyles, with the Company, and the *Entry* in the Company's Book of the Contract was in ſhort Items called a Label, which *was viz. At and from Fort St. George to London, loſt or not loſt*. And *the Policy was* ſoon after made out and taken in the following Words; " *That the Adventure was to commence from the Ship's departing from Fort* " *St. George to London.*" And the Caſe was, that *before the Inſurance made the Ship was loſt in the River of Bengal, whither the Ship had been ſent from Fort St. George to refit.* Bill was brought by Plaintiffs to have the Inſurance Money paid, being 500 l. as a Loſs &c. and founded the Equity that the Policy was not made agreeable to the Label, according to which the Riſque is to commence from the Ship's coming firſt to Fort St. George, and the going to Bengall to refit being a Thing of Neceſſity for performing the Voyage, was *no Deviation*, and the Loſs, being during that Time, was within the Intent of Contract for the Inſuring. Lord Chancellor ſaid, this is not proper to determine here. 1ſt, Queſtion is as to the Agreement. 2d, as to the Breach ; and doubted as to the Agreement. The Memorandum is not a printed Form as to the material Points, and the Policy muſt be governed by that, if not varied. The Words in the Memorandum or Label (at Fort St. George) includes the Stay of the Ship there, and the Policy follows the Words, but adds this, viz. The beginning of the Adventure to be from the Ship's departing from Fort St. George for London, which excludes the Riſque whilſt the Ship ſtaid there ; and this ſeems an Inconſiſtence in the Policy, firſt to deſcribe the Voyage, At and from &c. and then to exclude the Riſque, At &c. This ſeems a Miſtake in writing the Policy, and is to be rectified as in the Caſe of Articles and a Settlement ; and *decreed the Words to be added in the Policy, for the Adventure to commence At*

and from Fort St. George. MS. Rep. Dec. 6. 1739. Motteux v. London Aſſurance.

For more of Bottomry Bonds in General, See **Policies of Inſurance**, and other Proper Titles.

Fol. 368.

Bridges.

(A) Bridges. [*How repaired.*]

Cro. C. 365, 366. pl. 2. The Caſe of Langforth-Bridge, S. C. adjudged.

1. COmmon Bridges of Right ought to be repaired by the Inhabitants of the County, if it be not known who elſe ought to do it. Trin. 10 Car. in an Information againſt the Inhabitants of Middleſex for Longford Bridge; agreed per Curiam. * 10 Ed. 3. 28.

* S. C. cited 13 Rep. 33. Paſch. 7 Jac. ——By the Common Law the whole County, that is, the *Inhabitants of the County* or Shire, wherein the Bridge is, ſhall repair the ſame; for of common Right the whole County muſt repair it, becauſe it is for the common Good and Eaſe of the whole County. 2 Inſt. 701.

2. If a Man erects a Mill for his ſingle Profit, and makes a new Cut for the Water to come thereto, and makes a new Bridge over it, and the Subjects uſed to go over it, as over a common Bridge, this Bridge ought to be repaired by him that hath the Mill, and not by the County, becauſe it was erected for his own Benefit. 3 Ed. 2. B. R. adjudged for Bow-Bridge and Channel-Bridge, againſt the Prior of Stratford, and it is now repaired by London, who have the Mill.

S. P. *For it is pro Republica.* Ibid. pl. 29. cites S. C.

3. It was preſented that *the Abbot of T. ought to repair the Bridge of T.* who *ſaid that at another Time he traverſed ſuch Preſentment, where it was found that he ought to make but 2 Arches in the Middle*; and per Knivet, it is no Bridge without the Reſidue, and *it is not preſented who made the reſt*, therefore the Defendant ſhall make the Whole if he can ſay no more, and he may make the Bridge without the Licence of thoſe who have Land adjoining. Br. Preſentments in Courts, pl. 22. cites 43 Aſſ. 37.

4. If a *Prior and his Predeceſſor, Time out of Mind, have made a Bridge of Alms*, they ſhall be bound to repair it for ever. Br. Nuſance, pl. 5. cites 44 E. 3. 31. Per Knivet Ch. J.

Br. Nuſance, pl. 28. cites S. C.

5. *He who has Land adjoining* to a Bridge is not bound of common Right to repair it, tho' the Bridge has been there Time out of Mind, unleſs he has done ſo by Preſcription, and thoſe whoſe Eſtate he has &c. Mich. 8 H. 7. 5. b. pl. 2.

6. At the *Common Law* ſome *Perſons, Spiritual or Temporal, Incorporate or not* Incorporate, are bound to repair Bridges *ratione Tenuræ ſuæ, Terrarum ſive Tenementorum* &c. ſome *ratione Præſcriptionis tantum, ratione Tenuræ*, by reaſon that they, and thoſe whoſe Eſtate they have in the Lands or Tenements, are bound in reſpect thereof to repair the ſame; but they which have Lands on the one Side of the Bridge, or on the other,

other, or both, are not bound of common Right to repair the ſame. 2 Inſt. 700.

7. But as to *Ratione Præſcriptionis tantum*, there is a *Diverſity between Bodies Politick or Corporate, Spiritual or Temporal, and Natural Perſons*; for Bodies Politick or Corporate, Spiritual or Temporal, may be bound by Uſage and Preſcription only, becauſe they are local, and have a Succeſſion perpetual; but a natural Perſon cannot be bound by Act of his Anceſtor, without a Lien, or binding, and Aſſets. 2 Inſt. 700.

8. If a Bridge be *within a Franchiſe*, thoſe of the Franchiſe are to repair it. If the Bridge be *Part within a Franchiſe, and Part within the Guildable*, ſo much as in the Franchiſe ſhall be repaired by thoſe of the Franchiſe, and ſo much as is within the Guildable ſhall be repaired by thoſe of the Guildable, and ſo it is if it be *in 2 Counties*, Mutatis mutandis. 2 Inſt. 701.

9. If a *Man makes a Bridge for the common Good of all the Subjects*, he is not bound to repair it; for no particular Man is bound to Reparation of Bridges by the Common Law, but Ratione Tenuræ, or Præſcriptionis. 2 Inſt. 701.

10. If a *Man who holds* 100 *Acres* of Land, *ought by his Tenure* thereof to repair ſuch Bridge, if he *aliens in Fee* 20 *Acres to one, and* 20 *Acres to another*, and one of them only be diſtrained to make the Reparations upon a Preſentment found, he ſhall have a ſpecial Writ to the King's Officers, that they do not diſtrain him, but *according* to the Rate of his *Proportion* of the Land which he holds. F. N. B. 235. (B). Pl. C. 125. b. S. C. cited by Saunders J.

11. The *King ſeiſed of a Manor, repaired a Bridge as Lord* thereof, and then *granted the Manor to H. who ſold ſeveral Parts of the Land to ſeveral Perſons*, and afterwards H. was indicted for not repairing the Bridge, and thereupon he deſired to have Contribution of thoſe who had purchaſed from him, and then he ſaid he would repair it. But it was anſwered, that the Court might force the Repair upon him alone, or upon any other in whoſe Hands any of the Lands appeared to be which was chargeable to the Repair thereof, and they are to ſeek their Remedy at Law for Contribution from the Reſt, and *this Court is not to let the Bridge lay in Decay till the Diſpute between them about Contribution is determined.* Jo. 273. 8 Car. in Itinere Windſor. The Caſe of Loddon Bridge.

12. Where a *Lord of a Manor was chargeable* with the Repair of a Bridge *Ratione Tenuræ*, the *ancient Freehold and Copyhold Tenants are not liable to contribute*, becauſe nothing is Part of the Manor but the Demeſnes and Services, and not the Lands of the Tenants; and tho' the Copyholders were infranchiſed, yet they are not chargeabe; for the Infranchiſement only alters the Manner of their Tenure; but all who have any Part of the *Demeſne Lands* by Purchaſe are liable; and if Ceſty que Truſt of the Demeſnes in Poſſeſſion or Reverſion be named, that is ſufficient in a Court of Equity, without making the Tenants of the Land, or them in Reverſion, Parties. Hard. 131. pl. 4. Mich. 1658. in the Exchequer, Rich v. Barker.

13. *Corporations* are *rateable with the County* towards the Repairs of publick Bridges; Per Withens and Wright Ch. J. Herbert abſente, and Holloway doubting. Skin. 254. pl. 2. Mich. 2. Jac. 2. B. R. County of Worceſter and Town of Eveſholm.

14. The Inhabitants of a County cannot of their own Authority *change* a Bridge or Highway *from one Place to another*; for it cannot be without Act of Parliament. 6 Mod. 307. Mich. 3 Ann. B. R. in Caſe of the Queen v. the County of Wilts.

15. 14 *Geo.* 2. *cap.* 33. *The Juſtices of Peace in any County, City, &c. at their general Seſſions, or general Quarter Seſſions, or the major Part, may*

may purchaſe or agree with any Perſons, or Bodies Politick, for any Piece of Land joining, or near any County Bridge within their ſeveral Limits, for inlarging, or more convenient re-building the ſame, which Pieces of Land ſhall not exceed one Acre in the whole for any ſuch Bridge, and ſhall be paid for out of the Money raiſed by Virtue of an Act made 12 Geo. 2. *cap.* 29. *intitled, an Act for the more eaſy aſſeſſing, collecting, and levying of County Rates; the Treaſurers being authorized by Orders under the Hands and Seals of Juſtices at their General or Quarter Seſſions, which Lands ſhall be conveyed to ſuch Perſons as the ſaid Juſtices ſhall appoint in Truſt, for inlarging or rebuilding ſuch Bridges.*

(B) Actions, Indictments, and Informations. In what Caſes; and Pleadings.

Br. Nuſance, pl. 24. cites S. C.

1. *IT was preſented that E. and A. ought, and uſed to repair the Bridge of W.* which is broke, to the Nuſance &c. and it was ſaid, that the Preſentment is not ſufficient; for *it is not ſaid that they are Tenants of any Land by reaſon of which they ought to do it*, and they are not charged by their Perſons, and after they *ſaid that they did not do it but once of Alms*, abſque hoc *that they ought and uſed to do it* &c. Br. Preſcription, pl. 49. cites 27 Aſſ. 8.

2. In Caſe, Plaintiff declared, that the Defendant ought to repair a Bridge over ſuch a Water, *by which Bridge the Plaintiff, and thoſe whoſe Eſtate he has in a Manor, by reaſon of the Manor, had uſed to paſs with Carriage neceſſary* &c. which Bridge was not repaired &c. and held a good Title enough for the Plaintiff, *without ſaying that he had the Way to any Franktenement, or other Place certain.* Thel. Dig. 106. Lib. 10. Cap. 14. S. 14. cites Trin. 11 H. 4. 82.

This extends only to Common Bridges in the King's Highways, where all the King's Liege People

3. 22 *H.* 8. *cap.* 5. *S.* 1. *The Juſtices of Peace in every Shire, Franchiſe, City or Borough, or four of them, (Quor' Un') are impowered at their General Seſſions, to enquire of, and determine all Annoyances of Bridges broken in the Highways, and to make ſuch Proceſs and Pains upon every Preſentment before them, for Reformatiin of the ſame, againſt ſuch as ought to be charged to the amending the ſaid Bridges, as they ſhall ſee fit.*

have, or may have, Paſſage, and not to Private Bridges to Mills, or the like; and therefore the Indictment upon this Statute ſaith, Quod pons Publicus & Communis ſitus in alta Regia Via ſuper flumen, ſeu curſum Aquæ &c. 2 Inſt. 701.

In every Shire is to be underſtood, Reddendo ſingula ſingulis, that is to ſay, 1ſt. In every Shire or County where there be 4 or more Juſtices of the Peace, whereof one or more is of the Quorum. 2dly, Franchiſe, where be 4 or more Juſtices of the Peace, and one or more of the Quorum. 3dly, City, where there be 4 or more Juſtices of the Peace, and one or more of the Quorum. 4thly, Borough, where there be 4 or more Juſtices of the Peace, and one or more of the Quorum, and where they keep general Seſſions of the Peace for ſuch Franchiſes, Cities, or Boroughs, but for want thereof, the Juſtices of Peace of the County ſhall enquire; But if the Franchiſe, City, or Borough, be a County of itſelf, and have not 4 or more Juſtices of the Peace, whereof one or more is of the Quorum, no other Juſtices of Peace, of any other Shire or County, have any Power by this Act, to enquire of, hear and determine the Decay of Bridges there, but ſuch Decay muſt be reformed by ſuch Remedies (before ſpecified) as the Common Law did give; therefore it was neceſſary to be known what the Common Law was before the making of this Statute. And ſuch Proceſs they are to make upon every Preſentment before them, for Reformation of the ſame, againſt ſuch as own to be charged for the making or amending ſuch Bridges, as the Juſtices of his Majeſty's Bench uſe commonly to do, or it ſhall ſeem by their Diſcretions to be neceſſary and convenient for the ſpeedy Amendment of ſuch Bridges. 2 Inſt. 701, 702.

* See Tit. Inhabitants (A) pl. 1. and the

4. *S.* 2 & 3. *Where it cannot be known what Hundred, Town, Pariſh, or Perſon, ought to repair ſuch Bridges, if they be not in a City or Town Corporate, they*

*they ſhall be repaired by the * Inhabitants of the Shire or Riding where ſuch Bridges be; and if Part of ſuch Bridge happen to be in one Shire, and the other Part in another Shire, or in ſome City, or Town Corporate, that then the reſpective Shires, Cities, or Towns Corporate, ſhall repair ſuch Part of ſuch Bridges as lie within their ſeveral Limits.*

Notes there, who ſhall be ſaid to be Inhabitants within this Statute. —

It hath been gravely adviſed, that for the better Warrant of theſe 4 Juſtices of Peace, Inquiry ſhould be made by the great Inqueſt for the Body of the County, at the General Quarter Seſſions, who ought to repair it; and if that cannot appear upon any Proof made, then a Preſentment to be made, that the Bridge is in Decay; and to conclude, Et ulterius Juratores prædicti præſentant, quod Prorſus neſcitur quæ Perſonæ, quæ Terræ, ſive Tenementa, aut Corpora Politica eundem Pontem, aut aliquam inde Parcellam ex Jure, aut antiqua conſuetudine reparare debent, aut conſueverunt; and, by this Means, the 4 or more Juſtices of Peace, being Judges of Record, ſhall be informed of Record, that it cannot be known or proved &c. 2 Inſt 703.

As to Perſons who of Right ought to repair Bridges, the Act of 22 H. 8. was only declaratory of the Common Law; Per Powell J. which Holt Ch. J. agreed, and ſaid, that the Charge of repairing Bridges was incumbent on the County by Common Law, unleſs where particular Perſons were charged with it by Tenor or Preſcription; what was new in it, was the appointing the Method of doing it, that a Hundred might be charged with the Repair of a Bridge by Preſcription. 2 Ld Raym Rep. 1251. Paſch. 5 Ann. in Caſe of the Queen v. the Juſtices of the Peace of the Liberty of St Peter's in York.

5. *S. 4. And where it cannot be known what Perſons, Lands &c. ought to repair ſuch Bridges, the Juſtices of Peace within the Shires or Ridings &c. and the Juſtices of Peace within every City or Town Corporate, or 4 of the Juſtices at the leaſt, whereof one to be of the Quorum, ſhall call before them the Conſtables of every Town &c. being within the Shire &c. wherein ſuch Bridges, or any Parcel thereof ſhall happen to be, or elſe two of the moſt honeſt Inhabitants within every ſuch Town &c. by the Diſcretion of the ſaid Juſtices of Peace, or 4 of them at the leaſt, whereof one to be of the Quorum;*

The firſt Thing the Juſtices are to do when they are aſſembled, is to call the Conſtables &c. if they be preſent (as commonly they are) at the General Seſſions of Peace, or elſe to make Warrants to call them before them, at a certain Day and Place, and in thoſe Warrants to ſignify that it is for a Taxation of Inhabitants of the whole County, for a Reparation of ſuch a Bridge. 2 Inſt. 703. Marg.

6. *And the ſaid Juſtices of Peace, or 4 of them, whereof one to be of the Quorum, with the Aſſent of the ſaid Conſtables or Inhabitants, ſhall have Power to tax every Inhabitant within the Limits of their Commiſſions, for the repairing of ſuch Bridges.*

So as neither the Juſtices, without ſuch Aſſent, nor the Conſtables or Inhabitants without the Juſtices, can make any Taxation by this Act. 2 Inſt. 704.

By theſe Words (every Inhabitant) all Privileges of Exemptions or Diſcharges whatſoever from Contributions for the Reparation of decayed Bridges, (if any were) are taken away, altho' the Exemption were by Act of Parliament; and every one may be taxed by himſelf, and each one bear his Burthen; and the Taxation cannot be ſet upon the Hundred, Pariſh, Town &c. for then one, or a few, might be diſtrained for the whole. 2 Inſt. 704. ——— S. P. reſolved, 2 Ld. Raym. Rep. 1250. Paſch. 5 Ann. in Caſe of the Queen v. the Juſtices of Peace of the Liberty of St. Peter's in York.

7. *And the ſame Juſtices ſhall have Power to appoint 2 Collectors of every Hundred, for Collection of all ſuch Sums of Money by them ſet and taxed, and to diſtrain for Non-payment &c. and ſhall alſo appoint 2 Surveyors, which ſhall ſee ſuch decay'd Bridges repair'd from Time to Time, and the Juſtices ſhall have Power to make Proceſs againſt the ſaid Collectors and Surveyors, their Executors and Adminiſtrators, by Attachments under their Seals, returnable at the General Seſſions; and if they appear, then to compel them to account; or if they refuſe, to commit them to Ward till the Account be truly made.*

Hereby 4 Things are to be obſerved, 1ſt, (as hath been ſaid) that the Taxation muſt be ſeveral. 2dly, that the Remedy for Levying is by Diſtreſs in his Lands, Goods, and Chattels in any Place within that Hundred, and to ſell ſuch Diſtreſs; and this the Collectors of that Hundred may do by Force of this Act. 3dly, that if upon Demand the Sum be not paid, albeit the Inhabitant do not expreſsly refuſe, it is a Refuſal in Law. 4thly, albeit 2 Collectors be appointed, yet one of them by the Command and Conſent of the other may diſtrain and ſell; for this is the Diſtreſs and Sale of them. 2 Inſt 704, 705.

And by 1 Ann. Stat. 1. cap. 18. S. 6.

8. S. 8. *The Juſtices of Peace ſhall have Power to allow ſuch reaſonable Charges to the Surveyors and Collectors as ſhall be thought convenient.*

the Quarter-Seſſions ſhall have Power to allow Perſons concerned in the Execution of this Act 3 d. in the Pound.

9. If a Bridge be a *private Bridge*, as *to a Mill* which A. was bound to maintain, over which B. had a Paſſage &c. if the Bridge was in Decay, B. might have his *Writ de Ponte Reparando*; but if the Bridge was for the *Publick* &c. the Remedy was by *Preſentment at the Suit of the King*, for avoiding Multiplicity of Suits. 2 Inſt. 701.

10. This *Preſentment* might be *at the Common Law* before the Juſtices of B. R. or before Juſtices in Eyre, or Commiſſioners of Oyer and Terminer, or before the Sheriff by Commiſſion, or Writ in Nature of a Commiſſion; but as to the *Sheriff, his Power to take Indictments* by Force of any ſuch Commiſſion, or Writ in the Nature of a Commiſſion, *is taken away by the Statute* 28 E. 3. *cap.* 9. but it may be *preſented in the Turn or Leet.* 2 Inſt. 701.

11. If *I have a Paſſage* over a Bridge, and another ought to repair the Bridge, and he ſuffers the ſame to fall to Decay, I ſhall have a *Writ* againſt him. F. N. B. 127. (D)

12. If any Bridge, Wall, or Sewer be broken, unto the Annoyance of the Country, upon a *Surmiſe* made by any Perſon thereof *in Chancery, that certain Perſons ought to repair the ſame*, he ſhall have a Writ unto the Sheriff to diſtrain ſuch Perſons to repair the ſame; but it appears by the Regiſter, that the King ſhall ſend his Commiſſion to the Sheriff to inquire who ought to make ſuch Bridge, and that he diſtrain them to make the ſame, and repair it; but by the Statute of 28 E. 3. cap. 9. a Commiſſion ſhall not be made unto the Sheriff to take an Indictment, and the King may ſend unto the Sheriff to diſtrain thoſe Perſons who ought to make or repair ſuch a Way, or Cauſeway, or Pavement, and upon it an Alias & Pluries if it be not done, and an Attachment upon the ſame; and *if the Bridge* or Way *be in the Confines of the County*, he ſhall have *ſeveral Writs unto every Sheriff to diſtrain them* in their Bailiwicks, that they with the Men in other Counties ſhall make and repair the Bridges and Ways &c. F. N. B. 127. (E)

13. Indictment was *Debent & ſolent reparare* Pontem &c. It was moved that the Indictment was inſufficient, becauſe it is *not alleged* in the Indictment *that the Bridge was over a Water*, and no [ſo not] needful that it be amended; 2dly, it did not appear in the Indictment that at the Time of the Indictment the ſaid Bridge was ruinous and decay'd; 3dly, the Indictment is, that B. and N. debent & ſolent reparare Pontem, and it is *not ſhew'd that their Charge of repairing of the ſame is ratione Tenuræ*, cites 21 E. 4. 38. where it is ſaid that a Preſcription cannot be that a common Perſon ought to repair a Bridge, unleſs it be ſaid to be by reaſon of his Tenure; but it is otherwiſe in Caſe of a Corporation; and for theſe Errors the Indictment was quaſh'd by Judgment of the Court. Godb. 346, 347. pl. 441. Trin. 21 Jac. B. R. Bridges v. Nichols.

14. Indictment for not repairing a Bridge did *not ſet forth in what County* the Bridge lies, and for that Exception it was quaſh'd. Sty. 108. Trin. 24 Car. B. R. The King v. Sir Henry Spiller.

15. Another Indictment was for not repairing of May's Bridge, and it doth *not ſhew that the Bridge is in the Highway*; but to this Roll J. ſaid that the Indictment doth ſay it is a *Common Bridge*, and that *is* enough, and it is needleſs to ſay it is in the Highway. Sty. 108. Trin. 24 Car. B. R. The King v. Sir Henry Spiller.

16. Another Exception was taken, that it did *not ſhew whether the Bridge was a Cart-Bridge, or a Horſe-Bridge, or a Foot-Bridge*, or what other

other Paſſage was over it; and for that Exception that Indictment was quaſh'd. Sty. 108. Trin. 24 Car. B. R. The King v. Sir Henry Spiller.

17. To a 3d Indictment for not repairing the ſame Bridge, this Exception was taken, viz. It ſays that Sir H. S. was bound to repair the Bridge *ratione Manerii*, which cannot be good; but it ſhould be *ratione Tenuræ Manerii*. Roll J. ſaid it ought to ſhew that he is Owner of the Manor, and altho' it do expreſs that he is bound to repair ratione Manerii ſui, that is but Implication that he is to repair, and makes it not appear that he is poſſeſs'd of the Manor, and upon this Exception was this Indictment quaſh'd. Sty. 108, 109. Trin. 24 Car. B. R. The King v. Sir Henry Spiller.

18. To a 4th Indictment for not repairing the ſame Bridge this Exception was taken, that there is *no Addition of the County where Sir H. S. dwelt*, as the Statute directs, and for this it was alſo quaſh'd. Sty. 109. Trin. 24 Car. The King v. Spiller.

19. By 22 *Car.* 2. *cap.* 12. *S.* 4. *all Defects of Repairs of Bridges &c. ſhall be preſented in the County, and no ſuch Preſentment or Indictment ſhall be removed by Certiorari or otherwiſe out of the County, till ſuch Preſentment or Indictment be traverſed, and Judgment given thereupon.* See infra 5 & 6 W. & M. cap. 11. S. 6.

20. Information againſt the Inhabitants of the County of N. for not repairing a Bridge, which, Time out of Mind, they have and ought to repair. *Two of the Inhabitants, in the Name of themſelves and of the reſt, plead that L. and other Perſons, Owners of Lands called Bridglands, ought to repair ratione Tenuræ, and traverſe that the Inhabitants had and ought* &c. The Attorney-General replied that the Inhabitants ought, and traverſed that L. &c. ought. The Defendants rejoined that L. &c. ought; upon which they were at Iſſue; and Ex aſſenſu partium, it was tried at Bar by a Middleſex Jury by Conſent, and the Defendants were found Guilty. 2 Lev. 112. Trin. 26 Car. 2. B. R. The King v. the Inhabitants of Nottingham. The Reporter adds a Nota, that the Defendants did not plead Not guilty, but that another ought to repair, and traverſed that themſelves ought, as Hale Ch. J. held they ought in this Caſe of a Bridge to do, ſo that if they ought not to do it, it might appear who elſe ought. 2dly, note a Traverſe upon a Traverſe, and the Iſſue join'd upon the laſt Traverſe who ought to repair it; and yet the Defendants were found Guilty upon this Iſſue, joining it to the firſt Traverſe that they ought not to repair, and all this by Direction of Hale Ch. J. the reſt of the Juſtices conſenting. Ibid.—3 Keb. 370. pl. 59. S. C. ſays that Verdict was for the King againſt L.

21. If a Bridge be out of Repair, the *Juſtices cannot ſet Rates* upon the Perſons that are to repair it; but they muſt conſent to it themſelves. 2 Mod. 8. Hill. 26 & 27 Car. 2. C. B. obiter, in Caſe of Curtis v. Davenant.

22. A. and others were indicted for not repairing of a Bridge, which it was alleged they were bound to repair, *Ratione Tenuræ* of ſuch Lands. A. pleaded, that he was not bound to repair *Ratione Tenuræ*, and found that he was. In Arreſt of Judgment it was ſaid, that the Verdict was not purſuant to the Indictment; for therein it is alleged, that A. and others were bound to repair *Ratione Tenuræ*, and the Verdict is, that A. *Ratione Tenuræ &c. reparare debet Parietem prædict' Modo & Forma, prout per Indictamentum prædict' ſupponitur*; ſed non allocatur; for each of them may be bound to repair for their reſpective Lands, and they muſt get Contribution by the Writ *De Onerand' pro Rata Portione*. 2dly, It was ſaid, that it is *Ratione Tenuræ*, and not ſaid *ſuæ*, and this was ſaid to be naught, and Noy 93. was cited; ſed non allocatur; for the Precedents are generally ſo. Vent. 331. Trin. 30 Car. 2. B. R. the King v. Sir Tho. Fanſhaw.

23. Information againſt the Inhabitants of Eſſex for not repairing a Stone *Bridge, called D. Bridge, in the ſeveral Pariſhes of H. and D.* The Defendants *plead*, that they ought not to be charged &c. for *that by an Inquiſition*

Inquiſition taken at Chelmsford, Auguſt the 3d. 26 Car. 2. *before Sir M. H. and T. and others, Juſtices of Oyer and Terminer, it was preſented, that a certain Bridge, commonly called D. Bridge, lying* &c. *in Parochia de D.* &c. *was then in Decay, and that Sir T. F. ought to repair it Ratione Tenuræ* ; who pleaded, that he ought not to repair the ſaid Bridge Ratione Tenuræ, but that the Inhabitants of D. ought to repair it ; upon which a Trial was had, and the Jury *found that Sir T. ought to repair it, and Judgment againſt him* ; and the Defendants *aver the Bridge to be the ſame, and that the Judgment was ſtill in Force* ; and upon Demurrer it was objected, that the Bridge laid in the Information was in two Pariſhes, (viz.) in H. and D. but the Bridge in the Defendant's Plea was only in D. ſo it could not be the ſame Bridge ; for Sir T. F. may be obliged to repair ſo much of the Bridge as was in D. and the County the other Part, which lies in H. and Judgment was given for the King. Raym. 384. Trin. 32 Car. 2. B. R. the King v. Inhabitants of Eſſex.

24. In an Indictment (for not repairing a Bridge) againſt the County, one of the County may be a *Witneſs*. Arg. and per Dolben J. it was ſo in the Caſe of Peterborough Bridge. Vent. 351. Mich. 32 Car. 2. B. R.

25. *5 & 6 W. & M. cap.* 11. *S.* 6. *If any Indictment be againſt any Perſon for not repairing Bridges &c. and the Title to repair the ſame may come in Queſtion, upon ſuch Suggeſtion, and Affidavit made thereof, a Certiorari may be granted to remove the ſame in B. R. provided that the Parties proſecuting ſuch Certiorari ſhall find 2 Manucaptors to be bound in a Recognizance, with Condition to try it at the next Aſſiſes &c.*

He was Lord of the Manor of Le More in Hertfordſhire, which Manor was held by the Service of repairing a Publick Bridge, and tho' all the Demeſnes of the Manor, except the Copyholds, were alien'd, yet it was held per Cur. that all the Alienees were chargeable in Proportion, yet the Queen might charge any of them with the whole, and let him have Contribution againſt the others ; and tho' the Lord had nothing but the Copyhold, yet foraſmuch as the Freehold thereof was in him, he was chargeable, and the Court * would direct the Information to be againſt all the Parties liable, but let him that is charged have his Remedy againſt the reſt ; Per Cur. 7 Mod. 98. Mich. 1 Ann. B R. the Queen v. Bucknal.———2 Ld. Raym. 792. Trin. 1 Ann. S. C. ſays, this Cauſe was tried at Hertford Summer Aſſiſes, 1 Ann. before Holt Ch. J. who then held, that a Preſcription that the Lords of the Manor ought to repair the Bridge, without ſaying Ratione Tenuræ, or Ratione Terræ, was good, becauſe (by him) the Manor might have been granted to be held by the Service of repairing this Bridge before the Statute of Quia Emptores Terrarum ; or the King may make ſuch Grant at this Day, he not being bound by the ſaid Statute ; and in Pleading one may ſay that he is obliged as Lord of the Manor ; but indeed, it is by reaſon of the Demeſnes of the Manor, and therefore if Part of the Demeſnes are granted to J. S. he will be obliged to contribute to the Repairs, but the Information or Indictment may be againſt any of them, and tho' it appears upon the Evidence that another is obliged alſo, yet the Defendant muſt be convicted ; and ſo he was, tho' he proved upon the Evidence that others were obliged to repair as well as himſelf.——Ibid. 804 Mich. 1 Ann. S. C. and Holt Ch. J. Mutata Opinione ſaid, that tho' the Defendant was Lord of the Manor, yet that was no Reaſon that he ſhould repair the Bridge, but that ſome particular Charge ought to be ſhewn, as Ratione Tenuræ, or by Preſcription. And that in ſuch Caſe, where a Man is obliged to repair a Bridge, his Tenant for Years, being in

26. Indictment againſt Defendant for not repairing of a certain Bridge &c. which he was bound to repair, Eo quod he was *Dominus Manerii* de la More. Holt Ch. J. ſaid, that a Man is not bound to repair a Bridge becauſe he has a Manor, or is Lord of a Manor ; but it muſt be ſaid, that this is ſome Charge upon the Manor that can oblige the Man to repair, and that only can be one of the two Ways ; 1ſt. That he held the Manor by the Service of repairing the Bridge &c. that is, *Ratione Tenuræ*, and this being a Charge upon the Poſſeſſion, is like any other Service for which the Tenant in Poſſeſſion is chargeable. Every Tenant in Poſſeſſion, be he but Tenant for Years, or at Will, is bound to repair, and immediately, upon Default of Repair, he is indictable. 2dly, The other way of Charge is *by Preſcription*, and then it muſt be the Tertenant, and all thoſe, whoſe Eſtate he has, did uſe, and were bound to repair, and here you neither ſhew Tenure or Preſcription ; but as to charge to repair a Bridge, it will be well to ſay, that Omnes occupatores &c. But where one goes to charge the Eſtate of another with any thing for his own Benefit, he *muſt either ſay, that he and all thoſe whoſe Eſtate* &c. *or* at leaſt *Omnes Terr' Tenentes* ; and here Judgment was ſtaid ; Per Cur. 7 Mod. 54. Mich. 1 Ann. B. R. the Queen v. Bucknell.

in Poſſeſſion, will be obliged to do it, and if he fails he will be indictable for it, and all the other Judges being of the ſame Opinion, the Judgment was arreſted.

25. 1 *Ann. Seſſ.* 1. *cap.* 18. *S.* 2. *The Juſtices of Peace ſhall, at their Quarter Seſſions, have Power, upon Preſentment that any Bridge is out of Repair, which by them ought to be repaired, to aſſeſs upon every Place within their Commiſſions, as they uſually have been aſſeſſed towards the Repair of Bridges, which Money ſhall be collected by the Conſtables, or ſuch Perſons as the Seſſions ſhall appoint.*

26. *S.* 3. *Perſons neglecting to aſſeſs, collect, or pay the Money, ſhall forfeit* 40 *s. and every Treaſurer that ſhall pay Money, except by Order of Seſſions, ſhall forfeit* 5 *l.*

27. *S.* 4. *No Fine for not repairing ſuch Bridges and Highways ſhall be returned into the Exchequer, but ſhall be paid to the Treaſurer, and applied by the ſaid Juſtices towards the Building or repairing of ſuch Bridges and Highways.*

28. *S.* 5. *All Matters concerning repairing ſuch Bridges and Highways ſhall be determined in the County, and not removed by Certiorari.*

29. *S.* 7. *Perſons authorized by this Act may plead the General Iſſue, and give this Act, and the* 22 *H* 8. *cap.* 5. *in Evidence, and if Judgment be for them, they ſhall have double Coſts.*

30. *S.* 8. *This Act ſhall not diſcharge particular Perſons, Eſtates or Places from Reparation.*

31. *S.* 9. *All Penalties upon this Act ſhall be applied to repairing the ſaid Bridges and Highways.*

32. *S.* 11. *Cardiffe Bridge ſhall be reputed a Common Bridge, and be repaired by the County of Glamorgan.*

33. *S.* 13. *In all Informations or Indictments, the Evidence of the Inhabitants of the Town or County in which decayed Bridges or Highways lie, ſhall be admitted.*

34. W. who was only a *Tenant at Will*, was indicted for *permitting the Houſe in his Poſſeſſion, adjoining to a Common Bridge*, and which he ought to repair Ratione Tenuræ, *to be ſo much out of Repair, that it was ready to fall on the Queen's Subjects paſſing over the ſaid Bridge* &c. It was adjudged on a ſpecial Verdict, that he ought to repair the Houſe ſo that the Publick be not prejudiced by the want thereof, tho' he is not compellable to repair as to his Landlord; the only Objection is, that he is not chargeable to repair Ratione Tenuræ; but tho' that is improper, yet it ſhall be intended of the Poſſeſſion, and not of a Service, and Judgment was given againſt the Defendant. 2 Ld. Raym. Rep. 856. Paſch. 2 Ann. the Queen v. Watſon.

35. In an Information for ſuffering a common Bridge to be ruinous, which the Defendants by Tenure were bound to repair, it was reſolv'd, 1ſt, That if a *Manor* be *held by the Service or Tenure of repairing a common Bridge* or Highway, and that Manor afterwards *comes to be divided into ſeveral Hands, every one of theſe Alienees*, being Tenants of any Parcel, either of the Demeſnes or Services, *ſhall be liable to the whole charge*, and are contributory among themſelves; and though the Lord of the Manor had, upon the ſeveral Alienations, *agreed to diſcharge* thoſe, that purchaſed of him, as he might, of ſuch Repairs, yet that ſhall not alter the Remedy for the Publick, but only bind the Lord and thoſe that claim under him; as the whole Manor, and every Part of it in the Poſſeſſion of one Tenant, was once chargeable with the Reparation, ſo it ſhall remain notwithſtanding any Act of the Proprietor; it ſhall not be in his Power to apportion the Charge whereby the Remedy for publick Benefit ſhould be made more difficult, or by Alienations to Perſons unable to render it, in Reſpect of the Parts which ſhould come into ſuch Hands, quite fruſtrate. 2dly, That though a Manor, ſubject to ſuch charge, *comes into the Hands of the Crown*, yet the Duty upon it conti-

nues, and any *Perſon claiming afterwards under the Crown* the whole Manor, or any Part of it, *ſhall be liable* to an Indictment or Information for want of due Repairs. 1 Salk. 358. pl. 5. Paſch. 3 Ann. B. R. The Queen v. Bucklugh (Dutcheſs of.)

36. The County of W. was indicted for not repairing Laycock-Bridge. They pleaded that the Village of Laycock ought to repair it. It was *proved in Evidence, that the Juſtices at the Seſſions had made an Order upon the Village to repair it*; but the Court held that that was no Evidence; for the *Juſtices might indict, but* could *not make an Order*, and the County is liable, unleſs they can find a particular Perſon to charge. 1 Salk. 359. pl. 7. Mich. 3 Ann. B. R. The Queen v. the Inhabitants of the County of Wilts.

1 Salk. 359. pl. 8. The Queen v. Sainthill, Trin. 4 Ann. S. C. ſays the Indictment was for not repairing Occidentalem partem Communis Pontis Pedalis continent' dimidium Pontis in communi ſemita.

37. Indictment was for not repairing *quendam communem Pontem ſitum in quadam communi ſemita Pedeſtri* &c. Per Holt Ch. J. the Word *Communis* does not, ex Vi Termini, import that it is common to all the Queen's Subjects, as it ought to do to maintain an Indictment. The Word *Publicus*, mentioned in a Precedent produced, is of wider Extent than Communis; and it will be hard to underſtand the Word Communis to be univerſal to charge a Man's Freehold; nor will the Concluſion of *ad Nocumentum omnium Ligeorum Domini Regis illac tranſeunt'* help it, if ſo much be not expreſsly charged in the Premiſſes; and not being ſaid to whom it is common, it is very fit to ſee Precedents before we determine it. 6 Mod. 255, 256. Mich. 3 Ann. B. R. The Queen v. Saintiff.

It was objected that the 22 H. 8. by which Juſtices of Peace have their Juriſdiction of Nuſances in Bridges, extends only to Bridges in the common Highway; and likewiſe that it ought to ſhew the Quantity, viz. ſo many Foot in Length, and ſo many in Breadth. It was anſwered that there may be Communis Strata, which is not the King's Highway, and yet the Juſtices have Power over Nuſances in that Caſe not by virtue of the 22 H. 8. but by the 1 E. 3. which gives Power of all Nuſances. The Court doubted as to the 1ſt Exception, and over-ruled the 2d, it being ſaid Dimidium; but held that Pons pedalis did not ſignify a Foot-Bridge, but a Bridge a Foot long; and ſo reverſed the Judgment, being Pedalis for Pedeſtris.— ——2 Ld. Raym. Rep. 1174. S. C. adjudged, and the former Judgment reverſed according to 1 Salk.

38. The Court was moved for a *Mandamus* to the Juſtices of Peace for the County of Wilts, to make an Aſſeſſment upon the Inhabitants of an Hundred in the County *for the Reimburſing 2 of the Inhabitants* of that Hundred, *who, upon an Indictment* againſt the Inhabitants of that Hundred for not repairing a Bridge within the ſaid Hundred, were diſtrain'd to appear and defend the ſaid Indictment, and upon that Account *were near* 30*l. out of Pocket*. The Court refuſed to grant a Mandamus, becauſe the Juſtices had not a Power to make an Aſſeſſment for that Purpoſe, and ſaid it was an hard Caſe; but that no Remedy was provided therein. MS. Caſes, 67. Mich. 4 Geo. B. R. The Juſtices of Peace of Wiltſhire.

39. Upon a Motion made to diſcharge a Rule for an *Information againſt the Inhabitants of the County* for not rapairing a Bridge, it was *alleged that the Pariſhioners of Mitcham* in that County *ought to repair it, which they had done Time out of Mind*. It is true that Pariſh had obtained a Verdict againſt that County, but it was by Surpriſe; for by Certificates and other Records of the Seſſions, it will appear that this Pariſh ought to repair this Bridge, and that they had been fined for not repairing, and that they had acquieſced under that Charge many Years. It was *inſiſted for the Pariſh, that admitting they had repaired this Bridge, yet if they were not obliged ſo to do, either by Preſcription or Tenure*, they ſhall not always be liable. They cannot be obliged by Preſcription, becauſe the Inhabitants of this Pariſh are not a Body Politick, and it is not pretended that they are obliged by Tenure; to which it was anſwered, that an *Information againſt the County in General, was the only Way to try the Right*; for though this Pariſh might not be obliged to repair the Bridge, yet ſome other Pariſh might;

might, and ſince the County is Prima facie to repair it, it is probable, that when the Information is exhibited againſt them, the Inhabitants of Mitcham to excuſe themſelves may ſhew who is obliged to repair; and the Court being of that Opinion, the Rule was made abſolute. 8 Mod. 119, 120. Hill. 9 Geo. The King v. the Inhabitants of the County of Surry.

For more of Bridges in General, ſee other Proper Titles.

Bringing Money into Court.

(A) In what Caſes, and at what Time. And Pleadings.

1. DEBT upon Bond. The *Defendant pleaded a Tender at the Day, and Tout temps Priſt.* The *Plaintiff received the principal Sum in Court, and Judgment to acquit the Defendant of the Sum received*; but the *Plaintiff, to have Damages, alleged a Demand*; to which the *Defendant demurr'd*, and had Judgment; for if the Plaintiff would have Damages, he ought not to have received the Money out of Court; for after a Judgment, quod eat inde ſine Die, no Iſſue ſhall be taken. Cro. J. 126. pl. 13. Trin. 4 Jac. B. R. Harrold v. Clotworthy. S. C. cited by Holt Ch. J. Ld. Raym. Rep. 643. in Caſe of Horn v. Lewin, and therefore where a Defendant pleads Tout temps priſt, and brings the Money into Court, and concludes with a Prayer of Judgment as to the Damages, if the Plaintiff takes the Money out of Court, he muſt agree to all that the Defendant has ſaid, otherwiſe he ought not to take the Money out of Court; for a Man cannot proceed for Damages after he has barr'd himſelf from the having Judgment for the Principal, where the Damages are merely acceſſory, except in the Caſe of Ejectment, where the Term expires pending the Suit; but as to this Point the other three Judges ſeemed to doubt, and they gave no Opinion, but rather inclined to be of Opinion that the Avowry [which was the Caſe there] was not abated by this taking of the Money out of Court.——2 Ld. Raym. Rep. 774 Trin. 1 Ann. in the Caſe of Burton v. Souter, in Aſſumpſit, it was inſiſted, as in the Caſe of Horne v. Lewin (before,) that after accepting the Money the Plaintiff could not proceed for Damages, and there Holt Ch. J. held ſtrongly his former Opinion.

2. In an *Avowry* by the Bailiff of A. *for a Rent-Charge*, the *Defendant had Judgment*, and now *A. deſired to try the Right*; but the Court would not grant it without bringing the Money recovered into Court, and agree to bring no 2d Deliverance to procraſtinate the Cauſe by Withernam &c. Keb. 742. pl. 29. Trin. 16 Car. 2. B. R. Searl v. Taylor.

3. In an Action upon the *Caſe for* 3 *Hogſheads of Vinegar and a Rundlet*, Jones pray'd that he might deliver *Money for the Rundlet*, as was agreed, or as the Secondary ſhould tax, and that the Plaintiff might go on for the reſt; and the Court ordered the Plaintiff to ſhew Cauſe why the Rundlet ſhould not be ſtruck out, or he go on for the reſt at his Peril; ſo where the *Cauſe of Action is really ſmall, in Compariſon to the Declaration.* 2 Keb. 420. pl. 49. Mich. 20 Car. 2. B. R. Brown v. Welmes.

4. Money

4. Money brought into Court, in order to get an *Injunction* againſt a Judgment on a Bond given by a Mother to her Son, (an Infant, and whom ſhe and her after Husband had maintained for ſeveral Years, and had paid a conſiderable Part of the Money) *was delivered back again*, on giving *Security* to pay what ſhould appear due for Principal and Intereſt, and Satisfaction decreed to be acknowledged thereupon on the Record of the Judgment. Fin. Rep. 1. Mich. 25 Car. 2. Cook v. New.

5 A. *deviſed Lands* to B. ſubject to a *Proviſo for Payment* of 2000 l. to Defendants within 3 Years after A.'s Death. B. brought the Money into Court. Decreed that the Lands be *diſcharged*, and that the Defendants be at Liberty to take the Money out of Court. Fin. Rep. 61. Hill. 25 Car. 2. Ld. Willoughby v. Dixie.

6. *Portion* and Intereſt *deviſed on a Contingency* of dying before 21, and unmarried, decreed to be paid into Court for the Benefit of a Hæres Factus, according to the Will, in caſe of the Deviſee's Death. 2 Chan. Rep. 150. 30 Car. 2. Bourne v. Tynt.

Covenant on 3 diſtinct Covenants, ſeveral Breaches were aſſigned; one was for Non-payment of Rent. Motion was

7. In *Covenant* the Plaintiff declared upon *ſeveral Breaches*, one whereof was for *not paying* 7 *l. according to the Covenant*, 'twas moved for the Defendant that he might be admitted to bring 7 l. into Court, together with his Coſts hitherto &c. and that the Plaintiff *might proceed for the reſt if he thought fit*; but the Motion was denied, becauſe the Plaintiff had declared of other Breaches, and the Matter lay in Damages. Vent. 356. Mich. 33 Car. 2. B. R. Anon.

made, that upon bringing in 10 l. into Court, it might be ſtruck out of the Declaration; but the Court denied it; for when it *appears* the Plaintiff has *juſt Cauſe of Action for one Thing*, they will not put him to try the reſt at Peril of Coſts. 12 Mod. 95. Trin. 8 W. 3. Pawlet v. Heathfield.

Northey moved to bring Money into Court upon a Covenant, and was refuſed. 12 Mod. 241. Mich. 10 W. 3. Lawly v. Dibbie.——In Covenant *for Payment of Money*, Powell J. ſaid that the Court had granted it; but that in Covenant *for Repairs* they have denied it. 11 Mod. 270. pl. 12. Hill. 8 Ann. B. R. Anon.—— In Covenant for Non-payment of Rent, the Practice is to allow the bringing Money into Court. Barnes's Notes in C. B. 198. Mich. 2 Geo. 2. in a Note.

Rule of bringing Money into Court was deny'd in *Covenant*; otherwiſe if *Debt* had been brought *upon the Charter-Party*. Cumb. 138. Mich. 1 W. & M. in B. R. Anon.

8. A *Scire Facias* had *iſſued* out *againſt the Tertenants on a Judgment*, and they had *pleaded Ne unques Seiſie*, and *Iſſue found againſt them*, and Judgment for the Plaintiff. It was *moved that the Elegit might be ſtopp'd on bringing the Money into Court*; for if the Elegit were taken out and the Lands extended, we might have the Lands diſcharged by Scire Facias, and bringing the Money into Court; and it was granted. The like Motion was lately granted in C. B. Comb. 169. Mich. 1 W. & M. in B. R. Anon.

But was allow'd on accepting a new Leaſe, and ſealing a Counterpart.

9. In *Ejectment* for Non-payment of Rent, the Court denied to ſtop the Ejectment on bringing in the Arrears. Cumb. 255. Paſch. 6 W. & M. in B. R. Harding v. Brook.

2 Salk. 597. in pl. 3. cites Mich. 8 W. 3 B. R. Downes v. Turner.

S. P. But the Way is to *confeſs the Employing*, and that he *deſerved but ſo much*, and

10. Levins moved, that on Payment of 10 s. into Court, ſo much might be ſtruck out of the Declaration; but it appearing to be in a Caſe upon an Indebitatus Aſſumpſit and Quantum Meruit, the Court ſaid he might do it as to the *Indebitatus Aſſumpſit*, but * *not as to the Quantum Meruit*. Cumb. 264. Trin. 6 W. & M. B. R. Anon.

to plead a *Tender* thereof; for then the Plaintiff may reply that he deſerved more, and ſo come to Iſſue; but becauſe in moſt Declarations there are *Quantum Meruits*, even in an Indebitat. Aſſ. there *it may be brought in upon an Indebitat. Count*, and that will affect the other, and ſo it was done; per Holt Ch. J. 12 Mod. 614. Hill. 13 W. 3. Anon.

The Court granted it as to the *Indebitatus* Aſſumpſit, *but refuſed it as to the Quantum Meruit*; and the Court ſaid that ſuch Motion had been ſometimes obtained, where a Quantum Meruit and Indebitatus were joined together, yet regularly they ought not to be granted on a Quantum Meruit; for *who can tell*

tell what a Man deſerves till he be tried. 12 Mod. 187. Paſch. 10 W. 3. Smith v Johnſon ——Comb. 20. S. P. Paſch. 2 Jac. B. R. Anon. * 2 Salk. 597. in pl 3. cites Hill. 8 W. 3. accordingly. ——But 'twas allow'd afterwards Paſch. 5 Ann. B. R. Ibid.

11. In *Ejectment* brought *on Forfeiture of a Leaſe for Non-payment of Rent*, if the Leſſee will make Oath that his Leaſe is not expired, and bring all Arrears into Court, the Court will not compell him to plead on the common Rule. Cumb. 299. Mich. 6 W. & M. in B. R. Anon.

12. By Holt Ch. J. where the *Plea is to the Damages*, you cannot bring Money into Court; otherwiſe where the Plea is *to the Ground of the Action*, as Non-aſſumpſit. It may be allowed in *Trover* where you bring the Goods in Specie into Court, but rarely where only Part of them are brought in. Cumb. 357. Hill. 8 W. 3. B. R. Burman v. Shepherd. In *Trover* for a *Bill of Exchange* for a 100 l. ad damnum of 150 l. A Motion was made, that upon bringing 50 l. into Court it might be ſtruck out of the Declaration. Holt, This Practice in Aſſumpſit has been brought in within few Years, and has been only allowed, becauſe Payment goes to the Iſſue; but in Trover it goes only to the *Damages*. It may be the Plaintiff has *good Cauſe of Action for Part, and a probable Cauſe for the Reſidue*; now it would be hard to ſtrike out his certain Cauſe, and put him to his probable Cauſe at the Peril of Coſts. 12 Mod. 90. Hill. 7 W. 3. Burman v. Shepherd.

13. In *Debt on Bond*, Defendant muſt bring in the *whole Penalty*, or the Court will not ſtay Proceedings. 2 Salk. 597. in pl. 3. cites Hill. 9 W. 3. B. R. But Ibid. The Reporter ſays it ſeems it cannot be without bringing in the whole Money; if the Parties diſpute the Quantum, and there is a Diſpute how much is due, it cannot be referred. Trin. 11 W. 3. B. R.

14. Where an *Account-render* is brought, if the Defendant will plead *Plene computavit*, and offer to bring the Money into Court, that will ſignify nothing; for that *in* a Trial upon an Action of *Account* the *Jury have nothing to do, unleſs an Account ſtated* be proved; but an *Account muſt be before Auditors*; for they are the Judges and not the Jury. L. P. R. 31 cites Paſch. 9 W. 3. B. R.

15. A *Rent-charge* was granted to J. S. *out of Lands* which were *demiſed to ſeveral Undertenants*. The Grantee of the Rent *diſtrained upon them all for one half Year's Rent-arrear*. The *Tenants bring ſeveral Replevins*. The Avowant makes the *ſame Avowry againſt them all*. The Plaintiffs in Bar of the Avowry, *plead a Tender with Profert in Curia*. And now it was moved, that the *Bringing in one Sum ſhould ſerve for all* the 3 Avowries, they being for the ſame Rent-arrear; and the Motion was granted. Ex Relatione m'ri Jacob. Ld. Raym. Rep. 429. Hill. 10 W. 3. Anon.

16. In Replevin, Defendant *avows for Rent*, and Plaintiff admitted to bring it into Court. 2 Salk. 597. in pl. 3. Hill. 10 W. 3. B. R. Anon.

17. In *Debt for Rent*, it was moved to bring ſo much Money into Court; and Holt Ch. J. thought it hard, and ſaid he remembred the Beginning of theſe Motions; the firſt was to bring in Principal and Intereſt on a Bond; after that it came to an Indebitatus Aſſumpſit. It has been done in Debt for Rent, but not ſo freely; we do it in *Ejectment* on a ſpecial Reaſon, viz. becauſe that Action ſubſiſts entirely upon the Rules of the Court. 2 Salk. 597. cites it as by Holt Ch. J. Paſch. 10 W. 3. B. R. Defendant mov'd to pay 3 l. into Court, in *Debt for Rent*, and plead Nil debet; Per Cur. be it ſo, 'tis common Practice.

Barnes's Notes in C. B. 195. Trin 7 & 8 G 2. Dixon v. Allen.

In *Debt for Rent*, Rule to ſhew Cauſe why Defendant ſhould not bring Money into Court upon the common Rule, and plead Nil debet, made abſolute. Barnes's Notes in C. B. 198. Mich. 12 Geo. 2. White v. Daman.——Ibid. cites Trin. 7 & 8 Geo. 2. Dixon v. Allen, S. P.

18. An *Action* was brought by the Plaintiff againſt the Defendant, *for 100 l. won upon a Wager*, that the Peace would not be concluded by

ſuch a Day. *After the Rules for pleading were out*, it was moved, that upon the Bringing in of 100 l. into Court, and upon Payment of Coſts, the Plaintiff might proceed at his Peril; for the *Diſpute was only whether the Plaintiff ſhould have Intereſt or not?* And per Holt Ch. J. Intereſt is never given by the Jury in ſuch Caſe in the Damages. Ruled, that the Defendant ſhould ſhew Cauſe &c. Ld. Raym. Rep. 398, 399. Mich. 10 W. 3. Medena v. Kilder.

In Replevin, the bringing the Money into Court *is ſuperfluous* in Caſe of an Avowry; for the *Money is not demanded*, but the Replevin is for the Goods.

19. In a Plea of Tender of *Rent in Replevin* in Bar, the Money ought not to be brought into Court. In *Debt on a Bond*, there may be a Profert to ſave Damages, becauſe there the Money is the Thing in Demand; but it cannot be in an Avowry to a Replevin, becauſe the *Avowry* is to juſtify the taking the Cattle; and whether the Money is paid or not, is not the Queſtion. But if the Diſtreſs was rightfully taken, the Avowant muſt have a Return; if wrongfully, he muſt anſwer the Plaintiff's Damages. 2 Salk. 584. Hill. 12 W. 3. B. R. Horn v. Lewin.

12 Mod 352. Horn v. Luines.——Ld. Raym. Rep. 639. S. C. and Ibid. 643 644. S. P. per tot. Cur. And they all held that the Bar to the Avowry was ill pleaded, 1ſt, becauſe it is pleaded with a Paratus, where it ought to be pleaded with an Obtulit &c. 2dly, becauſe it is pleaded in Bar, where it ought to be pleaded only in Excuſe of Damages; but if the Tender had been well pleaded, it would have chaſed the Avowant to ſhew a Demand, to intitle him to the Diſtreſs. But here the Plea in Bar not amounting to a Tender, it is ill; and therefore the bringing in of the Money, and the taking of it out, is ſuperfluous. And Judgment ſhall be upon the Avowry for a Returno Habendo; and Judgment was given for the Avowant accordingly.

In Trover, the Defendant moved to bring *a Note* into Court. Mr. Serj. Darnell declared he had moved for and obtained a Rule to bring into Court 2 *Fowls* in one Term, and the next Term *a Spare-rib of Pork, or Money in lieu there*; Mr. Secondary Thomſon remembred a Motion to bring in *a Belt* in Trover, and ſeveral other Inſtances were given. The Court thought it as reaſonable that Goods, or their Value, ſhould be brought into Court in Action of Trover, as Money in an Aſſumpſit, and made a Rule accordingly. Rep. of Pract. in C. B. 59. Mich. 4 Geo. 2. Tuney v. Clarke.

20. It was moved that the Defendant in *Trover* after Declaration, might bring *the Thing itſelf* and deliver it to the Plaintiff. And Gould J. ſaid he had known it often done; otherwiſe where he would tender the Value; for Defendant ſhall not ſet a Value upon the Plaintiff's Goods; and a Motion was granted. 12 Mod. 397. Paſch. 12 W. 3. Farrel's Caſe.

21. It was moved to bring ſo much Money into Court, to have it ſtruck out of the Declaration. Now the Courſe is upon bringing Money into Court to pay Coſts ſo far, if the Plaintiff will take it out; but if it be ſuch an *Action in which the Defendant may plead Tender in Bar of Coſts*, and that the Plaintiff, to ouſt him of that Benefit, would *reply a ſpecial Capias teſted of a Term antecedent to the Principal*, all this may be opened and *ſettled on Motion*; per Cur. 12 Mod. 633. Hill. 13 W. 3. Anon.

22. Note, The Court will never give Leave to bring Principal and Intereſt into Court, and ſtay Proceedings upon a Bond, when the Suit is *upon a Counter-bond*, or when there is *any Pretence of a collateral Agreement*. 12 Mod. 598. Mich. 13 W. 3. Coke v. Heathcot.

23. Till *Bail put in*, one is not in Court to move to bring in Principal, Intereſt and Coſts. 7 Mod. 140. Hill. 1 Ann. B. R. Anon.

24. In an Action of *Debt* brought upon Articles, Holt Ch. J. ſaid he never knew Money brought into Court and ſtruck out of the Declaration in Debt, though it had been done on a *Bond with Condition in Delt for Rent*; and he ſaid he had known it done in *Replevin, where the Diſtreſs was for Rent*. 7 Mod. 141. Hill. 1 Ann. B. R. Anon.

25. Money has been brought into Court and ſtruck out of the Declaration in a *Mutuatus eſt*; Per Holt Ch. J. who ſaid that the firſt Motion ever made for bringing Money into Court upon a Mutuatus was made by Levins in Keeling's Time. 7 Mod. 141. Hill. 1 Ann. B. R. obiter.

26. *After*

26. *After Judgment in Debt on Bond*, the Court will not make a Rule upon a Plaintiff to take his Principal, Intereſt, and Coſts; and held, that in ſuch Caſe Plaintiff ought to have his full Coſts out of the Penalty. 7 Mod. 114. Mich. 1 Ann. B. R. Le Sage v. Pere.

27. In *Trover* for a Horſe, it was moved to bring the *Saddle and Bridle* into Court, but denied. 2 Salk. 597. 2 Ann. B. R. cites the Caſe of Wilcocks the Attorney.

28. Money ought not to be brought into Court to have it ſtruck out of the Declaration where an *Executor is Plaintiff*, but you may plead a Tender, & Touts Temps Priſt; Per Cur. ſaid to be ſettled here on Debate. 6 Mod. 29. Mich. 2 Ann. B. R. Anon. Per Holt Ch. J. at the Sittings in Guildhall, in an *Action by an Adminiſtrator*. The Defendant cannot bring Money into Court, becauſe the Adminiſtrator is not by Law to pay Coſts; And Paſch. 5 Ann B. R. in Gregg's Caſe, an Action was brought by an *Executor*, for Money due to his Teſtator for Law Buſineſs done by him, it was moved to bring ſo much Money into Court, but denied 2 Salk. 596. pl. 3. Paſch. 5 Ann. B. R. Gregg's Caſe.

Upon the common Motion to *bring Principal, Intereſt, and Coſts* into Court, *and refer to Prothonotary*, the Court refuſed to grant the Rule, the *Plaintiff being an Executor*, but ſaid, the Plaintiff might be willing to accept the Debt and Coſts, and therefore they would grant a Rule to ſhew Cauſe. Barnes's Notes in C. B. 195. Hill 6 Geo. 2. Bryan v Holloway.

It was moved to diſcharge a Rule to pay Money into Court, which was drawn up in common Form, without diſtinguiſhing that *Plaintiffs ſued as Adminiſtrators*, and the Motion was granted. Barnes's Notes in C. B. 195. Hill 8 Geo. 2 Satterthwaite, and his Wife Adminiſtratrix, v. Watford.

29. In *Debt on a Judgment*, the Court will not ſtay Proceedings on Motion upon Payment of Principal, Intereſt, and Coſts, as they will upon Debt upon Bond. 6 Mod. 60. Mich. 2 Ann. B. R. Burridge v. Forteſcue.

30. Motion *before Plea* to bring Money into Court, and have it ſtruck out of the Declaration, was denied. 6 Mod. 153. Paſch. 3 Ann. B. R. Anon.

31. *4 & 5 Ann. cap. 16. S. 13. Pending an Action on Bond, the Defendant may bring in Principal, Intereſt, and Coſts in Law and Equity, and then the Court ſhall give Judgment to diſcharge the Defendant.*

32. *Covenant* and Breach for *Non-payment of Rent, and for not repairing* &c. It was moved, to bring in ſo much for the Rent, and as to the other Breach, that the Plaintiff might proceed as he thought fit; and per Trevor, all the Judges have agreed, (for he put the Caſe to Holt Ch. J.) that it is but reaſonable to allow it; that it does not differ from Debt for Rent; for tho' it be Covenant, yet it is a Covenant for Payment of a Sum certain. The ſame Diverſity was taken between Covenant for a Sum certain, and a Thing uncertain; Per Holt Ch. J. Hill. 9 W. 3. B. R. ſaying it did not differ from an Indebitatus Aſſumpſit. And Trin. 12 W. 3. B. R. ſame Rule. 2 Salk, 596. in pl. 3. Paſch. 5 Ann. B. R. Gregg's Caſe.

33. In an *Action* brought *upon a Policy of Inſurance*, it was moved for Leave to bring 15 l. into Court, being as much as they thought their Average of the Damage came to, *(the Goods not being loſt, but only damaged)* and ſo the Plaintiff to proceed upon Peril of Coſts; Per Powell J. the Motion cannot be granted, tho' we have granted it in a Quantum Meruit, and alſo in Covenant for Payment of Money; but in Covenant for Repairs we have denied it, and ſo we muſt here. 11 Mod. 270. pl. 12. Hill. 8 Ann. B. R. Anon.

34. In an Action againſt an *Executor*, he *paid Money into Court* upon the common Rule, and on the Trial, the *Plaintiff being nonſuited*, the *Executor moved that he might have the Money out of Court, and granted, becauſe he* being Executor was unacquainted with the Affairs of his Teſtator, and *might not know whether the Teſtator owed the Plaintiff any Money or not*; but where the Defendant is neither Executor nor Adminiſtrator, altho' the Plaintiff be nonſuited, or a Verdict for the Defendant, the Plaintiff ſhall have the Money out of Court, becauſe the Defendant brings

brings it in as knowing, and being conſcious that he owes the Plaintiff ſo much. Rep. of Pract. in C. B. 5. Mich. 11 Ann. Anon.

35. A. by Marriage Articles was to pay 50 l. at 5 l. per Ann. till all paid, and *in failure* of Payment of any 5 l. then he was *to pay the whole*; Per. Cur. the Power given to the Court by the Statute, is to ſtay all Proceedings on Payment of all that is due, and in the principal Caſe all the 50 l. is due, and no Part of it is a *Penalty*, but only the Defendant by the Condition of theſe Articles, had time for the Payment of the Money by Parcels, as therein directed, which he has loſt the Benefit of. 8 Mod. 56. Trin. 7 Geo. 1. Anon.

36. The Court will not compel a Creditor by *Judgment* to accept a *leſs Sum than is due* on the Judgment, *on Account of any former indefinite Payments*, when there were *other Accounts* depending between the Parties, unleſs the Defendant will conſent to bring in all that is due to the Plaintiff. 8 Mod. 236. Paſch. 10 Geo. 1. Anon.

37. In *Replevin* Defendant juſtified the *taking the Cattle Damage feaſant*, and now moved to ſtay Proceedings on bringing into Court what was due, with Coſts; Per Cur. If you bring in what is due on the Replevin-Bond Proceedings ſhall be ſtay'd, but if it is to ſtay Proceedings on Payment of what is due for Damages it ſhall not be granted, becauſe the Court has no Rule to guide them in ſuch Caſe; but it is otherwiſe for *Rent*, for that is certain. 8 Mod. 379. Trin. 11 Geo. 1. Anon.

38. In Action of *Covenant in Articles* of Agreement, wherein Defendant covenanted to find Diet and Lodging for Plaintiff for a Year, or to pay him 10 l. the Defendant, on Affidavit that there was not above 10 l. due, moved to bring it into Court, and that the Plaintiff might proceed at his Peril. The Court would not aſcertain what was due for Diet and Lodging, but becauſe the Agreement was in the Disjunctive, *to find Diet and Lodging, or to pay* 10 *l.* a Rule was made that Defendant might bring the Money into Court. 8 Mod. 305. Mich. 11 Geo 1. Savil v. Snell.

39. A Motion to bring 100 l. into Court, the Defendant ſuggeſting that the *Ejectment* was brought *for Nonpayment of a Fine, and* for *letting a Leaſe, contrary to the Cuſtom of a Manor*, and therefore he propoſed to bring in the 100 l. to anſwer the Fine, and that the Leſſor of the Plaintiff ſhould proceed at his Peril for the Forfeiture in reſpect to the Leaſe ſuppoſed to be let contrary to the Cuſtom of the Manor, but the Court denied the Motion; for tho' it can be no Diſadvantage to a Leſſor to ſtay Proceedings on Payment of his Rent and Coſts, yet the granting this Motion may probably give the Defendant ſuch an Advantage over the Leſſors, who have brought this Ejectment for a juſt Cauſe, as may do them Injuſtice. Rep. of Pract. in C. B. 42. Hill. 1 Geo. 2. Rocks v. Ateaſe, ex Dimiſſ' Dom. Briſcoe vid. & al'.

40. On a Rule to ſhew Cauſe why 8 s. ſhould not be brought into Court, and ſtruck out of the Declaration. It was moved, that this was a *Quantum meruit for uſing a Chaiſe hir'd of another*, ill; and that the Court had never gone ſo far as to allow of theſe Motions in ſuch Caſes; for, at this Rate, they might come, in Time, to allow of them in Battery and Treſpaſs &c. It is true indeed, it was anſwered, that in general Quantum Meruits for the Hire of a Chaiſe &c. the Court does grant them, and the Court agreed to this Difference; and the Ch. J. ſaid, that this Rule was firſt made in my Ld. Ch. J. Kelynge's Time, and the Reaſon of it he ſaid was, for the Difficulty of pleading a Tender; accordingly they diſcharged the Rule in this Caſe. Barnard. Rep. in B. R. 25, 26. Mich. 1 Geo. 2. White v. Woodhouſe.

41. The Plaintiff had *declared for* 3 *s.* 2 *d. Half-penny for Rent, and* 97 *s. upon a Mutuatus.* It was moved, that there was no Colour, that any more was due than the 3 s. 2 d. Half-penny, and the 97 s. was only added to make a Cauſe of it in this Court; and that if this Practice was allowed,

allowed, it would lead to a great deal of Oppreſſion; and therefore he mov'd, that upon bringing in *the Money due upon the firſt Count* with Coſts, Proceedings might be ſtay'd. The Court ſaid, that they had never gone ſo far as to allow *Money to be brought upon one Count*; but however as this was ſuch a Piece of Evaſion, the Court made a Rule to ſhew Cauſe. Barnard. Rep. in B. R. 180. Trin. 2 Geo. 2. Bellow v. Pew.

42. An Action of *Aſſault and for taking away* 1*s.* moved to bring the Shilling into Court, and Plaintiff to proceed at his Peril for the Reſidue; and a Rule made to ſhew Cauſe. But Quære, whether it was ever made abſolute, or oppoſed? Rep. of Pract. in C. B. 46. Trin. 2 Geo. 2. Smith v. Dobby.

43. *Debt* was brought *upon a Bond of* 200 *l.* the Defendant had ſeveral Demands likewiſe upon the Plaintiff, ſo that upon the *Balance*, there *was but* 25 *l.* owing; upon which it was moved, that he might bring the Balance into Court, and ſaid he thought this within the Meaning of the late Statute. But per Cur. the Statute had preſcribed only 2 particular Ways of Proceeding; one by pleading the Matter of Account ſpecially; the other by giving the ſpecial Matter in Evidence upon the general Iſſue, and ſaid they could not allow of any other Way of Proceeding, and accordingly refuſed the Motion. Barnard. Rep. in B. R. 214. Mich. 3 Geo. 2. Anon.

44. In *Debt upon an Emiſſet* for Goods bought, where the Party had *declared according to the Cuſtom of the City of London*, and which was removed up here by Habeas Corpus; it was moved, that Money might be brought into Court and be ſtruck out of the Declaration, and this was likened to the Caſe of an Indebitatus Aſſumpſit; accordingly the Court made a Rule to ſhew Cauſe. Barnard. Rep. in B. R. 420. Hill. 4 Geo. 2. Lepege v. Pompylion.

45. In an Action of *Treſpaſs* brought *for the mean Profits*; *after a Recovery in Ejectment*, it was moved to bring the Money into Court, and that it might be ſtruck out of the Declaration. But the Court ſaid this was an *Action founded upon a Tort*, and therefore refuſed the Motion. Barnard. Rep. in B. R. 368. Mich. 4 Geo. 2. Chairman v. Edwards.

46. In *Caſe for Dilapidations*, it was moved, that Money might be brought into Court and ſtruck out of the Declaration. But Page J. ſaid theſe Motions are never granted where the *Damages* are ſo very *uncertain*, and therefore never allowed in Covenant for Want of Repairs; he ſaid too, that formerly theſe Motions he has known refuſed even in Quantum Meruits. Accordingly (the Ch. J. abſent) the Court thought proper not to make any Rule. 2 Barnard. Rep. in B. R. 4. Trin. 5 Geo. 2. Squire v. Archer.

47. Per Cur. Money may be paid into Court upon the Common Rule, after Rule to plead is out, *at any Time before Plea pleaded*. Barnes's Notes in C. B. 194. Mich. 6 Geo. 2. Anon.

48. Defendant brought Money into Court upon the common Rule (Plaintiff refuſing to accept the ſame) and *pleaded the general Iſſue*. Plaintiff joined and delivered the Iſſue Book, with *Notice of Trial*. Plaintiff did *not proceed father*, but moved to have the Money out of Court, with *Coſts to the Time of bringing the Money into the Court*; which was ordered upon Plaintiff's Payment of *Coſts to Defendant ſubſequent to the Time of bringing the Money into Court*. Barnes's Notes in C. B. 195, 196. Hill. 8 Geo. 2. Savage v. Franklyn.

49. Money was paid into Court by Defendant, upon the common Rule; and Plaintiff proceeded to Trial, and *recovered a ſmaller Sum than that paid into Court*. Moved in the Treaſury, that Defendant might have the Money out of Court towards his Coſts; and ordered, upon hearing the Attornies on both ſides. Barnes's Notes in C. B. 196. Hill. 8 Geo. 2. Anon.

Rep. of Pract. in C. B. 130. S. C. ruled accordingly, they being many Houſe-hold Goods;

50. In *Trover*, it was moved for Defendant to bring the *Goods ſpecified in the Declaration* into Court; but the Goods *being ponderous*, the Motion was denied; Per Cur. Let the Plaintiff ſhew Cauſe why he ſhould not conſent to accept the Goods and Coſts. Barnes's Notes in C. B. 197. Trin. 10 G. 2. Cooke v. Holgate.

and ſays ſuch Motion was denied Hill. 6 Geo. 2. Watkinſon v. Cockſhott.

51. A Rule to pay 1 l. 11 s. 6 d. into Court was diſcharged, the Money not having been paid in till *after Plea pleaded*. Barnes's Notes in C. B. 198. Hill. 11 Geo. 2. Straphon v. Thompſon.

Rep. of Pract. in C. B. 85.

52. Per Cur. Money cannot be brought in *after regular Judgment*. Barnes's Notes in C. B. 198. Mich. 12 Geo. 2. Burgeſs v. Pollamounter

Hill. 6 Geo. 2. Spring v. Bilſon, S. P. accordingly.

(B) In what Caſes it ſhall be delivered to the Plaintiff, or re-delivered to the Defendant.

1. IN *Debt*, the *Defendant ſaid as to parcel that he has been always ready to pay, and yet is, and brought the Money into Court, and to the Reſt pleaded in Bar*; the *Plaintiff pleaded in Eſtoppel to the ſaying that he has been always ready*, &c. *for he imparl'd the laſt Term.* Judgment if he ſhall be received to ſay, that always ready &c. And per Danby, the Plaintiff ſhall not have the Money here, till the other Iſſue be tried, and this by Reaſon that the Damages ſhall not yet be tried; but per Priſot, he may have Judgment of his Debt of this Parcel, and his Damages, and ceſſet Executio; for thoſe may be well aſſeſſed by the Court as to this Parcel, but the Plaintiff ſhall not have it till the other Iſſue be tried, by Reaſon that the Coſts are entire, which cannot be taxed till the other Iſſue be tried; and when the Plaintiff pleaded the Eſtoppel above, the Defendant pray'd to re-have his Money again. And per Priſot, he ſhall re-have it, Quod non fuit conceſſum; for he has confeſſed of this Part. And, by him, if the Plaintiff will relinquiſh the Eſtoppel, he ſhall have Livery of the Money without Damages and Coſts; and the Plaintiff after relinquiſhed the Eſtoppel, by which the Money was delivered to him. Br. Touts temps &c. pl. 22. cites 36 H. 6. 13.

S. C. cited Noy 110 in Caſe of Bridges v. Raymond, where the Caſe was viz. In Debt on Bond to pay a leſs Sum, Defendant pleaded Tender *at the Day and Place*, Plaintiff takes *Iſſue on the Tender* &c. which is found againſt him; and now he prays to have the Money out of Court, but it was denied; for he has loſt that Advantage by taking Iſſue on the Tender, and that he was too Covetous, and by ſeeking to gain all, he has loſt all ——— Sty. 388. Mich 1653. B. R. Benskin v. Herick. S. P.

2. Debt upon an *Obligation of* 10 *l. to pay* 40 *s. ſuch a Day*. The *Defendant pleaded Payment of* 20 *s. at the Day, and that he offered* 20 *s. Reſidue there the ſame Day, and that the Plaintiff refuſed it, and* that he has been *always ready* to pay, *and yet is, and tendered the Money in Court*; and the *Plaintiff tendered to aver that he did not tender the* 20 *s. at the Day*; and per Cur. now the Defendant ſhall have the Money again, and ſo he had; and if the Iſſue be found for the Plaintiff, the Obligation is forfeited; and if it be found for the Defendant, the Plaintiff has loſt his 20s. Quod nota; for he has refuſed it by Matter of Record, and taken the other Iſſue at his Peril. Br. Tout temps &c. pl. 32. cites 21 E. 4. 25.

Defendant brought 10 l. into Court, and had it ſtruck out of the Declaration, afterwards the Plaintiff ſuffered a *Nonſuit*; and the Queſtion was, whether he ſhould be allowed to take this Money? Et per Cur. he ſhall; for *ſo much the Defendant has admitted to be due*, and ſo much he has actually paid him; and if the Cauſe had gone on to Trial, there muſt have been a Verdict for the Plaintiff as to ſo much,

much, for this is admitted to be due, and paid down as the Plaintiff's Money, otherwiſe perhaps of Money paid into Court *by Way of Tender*. If a Man pleads a Tender and uncore Priſt, and pays the Money into Court, and the Plaintiff takes Iſſue on the Tender, and it is found againſt him, the Defendant ſhall have the Money. 2 Salk. 597. pl. 4. Mich. 9 Ann. B. R. Elliot v. Callow, cites Sty. 388.

3. Money being brought into Court on the common Rule, and the *Plaintiff nonſuited*; the Defendant moved to have the Money out of the Court, but the Motion was denied; for he paid it into Court, as knowing, and being conſcious that he owed the Plaintiff ſo much, and therefore the Plaintiff ſhall have it. Rep. of Pract. in C. B. 36. Trin. 13 Geo. 1. Lane & al' v. Wilkinſon.

4. An Order was made by the Ch. J. at his Chambers, that Proceedings upon the Bail Bond ſhould be ſtay'd upon paying 17 l. into Court. *Four Services* had been *given* of this Rule, and yet the Plaintiff would not take the Money. It was moved, that the Money may be re-paid; for that there muſt be a reaſonable Time in which the Plaintiff muſt be bound to take it, and accordingly the Court made a Rule, that the Plaintiff ſhould accept it within a Week. Barnard. Rep. in B. R. 73. Trin. 2 Geo. 2. Parker v. Stephens.

5. 63 s. being brought into Court upon the common Rule, and *Verdict for the Defendant*, upon Motion in the Treaſury, and hearing the Attornies on both Sides, it was *ordered*, *that* the *Defendant ſhould have the Money out of Court in Part of his Coſts*. Rep. of Pract. in C. B. 54. Trin. 2 & 3 Geo. 2. Rathbone v. Stedman.

6. Motion was made, upon an Affidavit that the *Defendant was dead*, that 10 l. formerly paid into Court upon the common Rule, might be *paid out to his Executors*, but denied per Cur. Barnes's Notes in C. B. 194 Mich. 6 Geo. 2. Knapton v. Drew.

7. The *Plaintiff being dead*, the Defendant moved to have 10 l. out of Court, but it was objected, that it belonged to the Plaintiff's Executor. After hearing Counſel on both Sides, a Rule was made, that the Plaintiff's *Executor ſhould bring a new Action*, and in the mean time all Things ſhould ſtay. Rep. of Pract. in C. B. 129. Paſch. 9 Geo. 2. Crockhay v. Martin.

S. C. and the Court were of Opinion, that the Money being paid into Court for Plaintiff's Uſe, ought not to be paid back to Defendant. The Court have not gone ſo far as to order Payment to Plaintiff's Executor, but it ſeems reaſonable, if the Executor be willing to accept the Money paid into Court, and after Trial it is plain Executor is intitled to the Money paid into Court, tho' a ſmaller Sum be recovered; had Plaintiff liv'd, and refuſed to accept the Money paid into Court, and been nonſuited upon the Trial, yet Defendant could not have the Money back out of Court, Plaintiff being intitled thereto in all Events, as determined in Lane and Wilkinſon's Caſe. Barnes's Notes in C. B. 196, 197. Eaſter, 9 Geo. 2. Crockay v. Martin.

(C) Allowed. Upon what Plea.

1. A Suggeſted by *Affidavit*, *that he was in Execution for 50 l. upon a Judgment at the Suit of B. and that he had tendered the ſame to B. which B. refuſed to accept*, but ſtill detained him in Priſon, ſo *prayed*, *that upon bringing ſo much into Court*, *he might be diſcharged*. B. oppoſed it, ſetting forth, that after the ſaid Judgment and Execution, A. put him to conſiderable Charges in Chancery concerning the ſame, and that he had Coſts aſſeſſed him upon the ſaid A. and therefore prayed that he might remain in Priſon till he paid both; but the *Court ſaid*, *they would take no Conuſance of the Coſts in Chancery*, and therefore granted A. his Motion. Comb. 387. Mich. 8 W. 3. B. R. Anon.

2. It

2. It was moved to bring Money into Court, and that they might plead *Non Aſſumpſit infra ſex Annos*; but the Court ſaid, they never allow theſe Motions, but upon pleading the *general Iſſue.* Barnard. Rep. in B. R. 308. Paſch. 2 Geo. 2. C. B. Anon.

3. On a *Motion* for Liberty *to tender Money into Court upon ſome of the Promiſes in the Declaration, and to demur to one* of the Promiſes, a Rule Niſi was granted, but on hearing Counſel on both Sides, the Court declared, that a Tender of Money was in Order to make an End of the Cauſe, and not to delay it, and therefore diſcharged the Rule to ſhew Cauſe. Rep. of Pract. in C. B. 48. Mich. 2 Geo. 2. Tames v. Goſey.

4. On Motion that 20 l. which had been paid into Court might be reſtored to the Defendant, by reaſon that the *Plaintiff died before Verdict*, and *ſeveral Applications* had been made *to the Executors to take the Money*, but they had not done it. Page J. ſaid, that *in C. B.* he believed ſuch Motion might be regular, becauſe there *the bringing it into Court is not direct Payment*; for if the Plaintiff does not prove upon the Trial, that ſo much is due to him as is brought in, the Defendant is intitled to the Remainder back again; *but in this Court it is direct Payment*, and tho' ſo much Money as is brought into Court ſhould not be proved to be due, yet the Plaintiff is intitled to the whole; accordingly the Motion was refuſed, the Ch. J. abſent. 2 Barnard. Rep. in B. R. 186, 187. Mich. 6 Geo. 2. Jenner v. Padington.

(D) The Effect of accepting the Money brought into Court.

S. C. cited Arg. Ld. Raym. Rep. 642. in Caſe of Horn v. Lewin.

1. DEBT *upon an Obligation* conditioned *for the Payment of a leſs Sum.* The Defendant *pleaded Tender at the Day & Touts Temps Priſt*; The Plaintiff received the principal Sum in Court, and Judgment to acquit the Defendant of the Sum received, and the Plaintiff, to have Damages, alleges a Demand of the Money from the Defendant; and it was thereupon demurr'd and adjudg'd for the Defendant; for *if the Plaintiff would have Damages, he ought not to have received the Money*, but to ſuffer it to remain in Court; for after Judgment, Quod eat inde ſine Die, no Iſſue ſhall be taken. Cro. J. 126. pl. 13. Trin. 4 Jac. B. R. Hanold v. Clotworthy.

2. A Rule was obtained for Payment of 5 l. into Court, the *Money* had been *tendered, but* was *refuſed, and on that Refuſal brought into Court, and Coſts taxed.* The Defendant inſiſted, that no Coſts ought to be paid, the Plaintiff having refuſed the Money. The Counſel for the Defendant inſiſted, that the refuſing the Money when tendered, had put the Defendant to the Charge of paying it into Court and pleading, therefore the Plaintiff ought to pay Coſts from the Time of the Refuſal; but the Court over-ruled this, for *tho' the Defendant tendered the Money, ſhe could not tender the Coſts before they were tax'd.* Rep. of Pract. in C. B. 120, 121. Trin. 8 & 9 Geo. 2. Cotton v. Perks.

For more of Bringing Money into Court in General, See other Proper Titles.

(A) Burrough.

(A) Burrough.

1. 12 Ed. 1. Rotulo Walliæ Membrana 3. pro Burgenſibus de Carnarvan, de Libertatibus ſuis &c. it begins with the King's Grant, Quod ſit liber Burgus & Homines liberi Burgenſes &c. Membrana 4. pro Burgenſibus de Aberconwey de Libertatibus ſuis &c. in ſuch Manner as the other &c.

2. 5 Ed. 1. Rot. Cartarum Membrana 14. Part 2. Grant of the King, Quod Villa noſtra de Nova Windſor ſit liber Burgus & habeat Libertates &c.

3. 6 Ed. 1. Rot. Cartarum Membrana 4. Part. Libertates antea, that he hath made liber Burgus.

4. 18 Ed. 1. Rot. Cartarum Membrana 2. Grant to the Town of Baſenweck, Quod ſit liber Burgus, & quod Inhabitantes liberi Burgenſes, cum omnibus Libertatibus, & conſuetudinibus ad Burgum &c.

5. 12 Ed. 1. Rot. Pat. M. 14. Rex conceſſit quod Villa de Lime in Comitatu Dorſetiæ ſit liber Burgus & homines ejuſdem Villæ ſint liberi Burgenſes, ita quod habeant Gildam Mercatoriam, cum omnibus ad Gildam Spectantibus.

For more of Burrough in General, See other Proper Titles.

By-Laws.

(A) By-Laws. Who may make them.

Fol. 363.

1. 15 H. 6. cap. 6. It is enacted, That no Maſters, Wardens, or People of Guilds, Fraternities, and other Companies incorporate, ſhall make or uſe any Ordinance which ſhall be to the Diminution or Diſinheritance of the Franchiſes of the King or others, nor againſt the common Profit of the People, nor any other Ordinance of Charge &c. but this is expired as 19 H. 7. cap. 7. where it is enacted, That no Ordinance ſhall be made in Diminution or Diſinheritance of the Prerogative of the King nor other, nor againſt the common Profit of the People, unleſs they are examined and approved by the Chancellor, Treaſurer of England, Chief Juſtices of either Bench, or 3 of them, or both Juſtices of Aſſiſe, in their Circuit where the Ordinance is &c. nor ſhall diſtrain any to ſue to the King againſt ſuch Ordinances.

2. 3 H. 7. cap. 9. [recites that] an Ordinance [was] made in London, upon Pain that no Freeman of the City ſhall go or come to any Fair or Market out of the City of London, with any manner of Wares &c. to ſell or barter, to the Intent that all Buyers and Merchants ſhould retort to the ſaid City to buy &c. and this Ordinance was [made] void by the [this] Statute, becauſe of the great Damage which was likely to come by it.

3. 12 H. 7. cap. 16. [6. recites that] a By-Law [was] made by the Merchant-Adventurers, That none ſhall ſell or buy at the 4 Parts within the Dominions of the Duke of Burgundy, before Compoſition made by Fine with the ſaid Merchant-Adventures, contrary to the Liberty of every Engliſhman, and to the Liberty of the ſaid Mart, and therefore enacted that this Ordinance ſhall be void.

4. If an Ordinance be made by a Corporation which hath Power to make it by Cuſtom or Charter, if the Ordinance be reaſonable and lawful, it may be put in Execution without any Allowance by the Chancellor, Treaſurer, or others &c. according to the Statute of 19 H. 7. cap. 7. Co. 5. Chamb. Lond. 63. b. (but it ſeems that they forfeit the Penalty of the Statute, and it does not make the Ordinance void.)

Every By-Law is grounded on Charter or Preſcription;

5. By-Laws made have a *Foundation* on *Patent*, *Cuſtom*, or *Conſent*. Arg. Cart. 178. Hill. 18 & 19 Car. 2. C. B. in Caſe of the Earl of Exeter v. Smith.

per Holt Ch. J. 12 Mod. 683.

6. The *making* By-Laws *is incident* to every Corporation aggregate; for that Power is included in the Incorporation; per Holt Ch. J. Carth. 482. Paſch. 11 W. 3. B. R. London City v. Vanaker.

Of common Right *every Corporation* may make a By-Law *concerning any Franchiſe granted to them*, becauſe it is for the Welfare of the Body Politick, and included in the very Act of Incorporation.

7. The Privilege of making of By-Laws is veſted in the City of *London* by common Right, if not by Cuſtom; for it concerns the *better Government* of the City; and every City and Town Corporate may, by a Power inherent to their Conſtitution, make By-Laws for the Government of that Body Politick, and this is the true Touchſtone of By-Laws. And note, it was ſaid by the Ld. Hobart in his Rep. Fol. 211. that he holds that the Power to make By-Laws, given by *Special Clauſe* in all Corporation-Patents, *is needleſs*, that Power being included by Law in the Incorporating Act; for as Reaſon is given to the Natural Body to govern it, ſo the Politick Body muſt have Laws, as a Politick Reaſon, to govern it; per Holt Ch. J. in delivering the Judgment of the Court. 5 Mod. 439. Trin. 11 W. 3. London City v. Vanacre.

12 Mod. 270. The City of London v. Vanacre. —— S. C. cited per Holt Ch. J. 12 Mod. 686. The City of London v. Wood.

A Corporation has an *imply'd Power* to make By-Laws; *but* where the *Charter gives* the Company *a Power to make By-Laws, they can only make them in ſuch Caſes as they are enabled to do by the Charter*; for ſuch Power given by the Charter, implies a Negative that they ſhall not make By-Laws in any other Caſes; per Ld. C. Macclesfield. 2 Wms's Rep. 209. Hill. 1723. Child v. the Hudſon's Bay Company.

1 Salk. 397. pl. 3. S. C. but S. P. does not appear.

8. Every By-Law *is a Law*, *and as obligatory* to all Perſons bound by it, that is, within its Juriſdiction, *as any Act of Parliament*, only with this *Difference*, that a By-Law is liable to have its Validity brought in Queſtion, but an Act of Parliament is not; but when a By-Law is once adjudged to be a good and reaſonable Law, it is to all Intents as binding to thoſe that it extends to, as an Act of Parliament can be; per Holt Ch. J. 12 Mod. 678. Hill. 13 W. 3. in Caſe of the City of London v. Wood.

(A. 2) *What* ſhall be ſaid a *good* By-Law.

1. ED. 6. incorporated the Town of St. Alban's by the Name of Mayor &c. and granted to them Power to make Ordinances; and after, when the Term was appointed to be there, by the Aſſent of A. and other Burgeſſes, they aſſeſs'd a Sum upon every Inhabitant for the Charges in Erection of Courts there, and ordained that if any refuſe to pay &c. they ſhall be impriſoned. This is not a good Ordinance to impriſon Men if they do not pay, becauſe it is againſt the Statute of Magna Charta, nullus Liber Homo &c. but they might have inflicted a reaſonable Penalty, but not Impriſonment, which Penalty they might have limited to be levied by Diſtreſs, or to have an Action of Debt for it. Co. 5. *Clerk's Caſe*, adjudged, 64.

5 Rep. 64. a. Trin. 38 Eliz. C. B. Clark's Caſe, al' Clark v. Gape; and in Action for falſe Impriſonment the Plaintiff had Judgment.—S. C. cited 2 Inſt. 54. —S. C. cited 2 Bulſt. 328.——S. C. cited Jo. 162. pl. 2.—8 Rep. 127. b. S. C. cited.——S. C. cited 5 Mod. 157. —Mo. 580. Arg. cites Trin. 38 Eliz. C. B. and ſeems to intend S. C. tho' the Point is ſomewhat different, viz. That a By-Law was made at St. Alban's for every Inhabitant to pay a Sum of Money certain, in Contribution for making the Vill clean and ſerviceable for the Term to be kept there, and ruled good; but becauſe they aſſeſs'd Corporal Puniſhment of Impriſonment upon the Offender, it was ill, and adjudged void in Action of Falſe Impriſonment, becauſe contrary to Magna Charta.——See (C) pl. 1. and the Notes there.——Jo. 162. pl. 2. Trin. 3 Car. B. R. in Caſe of the King v. the Corporation of Boſton, S. P.

2 King Charles made the Sourcmakers of London a Corporation, and gave to them Power to make Ordinances, and they made an Ordinance that none ſhould uſe the Trade till he was free of the Corporation, and that if any who was not free did uſe it, he ſhould forfeit 40 s. for every Week which he did uſe it, and to be committed for it; and after they committed J. S. for uſing the Trade, and not paying 40 s. contrary to the Ordinance. This is not lawful to impriſon him. Hill. 14 Car. B. R. *Hardcaſtle's Caſe*, per Curiam, reſolved upon an Habeas Corpus, and he delivered accordingly. Fol. 364.

3. A By-Law by a Corporation of Weavers in a Town, to reſtrain Apprentices educated in the ſame Trade within the ſame Town for 7 Years after the making of the By-Law, is utterly void. Hobart's Reports, 285. Hob. 210. pl. 268. Paſch. 14 Jac. Norris v. Staps, S. C——

Hutt. 5, 6. S. C. agreed that the Ordinance was againſt Law, and Judgment againſt the Plaintiffs.——Brownl. 48, 49. S. C. adjudged for the Defendant.——Mo. 869. pl. 1205. S. C. ſays that the Ordinance was, that none ſhould exerciſe the Trade within the Town, unleſs that he had been an Apprentice within the Town 7 Years before the Ordinance made; and adjudged that the By-Law was againſt Reaſon.——Hob. 211. S. P. which Hobart Ch. J. ſaid was abſurd.——See Freem. Rep. 36, 37. pl. 44. C. B. The Mayor &c. of St. Alban's v. Dobbins.

4. A new Corporation, not having any Preſcription to appropriate to themſelves and exclude others, cannot make a By-Law to exclude all Perſons from uſing an Art or Trade in their Town, to which they were not Apprentices in the ſame Town, tho' they have ſerved as Apprentices to it in another Place. Hobart's Reports, 285. between *Norris and Stapes*. Hob. 211. S. C. and Hobart Ch. J. ſays that this was the Queſtion chiefly intended, and

which he ſays is indeed great, and wherein the Queſtion is between the particular Privileges of Towns and the general Liberties of the People, which is fit to receive a Determination, becauſe it runs thro' the Realm; but ſays this Point was not ſpoken to at the Bench, but reſerved till ſome other Action ſhould require it.——Mo. 869. pl. 1205. S. C. and adjudged that the Action did not lie, becauſe they were incorporated within Time of Memory, and after the Statute of 5 Eliz. ſo that the Power to make By-Laws is not given to them ——Cro J. 597 pl. 19. Mich. 18 Jac. B. R. in Caſe of Broad v. Jollyſe, it was ſaid that a Preſcription to reſtrain one from uſing a Trade in ſuch a Place is good.——Raym. 294. Arg. cites Mich. 1656. in C. B. Osburne's Caſe, where, after many Arguments, a Difference

rence was agreed between By-Laws made by virtue of a Cuſtom, and where they are made by virtue of a Charter; and that ſo is Cro. J. 597 Broad's Caſe, that a Cuſtom is ſtronger than a Charter.——S. P. Arg. Cart. 69. and ibid. 118. Mich. 18 Car. 2. C. B. in Caſe of Colcheſter (Mayor) &c. v. Goodwin, Common Law forbids not a Man to exerciſe a Trade any where, yet a Cuſtom may reſtrain it; per Tirrell J. cites 43 E. 3. 52. and if ſuch a By-Law had been by a new Corporation, it is a Diſpute whether it had been good, and ſuch a Law is not againſt any Statute, it being good by Cuſtom and Preſcription, and cites 8 Rep. 121. where this Difference is taken. And ibid. 120 Bridgman Ch. J. held that a Cuſtom, in ſuch a Caſe, will warrant that which a Grant cannot do; and as to what was ſaid that By-Laws for Reſtraint of Trade ought to be taken ſtrictly, he denies that; for when they are to ſtrengthen a Corporation, and to regulate a Trade, they ought not to be taken ſtrictly, becauſe a general Liberty of Trade, without a Regulation, does more Hurt than Good.——See Freem. Rep. 36, 37. pl. 44. Trin. 1672. Mayor &c. of St. Alban's v. Dobbins.

A By-Law was made in London *that ikere ſhould be no more than* 420 *Carts let to hire in London*, and if more are uſed, then the Owner ſhould *forfeit* 40 *s.* It was objected this was not a good By-Law, becauſe it was a Reſtraint to Trade; but the Court held the By-Law good; for if the Number of Carts be not reſtrain'd, they might be a great Nuſance in ſtopping up the Streets, and hindring Paſſage. Sid. 284. pl. 18. Paſch. 18 Car. 2. B. R. Player v. Jenkins.——2 Keb. 27. pl. 57. S. C. and a Procedendo was awarded, Niſi.——Vent. 21. Paſch. 21 Car. 2. B. R. Player v. Jones, S. P. reſolved that the By-Law in London, whereby the Number of Carts were reſtrained, is a good By-Law——2 Keb. 490. pl. 39. S. C. and agreed the By-Law to be good.——Ibid. 501. pl. 64. S. C. and a Procedendo was awarded——S. C. cited by Holt Ch. J. in delivering the Opinion of the Court. 5 Mod. 441. Trin. 11 W. 3.

5. King Edw. 3. by his Letters Patents gave Authority to the Mayor and Commonalty of London to make By-Laws among them, for the better Government of the City, and this was confirm'd by Act of Parliament; and after a By-Law was there made, That no Carman within the City ſhould go with his Cart without a Licence of the Guardians of ſuch an Hoſpital; and that if any one did to the contrary, that then he ſhall forfeit 15 s. for every Time. This is a void By-Law, becauſe it is in Reſtraint of the Liberty of the Trade of a Carman, and ſo againſt Reaſon; for this tends only to the private Benefit of the Guardians of the Hoſpital, and is in Nature of a Monopoly. Trin. 42 Eliz. B. R. between *Payne and Haughton*, adjudged.

At a Common Council held April 2d, 1677. it was enacted, That a former By-Law concerning the ordering of Carts and Carmen, ſhould be repealed; and that the Preſident of Chriſt's Hoſpital ſhall have the Ordering thereof; and that there ſhall be *no more than* 420 *Carts to work in the City and Liberties thereof for Hire*; *and that* 17 s. 6 d. *and no more, ſhall be paid yearly for every Cart*; *and* 20 s. *and no more, for a Fine upon any Admittance or Alienation* of a Cart, *which ſhall be applied towards the Relief of the poor Orphans in Chriſt's Hoſpital*; *and that if any Wharfinger, or Retailer in Fuel, ſhall keep or work a Cart not licenſed by the Preſident and Governors of the ſaid Hoſpital, he ſhall forfeit* 13 s. 4 d. to be recovered by Action of Debt, in the Name of the Chamberlain of the City, in the Lord Mayor's Court. It was argued that this was a void By-Law, becauſe in all Privileges, either by Cuſtom or by Charter, to make By-Laws, there muſt be this Clauſe either expreſs'd or imply'd, that they be Ad Utilitatem Regis & Populi & Rationi conſona. Now it may properly be ſaid to be Ad Utilitatem Populi, when the Advantages are mutual, that is, when the Duty is equivalent to the Profit; ſo is the Caſe of Blackwell-Hall, 5 Rep. 62. b. where the Penny for Hallage is equivalent to the Labour of the Searcher; but here, by this By-Law, there is 17 s. 6 d. per Ann. Rent, and 20 s. Fine, to be paid by the Carmen, not in reſpect to any Thing for overſeeing and ordering their Carts, but for the Uſe of the Poor of Chriſt's Hoſpital; ſo that 'tis a meer Impoſition, without any regard to the Thing in Queſtion. Adjudged by the whole Court, nemine contradicente, that the By-Law was not good, by reaſon of the Fine and Rent; but in all Things elſe was very good, and a Procedendo was granted. Raym. 288. 324. Mich. 31 Car. 2. in the Exchequer-Chamber, Player v. Vere.

Mo. 576. pl. 796. Davenant v. Hurdis, S. C. ſays the Ordinance was that every Brother of that Society ſhould put out one Half of his Clothes to be dreſs'd &c. to ſome Brother of their Company. Adjudged that this By-Law is in Effect a Monopoly, and that a Preſcription of ſuch kind to induce the ſole Trade or Traffick to a Company or one Perſon, and thereby to exclude others, is againſt Law.——S. C. cited Mo 672. that the By-Law was held void.——S. C. cited 11 Rep. 86 per Cur. accordingly, and that the Power they had by Charter to make Ordinances, was with an Ita quod they be conſonant to Law and

6. So if the Merchant-Taylors of London, by Force of a Charter of the King, which gives to them Authority to make By-Laws, make a By-Law that no Merchant ſhall put his Cloth to be dreſs'd but at a Clothworker's of their Company, this is a void By-Law; for it is againſt Reaſon, and the general Liberty of the Subject, to be reſtrained from putting his Work to whom he pleaſes. Trin. 42 El. B. R. adjudged.

and Reaſon, and that it was adjudged that tho' this Ordinance had the Countenance of a Charter, yet it was againſt the Common Law, becauſe it was againſt the Liberty of the Subject; for every Subject has Freedom by the Law to put his Clothes to be dreſs'd by what Clothworker he pleaſe, and the reſtraining it to certain Perſons is in Effect a Monopoly, and therefore ſuch By-Law by Colour of a Charter, or any Grant by Charter to ſuch Effect, will be void. —— 2 Inſt. 47. S. P.—S. C. cited by Archer J. Cart. 116.

7. If the Corporation of Taylors in Ipſwich, by Force of the King's Patent, which gives them Power to make By-Laws for their better Government, ſo that they be according to the Law of England, make a By-Law that none ſhall exerciſe the Trade of a Taylor in Ipſwich, qui non fuerit allocatus per legale Warrantum vel Authoritatem datam by the ſaid Corporation, or 3 of the Maſters and Wardens, nor ſhall ſet up any Shop for this Art, nor ſhall exerciſe it, until ſuch time as they have preſented themſelves to the Maſter &c. or 3 of them, or * proved that they have ſerved in this Trade as an Apprentice for 7 Years; and if any does contrary, that he ſhall forfeit 3 l. to the ſaid Corporation; this is a void By-Law, becauſe by this none ſhall exerciſe his Trade without their Allowance, and becauſe it is not known what Proof is ſufficient * within the By-Law. P. 12 Jac. B. R. The *Corporation of Ipſwich*, adjudged. 11 Rep. 53. S. C. adjudged — Roll Rep. 4. pl. 6. Taylors of Ipſwich v. Sherring, S. C. adjudged.— Godb. 252. pl. 351. The Clothworkers of Ipſwich's Caſe, * Fol. 365

S. C. adjudged.———S. C. cited Arg. Comb. 221. and ſays the Reaſon of that Reſolution in Ld. Coke's 11 Rep. was becauſe it tended to the Reſtraint of Trade &c.

† Dodderidge J. ask'd how this Proof ſhould be made, and whether the Wardens ſhould be Judges of this Proof, what ſhall be ſufficient, and what not? and Coke Ch. J. to the ſame Purpoſe, and ſaid that they cannot take an Oath; for how an Oath ſhould be warrantable by a Patent he did not know. Roll Rep. 5. S. C.—And Godb 254. ſays it was agreed that the Proof cannot be upon Oath; for ſuch a Corporation cannot adminiſter an Oath to the Party, and then the Proof muſt be by his Indentures and Witneſſes, and perhaps the Corporation will not allow of any of them; for which the Party has no Remedy againſt the Corporation but by his Action at the Common Law, and in the mean time he ſhould be barr'd of his Trade, which is all his Living and Maintenance, and to which he had been Apprentice for 7 Years; and becauſe by this Way they ſhould be Judges in their own Cauſe, which is againſt Law; and the King cannot grant to another to do a Thing which is againſt the Law.

8. If an Ordinance be made in London, by the Common Council, (who haty Power by Cuſtom, which is, among other Cuſtoms, confirmed by Act of Parliament by general Words) that if any Freeman, Citizen, or Stranger, within the City, ſhall put any Broad-cloth to Sale within the City of London, before it be brought to Blackwell-Hall to be viewed and ſearched, ſo that it may appear to be ſaleable, and that Hallage be paid for it, ſcilicet, 1 d. for every Cloth, that he ſhall forfeit for every Cloth 6 s. 8 d. this is a good Ordinance, as well to bind Strangers as Freemen, becauſe it is made to prevent Fraud and Falſity in Cloth, and for the better Execution of the Statutes without Deceit, and the 1 d. for Hallage is but a reaſonable Expence of Charge for the Benefit which the Subject hath by it. Co. 5. Chamb. Lond. 62. reſolved. 5 Rep. 62. b. Mich 32 & 33 Eliz. B R. —— 3 Le 264, 265 pl. 355. S. C. but for the State or Point of it refers to 5 Rep. and ſays a Procedendo was granted —— S. C. cited Arg. Mo. 580.

9. If a By-Law be made in London, that none ſhall make a Hot-preſs, nor uſe it within the City, under the Penalty of 10 l. for the making thereof, and 5 l. for the Uſe thereof, this is a good By-Law, becauſe the uſing of theſe Preſſes is dangerous for Fire, and deceitful, inaſmuch as this makes Cloths and Stuffs better to the Eye than they are in Truth. Hill. 13 Jac. B. R. *Edwards*'s Caſe, adjudged upon a Habeas Corpus. Roll Rep. 312. pl. 22. S. C. the Court to inform themſelves of the Truth of the Damage ariſing from theſe Hot-Preſſes, appointed certain of the Company of Cloth-workers to come into Court and inform them, which they did, and upon their affirming the Danger and Deceit of them, and likewiſe on reading the Statute of 5 E. 6. [cap. 6.] the By-Law was held good, and a Procedendo granted.

10. If there hath been a Court (which is called Curia legalis) held by the Lord of a Manor, Time out of Mind, in a great Moor, Part of Cro C 497. pl. 2. James v. Tutney,

S. C. and held good, per tot. Cur. —Jo. 421. pl. 9. S. C. but S. P. does not appear. —Ibid. 434 pl. 1. S. C. but S. P. does not appear.—Mar. 28. pl. 64. the Arguments of the Ld. Ch. J. —S. C. cited Arg. Cart. 178. —*D. 322. b. 323. a. pl. 23. Ld. Cromwell's Case, where a Bye-Law was made by the Homage as to the turning in and pasturing Beasts in the Common, that if any of the Tenants should put in his Beasts * Fol 366. before the Farmor of the Rectory of N. should ring a Bell in the Belfry of the Church there, such Tenant should forfeit 10 s. and this Bye-Law was held good. —— See (B) pl. 1. † Br. Customs, pl. 12. cites S. C.

of the Manor, (in which many Men have Common) for the better ordering of the Common there, at which all the Commoners ought to appear by the Custom, and there hath used to be a Homage sworn by the Steward, which Homage hath used to present all Oppressions and Offences in the Common, and to make By-Laws and Ordinances for the better ordering of the Common, which Ordinances the Commoners ought to obey, under a reasonable Penalty, upon them to be assessed, to be forfeited to the Lord &c. and the Homage sworn, make a By-Law, that no Commoner shall put his Sheep within a Part of the Moor, under the Pain of 3 s. 4 d. to be forfeited to the Lord, and this By-Law is published and proclaimed in Court, this is a good By-Law, and shall bind all the Commoners, because this By-Law arose out of a Custom which began by Consent of Parties; also, this does not take away all the Common, for he may have Common for other Cattle, and that more abundant; also, he is not restrained as to Sheep in all the Moor, but only in one Part, and this is in Nature of an Act of Parliament as Time and Occasion requires, as perhaps by Inundation, or other Occasion, it may be inconvenient for Sheep, and at another Court, when the Occasion is taken away, it may be altered; and this shall bind as well Homagers as other Commoners; and this is not like the Case of * D. 15 El. 322. and † 2 H. 4. 24. b. because there the Commoners had their Common at the Will of the Lord only, and in this Case the Commoner ought to take Notice of this By-Law, without any particular Notice given to him, or otherwise he shall forfeit the Penalty, because he ought to appear at the Court, and the Custom is alleged to be, that if the By-Law be proclaimed, that it shall bind all Commoners, and this is a Personal Thing, ergo, Trin. 14 Car. B. R. between *Tinteny and James*, per (*) Curiam, adjudged in a Writ of Error, upon a Judgment in Banco, where it was adjudged upon Demurrer accordingly; Intratur, Trin. 9 Car. Rot. 234. This concerned Sir John Stowell, and his Manor of Somerton, in the County of Somerset.

11. A By-Law was made by the Homage of the Court of a Manor, *That No Tenant should put any Sheep to Pasture in any Common Land of the Manor, but only in his several Demesne*, on Pain of forfeiting 4 d. for every Sheep. Manwood thought it not good, because the Inheritance is thereby taken away; and tho' the Plaintiff himself was one of the Homage, yet that is not material; for tho' a Man may give away his Inheritance by Grant or Feoffment, yet he cannot do it by his Assent. Curia advisare vult. Dal. 95. pl. 23. Anno 15 Eliz. Franklin v. Cromwell.

S. C. cited Arg. Raym. 293.

12. A By-Law was, *That none should bring any Sand, nor sell, nor use any within the City or Suburbs of London, but only that which was taken out of the River Thames*, under the Penalty of 5 l. for the 1st. and 10 l. for the 2d Offence, and held not good. Godb. 106. pl. 126. Mich. 28 & 29 Eliz. C. B. Anon.

By-Law ought to be in furtherance of the Publick Good, and the better Execution of the Laws, and not to prejudice the Subjects, or for private Gain. Arg. Mo. 530.

13. Every By-Law *ought to be* made *for the Common Benefit* of the Inhabitants, and not for the private Advantage of any particular Man, as J. S. only, or the Lord only; As if a By-Law is made, that no Person shall put his Cattle into the Common Field before such a Day, this is good; but if it be, that they shall not carry their Hay over the Lord's Lands, or break the Hedges of J. S. this is not good, because it does not respect the Common Benefit of all. Goldsb. 49. pl. 13. Hill. 30 Eliz. Anon.

14. At

14. At a Court of the Manor a By-Law was made by the Majority of the Tenants then preſent, *that no Tenant, for the future, ſhould keep in the Common Fields, any Steer above a Year old, upon Pain of 6 d. for every Offence.* Adjudged, that this By-Law was againſt Reaſon, becauſe it was *to bind the Inheritance of the Tenants*, if they had any Inheritance in this Common, and that without their Conſent, which they cannot do without Courſe of Law. And. 234. pl. 250. Mich. 31 & 32 Eliz. Latton v. Erbury. Le. 190. pl. 270. Erbury v. Latton, S. C. and the By-Law held ill, becauſe it is againſt Common Right where a Man has Common for all his Cattle Commonable to reſtrain him to one kind of Cattle.

15. In falſe Impriſonment the Defendant juſtified, that the Borough of St. Albans had Authority by Charter to make By-Laws for the Government of Townſmen, and they made a By-Law, *that if any Burgeſs gives opprobrious Words to the Mayor, he ſhould be impriſoned by the Mayor during his Pleaſure*, and that he being Mayor, ſent an Officer to the Defendant, being a Burgeſs, to come to the Common Hall for the Affairs of the Town. He ſent him this Anſwer, Let the Mayor come to me if he will, for I will not come to him. Adjudged the Juſtification was not good, that the By-Law was not lawful, but a By-Law to diſfranchiſe the Offender is good, and that the Words were not opprobrious Words. Mo. 411. pl. 563. Hill. 33 Eliz. Bab v. Clerk. 5 Rep. 64. a. Trin. 38 Eliz. Clark's Caſe, alias, Clark v. Gape, ſeems to be S. C. but not S. P.

16. A Conſtitution in London is, *that an Apothecary that ſells unwholſome Drugs ſhall forfeit a certain Pain.* The Defendant ſold unwholſome Drugs in London, for which the Chamberlain of London brought Debt in London for the Pain, and held maintainable there, by their By-Laws and Cuſtoms. Mo. 403. pl. 538. Hill. 33 Eliz. Wilford v. Maſham.

17. King H. 6. *granted to the Corporation of Dyers in London, Power to ſearch &c. and if they find any Cloth dy'd with Logwood, that the Cloth ſhould be forfeited.* Adjudged, that by the Patent no Forfeiture can be impoſed of the Goods of the Subject, [tho' it might by *Cuſtom*] and therefore in ſuch Caſe, Fortior & potentior eſt Vulgaris conſuetudo quam Regalis Conceſſio. 8 Rep. 125. a. per Cur. cites Trin. 41 Eliz. C. B. Waltham v. Auſten. S. C. cited Ibid. 127. b. — 2 Inſt. 47. cites S. C. accordingly; for no Forfeiture can grow by Letters Patents. — S. C. cited D. 279. b. Marg. pl. 10.

18. The *Cuſtom* of London *was, that no Perſon, not free of the City, ſhall keep any Shop, inward or outward, for putting to Sale any Wares &c. by way of Retail, or uſe any Trade, Occupation, Myſtery, or Handicraft for Hire, Gain, or Sale, within the City*; a Conſtitution was made purſuant to this Cuſtom, that *if any Perſon ſhould act contrary to ſuch Cuſtom, he ſhould forfeit 5 l.* Reſolved, that there is a Diverſity between ſuch Cuſtom in a City &c. and a Charter granted to the City &c. to ſuch Effect; for it is good by way of *Cuſtom*, tho' not by way of *Grant*, and therefore no Corporations made within Time of Memory can have ſuch Privilege, unleſs it were by Act of Parliament. 8 Rep. 121. b. 124. b. 125. a. Hill. 7 Jac. the City of London's Caſe, [Alias, Waggoner's Caſe.] Cuſtom *that Goods foreign bought and foreign ſold* within the Liberty of the City of York, *ſhould be forfeited*, and ſeizable by the Mayor, Sheriff, and Citizens, and in the Preſcription they ſhew that they were Mayor, Bailiffs, and Citizens in the City Time out of Mind, till the 1 R. 2. when they were conſtituted Mayor, Sheriffs, and Citizens, and held good. D. 279 b. pl. 10. Mich. 10 & 11 Eliz. — Bendl. 21. pl 36. S. C. the Pleadings. — S. C. cited 8 Rep. 125. a. per Cur. — S. C. cited Arg. Mo. 581, 582.

19. A By-Law was made, *to pay a Mark a Truſs for Hay, which ſhould be ſold unweighed*, and adjudged good. Lev. 16. Arg. cites 1652. B. R. Sutton's Caſe.

20. The

Ibid. 496. pl. 46. Paſch. 15 Car. 2. B. R. the S. C. it was objected, that this By-Law was contrary to Law, as reſtraining private Perſons to work with their own Carts with their own Goods; ſed non allocatur; for it muſt be intended of common working Carts. Adjornatur.

20. The Common Council of the City of London made an Order, *that no Carts ſhould work without Licence from the Company of Woodmongers*, and that if they did, they might take and detain them until they ſhall conform to the Government of the Woodmongers. The Court conceived, that the Common Council may depute Woodmongers to make ſuch Law for the Good of the City. Keb. 463. pl. 62. Hill. 14 & 15 Car. 2. B. R. Gavel v. Tasker.

21. A By-Law *for the better ordering of Common was made at a Court Leet*, and it being *by a Cuſtom* was held good, by Wild and Archer J. contra Tirrell; and Bridgman Ch. J. before his Removal to be Ld. Keeper, ſeemed of Opinion, that it was good by Cuſtom, eſpecially concurring with the *Conſent of all the Inhabitants*. Cart. 177. 179. Hill. 18 & 19 Car. 2. C. B. the Earl of Exeter v. Smith.

22. Debt was brought upon a By-Law by Virtue of a Charter of King Car. 2 enabling the Plaintiffs to make By-Laws, and this By-Law was confirmed by the Ld. Chancellor, Treaſurer, and Ch. J. viz. *that every Mariner, within 24 Hours after he ſhould come to Anchor in the River Thames, ſhould put on Shore all Gunpowder, (the Weather permitting) upon Pain of forfeiting 20 Nobles*, and that the Defendant had Notice of this By-Law &c. and they being at Iſſue upon the Point of Notice, the Plaintiff had a Verdict. Exception was taken, that it was not made by a ſufficient Authority, for the King himſelf cannot by his Proclamation make ſuch an univerſal Law, and by Conſequence the Patentees cannot; and all Laws made by Corporations have their Obligation by Conſent of Parties, or Quaſi by Conſent, but this cannot be as to Places out of their Juriſdiction. The Court agreed the By-Law to be a beneficial Law in itſelf, and that the Penalty is not too great, becauſe the Breach thereof is Negligentia Craſſa, but upon the Reaſons given in the Exception, they would adviſe. 2 Jo. 144. 145. Paſch. 33 Car. 2. B. R. Trinity-Houſe v. Criſpin.

23. A By-Law was *made by a new Corporation, that Perſons of the Corporation elected to be Stewards for the Year enſuing, ſhall provide a Dinner for the Maſter, Warden and Aſſiſtants on ſuch a Day, under the Penalty of 10 l. or other leſs Sum, to be levied by Diſtreſs, or recovered by Action of Debt.* Exception was taken that the By-Law was ill, becauſe *not ſaid that this Dinner was appointed to the End that the Company ſhould aſſemble and conſult of Things beneficial to the Corporation*; for by what appears it may be only Luxury, and not for any Benefit to himſelf or the Company; and the By-Law being unreaſonable, the Penalty is ſo too, and conſequently not Obligatory; Quod Curia conceſſit; and this By-Law cannot be good in Caſe of a new Corporation for the Reaſon aforeſaid; but had it been for the Company to aſſemble and chooſe Officers, or any other Thing for the Benefit of the Corporation, it had been well enough; but *in Caſe of old Corporations by Preſcription, a By-Law to make a cuſtomary Feaſt has been held good*; and therefore Judgment was arreſted. Ld. Raym. Rep. 113. 114. Mich. 8 W. 3. Frame-work-Knitters Company v. Green.

24. Every By-Law by which the Benefit of the Corporation is advanc'd, *is good* for that very Reaſon, that being the true *Touchſtone* of all By-Laws; Per Holt Ch. J. Carth. 482. Paſch. 11 W. 3. B. R. London City v. Vanaker.

6 Mod. 123, 124. S. C. adjudged accordingly.—1 Salk. 192. pl. 5. S. C.

25. By-Law, *that all Strangers, coming into the Port of London, ſhould employ City Porters to carry their Goods* &c. was held naught; and per Cur. they may make a By-Law that none but Freemen ſhall be Porters, but

but to confine Strangers to City Porters is unreaſonable; becauſe if the City will appoint no Porters, there is no Remedy againſt the City; beſides Strangers cannot know who are City Porters, neither can they compel them to ſerve them. 1 Salk. 143. pl. 7. Hill. 2 Ann. B. R. Cuddon v. Eaſtwick.

26. No By-Law which is either *unjuſt or unreaſonable*, can ever be good; Per Parker Ch. J. 10 Mod. 133. Hill. 11 Ann. B. R.

27. A By-Law was made in London, *that none but Free-Porters ſhould intermeddle with the carrying or unlading of Corn, Salt, or Sea-Coal, or any other Goods out of any Barge, Lighter &c. between Staines Bridge and Kendal in the County of Kent, that are to be imported into the Ports of London*, under the Penalty of 20 s. for each Offence, *except in Time of Danger*, and to ſave the loſing of the Goods. It was argued by Mr. Peer Williams, that it was a void By Law; but nothing more is reported. 10 Mod. 338. Mich. 3 Geo. 1. B. R. Fazakerly (Chamberlain of London) v. Wiltſhire.

28. The Bailiffs &c. of Chipping Cambden had Power to make By-Laws, and made a By-Law *that no Perſon inhabiting out of the Borough, or not free of the Borough, ſhould ſet forth Goods to ſale, except Victuals on Market-Days*, in any Market *within the Borough* &c. Upon Demurrer this was reſolved a void By-Law; for without a Cuſtom, ſuch a By-Law to reſtrain Perſons not free of the Borough from exerciſing a Trade cannot be maintained; and Judgment accordingly. Comyns's Rep. 269. pl. 148. Mich. 4 Geo. 1. C. B. Parry v. Berry.

29. A By-Law was, *that any Perſon who exerciſes the Trade of a Joiner in the City of London, ſhall take his Freedom in the Company of Joiners*, and if ſummon'd for that Purpoſe, ſhall refuſe or neglect to take it in that Company, he may be fined for exerciſing ſuch Trade and diſfranchiſed. The Court adjudged this a reaſonable By-Law, it being made to prevent Frauds in Trade, by ſubjecting a Man to the Inſpection of thoſe who underſtand the ſame Trade. 8 Mod. 267. Trin. 10 Geo. 1. The King v. the Chamberlain of London.

[A. 3]

1. IT is not neceſſary that the Breach of a By-Law made by the Homage according to a Cuſtom, ſhould be preſented by the Homage. D. 15 El. 322. 23. adjudged.

2. If a By-Law be made by a Cuſtom, and that for Want of obſervance, one ſhall Forfeit, for which the Lord ſhall diſtrain, and does not ſay whoſe Cattle, ſcilicet, the Cattle of the Offender, yet it ſhall be intended; and therefore good. D. 15 El. 322. 23. adjudged, as it ſeems to me.

(B) *Of what Things* By-Laws may be made, and of what not. [And who bound by them.]

1. IT is a good By-Law, (where there is a Cuſtom for the Homage of a Manor to make By-Laws, pro meliore ordine tenentium &c.) that none ſhall put his Cattle in Communi le Shack antequam fit- See (A. 2) pl. 10. in the Notes. S. C. cited;

Arg'. Mo. 584. —— S C cited Cart. 178.

marius Rector [Rectoriæ] of the Manor, pulsasset Campanum in Campanile Ecclesiæ ibidem, upon the Pain of 10 s. (for it seems the Reason is, that he is not Lord, but hath Common there with the other Tenants, or no Common, and so is indifferent) D. 15. El. 321 23. adjudged upon Demurrer against him, who was one of the Homage who forfeited the By-Law; but there, in the same Case another Demurrer commenced, and not resolv'd; but there it was objected, that this tended to the Disinheritance of the Commoner for ever, which was not reasonable.

* Fitzh. Avowre, pl. 74. cites S. C.

2. By the Custom, Commoners may make a By-Law, that they do not put in their Cattle before such a Day, and if they do, that they may be distrained; and though all the Neighbours will not come, yet if Proclamation be made to do it, they who make Default, shall be bound as well as those that appear. Dubitatur, * 44 E. 3. 18. 19. whether it may be without the Assent of all. But Brooke in abridging it, Title Custom, 6. [says] That there is a Diversity where it is in Court, and where not, for it is used to bind in all base Courts in England.

So of Tenants of a Leet. Br. Prescription, pl. 40. cites S. C. ——

3. Tenants of a Manor may make a By-Law to bind themselves, but not Strangers. 21 H. 7. 40. (it seems to be intended by Custom.)

Fitzh. Prescription, pl. 67. cites S. C. & Trin. 14 H. 7 —— Br. Customs, pl 32. cites S. C. —— *And* Custom, *that every one who makes an Affray or Blood-shed* [*in a Leet*] *shall lose* 20 *s.* is good; for it is *Curia Regis*. Br. Ibid. & Fitzh Ibid —— So *of Distress in a Leet, and Sale of the Distress*. Br. Ibid. & Fitzh. Ibid. —— And *Tenants of a Vill*, may make *a By-Law touching their Common* &c. and *it shall bind them, but not Strangers*. Br. Ibid. and Fitzh. Ibid.

Inhabitants of a Vill without any Custom, may make Ordinances and By-Laws

4. By-Laws *for Payments and other Works necessary for the making of Highways, Causeys* and the like publick Things, shall *bind without Custom*; but they *ought always to be made by the major Part*; Arg'. Mo. 579. cites 44 E. 3. Per Finchden.

for Reparation of the Church, or of a *Highway*, or the like, which is for the publick Good; generally and in such Case, the *major Part shall bind the Rest without any Custom. But* if it be for their own *private Profit*, as for the well *ordering of their Common of Pasture*, or the like, there they cannot make By-Laws without a Custom; and if there be a Custom, yet the *major Part cannot bind the Rest, unless it be warranted by the Custom*; for as Custom creates them, so they ought to be warranted by the Custom. 5 Rep. 93. a. Mich. 32 & 33 Eliz. B. R. Arg'.

5. Where a *Parish is compellable to make a Bridge, a By-Law may adjust the Proportion*, how much the Part of every one, who of Right ought to make it, amounts to; Arg'. Dal. 103, 104. pl. 42. cites 44 E. 3.

6. *Corporations cannot make* Ordinances or Constitutions *without Custom or Charter* of the King, *unless for Things which concern the publick Good, as Reparations of the Church or common Highways*, or the like; Arg'. 5 Rep. 63. a. cites 44 E. 3. 19. 8 E. 2. Tit. Assise, 413. 21 E. 4. 54. 11 H. H. 7. 13. 21 H. 7. 20 & 40. & 15 Eliz. D. 322.

This Statute does not corroborate any of the Ordinances made by any Corporation, which are so allowed and approved as the Statute speaks, but

7. 19 *H. 7. cap. 7. No Masters, Wardens, and Fellowships of Crafts or Mysteries, or any Rulers of Guilds or Fraternities, shall take upon them to make Acts or Ordinances in Disinheritance or Diminution of the Prerogative of the King, or of other, or against the common Profit of the People, except the same Acts and Ordinances be approved by the Lord Chancellor, Treasurer, or Chief Justices of either Bench, or three of them, or before both the Justices of Assise in their Circuits, on Pain of* 40 *l. Nor shall they make Acts or Ordinances to restrain Persons to sue in the King's Courts, or inflict any Penalty or Punishment on them for so doing, on Pain of* 40 *l.*

leaves them to be affirm'd as good, or disaffirm'd as illegal by the Law; and the sole Benefit which the Incorporation acquires by such Allowance is, that they shall not incur the Penalty of 40 l. mentioned in the Act, if they should put in Use any Ordinances which are against the King's Prerogative, or the common

common Profit of the People &c. Reſolved, 11 Rep 54. b. Mich. 12 Jac. Taylors of Ipſwich's Caſe. ——Roll Rep 4. pl. 6. S. C. but I do not obſerve S. P. there.———Godb. 252. pl. 351. S.C. but S. P. does not appear.

8. By-Laws made *in a Court-Baron to bind Strangers* who are not Tenants of the Manor, are void; and ſo it is if the *Homage make the By-Laws, and not all the Tenants*; and to make a By-Law that they ſhall not put in their Cattle into their Severalties before ſuch a Day, is void. By-Laws made *to bind Strangers, are not good, tho' they are made by the Homage and by all the Tenants, and tho' they are concerning ſuch Things whereof By-Laws may be made.* Sav. 74. pl. 151. ſays it was adjudged Mich. 25 & 26 Eliz.

9. Suit J. ſaid, that if the Cuſtom of a *Manor* be that the *Homage* might make By-Laws, it ſhall *bind* the Tenants, *as well Freeholders as Copyholders.* But Tanfield, of Counſel in the Caſe, ſaid 'tis not a good nor reaſonable Cuſtom; but ſuch By-Laws may be *made by the greater Number of the Tenants*, otherwiſe they ſhall not bind them. Godb. 50. pl. 62. Mich. 28 & 29 Eliz. B. R. Anon.

10. In Covenant &c. upon an Indenture of Apprenticeſhip, the Defendant pleaded a By-Law in London by the Common Council there, where he was Apprentice, *that if a Freeman took the Son of an Alien to be Apprentice, his Bonds and Covenants ſhall be void*; and adjudged no Plea; for the Common-Council cannot make the Bonds and Covenants void; but they might have inflicted a Fine and Puniſhment on the Maſter for taking ſuch an Apprentice. Mo. 411. pl. 562. Trin. 37 Eliz. Doggerell v. Pokes. Ow. 69. Dogrel v. Perks, S. C. adjudged accordingly.

11. Where Cities, Boroughs &c. are incorporated by the Name of Mayor and Commonalty, Mayor and Burgeſſes, Bailiffs and Burgeſſes &c. and in the *Charters* it is *preſcribed that the Mayors, Bailiffs &c. ſhall be choſen by the Commonalty or Burgeſſes &c. yet if the ancient Elections were by a certain ſelected Number of the Principal of the Commonalty &c. (commonly called the Common Council) and not by all the Commonalty &c. nor by ſo many of them as will come to the Election, this was reſolved to be good* in Law, and warranted by the Charter; for in every Charter a Power is given them to make Laws and Ordinances, and Conſtitutions, for the better Government and Ordering of their Cities &c. by virtue whereof, and *for avoiding popular Confuſion*, they, *by their common Aſſent, ordained &c. that the Election ſhould be by ſuch a ſelect Number*; and tho' this Ordinance cannot be ſhewn now, yet it ſhall be preſumed that ſuch Ordinance was made. 4 Rep. 77. b. Mich. 40 & 41 Eliz. at Serjeants-Inn in Fleet-ſtreet. The Caſe of Corporations. Jenk. 273. pl. 93. S. C. by all the Juſtices of England.—S. P. admitted; but ſays it is otherwiſe as to Elections to be made of Burgeſſes for the Parliament; for ſuch Election muſt be by all; for free Elections for Members of Parliament are pro Bono Publico, and not to be compared to other Caſes of Elections of Mayors, Bailiffs &c. of Corporations &c. 4 Inſt. 48, 49.

12. The Corporation of Butchers in London having a Power to make By-Laws, made a By-Law *that no Butcher, or Perſon being a Stranger, ſhould ſell any Veal within the City of London, unleſs they dreſs'd the Kidneys thereof in ſuch manner as the Kidneys of Sheep were dreſs'd; and if they did otherwiſe, then to forfeit 6 d. and if they refuſed to pay it, then to forfeit the Veal.* Then they ſhew the Breach of this Law, and ſo juſtify the taking the Veal. Adjudged that this By-Law was not good, becauſe it was to reſtrain Strangers, who are not bound to take Notice of any private By-Law made in a Corporation, unleſs 'tis to ſuppreſs Fraud, or any other general Inconvenience uſed by Foreigners, as Corruption, or the like, in the Sale of their Meat, and then they ought to take Notice thereof; and Judgment accordingly. Bulſt. 11. Hill. 7 Jac. Franklin v. Green.

13. By

But Lea Ch J. ſaid that if it had appeared in the Return that daubing with Lime and Hair appertains to the Bricklayers, the Ordinance is not good. Ibid. 396 ——

13. By an Act of the Common Council in London, for the Ordering the Companies of Bricklayers and Plaiſterers, it was ordained *that the Bricklayers ſhould not plaiſter with Lime and Hair, but with Lime and Sand only; and that Plaiſtering with Lime and Hair ſhould belong to the Plaiſterers*; and that thoſe who broke this Order ſhould forfeit 40 s. to be recovered by the Chamberlain &c. It was objected that this was not a good Ordinance, becauſe it reſtrained the Bricklayers in Part of their Trade, which was to plaiſter with Lime and Hair; but adjudged that this Ordinance is not in Deſtruction, but for ordering the Traders, and no more in Effect than a Determination of a Queſtion between the Companies. Palm. 395. Mich. 21 Car. B. R. Bricklayers v. Plaiſterers Company.

2 Roll Rep. 391. S. C. & S. P. by Ley Ch. J.

2 Sid. 178. Hill. 1659. B. R. the S. C. argued; ſed adjornatur. —Keb 32. pl. 84 Paſch. 13 Car. 2. B. R. Player v. Barnardiſton, S. C. Procedendo awarded, Niſi &c.— Ibid 35. pl. 95. S. C. adjornatur, Foſter Ch. J. abſente. — Ibid. 39. pl. 106. S. C. and a Procedendo was awarded per tot. Cur.— S. C. cited 6 Mod. 123. in Caſe of Cuddon (Chamberlain of London) v. Provoſt, and ſays that all the Exceptions taken in the Caſe of Bernardiſton in Lev. 14, 15. were inſiſted on in the principal Caſe, Hill. 2 Ann. B. R. and yet the Court, after great Conſideration, awarded a Procedendo according to the ſaid Caſe in Lev.

14. A By-Law was made in London, *that every Foreigner who ſells Goods uſually ſold by Weight, without bringing them to be weigh'd by a Beam there called the King's Beam, ſhall forfeit* 13 s. 4 d. for every 500 Weight, to be recovered by the Chamberlain in the Sheriff's Court, and not elſewhere, *and that no Eſſoin, Protection &c. ſhall be allowed.* It was objected, 1ſt, That it was unreaſonable to compel the Subject to bring every thing ſold by Weight to this Beam; for they are frequently ſold by the Lump, and then no need of weighing; but it was anſwered that this By-Law is founded on the Cuſtom of London, which is of ſuch Force, that 'tis good even againſt a Negative Act of Parliament. 2dly, it was objected that this By-Law was unreaſonable, in reſpect of the Penalty and *Inequality* of it; for ſome Goods may not be worth 13 s. 4 d. the 500 Weight, and ſome of 500 Weight may be worth 500 l. Sed non allocatur; for the Penalty is only to inforce Obedience; but had it been to pay a great Sum for the Weighing, it might be otherwiſe. 3dly, that it deprived the Subject of Privileges allowed by Law, viz. of Eſſoins &c. Sed non allocatur; for it is generally ſo in all By-Laws. 4thly, that it reſtrains the Actions to their own Courts; ſed non allocatur; for the Facts and the Perſons are beſt known there. 5thly, that it does not appear that he had Notice of this Law, and a Foreigner cannot take Notice of it; but the Court held that every one that will trade in London muſt take Notice of the Cuſtoms of the City, which are the Laws of the City; and a Procedendo awarded, Niſi &c. Lev. 14. Hill. 12 & 13 Car. 2. B. R. London (Mayor &c.) v. Bernardiſton.

The Recorder certified the Cuſtom of London, as to erecting Taverns; and a Perſon was impriſoned by the Mayor and Commonalty for erecting one in Birchin-Lane, contrary to their Order. Mar. 15. pl. 34. Paſch. 15 Car. Anon.

15. Tho' *By-Laws cannot reſtrain Trades, yet* they *may prevent ſuch Excreſcence of them as would make a Nuſance*, As the Multitude of Taverns and Alehouſes; per Cur. Sid. 284. pl. 18. Paſch. 18 Car. 2. B. R. in Caſe of Player v. Jenkins.

As to ſetting up a Butcher's Shop, or a Tallow-chandler's Shop in Cheapſide, it ought not to be for the *great Annoyance that would enſue.* Mar. 15. pl. 34 Paſch. 15 Car. Anon.——So of a *Brewhouſe in Fleet-ſtreet*, becauſe it is in the Heart of the City, and would be an Annoyance to it. Ibid.——S. P. by Twiſden J. Vent. 26. Paſch. 21 Car. 2. B. R.

16. A By-Law, as to the Place of particular Trades, may be good, as *to reſtrain a Butcher from having a Shop in Cheapſide* &c. Per Cur. Sid. 284 pl. 18. Paſch. 18 Car. 2. B. R. in Caſe of Player v. Jenkins.

17. A

17. A By-Law made by the Company of *Silk-Throwſters, that none of that Company ſhould have above ſuch a Number of Spindles in one Week.* Reſolved that this is not a Monopoly, but rather reſtraining a Monopoly, that no one ſhould ingroſs the whole Trade, but to provide rather for Equality of Trade, ſecundum quod eſt Conveniens; and good, and Judgment for the Plaintiff. Lev. 229. Hill. 18 & 19 Car. 2. B. R. Freemantle v. Company of Throwſters.

18. A Libel was exhibited againſt the Defendant in the Vice-Chancellor's Court at *Oxford*, upon a By-Law made by the Univerſity, *that whoever ſhould be taken walking in the Streets after 9 at Night, having no reaſonable Excuſe to be allow'd by the Proctor &c. ſhould forfeit 40 s.* one Half to the Univerſity, and the other to the Proctor &c. who ſhould take him &c. and that the Defendant was taken walking in the Streets after that Hour, and refuſed to give an Excuſe &c. Upon a Motion for a Prohibition it was inſiſted that the Defendant, being a *Townſman*, the Univerſity could make no By-Law to bind thoſe who are not of their own Body, unleſs by Act of Parliament, or expreſs Preſcription. It is true they have an Act of Parliament Anno 13 Eliz. by which their Juriſdiction, Privileges, and Statutes are confirm'd; but whether this By-Law, which was made ſubſequent to that Statute, viz. 7 Jac. was warranted by it or not, the Court would not determine upon a Motion; therefore propoſed that the Libel ſhould be amended, and grounded upon the By-Law 7 Jac. expreſsly, and then they would grant a Prohibition, and the Defendant might plead to it, and ſo the Point come in Queſtion. 2 Vent. 33. Paſch. 32 Car. 2. C. B. Univerſity of Oxford v. Dodwell.

19. On the 24th of April 1657 a By-Law was made by the Company of Vintners in London, *that for the Time to come* 31 *l.* 13 *s.* 4 *d.* and no more, *ſhould be paid by every Liveryman upon his Admiſſion into the ſaid Office.* It was inſiſted that this By-Law was unreaſonable, and againſt Law, and a Grievance to the Subject; but the Court reſolved that were the Sum more or leſs, it would not make the By-Law void, becauſe it is to bind only the Members of that Corporation; and when any Man will agree to be of a Company, he thereby ſubmits to the Laws thereof; and this Court will not take Notice of any Extravagancy of Charges they lay upon themſelves, and it is convenient that the Company ſhould have ſuch Power, to keep up their Reputation and the Honour of the City of London. Raym. 446. Paſch. 33 Car. 2. B. R. Taverner's Caſe.

S. C. cited Arg. 5 Mod. 319. Mich. 8 W. 3. in Clarke's Caſe, who refuſed to take upon him the Office of a Liveryman of the Company of Vintners, tho' he was a Citizen and Freeman of London, and therefore the Mayor and Aldermen committed him to Fell the Keeper of Newgate, until he ſhould take upon him the ſaid Office. Holt Ch. J. ſaid that we ought to go as far as we can by Law to ſupport the Government of all Societies and Corporations, eſpecially this of the City of London; and if the Mayor and Aldermen ſhould not have Power to puniſh Offenders in a ſummary Way, then farewell the Government of the City. But the Exception which ſticks with me moſt is, that it is not ſet out that Fell is an Officer of the City; and indeed I think not that he is an Officer of the City, quatenus a City, tho' I confeſs he is an Officer to the Sheriffs, as he keeps the County-Goal; but it ought to have appeared that he was committed to an Officer of the Mayor and Aldermen. Clark was afterwards diſcharged per tot. Curiam, tho' all the Court declared their Opinion that the Cuſtom was a good Cuſtom, and was for the Advantage of the good Government of the City, and therefore they would always ſupport it.

20. A By-Law made by the Maſter, Wardens, and Brotherhood of *Taylors* in the City of Litchfield, *that every Year, within one Month after Midſummer, they ſhould chuſe a Maſter and 2 Wardens to continue for a Year; and that upon every Day of Election there ſhould be a convenient Dinner for the Maſter and Brothers, and that every one ſhould pay his Proportion, and if any Brother ſhould be abſent, he ſhould pay into the common Stock ſo much as the Maſter paid for his own Dinner*, upon Pain of forfeiting 3 s. 4 d. That Anno 18 Eliz. thoſe By-Laws were approved by Sir Ed. Saunders, then Ch. Baron, according to the Stat. 19 H. 7. and ſo

brings the Case within this By-Law; and upon Demurrer this was adjudged a good By-Law upon the Authority of Wallis's Case, Cro. J. 555. [pl. 17. Mich. 17 Jac. B. R.] but that the Breach of this By-Law was not well assign'd; for no Notice was given, nor precise Demand made of the same Sum as the Master paid; and without failing in this Payment the Defendant was not to incur the Penalty, tho' absent from the Feast; and Judgment for the Plaintiff. 2 Lutw. 1320, 1324. Pasch. 1 Jac. 2. Gee v. Wilden.

21. A By-Law was made by the *Company of Horners* in London, *that two Men appointed by them should buy rough Horns for the Company, and bring them to the Hall, there to be distributed* &c. *and that no Member of the Company should buy rough Horns, within* 24 *Miles of London, but of those two Men so appointed*, under such a Penalty &c. After Judgment by Default it was moved, that this being a Company incorporated within London, they have not Jurisdiction elsewhere, but are restrain'd to the City, and by consequence cannot make a By-Law which shall bind at the Distance of 24 Miles out of it; for, by the same Reason, they may enlarge it all over England, and so make it as binding as an Act of Parliament; and for this Reason it was adjudged no good By-Law. 3 Mod. 158. Hill. 3 Jac. 2. B. R. The Company of Horners v. Barlow.

Debt upon a By-Law, (viz.) *That if any Person should be duly elected to be Chamberlain of the City of Oxford, and should refuse to undertake that Office, he should forfeit* 10 *l. to the Mayor* &c

22. A By-Law by the Mayor &c. of Guildford was, *that if any Inhabitant of the said Town should be chosen to the Office of Bailiff, and should refuse to take it upon him, he should forfeit* and pay to the Corporation 20 l. Exception was taken, because the By-Law was that if any Inhabitant should be chosen, whereas they cannot make By-Laws to bind all the Inhabitants of the Town, but only the *Freemen and Members of the Corporation.* The Court held this and another Exception taken to be incurable; and so in Debt brought on the By-Law, Judgment was given for the Defendant. 2 Vent. 247, 248. Mich. 2 W. & M. in C. B. The Mayor & Probi Homines of Guildford v. Clarke.

and then sets forth, that the 30th of Sept. &c. the Defendant was duly elected into the said Office, he being a Citizen and Freeman of the said City, and that he refused to accept it, whereby the Action accrued for the said 10 l. The Declaration was adjudged ill per tot. Cur. because a By-Law to elect any Person is void; for by this they may elect a Stranger, and the alledging that he was duly elected will not cure it, because those Words extend only to the Manner of Electing, but not to the Persons to be elected, and though it is said that they elected the Defendant being a Citizen and Freeman, this is only the Execution of the By-Law, and shall not make the By-Law good, which is void in itself; and it *ought to be, if any Citizen or Burgess shall be elected, and refuse* &c. *and not if any Person* &c. 3 Lev. 293. Hill. 2 W. & M. in C. B. Mayor &c. of Oxford v. Wildgoose.

S. C. cited Arg. 8 Mod. 269. and says that this By-Law exceeds the Custom, and for that Reason it was held void; and Ibid. 270. the Court said that in this Case of Robinson v. Groscourt, there was no Company of Dancing-Masters, of which the Defendant might be made free.

23. Debt for 10 l. upon a Forfeiture for Breach of a By-Law, which was, *that every Person using the Occupation of Musick and Dancing in the City of London, who shall have a Privilege to be made free by Patrimony, shall, at the next Court of Assistants of the Company of Musicians, after Notice accept and take the Freedom of the said Company; and that every Person who hath served an Apprenticeship to such Mysteries, and not made free, and yet shall exercise his Trade, shall forfeit* 10 l. for every Offence. This was adjudged a void By-Law; for though the Custom is, that whoever is free of the City must be free of some Company, yet that *Custom does not oblige a Man to be free of any particular Company*; for if it should, then though the Defendant be intitled by Birth to be free of such Company, yet he must also be free of this, otherwise he cannot exercise this Art, which is unreasonable. They may make him take his Freedom, but cannot direct in what Company. 5 Mod. 105. Trin. 7 W. 3. Robinson v. Groscourt.

24. The

24. The Mayor &c. of Bedford, made a By-Law *that no Perſon who was not a Freeman of that Corporation, ſhould ſet up any Art, Myſtery or Manual Occupation within the Corporation*, under the Penalty of 5 l. per Day, to be paid to the Chamberlain to the Uſe of the Corporation, to be levied by Diſtreſs &c. Exception was taken among others, that the By-Law was unreaſonable and againſt Law, becauſe it *excludes all thoſe who had ſerved Apprenticeſhips* in the Corporation; and of that Opinion was the whole Court, and Judgment for the Defendant; but they held that a *Cuſtom* to the Effect of the ſaid By-Law would have been good. Lutw. 562, 564. Hill. 9 W. 3. Bedford (Mayor) v. Fox.

25. Anno 7 Car. 1. a By-Law was made, that *no Freeman of the City choſen to be Sheriff of London ſhall be exempted, unleſs he will make Oath that he is not worth* 10000 *l. and bring 6 approved Compurgators; and that upon Proclamation made at Guildhall of the Choice, and he being called to come and take upon him the Office at the next Court, and enter into a Bond of* 1000 *l. for that Purpoſe, upon Default ſhall forfeit* 400 *l. and if not paid within* 3 *Months, ſhall forfeit* 400 *l.* [100 *l.*] *more &c.* It was inſiſted, that the Chuſing a Sheriff is not within the Cuſtom of making By-Laws, becauſe the Conſtitution of Sheriff is by a Charter of King James; ſed non allocatur; for where a Franchiſe is granted for the Benefit of a Body Politick, they have an incident Power to regulate that Franchiſe for their publick Benefit; and as every Member has the Benefit of the Franchiſe, ſo he is compellable by Penalties to undergo the Charge to which the Body Politick is liable; and though the Perſon choſen, may be indicted and fined for his Refuſal, yet that will not ſave the City Franchiſe, and therefore it ſhall not hinder the Forfeiture incurred by the By-Law; and though it is the Livery-men who are to be preſent at the Election, and not the Free-men, yet the Free-men are repreſented by the Livery-men, and he, that is repreſented, muſt take Notice as much of the Act of the Repreſentative Body, as if preſent; beſides the Election is a notorious Thing, and there is a Proclamation notifying it. 1 Salk. 142. pl. 1. Trin. 11 W. 3. B. R. London (City) v. Vanacre.

5 Mod. 438. S. C. and the By-Law adjudged good; and that Defendant had forfeited the Sum of 400l. by not complying with it. And an Objection having been made, that ſuppoſing the Perſon choſen to be a Madman or a Fool &c. Holt Ch J. in delivering the Opinion of the Court, anſwered that theſe Incapacities are excepted, and that they are tacitly excepted out of all Laws whatever, and therefore this By-Law ſhall not extend to ſuch Perſons, and that the By-Law need not run, "provided that the Party to be "choſen Sheriff, be not a Fool or a Madman" for it is excepted without it.—Carth. 480. S. C. and the By-Law adjudged good——12 Mod. 269. S. C. adjudged accordingly, and that a Procedendo ſhould go; but in the State of the By-Law it is ſaid that "Not having a reaſonable Excuſe to be al-"lowed by the Lord Mayor and Court of Aldermen, he ſhall forfeit 400 l. whereof 100 l. to be paid to "the next Sheriff that ſhall hold, and the Reſt to the Uſe of the Mayor and Commonalty, to be reco-"vered in the Court of Record held before the Mayor and Aldermen". And it being objected that this reaſonable Excuſe is to be made to the Mayor and Aldermen, Holt Ch. J. anſwered, that whatever Excuſe he makes, if they allow it, the City is bound by it; and if they refuſe to allow a reaſonable Excuſe, it is not final; for it may be pleaded or given in an Evidence, in an Action brought for the Penalty by the City; for it was not the Meaning of the Common Council to put an arbitrary Power in the Lord Mayor and Aldermen, but is like the Power given by the Stat. 23 H. 8. cap. 5. to Commiſſioners of Sewers to do ſeveral Things according to their Diſcretion; but that muſt be underſtood of a Legal Diſcretion——Ld. Raym. Rep. 496. S. C. and the Court all held that a Procedendo ſhould be granted; and S. P. mentioned as to the (not having a reaſonable Excuſe) which was objected to be a making them Judges in their own Cauſe; it was anſwered by Holt Ch. J. as above.——Carth. 483. the ſame Point is ſtarted in the Arguing for the Defendant, though not mentioned in the State of the By-Law there; and there Holt Ch. J. anſwered, that in ſuch Caſe the Defendant may give it in Evidence, upon Nil Debet pleaded in an Action of Debt brought for the Forfeiture, and there the Validity of the Excuſe may be tried by a Jury.——5 Mod. 442. ſame Objection made in arguing the Caſe, though not mentioned there in the State of the By-Law; and anſwered by Holt Ch. J. accordingly.

26. A *Difference* was taken *between a private* Corporation or *Company, and a great City or Borough*; for the *former can only make By-Laws to bind their own Members, and touching Matters that concern the Regulation of the Trade*, or other Affairs of the Company; *but great Cities* and Towns, as London, Briſtol, York &c. *can make By-Laws for the better Ordering and Managing ſuch Town, and that Law will bind Strangers to the Freedom of the Town, while within ſuch Towns*, and they are bound to take Notice of ſuch

1 Salk. 193. pl. 5. S. C. and ſame Diverſity; for a Company or Fraternity, have not a local Power of Government.

ſuch Laws at their Peril; and this Diverſity was agreed to by the Court. 6 Mod. 123, 124. Hill. 2 Ann. B. R. Cuddon v. Eſtwick.

27. The *Hudſon's-Bay Company are* made a Corporation by Charter, and are thereby *impowered to make By-Laws for the* better Government of the Company, and for the *Management and Direction of their Trade* to Hudſon's Bay. They may, by the By-Laws, *make Reſtrictions upon their Stock*, viz. *That it ſhall be liable, in the firſt Place, to pay the Debts due to themſelves from their own Members*, or to anſwer the Calls of the Company upon the Stock; for the legal Intereſt of all the Stock is in the Company, who are Truſtees for the ſeveral Members; Per Ld. C. Macclesfield. 2 Wms's Rep. 207. pl. 55. Hill. 1723. Child v. Hudſon's Bay Company.

28. *So* a By-Law *to detain and ſeize a Member's Stock for a Debt due from a Member to the Company*, is good; *but* this being a By-Law to the Prejudice of other Creditors, it ſhall be taken ſtrictly, and *not extend to ſuch Debt as the Member does not owe* in Law, *but only in Equity*, as where it was owing to a Truſtee of the Company; Per Ld. C. Macclesfield. 2 Wms's Rep. 208, 209. Hill. 1723. Child v. Hudſon's Bay Company.

29. *But they cannot make By-Laws* by ſuch a Power, *for carrying on Projects foreign to the Affairs of the Company*, as in Relation to the Projects and Aſſurances; Per Ld. C. Macclesfield. 2 Wms's Rep. 209 Hill. 1723. Child v. Hudſon's Bay Company.

(C) *How* it may be made *for the Recovery of the Penalty.*

See (A 2) pl. 1. and the Notes there. ——S P ſeems admitted; but

1. **If a Corporation that hath** Power by Charter or Preſcription **to make By-Laws, makes a By-Law, and a** penal Sum for Non-performance **thereof to be recovered by Diſtreſs &c. this is good. Co. 5. Clark's Caſe, 64.**

if a By-Law impoſes a Penalty upon a Townſhip, it is ill; for it ought to be upon every ſeveral Perſon, and not to lay it upon all, and levy it upon any particular Perſon. 3 Lev. 48. 49. Mich. 33 Car. 2 C. B. Wells v. Cotterell. ——But a By-Law to levy Fines by Diſtreſs and Sale of Goods is illegal and void; and Judgment accordingly. 3 Lev. 281, 282. Paſch. 2 W. & M. in C. B. Clerk v. Tucker. ——2 Vent. 182, 183. S. C. adjudg'd.

2. So **if it be limited to be recovered by** Action of Debt. **Co. 5. 64.**

3. So **the Penalty may be recovered by Action of Debt,** without Limitation. **Co. 5. 64.**

5 Rep. 62. b. 63. b Mich. 32 & 33 El. B. R. the S. C.

4. **If an Ordinance be made by the Common-Council in London,** that a certain Thing ſhall not be done upon Pain of Forfeiture of a certain Sum, to be recovered by the Chamberlain of London by Action of Debt, **this is good; becauſe the Chamberlain is their publick Officer. Co. 5. Chamberlain of London, 63. per Curiam reſolv'd.**

Fol. 367. A By-Law was made by the Homage of a Court

5. **If a Corporation that hath Power by Charter or Preſcription to make By-Laws, makes a By-Law, and limits a** penal Sum **to be forfeited for Non-performance; this** cannot be levied by Diſtreſs, without a Preſcription to do it, or Limitation by the By-Law ſo to do. **Co. 5. Clark, 64. admit D. 15 El. 321. 23.**

Baron, *that ſo many Inhabitants within the Manor ſhould be choſen annually by the Homage to ſerve as Field-Reeves within the Manor, and that if any ſo choſen ſhould refuſe, he ſhould forfeit* 10 l. *which ſhould be levied by Diſtreſs.* In Treſpaſs for taking a Diſtreſs the Defendant juſtified; but Exception was taken, becauſe he had not preſcribed to levy the Penalty by Diſtreſs; but after ſeveral Arguments, it was adjudged to be

be well enough; becauſe the Preſcription being for the By-Law, and the By-Law itſelf ordaining a Diſtreſs, it is the ſame Thing as if the Preſcription had appointed the Diſtreſs; and Judgment for the Defendant. Ld. Raym. Rep. 91. Trin. 8 W. 3. C. B. Lambert v. Thornton.

6. The Mayor and Commonalty of *London* may make a By-Law, and *limit the Penalty to be forfeited to themſelves*, becauſe there is no way to inforce Obedience but by Puniſhment, which muſt neceſſarily be either Pecuniary or Corporal, as Impriſonment, which is not legal, unleſs there be a Cuſtom to warrant it; and the direct End the Law ſeeks, is no more than Obedience, and they might ſue for the Penalty in the Court of the Mayor and Aldermen if the Mayor could be ſevered and held before the Aldermen, which he cannot, for it is his Court, and the Stile of it is coram Majore, ſo that he is an integral Part, and therefore he would be both Plaintiff and Judge; reſolved by Holt Ch. J. Ward Ch. B. &c. 1 Salk. 397. pl. 3. at Guildhall, Mar. 2. 1701. Wood v. the Mayor and Commonalty of London.

12 Mod. 669. Hill. 13 W. 3. The City of London v. Wood, S. C. at Guildhall, Coram Holt, Ward and Hatſell, and held accordingly; with the Arguments of the Judges at large.

(D) Pleadings.

1. IN 2d, Deliverance, a Cuſtom of a Manor was ſet forth for making of By-Laws, and that a By-Law was made *that no Tenant &c. of the Manor from thence forth ſhould keep his Cattle within the ſeveral Fields of the Manor by By-Herds, nor could put any of the Oxen called Draught Oxen there before St Peter's Day*, upon Forfeiture of 20s. But Judgment was given againſt the Conuſance, becauſe he *pleaded, that it was preſented Coram Sectatoribus, and does not ſhew their Names.* 2dly, The Penalty appointed by the By-Law, was 20 s. and he ſhews that it was *abridg'd to 6 s. 8 d.* and ſo the Penalty demanded, and for which the Diſtreſs was taken, is not maintained by the By-Law; and a Pain certain ought not to be altered. 3dly, He ſhews that it was preſented that the Plaintiff had kept his Draught Oxen, whereas he *ought to have alleged* the ſame in Matter *in Fact, that he did keep* &c. 3 Le. 7. pl. 21. Mich. 7. Eliz. C. B. Scarning v. Cryer.

Mo. 75. pl. 205. Scarling v. Criett. S. C. adjudg'd; and there another Reaſon is given, viz. becauſe that is *not alleged that the By-Law was made, Ex aſſenſu omnium Tenentium neque Majoris Partis, but* Ex aſſenſu *aliorum Tenentium.*

2. Where there is a *Cuſtom* in a Manor for the Homage to *make By-Laws when Neceſſity requires*, whether it ought to be *ſet forth* that there was Neceſſity for it at the Time when made? See 3 Le. 38. pl. 63. Mich. 15 Jac. the Arguments in Ld. Cromwell's Caſe.

3. By a *Cuſtom for the Maſter and Company of Shoemakers of the City of Exeter to make By-Laws*, they *made a Law, that no Perſon, not being of their Fraternity, ſhould make or offer to ſell* &c. *Shoes within the City or County of Exeter, or any other Wares pertaining to the ſaid Art*, under Pain of forfeiting to the Maſter &c. for every ſuch Offence, ſuch Sum as ſhould be aſſeſſed by the Maſter and Wardens &c. not exceeding 40 s. and if he ſhall refuſe to pay the ſame, upon Proof made of the Breach of this Order, it ſhould be lawful for the Maſter &c. to diſtrain; and ſo ſhews, that the Plaintiff, being an Inhabitant in the City of Exeter, and no Brother of the Society, did make Shoes &c. and that a Fine of 33 s. 4 d. was impoſed on him for the ſaid Offence, of which he paid Part, but refuſed to pay the reſt, and thereupon the Defendant diſtrained &c. Upon Demurrer to this Plea it was adjudged ill, becauſe the Defendant had exceeded the Cuſtom alleged in the Extent of the By-Law; for

the *Cuſtom was, to make Bye-Laws for the better Government of the Company of Shoemakers* of the City of Exeter; but the By-Law is, that none ſhall make or ſell any Shoes within the City or County of Exeter, which is not warranted by the Cuſtom, and in this likewiſe they have exceeded their Power in the Thing prohibited, for it is not to reſtrain a Man from uſing the Art of a Shoemaker in the City, but *it is to reſtrain them generally from making Shoes*, and that *extends to making Shoes for himſelf*, which is void. It is void likewiſe as to the reſtraining Perſons from doing many Things which are to be done by other Artificers, As Laſts, which are to be made by the Laſt-maker, and Auls by the Smith &c. The Penalty likewiſe impoſed by this By-Law is not warranted by the Cuſtom or By-Law, becauſe that ought to be expreſſed, that the Court might be Judge of the Reaſonableneſs of it, but here *no certain Penalty is ſet down*, for that is left to the Diſcretion of the Maſter and Wardens &c. And, laſtly, the Defendants have diſtrained before their Time, for they ought not to do it before Refuſal to pay, and Proof thereof made, which ought to be by Verdict, and not before the Maſter and Wardens. Adjudged that the Plea was not good. Bridgm. 139. Trin. 16 Jac. Wood v. Searle.

4. A By-Law was made, *that every one elected to the Livery of the Company of Leatherſellers, who had not been Guardian of the Yeomanry before, ſhould pay to the Uſe of the Society 25 l.* And in Debt the Plaintiffs ſhew the Election of the Defendant to be one of the Livery, with apt Averments and due Notice given to him. The Defendant pleaded the Cuſtom of the City of London, that no Man, not being free of the City, can be elected to the Livery of any Society, and that he is not free. The Plaintiffs deny the Cuſtom, Et hoc parati ſunt verificare. The Defendant demurr'd, and ſhew'd, that the Plaintiffs ought to *conclude their Plea to the Country*; But Curia contra; becauſe the Cuſtom ought to be tried by the Certificate of the Recorder; and Judgment for the Plaintiff. 2 Jo. 149. Paſch. 33 Car. 2. B. R. Leatherſellers Company of London v. Beecon.

5. The *alleging a By-Law to be made by the Steward of the Manor with the Conſent of the Homage is ill*; for the By-Laws ought to be made by the Homage; Per tot. Cur. 3 Lev. 48. Trin. 33 Car. 2. C. B. Wells v. Cotterell.

6. In Replevin the *Defendant juſtified under a Cuſtom to make By-Laws, and to diſtrain* for the Penalty. The *Plaintiff replied, De Injuria ſua propria abſque tali Cauſa* &c. Upon a Demurrer this Replication was held good by all the Juſtices, præter Levins, *without a particular Traverſe of the Cuſtom.* 3 Lev. 48. Trin. 33 Car. 2. C. B. Wells v. Cotterel.

For more of By-Laws in General, See **Common, Corporation, Courts, Trade,** and other Proper Titles.

Canons.

(A) Good. And the Force of them.

1. IF a Canon be *againſt the Common Law* it is void. Arg. Roll R. 454. cites 11 H. 4. 7 H. 8. and that the Common Law ſhall not be altered by the Canon Law, cites 5 Rep. Cawdry's Caſe. Godb. 163. pl. 228. Paſch. 8 Jac. C. B. the S. P. by Coke Ch. J. in Caſe of Candict v. Plomer.

2. *25 H. 8. cap. 19. S. 1.* Enacts, that *the Clergy ſhall not preſume to claim, or put in Ure, any Conſtitutions or Canons; nor ſhall enact, promulge, or execute any ſuch Canons or Ordinances in their Convocations, (which alway ſhall be aſſembled by Authority of the King's Writ) unleſs the Clergy may have the King's royal Aſſent and Licence to make, promulge, and execute ſuch Canons and Ordinances, upon Pain of every one of the Clergy doing contrary, and being thereof convict, to ſuffer Impriſonment, and make Fine at the King's Will.*

3. *S. 2. No Canons ſhall be made or put in Execution within this Realm by Authority of the Convocation, which ſhall be repugnant to the King's Prerogative, or the Cuſtoms, Laws, or Statutes of this Realm.*

4. The King, without Parliament, may make *Orders and Conſtitutions to bind the Clergy*, and may *deprive* them if they obey not; but they cannot make any Conſtitutions without the King. Cro. J. 37. per omnes J. &c. Trin. 2 Jac. in pl. 13. 4 Inſt. 323. cap. 74.

5. Reſolved, that the Canons of the Church made by the Convocation and the King, without Parliament, ſhall *bind in all Matters Eccleſiaſtical* as well as an Act of Parliament; for they ſay, that by the Common Law every Biſhop in his Dioceſe, Archbiſhop in his Province, and Convocation Houſe in the Nation, may make Canons to bind within their Limits. When Convocation makes Canons of Things appertaining to them, and the King confirms them, they ſhall bind all the Realm. Mo. 783. pl. 1083. Trin. 4 Jac. in Canc. with the Aſſiſtance of the 2 Ch. Juſtices and Chief Baron. Bird v. Smith. The Convocation, with the Licence and Aſſent of the King *under the Great Seal*, may make Canons *for Regulation of the Church*, and that as well concerning *Laicks* as Eccleſiaſticks; Per Vaughan Ch. J. 2 Vent. 44. in Caſe of Grove v. Dr. Elliot. — And ſays, that ſo is Lindwood; and if in making new Canons they *confine themſelves to Church Matters*, it is all that is required of them. Ibid.

6. Canons made by the Pope and allowed here, yet unleſs they were *allowed by Parliament* were not good. Arg. Roll R. 454. Per Dr. Martin, Hill. 14 Jac. in the Exchequer-Chamber.

7. Where there is a ſpecial Cuſtom for the *chuſing Churchwardens*, the Canons (viz. that the Parſon ſhall have the Election of one) cannot alter it, eſpecially in London, where the Parſon and Churchwardens are a Corporation to purchaſe Lands and demiſe their Lands. Cro. J. 532. pl. 15. Paſch. 17 Jac. B. R. Warner's Caſe. Jo. 439. pl. 4, Trin. 15 Car. B. R. Evelin's Caſe, S. P. held accordingly. —— Mar. 22 pl. 50. Anon. but is S. C. —— Noy 139. Mich. 4 Jac. C. B. Anon. S. P. accordingly, and Coke Ch. J. ſaid, that the Canon is to be intended where the Parſon had Nomination of a Churchwarden before the making of the Canon. —— Cro. J. 670. pl. 9. Trin. 21 Jac. B. R. Jermyn's Caſe, it was held

held a good Cuſtom for the Pariſhioners to *chuſe a Pariſh Clerk*, and that the Canon cannot take it away. —Godb. 163. pl. 228. Paſch. 8 Jac. C. B. Candict v. Plomer, S. P. accordingly.

8. The Canons are the Eccleſiaſtical Laws of the Land, but ſhall not *bind* here unleſs received, as appears by Stat. 25 H. 8. 21. and the Stat. De Bigamis, and the Stat. of Merton, as to one born before Marriage, tho' by the Canon he was legitimate, yet by our Law he is not; Per Cur. Jo. 160. Trin. 3 Car. B. R.

9. The Canons made 1571 in Queen Elizabeth's Time, and 21 Jac. being confirmed by Q. Eliz. and K. Jac. are good by the *Stat. 25 H.* 8. ſo long as they do not impugn the Common Law or Prerogative of the King, and before the 25 H. 8. 19. the Eccleſiaſticks might make Canons without the King, but are by that Statute reſtrained, but ſince that Statute they may make Canons with the Aſſent of the King, ſo long as they are not contrary to the Laws of the Land, or derogatory of the King's Prerogative. 2 Lev. 222. Trin. 30 Car. 2. B. R. Cory v. Pepper.

Ld. Raym. Rep. 449. S. P. by Holt Ch. J. in S. C. —— But undoubtedly the Canons of 1603. do not bind the Laiety; by the Ch. Juſtice. 2 Barnard. Rep. in B. R. 353 Mich. 7 Geo. 2.

10. Eccleſiaſtical Perſons are ſubject to the Canons. Thoſe of 1640 have been *queſtioned*, but no doubt was ever made as to thoſe of 1603; Per Cur. 1 Salk. 134. Paſch. 11 W. 3. B. R. the Biſhop of St. David's v. Lucy.

12 Mod 238. S. C. & S. P. per Holt Ch. J. —— Canons *oblige not the Laiety* without the Conſent of the Civil Legiſlative Power. 2 Salk. 412. Hill. 1 Ann. B. R. Matthews v. Burdet.—Ibid. 672. S. C.—Not without an Act of Parliament; per Ld Keeper, Mich. 1700. Wms's Rep 32. Cox's Caſe — —Reſolved that the Canon Law obliges not the Subjects of this Realm, unleſs it be incorporated into the Common Law by Act of Parliament, or received Time out of Mind &c. and then it becomes Part of the Common Law. Ld. Raym. Rep. 7. Trin. 6 W. & M. in Caſe of Philips v. Bury.

11. All the *Clergy are bound* by the Canons confirm'd only by the King; but they muſt be confirm'd by the Parliament to bind the Laiety; per Cur. Carth. 485. Paſch. 11 W. 3. B. R. The Biſhop of St. David's v. Lucy.

2 Salk. 672, 673 S. P. in S. C.

12. In the primitive Church the Laity were preſent at all Synods. When the Empire became Chriſtian, no Canon was made without the Emperor's Conſent; the Emperor's Conſent included that of the People, he having in himſelf the whole Legiſlative Power, which our Kings have not; therefore if the *King and Clergy make a Canon, it binds the Clergy in Re Eccleſiaſtica*; *but* it does *not* bind *Laymen*; they are not repreſented in Convocation; their Conſent is neither asked nor given. 2 Salk. 412. pl. 2. Hill. 1 Ann. B. R. Matthews v. Burdett.

But he agreed that *more ancient* Canons might. Ibid.

13. No Canons, *ſince* 1603, can Proprio Vigore bind Laymen; per Holt Ch. J. 6 Mod. 190. Trin. 3 Ann. B. R. in Caſe of Britton v. Standiſh.

MS. Rep. Mich. 1736. Middleton and his Wife v. Croft.

14. Declaration in Prohibition, which ſets forth the Statute 7 & 8 W. 3. cap. 35. and further, that Lay-People are not puniſhable by Canons; that the Plaintiffs, at the Promotion of the Defendant, were articled againſt in Court-Chriſtian, for that the Plaintiffs were clandeſtinely married without publiſhing Banns or Licence, and between the Hours of 1 and 8 in the Morning, contrary to the Canons. Then alleges that, if any, this is a Temporal Offence, and puniſhable by the ſaid Statute, and the uſual Averment of proceeding in the Spiritual Court contrary to the Prohibition of this Court. The Defendant by Plea denies he has proceeded in the Spiritual Court, prout; and that the Canons are in Force to bind Lay-People &c. Demurrer to the Plea, and Joinder in Demurrer. Now this Term Ld. Hardwicke Ch. J. pronounces the Reſolution of the Court. The Queſtions that have been made in this Caſe were, firſt, whether by the Canons of 1603, Lay-

Perſons

Perſons are puniſhable? 2dly, if Lay-Perſons cannot be puniſhed by thoſe Canons, whether the Eccleſiaſtical Court has any Juriſdiction in this Caſe by virtue of any ancient Canons and Conſtitutions? 3dly, ſuppoſing they have a Juriſdiction, whether it is not taken away by the Operation of Stat. 7 & 8 W. 3. I ſhall ſubdivide theſe Queſtions into 2; firſt, whether the Canons of 1603, relating to clandeſtine Marriages, do affect the preſent Caſe? 2dly, ſuppoſing Lay-Perſons are included in the Words of thoſe Canons, whether they are binding againſt Laymen? The 62d Canon only relates to the Puniſhment of the Miniſter who marries Perſons without a Faculty or Licence. The 101, 102, 103 Canons relate to the Manner and Conditions of granting Licences, and that the Marriage ſhall be in the Pariſh-Church or Chappel where one of the Parties dwell, and that between the Hours of 8 & 12 in the Forenoon. The 104th contains an Exception, as to Parents Conſent, to thoſe in a State of Widowhood; and that every Licence that has not the preceding Requiſites ſhall be void, and the Parties marrying by virtue thereof ſhall be ſubject to the Puniſhments appointed for clandeſtine Marriages. None of theſe Canons, except the laſt, affect the Perſons contracting, and that is with regard to thoſe who marry under Colour of an irregular Licence, which is void; but that is not the preſent Caſe; for here is no Licence nor Publication of Banns; ſo theſe Canons do not extend to Lay-Perſons in the preſent Caſe. But 2dly, ſuppoſing they had a Juriſdiction in the preſent Caſe, whether the Authority by which theſe Canons were made can bind the Laity? Theſe Canons are confirmed by the King under the Great Seal. With regard to this Queſtion, there is ſome Variety of Opinions in our Law-Books; but I always underſtood that the Canons of 1603 did not bind the Laity, for want of a Parliamentary Authority. It was admitted by Serj. Wright, that theſe Canons did not bind the Laity Proprio Vigore, but that they were declarative of ancient Canons which had immemorially been received and incorporated into the Law; and we are all of Opinion, that the Canons of 1603 do not Proprio Vigore bind the Laity, tho' many Proviſions are contained in theſe Canons, which will bind the Laity as declarative of the Common Law. The ancient Councils which compoſed theſe Canons in the firſt Ages of the Church, were a mix'd Aſſembly, conſiſting partly of Lay and partly of Eccleſiaſtical Perſons; but it is uncertain how they were convened, whether by Election or otherwiſe; and Spelman, tho' a learned Work, does not ſettle it. But by the Fundamental Principles of our Conſtitution, no new Law can be made but by the united Authority of Parliament, Parl. Rot. H. 6. 12 Co. 74. That the Parliament conſiſts of the 3 Eſtates of the Realm, 4 Inſt. And that the whole Commons are repreſented in Parliament. By reaſon of this it is ſaid that every Perſon's Conſent is to every Act of Parliament; but in the conſtituting and making of Canons there is only the Sanction and Authority of one Part of the Legiſlature, viz. the King. The original Obligation of Acts of Parliament did not ariſe from the actual Conſent of every Perſon, but from an implied Conſent; for it is an actual Repreſentation of the whole People. The Individuals could not with Convenience aſſemble, therefore by Neceſſity it was qualified, and made a Repreſentative Body. It is a new Notion that the People are repreſented in Convocation, and is contrary to the Writs of Convocation, which is Convocari Facias totum Clerum veſtrius Provinciæ, which imports that the Clergy are aſſembled together, and only the Clergy of either Province are either preſent in Perſon or by Repreſentation. 4 Inſt. 322. There is indeed a Difference between the old Canons and the new Provincial Canons. The Canons in the firſt Ages of the Church bound all the Subjects of the Empire, as well Lay as Eccleſiaſtical; but the binding Force over Laymen aroſe becauſe the ſupreme Legiſlative Power was veſted in the Emperor, who

gave the Force and Authority to ſuch Laws. Juſtinian's Inſt 1 Lib. S. 16. the whole Power of making Laws devolved upon the Emperor. The
* Sup. pl. 12. Reaſoning in the Caſe of * **Matthews** againſt **Burdett**, 2 Salk. 673. is of great Weight, tho' no Reſolution was ever given, and the Reaſon was, one of the Parties died. It was inſiſted at the Bar, that the Conſent of the People was included in the Authority of the King to confirm Canons; but that cannot be; for where there is an Authority to make Laws of a binding Force, there is a like Authority to impoſe Taxes: Theſe Things are inſeparable; but it was never allow'd that the King, by virtue of his ſole Authority, could impoſe Taxes, and the Clergy could never charge any Perſons with any Burthens or Impoſitions but themſelves. The Clergy in Convocation cannot create a new Fee, and yet to ſuppoſe they can make a Law binding upon the Laity, is abſurd. The beſt Rule to judge of the Validity of their Canons, is from the conſtant Uſage ſince the Reformation. At that Time, upon the Change of the National Religion, great Alterations were made as to the Form of Prayer, and the Rites and Ceremonies to be obſerved in the Reformed Religion. All theſe Alterations were eſtabliſhed by Act of Parliament. The Clergy did not think their own Conſtitutions, tho' in a Matter of Eccleſiaſtical Nature, were binding upon the Laity without the Aid and Aſſiſtance of the whole Legiſlature of the Realm. It was inſiſted at the Bar, that the Reaſon of their Acts of Parliament was to inforce theſe Alterations by Civil Sanctions and Temporal Penalties; that indeed was one, but not the only Reaſon; for even all the Regulations at the Time of the Reformation, even the moſt minute, were eſtabliſhed by Act of Parliament. It was aſſerted at the Bar, that the Power of the Convocation of making Law is co-extenſive to their Juriſdiction. This is carrying it much too far; for ſhould this Argument prevail, then, in all Matters in which the Eccleſiaſtical Court has Juriſdiction, new Laws and Meaſures of Juſtice might be inſtituted: As the Eccleſiaſtical Court has Juriſdiction of Marriages, they might, by Laws of their own making, alter the Degrees of Conſanguinity, and make thoſe Marriages unlawful which are now lawful: By this Means the Common Law relating to Heirſhip might be changed. The ſame holds good with reſpect to Tithes, and to every Part of their Juriſdiction; ſo that if this Objection was to be allow'd in its full Latitude, it would produce very pernicious Conſequences, and induce Innovations upon the Law. If this Power had been veſted in them, they need not have reſorted to Parliament to have the Baſtard Eigne legitimate according to the Canon Law, when Eſpouſals were had afterwards, but by their own Authority they might have done it; and that memorable Saying of the Lords, Nolumus Leges Angliæ mutari, would have been unneceſſary, 2 Roll Abr. 586. pl. 35. The Caſe in Roll Abr. 909. pl. 5. Letter (I) ſeems a ſtrong Caſe for the Validity of theſe Canons; but yet, when conſidered, is of no Authority. It is the Canon relating to what Sum ſhall be deem'd Bona notabilia, which fixes it to 5 l. and the Caſe ſays, it ſeems that this Canon has changed the Law, if that was otherwiſe before; inſomuch that the Grant of Adminiſtration belongs to the Eccleſiaſtical Law, and our Law but takes Notice of their Law in that, and for that they may alter it at their Pleaſure; **Needham's Caſe.** The ſame Caſe is reported in 8 Rep. but not a Word of this there mentioned. Perkins, pl. 489. But this Caſe, as reported by Roll, is contrary to Law, and no Foundation for ſuch an Opinion. There is indeed a poſitive Declaration of Law with regard to this Matter; but we find that it has been the Parliamentary Notion, that no Power of making Laws, binding upon the Subject, is veſted in any but
Par 1. S. 2. themſelves. In the Statute 25 H. 8. cap. 19. it is recited, That whereas divers Conſtitutions and Canons, which heretofore have been enacted, be thought not only to be much prejudicial to the King's Prerogative,

and

and repugnant to the Laws and Statutes of this Realm, but alſo much onerous to his Highneſs and his Subjects; therefore the ſaid Conſtitutions are committed to the Examination of 32 Commiſſioners, to aboliſh or retain ſuch as they ſhall think worthy. This Statute, with regard to the Power of appointing Commiſſioners, was continued 35 H. 8. cap. 16. It is to be obſerved by this Act, that both the King and Clergy thought it neceſſary to have the Concurrence of Parliament in the abrogating or retaining thoſe ancient Canons. 2dly, that whatever Alterations happen'd in the Canon Law by the Act of thoſe Commiſſioners have their binding Force by virtue of this Act of Parliament; and therefore whatever of the Canon Law remains, that is not contrary to the Statutes and Uſages of this Realm, are confirmed by Act of Parliament. As to judicial Opinions, the Caſe of 20 H. 6. 13. is a ſtrong Authority with our Opinion. Brooke, Tit. Ordinary 1. which is a true State of it. Newton J. ſays the Ordinary has Power to make Holy-Days and Faſting-Days, and to make Conſtitutions Provincial to bind the Clergy, but not to bind the Temporalty; nor can they allow or diſallow the King's Letters Patents in their Convocation. E. 3. 44. b. Catesby there argues, that the Acts of Convocation are as binding upon the Clergy as Acts of Parliament to the Laity. Every Abbot, Prior, and other Eccleſiaſtical Perſon, is either a Privy or Party in Convocation. The **Caſe of the Prior of Leeds**, before, is not miſtaken by Brooke. The old Edition is le Temporal. Newton J. gives his Opinion at large, and ſays that the Power of the Convocation does not bind the Temporal Rights of the Clergy themſelves. It appears from Mo. 755. 2 Cro. 37. that the King may make Ordinances without Parliament to bind the Clergy, and if they obey not, may by his Commiſſioners deprive them. This is the ancient Prerogative of the Crown, as appears by thoſe Books; therefore the Convocation, which is by the Aſſent and Confirmation of the King, may make Canons to bind the Clergy; and ſo is the Caſe of **the Biſhop of St. David's v. Lucy**, 1 Salk. 134. Carth. 485. where it is ſaid by Holt, that all the Clergy are bound by the Canons confirm'd only by the King; but they muſt be confirmed by the Parliament to bind the Laity; and the Notes of Raymond and Eyre Ch. J agrees with the Report in Carth. In the Caſe of **Briton v. Standiſh**, * Mo. Ca. 190. Holt, agreeable to his former Opinion, held that no Canon, unleſs anciently received, tho' in full Convocation, can Proprio Vigore bind Laymen; and of the like Opinion was the Court of C. B. in the **Caſe of Davis**, Mich. Term, 5 Geo. 1. which was upon teaching School without Licence in Prohibition. In Oppoſition to this Opinion has been cited the Caſe of † **Bird v. Smith**, Mo. 783. where it is ſaid that the Canons of the Church made by the Convocation and the King, without Parliament, ſhall bind in all Matters Eccleſiaſtical as well as an Act of Parliament. The Caſe in itſelf is of a very extraordinary Nature, and ſuch as no Relief would be given to in Chancery at this Time; beſides, it is ſaid in the Caſe, that every Biſhop in his Dioceſe, Archbiſhop in his Province, may make Canons to bind within their Limits. Now there is no Colour for this. But further it is not expreſsly ſaid that the Canons will bind Laymen; Upon the whole, it is not of very great Authority. The next Opinion is ‡ Vaugh. 327. where it is ſaid, a lawful Canon is the Law of the Kingdom as well as an Act of Parliament. This is only a looſe Saying, and not of any great weight. The next Caſe is * **Grove and Elliot**, 2 Vent. 41. where Vaughan ſays, that the Canons of 1603 are of Force, tho' never confirmed by Act of Parliament; that the Convocation, with the Licence and Aſſent of the King, under the Great Seal, may make Canons for the Regulation of the Church, and that as well concerning Laicks as Eccleſiaſtical Perſons; and ſo is Linwood. This was upon a Motion without much Conſideration, and Tyrrell J. was of a contrary Opinion, the other two Judges

6 Mod.— See Prohibition (C) pl. 10.

† At Prerogative (I. f) 6.

‡ In the Caſe of Hill v. Good.

* At Tit. Prohibition (C) pl. 5.

Judges were ſilent about it, and this was of a Point not in Judgment before them, and only the ſingle Opinion of Vaughan. The next Queſtion is, ſuppoſing Lay Perſons cannot be puniſhed by the Canons of 1603, then, whether the Eccleſiaſtical Court has any Juriſdiction, with regard to the preſent Queſtion, by the antient Canons? and we are all of Opinion, that with regard to the Marrying without Licence, or publiſhing the Banns, they have ſuch Jurisdiction; that by the Statute 25 H. 8. cap. 21. concerning Impoſitions that uſed to be paid to the See of Rome, in the Preamble, that the King is bound by no Laws but ſuch as the People have taken at their free Liberty, by their own Conſent, to be uſed among them, and have bound themſelves, by long Uſe and Cuſtom, to the Obſervance of the ſame; and in S. 8. that all Children, procreated after Solemnization of any Marriage to be had by Virtue of ſuch Licences, ſhall be reputed legitimate. That in the Statute 35 H. 8. cap. 16. Authority is given to the King, during Life, to name 32 Perſons to examine all Cauſes, and to eſtabliſh all ſuch Laws Eccleſiaſtical as ſhall be thought convenient; from hence it follows, that many Canons that had been immemorially uſed, and not aboliſhed by thoſe Commiſſioners, are Part of the Common Law, and as ſuch have their binding Force. Ch. J. Hale in a Manuſcript ſays, and very truly, that it was the Civil Power that gave the Eccleſiaſtical Juriſdiction its Life and Vigour. And it appears from Linwood, that clandeſtine Marriages were puniſhed by Canons which had been received, and that the Puniſhment of a Clergyman for marrying Perſons without Licence, or publiſhing Banns, was Suſpenſion per Triennium. In the **Caſe of Battingley v. Martin**, Sir Will. Jones, 259. it was expreſsly determined in the 2d Point of that Caſe, that if any marry without publiſhing Banns or Licence, which diſpenſes with it, they are citable for it in the Eccleſiaſtical Court, and no Prohibition lies. This is an Authority in Point with our Opinion upon this Queſtion. The 3d Queſtion, whether this Juriſdiction is taken away by Stat. 7 & 8 W. 3. and is only now of Temporal Cognizance? As to this, we are all of Opinion that this Statute has not taken away any Eccleſiaſtical Juriſdiction that was ſubſiſting before; but that, notwithſtanding, the Spiritual Court may proceed to inflict Cenſures for clandeſtine Marriages. In the Caſe of † **Corey v. Pepper**, 2 Vent. 222. a Conſultation was granted, that was for teaching School without a Licence; and ſuggeſted the Statute of Uniformity 13 Car. 2. which gives a Penalty of 5 l. in ſuch Caſe. * Carth. 464. is contrary to Corey and Pepper; and in Matthews and Burdet no Reſolution; but in the Caſe of teaching School without a Licence, the 5 l. is inflicted as a Puniſhment for the ſame Offence; but in the preſent Caſe the 10 l. is not inflicted as a Puniſhment for the Offence of clandeſtine Marriages, but collaterally for the better ſecuring the Revenue of the Crown, and therefore it does not contradict the Maxim Nemo debet bis puniri pro uno delicto; for the Proſecution upon the Statute is as the Statute de Articulis Cleri mentions it, diverſo Intuitu ventilatur; in which Caſe the Eccleſiaſtical Juriſdiction is not taken away; and even in Acts of Parliament a double Puniſhment is inflicted Diverſo Intuitu, as in the Statute of 18 Eliz. concerning the reputed Fathers of Baſtards, the Offender may be puniſhed for the Crime, and alſo may be proceeded againſt to indemnify the Pariſh. The Argument generally uſed when the Temporal Power has annexed a Puniſhment to ſuch an Offence, that the Spiritual Juriſdiction is taken away, is, that their Proceedings are Pro ſalute Animæ; but thoſe are meer Words; for the Proceeding is really to puniſh the Offender for the Crime, and to have Effect as ſuch. Beſides it may be argued, that marrying without publiſhing Banns is confirmed by Act of Parliament; for the Statute of Uniformity confirms the Rubrick, and this is therein contained. Suppoſing this pecuniary Penalty in the Stat. 7 & 8 W. 3. would have taken away

At Prohibition (F) pl. 67.

† At Prohibition (U) pl. 25.

* Chedwick v. Hughes. See Schoolmaſter (A) pl. 4.

away the Eccleſiaſtical Juriſdiction in this reſpect, yet it is conſiderable whether this Act of Parliament ſhall repeal a Power given them by a former Act of Parliament; for in this Act of 8 W. 3. there are no Negative Words, ſo both the Acts may ſtand together. There is no Notice taken in this Statute of 8 W. 3. of the Act of Uniformity. Upon the Whole, we are of Opinion that the Eccleſiaſtical Court has a Juriſdiction to proceed to impoſe Eccleſiaſtical Cenſures upon any Perſons marrying without publiſhing Banns or Licence; therefore the Prohibition muſt ſtand as to the Plaintiff's not being married between the Hours of 8 & 12, that being ſingly enjoin'd by the Canons of 1603; and that a Conſultation is awarded as to the Reſidue. It is neceſſary to grant a Prohibition as to that; for the Eccleſiaſtical Judge may make it a clandeſtine Marriage ſingly upon that Poinr, viz. not marrying between the Hours of 8 & 12.

For more of Canons in General, ſee **Prerogative** (Y. e) **Prohibition**, and other Proper Titles.

Certainty in Pleadings.

(A) Requiſite in what Caſes.

1. PLeadings *of every Statute, Grant, Pardon, Cuſtom* &c. *in which is Exception, Foreprize, Condition, or Thing amounting to it*, theſe ſhall be pleaded expreſsly. Br. Pleading, pl. 124. cites 8 H. 4. 7.

2. Plea *in Abatement* of the Writ *ſhall be certain to every common Intent*; per Juin & Gaſcoign. And it is ſaid elſewhere that Plea *in Bar* ſuffices, if it be good, *to one common Intent*; but *Declaration* ſhall be good *to every Intent*. Br. Preſentation, pl. 32. cites 14 H. 6. 24.

3. In *Entry in Nature of Aſſiſe*, the *Tenant ſaid that J. N. was ſeiſed and infeoffed him, and after diſſeiſed him, and infeoffed the Plaintiff*; upon which the Tenant enter'd. The *Demandant ſaid that Fine was levied between him and this ſame J. N.* of the ſame Land, by which J. N. acknowledged to him &c. *before which Fine the Tenant had nothing of the Feoffment of J. N.* and *did not traverſe the Diſſeiſin nor the Feoffment*; and held *only Argument* to prove that the Tenant diſſeiſed the Demandant; whereupon he *ſaid that the Fine was levied as above, by which he was ſeiſed till by the Tenant diſſeiſed, abſque hoc that the Tenant any thing had of the Feoffment of J. N. before the Fine.* Yelverton ſaid J. N. infeoffed him before the Fine, priſt, and ſo to Iſſue. Br. Traverſe per &c. pl. 86. cites 21 H. 6. 12.

4. In Aſſiſe of Rent the *Plaintiff made Title to the Rent by Agreement made to P. by which the Party granted the Rent out of the Manor of B. to be paid at S. dated the Day, Year, and Place abovementioned*, where *three Places were named*; and by the beſt Opinion the Pleading is not good,

for the Uncertainty. Quod nota. Br. Pleadings, pl. 156. cites 32 H. 6. 15.

5. In *Annuity of* 10 *s.* the Plaintiff *counted by Preſcription.* The *Defendant ſaid that he held the Advowſon of B of him by the* 10 *s. which is the ſame Rent now in Demand*; Judgment of the Writ, and he was put to anſwer over; for it is only Argument. Br. Traverſe per &c. pl. 23. cites 33 H. 6. 27.

6. In *Præcipe* quod reddat the *Tenant pleaded a Releaſe of the Demandant by Name, of all the Land which he had of the Gift of one R.* He *ought to aver of what Land R. was ſeiſed, and releaſed* &c. Br. Pleadings, pl. 92. cites 2 E. 4. 29.

7. *But* where a Man releaſes *all his Right in* 3 *Acres in B. called G. which heretofore were H.'s*, there he need not plead ſuch *Averment*; for he has *given the Land a Name*, and therefore there the Releaſe is good, tho' the *Land was never H.'s*; and ſo *a Diverſity between Generalty and Specialty.* Ibid.

8. If in *Aſſiſe of an Office* a Man *pleads Admittance to the Office*, he need not ſay that the Office is *void by Reſignation* &c. but *'tis ſufficient to ſay that the Office voided, and* A. B. *was admitted by the Juſtices of Bank.* Br. Pleadings, pl. 122. cites 8 E. 4. 22.

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

9. If a Man be *bound upon Condition to ſuffer J. N. to enjoy all the Lands which one J. had*, he need *not ſhew how much the Lands were*; for he cannot have Notice thereof. *But* where I am bound upon Condition *to infeoff A. of all my Lands which were J. N.'s*, there I muſt ſhew how much the Lands were. Per Yelverton, if you be bound to deliver to W. N. all the Money in your Purſe, you ſhall ſhew how much; for you had the beſt Notice. Br. Conditions, pl. 73. cites 9 E. 4. 15.

10. In Treſpaſs he who pleads *Depoſition of an Abbot* Plaintiff, after the laſt Continuance, ſhall *ſhew before whom* &c. Quod nota bene; for it ſhall be written to him to try it; and in Debt brought againſt Executors, who plead Refuſal, he was compell'd to *ſhew before whom*, who ſaid before his own Commiſſary; for 'twas the Archbiſhop of Canterbury, and then well. Br. Pleadings, pl. 37. cites 9 E. 4. 24. & 33.

Br. Lieu, pl. 32. cites S. C. * In Br. it is as here (Speere); but in the Edit. 1586. it is (Squire) tho' in the Year-Books of the ſeveral Editions it is(Speere); but it being added in the Year-Books (and for 2 Valets) it ſeems it ſhould be (Squire.)

11. *Debt upon an Obligation*, upon Condition that *if the Defendant does releaſe, ſet over and avoid the Wages of a* * *Speere of Callice of* 18 *d. per Diem, at the Pleaſure of the Lieutenant of Callice, by ſuch a Day, that then* &c. and *ſaid that at D. in the County of Kent, at the Pleaſure of the Lord Haſtings, Lieutenant* &c. *he ſet over* &c. *before the Day* &c. Jenny ſaid he *ſhall ſhew where Callice was.* And per Littleton J. if a Man be *bound to make Feoffment of the Manor of D.* and *pleads that he made the Feoffment*, he *ſhall ſhew where the Manor is*; for it cannot be made but upon the Land. Br. Pleadings, pl. 31. cites 15 E. 4. 14.

Br. Lieu, pl. 32. cites S. C.

12. *Contra* if he be bound to releaſe, there he need not ſhew where the Manor or Land is, but he *ſhall ſhew at what Place he releaſed* by reaſon of the Viſne. Br. Pleadings, pl. 31. cites 15 E. 4. 14.

Br. Lieu, pl. 32. cites S. C.

13. *And* if I am *bound to make a Leaſe of the Manor, or grant the Office of Parkerſhip*, it is ſufficient for me to *ſay, that I leaſed or granted at ſuch a Place*, but it is not material where the Manor or Office is; Per Brian. Ibid.

14. *Treſpaſs of* 10 *Acres of Wheat*; Per Pigot, it ſhould be 10 Acres *ſown with Wheat*; Per Catesby, it is called 10 Acres of Wheat vulgarly, and ſo well; to which it was not anſwered; Quære. Br. Pleadings, pl. 107. cites 17 E. 4. 1.

15. *In Debt upon buying of a Horſe*, that *He did not buy* is no Plea; for it is only Nihil debet Argumentatively. Br. Traverſe per &c. pl. 275. cites 22. E. 4. 29.

16. Note,

16. Note, it is said, that a Return and a Declaration *shall be certain to every Intent*, and therefore because he returned *Rescous made at B. by M. by Command of N. and did not shew the Place of the Command*, the Return is ill, and the Sheriff was amerced; *But* it is said elsewhere, that a *Bar* is good if it be good to a common Intent; Note the Diversity. Br Count, pl. 58. cites 3 H. 7. 11. S. P. Br. Count, pl. 63. (bis) cites 3 E. 4. 21.

17. In *Trespass of Goods* the Defendant *pleaded*, that the Place was *His Freehold, and that* he *took the Goods there Damage feasant*; the Defendant was forced *to set down the Land in certain*, because he made Title to the Goods; *So* if he makes *Title to the Land by Feoffment*; but *otherwise* if he pleads *merely His Freehold*. Heath's Max. 64. cites 5 H. 7. 28.

18. Note, where a Man *pleads, that the Intestate had Goods moveable in several Dioceses*, he ought to *shew in what Place, and what Goods they are*, so that the Court may adjudge whether they are Goods moveable or not, and shall not stay till the Matter be traversed, and then to shew it in the Rejoinder; Per Rede, Fineux, and Brian, but Keble, Serjeant, contra. Br. Pleadings, pl. 165. cites 10 H. 7. 19.

19. In Trespass, the Defendant *justified the detaining of the Goods in Pledge by Accord of the Plaintiff, who was indebted to him in* 10 *l.* and good, without *shewing the Cause of the Debt*. Br. Pleadings, pl. 44. cites 21 H. 7. 13.

20. Error was assigned, because it was *pleaded that the Defendant, at the Vill of Westminster, in the County of Middlesex, releasedf* &c. *and after shewed at another Time another Thing to be in the Vill of Westminster, and did not say aforesaid, nor in what County*, and the Justices held, that it shall be intended in the same Vill and County, because it was mentioned in the Record before. Br. Pleadings, pl 49. cites 21 H. 7. 30.

21. A. *lets a House* to B. *with several Utensils* to B. for Years, rendring Rent; the Rent is Arrear; A. brings Debt for this Rent, and counts upon this Lease, and does *not shew* in this Count, *the Certainty of what the Utensils were*; yet it is good. So adjudged and affirmed in Error. The Rent in this Case issues only out of the House. Jenk. 196. pl. 3. Kelw. 153. b. pl. 2. Mich 1 H. 8. Falter v. Nokes, S. C.

22. General Pleading, tho' in Matters of Fact, is disallowed; As a *Covenant to make an Estate by the Advice of J. S. he* must *shew what Advice he gave*. Hob. 295. by Hobart Ch. J. cites 26 H. 8. 1. and 16 E. 4. 9.

23. A *Plea in Bar* is either to force the Plaintiff to make a Replication, or to compel him to come to an Issue, and therefore need not shew every thing certainly, for, peradventure, an Issue may not be joined thereupon, but upon the Replication. Arg. Pl. C. 28. a. b. Pasch. 4 E. 6.

24. There be 3 *kind* of Certainties; 1st. *To a common Intent*, and that is sufficient in Bar, which is to defend the Party and excuse him. 2dly, A *certain Intent in general*, as in Counts, Replications, and other Pleadings of the Plaintiff, that is, to convince the Defendant, and so in Indictments &c. 3dly, A *certain Intent in every Particular*, as in Estoppels. Co. Litt. 303. a.

25. Debt upon *Bond* conditioned, *that the Obligee*, on the 18th Day of August, 4 Jac. *should go from Aldgate in London, to the Parish Church of Stow-Market in Suffolk, within 24 Hours*. The Plaintiff *shewed, that he went* from Aldgate to the said Place, [within the Time,] *but* because he did *not shew* in his Declaration, *in what Ward Aldgate was*, it was held not good. Godb. 160. pl. 223. Mich. 7 Jac. B. R. Crosse v. Cason.

26. A *Condition that the Obligee should enjoy an Office according to a Grant of Letters Patents*, he must not plead the Letters Patents in hæc Verba, but must *shew the Effect of them, and the enjoying accordingly*. Hob. 295. per Hobart Ch. J. Arg. Mich. 15 Jac.

27. An *Aſſumpſit* to pay a Sum *pro diverſis Mercimoniis venditis* is good without mentioning the particular Wares in the Declaration; but an *Indebitatus Aſſumpſit* is not good, *without ſome general or ſpecial Conſideration* mentioned in the Declaration. Jenk. 196. pl. 3.

28. The Law requires Truth and convenient Certainty in Counts and Pleadings; this *Certainty ought to be ſhewn by him, who in Intendment of Law, has the moſt certain Knowledge* of it. Jenk 305. pl. 79.

Sty. 43. 44. S. C. but ruled to ſtay Judgment till they had ſeen the Record.

29. Treſpaſs &c. for taking *Diverſa Genera Apparatuum in Ciſta præd' exiſten'*. After a Verdict on on a Motion in Arreſt of Judgment, it was agreed, that Diverſa Genera Apparatuum were too uncertain of themſelves; but being referred to a Cheſt wherein they lay, they were reduced to ſufficient Certainty; but becauſe 2 *Cheſts were mentioned before, and the Apparel was alleged to be in Ciſta prædicta* (in the ſingular Number) ſo that it appears not in which they were, Judgment was given againſt the Plaintiff. All. 9. Paſch. 23 Car. B. R. Vincent v. Furſy.

30. Treſpaſs for breaking his Cloſe and *eating his Graſs cum averiis* &c. After Verdict, Error was brought and aſſigned, that the Declaration was incertain; and Jerman J. ſaid that *Averia* ſignifies Cattle of ſeveral Kinds, and is too General to declare upon. But by Roll Ch. J. to which Nicholas and Ask agreed, where the Thing itſelf is in Demand, for which the Action is brought, As in Trover, there it ought to be particularly named, but here *the Action is brought for Damages*; and ſo the Judgment was affirmed. Sty. 170. Mich. 1649. Brook v. Brook.

31. Treſpaſs Quare clauſum fregit, & *Arbores ſuccidit* ad Valentiam &c. Upon Demurrer, the Plaintiff pray'd Judgment as to the Breaking his Cloſe, but as to the Cutting the Trees, the Declaration was inſufficient; becauſe *not expreſſed what Kind of Trees*. 1 Vent. 53. Hill. 21 & 22 Car. 2. B. R. Thomlinſon v. Hunter.

32. Treſpaſs for entring his Houſe and taking ſeveral Things, & inter alia *unam parcellam penſarum laniarum* Anglice, a Quantity of Woollen Yarn; after Verdict for the Plaintiff, and intire Damages; Judgment was ſtaid for the Uncertainty of what Quantity Una Parcella is. 2 Lev. 195. Trin. 29 Car. 2. B. R. Wade v. Hatcher.

33. Debt againſt an Adminiſtratrix upon a Bond given by the Inteſtate for Performance of Covenants, reciting, that the Plaintiff was poſſeſſed of a *Leaſe* &c. and that he aſſigned his Intereſt to the Inteſtate, *reſerving* a Yearly Rent, and alſo 200 *Furze or Wood Fagots every Year*; the *Defendant pleaded Performance*; the Plaintiff *replied, that* he had not 200 Fagots every Year of the Inteſtate, but that 800 *Fagots were due to him from the Inteſtate, and from the Defendant after the Death of the Inteſtate for four Years*; upon a Demurrer, the Adminiſtratrix had Judgment, becauſe the Plaintiff did *not ſet forth How many Faggots were due in the Lifetime of the Inteſtate, and How many after his Death*; for perhaps the Defendant had ſeveral Matters to plead, viz. one diſtinct Matter as to thoſe not received by the Plaintiff in the Inteſtate's Life, and another as to thoſe not received after his Death. Lutw. 334. 338. Paſch. 4 Jac. 2. Tuckerman v. Tuckerman.

34. In *Aſſiſe* and *Treſpaſs* which are General, the Law allows the general Plea of *Liberum Tenementum*, and that is the common Bar; but it will not do where there is a *ſpecial Aſſignment*; but the *Uſe of it* is to inforce the Plaintiff to make his Charge certain, and it is only a favourable Plea; for the Plaintiff may have a Title, of Leaſe ſuppoſe, conſiſtent with the Plea; ſo if he has ſuch a ſpecial Title, that Plea affords him an Opportunity of ſhewing it, and Liberum Tenementum is traverſable; and beſides, if the Plaintiff has any other Plea, he may come with a Bene et Verum eſt, that it is the Defendant's Liberum Tenementum, and ſhew his ſpecial Cauſe of Action; ſo where the Defendant

pleads

pleads Liberum Tenementum, he gives a Plea traverſable; Per Powell J. 12 Mod. 508. Paſch. 13 W. 3. in Caſe of Pell v. Garlick.

35. *Caſe* for theſe Words, *you are a Whore and a perjur'd Whore*; per Quod ſhe *loſt her Marriage*. The Words being not Actionable, but in Reſpect of ſpecial Loſs, therefore that ought to be *ſhewed certainly*, for it is iſſuable. For where the *laying of particular Damage is the Giſt* of the Action, it ought to be laid ſpecially and certainly, that the Defendant may have an Opportunity of Traverſing it; and there is no Caſe where the laying of particular Damage is neceſſary to the Maintenance of the Action, but it muſt be laid certainly, and the Opinion in Hetley 8. is long ſince exploded; *ſecus*, *where* the particular Damages are *not the Giſt* of the Action, *but only* an *Aggravation*. Et Quer' nihil Capiat per Billam. 12 Mod. 597. Mich. 13 W. 3. Wetherhell v. Clerkſon. 2 Lutw. 129. S. C. but that is barely as to the Words.

36. In Covenant, a Breach aſſigned ought to be poſitive and certain; As where the Defendant covenanted that he would *diſcharge all Duties and charges due before Mich.* And the Plaintiff aſſigned for Breach, *that he did not diſcharge all Duties and Charges* for which the Premiſes were chargeable; Exception was taken that no anſwer can be given to ſuch a particular Charge. And cited Bendl. 62. pl. 110. where the Breach was *Quod Tenementum fuit ruinoſum & in Decaſu in diverſis partibus pro Defectu Reparationis*, and bad for the Uncertainty; and that he ſhould ſhew a Breach directly within the Words of the Covenant, was cited Lev. 246. Sed adjornatur. Comyns's Rep. 146. Paſch. 5 Ann. C. B. Dunmer v. Birch.

37. *Oportet ut Res certa deducatur in Judicium.* See Maxims.

(B) Intendment and Implication in Pleadings. What ſhall be intended &c.

1. IN Annuity, the Plaintiff as Dean of S. counted upon *Preſcription againſt the Perſon of Q.* and *alleged Seiſin at S.* and *did not ſay if it be in the County of N. where the Action was brought, nor in what County*, neither is it alleged whether S. be a Vill or not, and yet well; per Cur. for it ſhall be *intended in the ſame County where the Action is brought*. Br. Pleadings, pl. 61. cites 39 H. 6. 13.

2. *As in Præcipe* quod reddat *in B. it is not uſual to ſay in B. in the County aforeſaid*, or in *Treſpaſs in B.* for it ſhall be intended in the ſame County. Ibid. S. P. Br. Pleadings, pl. 89. cites 5 E. 4. 138. becauſe the County is expreſſed before in the Writ directed to the Sheriff, but *contra* in a Plea; for there no County is expreſſed before, and therefore it ought to be expreſſed after B.——Br. Lieu. pl. 52. cites S. C.——Br. Lieu. &c. pl. 44. cites 39 H. 6. 14.

3. *And alſo* it ſhall be *intended to be a Vill, if the Defendant nor Tenant does not plead that it is a Hamlet, or that there is not any ſuch Place* &c. Br. Pleadings, pl. 61. cites 39 H. 6. 13.

4. *And* where *a Man pleads* that the *Obligation* by which the Plaintiff [Defendant] was charged, was made *by Dureſs at B.* he *need not ſay that B. is a Vill, nor in what County B. is*; for it ſhall be intended a Vill in the ſame County. And Littleton agreed theſe Caſes, and the Court awarded that the Defendant anſwer over; Quod nota. Ibid. Br. Lieu. &c. pl. 44. cites S. C.

5. Treſpaſs upon the *Caſe for ſtopping of a Gutter*. The *Defendant intitled himſelf by Leaſe for Years of a Mill, and preſcribed* in his Leſſor, and his Anceſtors to ſtop for a Time to repair the Mill, and *did not ſtop*

ſhew where the Leaſe was made, and by the Reporter it ſhall be *intended where the Mill is*, as of Attornment, Surrender, or Tender of Money. Br. Lieu, pl. 45. cites 39 H. 6. 52.

Br. Pleadings, pl. 109. cites S. C.

6. In *Writ againſt a Sheriff for embezling of a Writ*, he need not *allege that he was Sheriff at the Time* of the embezzling. Br. Action ſur le Caſe, pl. 100. cites 21 E. 4. 22.

7. *So* in Writ *againſt a Gaoler upon Eſcape.* Ibid.

8. The *wearing of the Livery againſt the Statute* ſhall be intended to be where it was given. Br. Lieu, pl. 89. cites 5 H. 7. 17.

Br. Waſte, pl. 144. cites S. C.

9. *Waſte by the Prior of B.* &c. *to the Diſinheritance of the Prior and Houſe of B.* and did *not ſay of the aforeſaid Prior, nor of B. aforeſaid*, and yet well, per Cur. for it ſhall be *intended the Plaintiff.* Br. Pleadings, pl. 163. cites 10 H. 7. 5.

For more of Certainty in Pleadings in General, See Tit **Amendment and Jeofails**; and ſee the Pleadings to the ſeveral Titles throughout this Work.

Fol. 394.

* The Writ of Certiorari *is an original Writ*, and iſſues ſometimes out of B. R. and lies where the King would be certified of any Record which is in the Treaſury, or in C. B. or in any other Court of Record, or before the Sheriff and Coroners, or of a Record before Commiſſioners, or before the Eſcheator; then the King may ſend that Writ to any of the ſaid Courts or Offices, to certify ſuch Record before him in Banco, or in the Chancery, or before other Juſtices, where the King pleaſes to have the ſame certified. F. N. B. 245. (A).

* Certiorari.

(A) Certiorari. *Out of what Court* it ought to iſſue; and *to whom*; Et e contra.

1. IF the Record be pleaded in a more baſe Court than that in which it is, the Court may grant a Certiorari. 4 H. 6. 23.

Br. Failure de Record, pl. 3 cites S. C.——Fitzh. Record, pl. 17. cites S. C.

Hob. 135. pl. 181. S. C. & S. P. held accordingly; but if it were to certify the Record itſelf, as upon a Writ of Error, or a Certiorari out of B R to a Juſtice of Peace, which removes the very Record itſelf to hold Plea upon, there it were otherwiſe. But it appeared after, that the Plea was of a Conviction before the Juſtice of Gaol-Delivery, and ſo the Certiorari and all was void; but a Certiorari was awarded De Novo to the Juſtices of Gaol-Delivery.——See Trial (E) 1. S. C.

2. In an Information in Banco upon the Statute of Recuſants, if the Defendant pleads a Conviction at the Seſſions of Peace in Middleſex, and the Plaintiff pleads Nul tiel Record, the Common-Pleas will grant a Certiorari to the Juſtices of Peace to certify them of the Record, becauſe they ſhall be certified by the Tenor of the Record. Hill. 14 Jac. Banco, *Pie and Trill*, adjudged, tho' it was objected that it ought to iſſue out of Chancery, and come by Mittimus in Banco. Hobart's Reports, 182. the ſame Caſe; and there afterwards awarded to the Juſtices of Gaol Delivery.

3. So

3. So in Conſpiracy in Banco, upon an Indictment before Juſtices of Peace, **if Nul tiel Record is pleaded, a Certiorari ſhall iſſue out of Bank, and then Proceſs ſhall iſſue thereupon, till he hath done the one or the other, becauſe this is the more baſe Court.** * 4 H. 6. 23. b. † 19 H. 6. 19. * Br. Failer de Record, pl. 3. cites S. C. In this Caſe Defendants have a Day given them to bring in the Record, and fail; the Plaintiff has Judgment; this Judgment was reverſed; for the Court of C. B. ought to have awarded a Certiorari to the Juſtices of Peace, to certify whether they have ſuch a Record; for they are an inferior Court to the Court of C. B. But in this Caſe, where the Court is ſuperior, or the Juriſdictions equal, Day is given to the Defendant to have the Record in Court by a certain Day By the Juſtices of both Benches. Jenk. 114. pl. 23.

† Fitzh. Record, pl. 4. cites S. C, and Mich. 18 H. 6. ——— Br. Record, pl. 24. cites S. C.

4. Writ iſſued *to the Executors of the Coroners* of N. out of the Chancery, to ſend all their Rolls which were ſuch a Coroner's, and this ſeems to be by Certiorari, and the Rolls were certified in B. R. But Brook ſays, it ſeems that *they ſhall come firſt into the Chancery.* Br. Certiorari, pl. 9. cites 43 Aſſ. 40. 2 Hawk Pl. C. 290. cap. 27. S. 42. S. P. and cites S. C.

5. Knivet Ch. J. denied J. S. to have Writ to remove Indictment out of the Court of C. into B. R. for this Court *never writes if they have nothing before them* which may induce them to write, and therefore ſent them into *Chancery* to have a Writ to bring in the Record and the Body before them. Br. Certiorari, pl. 8. cites 41 Aſſ. 22.

6. *Treſpaſs in C. B.* they are at *Iſſue*, which *paſſed for the Plaintiff* at the Niſi Prius, and the Plea *is without Day by Depoſition of King E. 4. before the Day in Bank*, there the Plaintiff may have a *Certiorari out of the ſame Bank*, to bring the Record of Niſi Prius into Bank, and then ſhall have Re-ſummons or Re-attachment, as his Caſe lies, to have Judgment againſt the Defendant; Quod Nota. Br. Certiorari, pl. 11. cites 10 E. 4. 13. A Record may be removed into B. R. as well by Certiorari *out of B. R.* as by Certiorari *out of Chancery*, and Removal into B. R. *by Mittimus*; Reſolved. Ld. Raym. Rep. 216. Paſch. 9 W. 3. Guilliam v. Hardy. ——— Ibid. Marg. ſays, the Law is the ſame in C. B. and was ſo held by all the Judges Hill. 8 & 9 W. 3. in C. B.

7. Where the *Sheriff returns Mandavi Ballivo talis Libertatis*, and it *is alleged that there is no ſuch Liberty there*, Certiorari may iſſue from the Chancery to the Treaſurer of the Exchequer, to certify the Roll of the Liberties to the Juſtices &c. for there are all the Liberties inroll'd by the Stat. W. 2. cap. 39. Br. Certiorari, pl. 13. cites 11 E. 4. 4. Br. Retorn de Brief, pl. 98. cites S. C.

8. Certiorari iſſued *to a Juſtice of Peace who had taken Recognizance*, to make him certify it to the King. Br. Certiorari, pl. 10. cites 2 H. 7. 1. Br. Peace, pl. 11. cites S. C. ——— And if he dies, having a Recognizance in his Cuſtody, a Certiorari may be directed *to his Executor or Adminiſtrator* to certify it. 2 Hawk. Pl. C. 290. cap. 27. S. 42.

9. *Debt in C. B. upon a Judgment in B. R.* The Defendant *pleaded Nul tiel Record.* The *Plaintiff in C. B. obtained a Certiorari out of the Chancery, to ſend the Record thither, which by Mittimus might be ſent in C. B.* It was doubted, whether ſuch Certiorari was allowable, becauſe the Records of B. R. ſhall not be removed out of that Court in any other Court, the Pleas there being coram Rege. Divers Precedents were ſhewed, where ſuch Records by Mittimus were ſent out of that Court into C. B. and upon View of the Precedents the Court was of Opinion, that the Courſe of ſending them by Mittimus was well allowable; ſed adjornatur. Cro. C. 297. pl. 7. Hill. 8 Car. B. R. Lutterel v. Lea. S. C. cited Arg. Saund. 98. that the Point was doubted ——— Danv. Tit. Certiorari, pl. 4 cites S. C. cites it as adjudged, but vide Librum.

10. In *Debt* brought *in Briſtol upon a Bond*, the Defendant *pleads in Bar a Judgment in B. R. upon the ſame Bond*, and the Plaintiff *replies Nul tiel Record*, and thereupon Iſſue is joined, quod habetur tale Recordum. Lev. 222. S. C. & S. P. inferr'd by the Report.

er——Sid. 329, 330. pl. 1. S. C. and in a Nota there says, the uſual way of ſending the Record is by Certiorari and Mittimus out of Chancery to the inferior Court, and then it being under the Great Seal is pleadable there.

cordum. The Court was of Opinion in another Term, that the Record in B. R. might have been certified to Briſtol by Certiorari and Mittimus. Saund. 97. 99. Mich. 19 Car. Pitt v. Knight.

Ibid. ſays that the ſame was done in Sir Tho. Read's Caſe, late Sheriff of Hertfordſhire, where the Fine and the Cauſe of impoſing it were conſidered and determined by the Barons.

8. A *Fine* was *impoſed* on the Sheriffs of London and Middleſex, by the Juſtices of Peace of the County, *and eſtreated into the Exchequer* on a Mandate from the Chief Baron, and this being certified into B. R. the Court would not ſuffer the Return to be filed; becauſe the Fine being eſtreated, the Order was executed, at leaſt in Part, and ſo as it was not proper for B. R. to intermeddle; for that would be to anticipate the Judgment of the Exchequer, where the whole Matter may be properly determined. 2 Jo. 169. Mich. 33 Car. 2. B. R. The Caſe of the Sheriffs of London and Middleſex.

2 Hawk. Pl. C. 287. cap. 27 S. 29. ſays that it is ſaid, that the Court of B R. will never grant a Certiorari for a *Conviction of Recuſancy upon a Default at Seſſions*, becauſe by the Statute, ſuch Convictions are to be removed into the Exchequer, and from thence Proceſs is to be awarded upon them. But the Court of B. R. cannot proceed upon them, and therefore will not ſuffer them to come thither, leſt the Statute ſhould be evaded.

9. Two Juſtices tendered the Oaths appointed by the Statute 1 Will. 3. cap. 8. to Dr. Sands, which he refuſing, it was certified to the Judge of Aſſiſe, and by him into the Exchequer, according to the Statute 7 & 8 W. 3. cap. 27. A Certiorari was pray'd *to remove this Conviction of Recuſancy* into B. R. but Holt Ch. J. ſaid it could not be granted, becauſe it would evade the Statute; for when it is in B. R. it cannot be ſent back again, and the Party cannot be proceeded againſt here; and ſaid that the Caſe of the Duke of York, who was preſented upon the Statute 3 Jac. 1. cap. 4. at the Quarter-Seſſions for not coming to Church, was the only Cauſe wherein it ever was done. 1 Salk. 145. pl. 5. Paſch. 10 W. 3. B. R. Dr. Sand's Caſe.

(B) *To what Court* it may be granted.

* Cro. J. 484. pl. 1. Trin. 16 Jac. B. R. Sir John Carew's Caſe, a Certiorari was granted to remove Indictments of Riots taken in Wales, there being divers Precedents to that Purpoſe, as the Clerk of the Crown informed the Court.——2 Hawk. Pl. C. 287. cap. 27. S. 25. ſays, It ſeems to be ſettled, that ſuch a Certiorari lies to remove any Indictment taken in Wales for a Crime not capital, either at the Grand-Seſſions, or at the Seſſions of the Peace; but it is ſaid that it has never been granted to remove an Appeal from Wales; neither doth it ſeem to be clearly ſettled, that it lies to remove an Indictment of Felony from thence, for ſuch Indictments are never quaſhed, as Indictments for inferior Crimes are. Neither do I find it agreed in what Manner B. R. ſhall proceed on

1. IF Indictments are taken in Pembroke-ſhire, or Brecknock-ſhire in Wales, before the Juſtices of the Great Seſſions there, a Certiorari may be granted out of the King's Bench, to the ſaid Juſtices to remove thoſe Indictments, becauſe theſe are but the Declarations of the King, which he may remove where he pleaſes. Mich. 15 Jac. B. R. a Certiorari was granted for the Indictments of one *Collins*, and one *Bartlet*, and one * *Sir J. Cary*, but the Juſtices there would not return them, upon which the Court was of Opinion to grant an Attachment; but upon the Prayer of the Attorney-General, a new Certiorari was granted. (Quære How the Court of King's Bench may proceed upon theſe Indictments.)

on any Indictment removed from Wales; but it is said, that an Indictment of Felony so removed may be tried in the next English County, by Force of 26 H. 8. But it seems agreed, that this Statute extends not to Appeals.

2. Trin. 16 B. R. It was argued by Jenkins, that a Certiorari does not lie, by Reason of the Statute of 27 H. 8. & 34 H. 8. cap. by which absolute Power in the Affirmative, is given to the Justices there; but notwithstanding this, per totam Curiam, those Statutes bind not the King, but he may sue where he pleases; and therefore it was ordered, that a Return of the said Writ should be made by a Day, and the Clerks said there were many Precedents of the same Nature, and upon some of them the Trial had been in the County next adjoining. Mich. 13 Car. B. R. a Certiorari was granted in the Case of one *Evans*, and others, to remove Indictments of Murder taken within one of the 4 new Counties, which were Counties Marchers. In the *Court of Montgomery*, 17 were indicted of Murder done in a Quarrel between Herbert and Vaughan, and were imprison'd; but were of so great Power in the County, that a Jury could not be got to appear. The Court granted a Certiorari, and the Indictments were returned into B. R. and ordered the Trial to be in Shropshire. Lat. 12. Hill. 1 Car. Herbert and Vaughan's Case.

3. Mich. 9 Car. B. R. A Certiorari was granted to remove the Indictments of one *Chedle* and others, of petit Treason, for the Murder of *Sir Richard Bulkly*, which were taken in Anglesey, though this be in North-Wales, and a County of itself, at the Time of the making of the Statute of Rutland. And the Court said, that although they were not yet resolved that it could be tried in the next English County, yet they had Power to remove the Indictments, to see whether the Indictments are good, and to (*) quash them if they are not good, and if they are good, to remand them back again by Mittimus, by Force of a Statute made tempore H. 8. and Justice Jones said, that in the 31 & 32 Eliz. upon the same Reason a Certiorari was granted in Banco Regis, to remove an Indictment taken in Caernarvan, although they were not resolved that it could be tried in the next County. But after there were several Arguments made at the Bar, whether the Certiorari lies or not; and it was not resolved in the End, but the Parties tried it in the proper County. Cro. C. 248. pl. 8. Hill. 7 Car. B. R. at the End of Sonthley v. Price, says, Note the Statute * Fol. 395. of 26 H. 8. cap. 6. allows that Indictments may be in Counties next adjoining; but there is not any 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. 331. pl. 16. S. C. Dubitatur, and appointed to be argued, whether a Certiorari was grantable.——S. C. of Chedley, and also of Soutley v. Price, cited Vent. 93. Trin. 22 Car. 2. B. R. Anon. Where a Certiorari was granted to remove an Indictment of Manslaughter out of Wales; and ordered that the Prosecutor should be bound by Recognizance, to prefer an Indictment in the next English County; but the Court at first doubted whether they might grant it, in Regard it could not be tried in an English County; but an Indictment might have been found thereof in an English County, and that might be tried by 26 H. 8 cap. 6 ——Same Cases cited Vent. 146. Trin. 23 Car. 2. B. R. in Morris's Case, and says that in Chedley's Case, a Certiorari was granted, as was likewise in the principal Case to remove the Indictment found in Anglesey, which was afterwards tried in the next English County; and the Court held, that so it might be in the principal Case of Morris, who was indicted for Murder in Denbigh, and a Certiorari to remove it into B. R. in order to try it in the next English County.

4. If a Certiorari be directed to the Justices of Peace in the County of Durham, to certify an Indictment taken there before them, they ought to return it. Mich. 10 Car. B. R. *Clark's* Case, where they returned that it was a County Palatine by Prescription, and the Court advised thereupon. It is the constant Practice to grant Certioraries into the Counties Palatine of Durham and Lancaster, which yet had original Jurisdiction, and the same Courts among themselves: Per Holt Ch. J. Ld. Raym. Rep. 581. Trin. 12 W. 3. obiter.

5. [So] 11 Car. B. R. in one *Simpſon's* Caſe, a Certiorari with a Pain was granted to Durham, to remove an Indictment of Barretry there taken before the Juſtices of the Peace; for they were made Juſtices by Statute.

*Cro. C. 252. pl. 3. Tyndale's Caſe. S. C. & Ibid. 264. pl. 13. S. C. the Court awarded a Pluries Certiorari directed to

6. A Certiorari lies to the Juſtices of Peace within the Cinque Ports, to certify an Indictment of Sodomy taken before them; becauſe this is made Felony of late Time, of which they cannot hold Plea there, without a Charter of late Time. Trin. 8 Car. B. R. *Hopſtill* * *Tilden's* Caſe reſolved; and the Indictment taken in Sandwich removed accordingly, and tried thereupon and found Not Guilty. Mich. 8 Car. B. R. † *Dugdale's* Caſe, ſuch a Certiorari was granted, and the Indictment taken at Dover removed accordingly.

the Mayor and Jurats; and Ibid. 291. pl. 1. S. C. the Record was removed into B. R. and the Defendant try'd there and acquitted.

† Cro. C. 253. at the End, pl. 3. cites Ringden's Caſe. Mich. 8 Car. and ſeems to intend S. C. where a Certiorari was pray'd to the Mayor and Juſtices of Dover, being within the Cinque-Ports in a like Caſe; but it was objected that it ſhould be directed to the Lord Warden of Cinque Ports, as other Proceſs uſually is; but upon Debate, all the Court agreed that it ſhould be immediately directed to the Juſtices, before whom the Indictment was; for they hold Plea of it as Juſtices of Peace, by Virtue of their Commiſſions, and not by their ancient Charters of Preſcription, which was awarded accordingly. ——2 Hawk. Pl. C. 286, 287. cap. 27. S. 24. cites the principal Caſe of Roll, and ſays that by the Reaſon there given, it ſeems to be implied that Roll's Opinion was, that Indictments in ſuch Courts of Crimes, whereof they have Juriſdiction, are not removeable; but ſays that other Books there cited by him ſeem to ſpeak generally of all Indictments; and to lay it down as a Rule, that the Privilege of the Courts of the Cinque Ports uſed Time out of Mind, that the King's Writ does not run there, is to be intended only of Civil Cauſes between Party and Party.

It was ſaid by one of the Clerks of the Crown, that a Certiorari had many times been return'd from Durham. Lat. 160. Trin. 2 Car. in Jobſon's Caſe.

7. The Plaintiff ſet forth, that his Father and he are jointly ſeiſed for Life of the Lordſhip of Barrington in the County Palatine of Durham, and that the Defendant ſues his Father for thoſe Lands before the Chancellor of Durham; and for that it was informed that the Plaintiff *dwells in Ratcliff in the County of Middleſex*, and that the Plaintiff's Father is an old diſeaſed Man, and *not able to follow his Suit*; therefore a Certiorari is granted, directed *to the Chancellor of Durham*, to certify into this Court the whole Matter depending before him. Cary's Rep. 68, 69. cites 2 Eliz. Fol. 200. Hilton v. Lawſon.

8. The Regiſter makes mention of a Certiorari to remove a *Record taken at Calice*. Cro. C. 484. pl. 1. Trin. 16 Jac. B. R.

9. Where *Judgment is given before the Sheriff, and the Tenant has no Goods &c. in that County*, he may have a Certiorari to remove the Record into B. R. and there have Execution; for that is not Placitum. 2 Inſt. 23. ad finem.

10. If there be an Indictment for a Forcible Detainer upon the 8 H. 6. before Juſtices of the Peace in the *County Palatine of Cheſter*, it may by Certiorari be removed in B. R. for the Juſtices of Peace there, being made by Letters Patents, their Proceedings, quatenus Juſtices of Peace, muſt be ſubject to B. R. Per Bacon, and a Certiorari awarded accordingly; and the Indictment being return'd, was quaſhed. All. 49. Hill. 23 Car. The King v. Simmons.

11. A Certiorari was denied to remove an *Order of Seſſions for chuſing one Conſtable*, becauſe if it had been granted, it might have prevented Juſtice being done by the Juſtices of Peace, but bid them appeal to the Juſtices of Aſſiſe; but a Writ was granted to compel the Conſtable to be Sworn. Sty. 126, 127. Trin. 24 Car. B. R. Anon.

12. By the Statute 15 *Car. 2. cap.* 17. It is *enacted, That there ſhall be certain Commiſſioners, who ſhall have Power to receive Claims concerning the Fens* in the Counties of Cambridge, Huntingdon &c. *and to ſettle their Bounds, and make and return their Decrees into the Petty-Bag in Chancery.* After Conſideration of the Statute, it was reſolved, that no Certiorari ſhall be granted, and if any be, there ſhall be a Procedendo; for

for *it is a new Judicature, and absolute in the Commissioners* by this new Law, *with which this Court has nothing to do if they proceed according to the Statute*; but if not then all is void, Et coram non Judice, and the Parties are at Liberty to examine it in an Action at Common Law. Sid. 296. pl. 20. Trin. 18 Car. 2. B. R. Ball v. Parteridge.

13. The Question was whether a Certiorari lay to *Winchelsea*, being *one of the Cinque-Ports*, for a Record made there, whereby they had taxed the Foreign, and which they insisted was made for the Preservation of the Corporation, and to raise Ammunition to provide against Invasion of Foreigners; and that Breve Domini Regis non currit to the Cinque-Ports. The Counsel that argued against the Certiorari, confessed that in Matters which concerned the King's Revenue, or in Matters criminal, or where the Liberty of a Subject is concerned, a Certiorari would lie; but that this Case was none of those, and that they had always Liberty of taxing the Foreign for Defence of the Corporation in Time of War, especially when in Danger of Foreign Invasion. Hale Ch. J. said they ought to shew some Jurisdiction, to which the Party, if injur'd, might appeal, otherwise the Corporation will be Party and Judges, and tax the Land of the Foreign to what Value they please; and said there were 3 Sorts of Suits, 1st, Between Party and Party, and there you must return that you have Jurisdiction. 2dly, Matters of the Crown; and 3dly, Matters of a middle Nature, as where the King and his Subjects are both concerned, as in this Case; sed Curia advisare vult. Freem. Rep. 99. pl. 111. Pasch. 1673. B. R. Winchelsea Port's Case. 2 Lev. 86. The King v. The Corporation of Winchelsea, S. C and the Return adjudged Insufficient; and this Case is not merely Civil between Party and Party, but between the Corporation and the Party.

14. A Rule of Court was made that no Certiorari should go *to the Sessions of Ely* without Motion in Court, or signing of it by a Judge in his Chamber. 3 Mod. 229. Trin. 4 Jac. 2. B. R. in a Nota. A Certiorari lies out of C. B. *to the Court of Ely*, and to any Franchise which hath Conusance of Pleas, and which is more than a bare Franchise tenere Placita; per Cur. 1 Salk 148. pl. 13. Hill. 1 Ann. B. R. Cros v. Smith.——12 Mod. 643. Hill. 13 W. 3. S. C. & S. P. accordingly.——3 Salk. 79. pl 4 S. C. & S. P.——7 Mod 138 S C & S. P. admitted.——2 Ld. Raym. Rep. 836. S.C. & S. P. accordingly, and so a Judgment given in the Court of the Bishop of Ely was reversed.

15. The Court denied to grant a Certiorari to the *Old Baily*, saying they never do it, because the Judges sit there; yet Quære how B. R. can legally take Conusance of Proceedings there without a Certiorari, the Old Baily being another Court, and possess'd of their own Records till removed by Certiorari &c. Cumb. 319. Hill. 6 W. 3. B. R. Monger's Case.

16. A Motion was made for a Certiorari to remove an Indictment of Barretry found at the Sessions of Gaol-Delivery; and one **Nurse's Case** was cited, wherein such a Motion was granted. But per Cur. 'tis never granted to remove an *Indictment found before Justices of Gaol-Delivery* without some special Cause. So it is of the *Old Baily*; and if such Certiorari should be granted, and the Cause suggested should afterwards appear false, a Procedendo should be awarded. 1 Salk. 144. pl. 2. Pasch. 9 W. 3. B. R. Anon.

17. Indictment in the Grand Sessions of Wales, and Certiorari granted to remove it, at the Prayer of the Defendant; and now a Supersedeas was pray'd to the Writ, because a Certiorari does not lie *into Wales*; or if it does, it is only when the King directs or desires it, and not at the Desire of the Defendant; but the Court held that Certiorari lies *either at the Desire of the King or of the Party, according as the Court shall think fit*; and accordingly a Rule was given for the Return of the Certiorari, and that the Indictment should be tried in the next English County. 12 Mod. 197. Trin. 10 W. 3. The King v. James.

18. *In-*

18. *Indictment* being found againſt the Defendants in London for printing and publiſhing a *Paper* intitled *the Black Ram*, wherein certain Perſons were ſcandalouſly deſcribed, ſo as any Body that knew them might know them to be the ſame Perſons; and among others the Recorder of London was maul'd; and Certiorari was moved for by Montague, inſinuating that it would be hard to be tried at the *Old Baily*, *where ſome of the Judges might take themſelves to be ſcandalized* by that Paper; and the Court ſaid they ſeldom would grant Certiorari to the Old Baily, yet they granted one here, tho' it could not be tried here this Term; for Certiorari *into a foreign County ought to* have 15 *Days between its Teſte and Return*; and tho' by *Conſent* it may be return'd immediately, yet ſtill there muſt be 15 Days between the Teſte of the Writ and Return of the Jury, which could not be within this Term. 12 Mod. 250. Mich. 10 W. 3. The King v. Dutton & al' Printers.

19. Certiorari to remove a Conviction may go *to any new conſtituted Court, or Juriſdiction of Record*, As to the Cenſors of the College of Phyſicians, becauſe B. R. has a Power to keep all limited Juriſdictions within their proper Bounds; per Holt Ch. J. Carth. 494. Paſch. 11 W. 3. B. R. in Caſe of Dr. Groenvelt v. Dr. Burnell.

12 Mod. 390. S. P. in S. C. and Holt Ch. J ſays that the Commiſſioners were obliged to obtain the King's Pardon for their Offence; and that Mr. Callice, in his Reading upon the Statute of Sewers, holds that

20. Where any *Court* is *erected by Statute*, a Certiorari lies to it; ſo that if they perform not their Duty, B. R. will grant a Mandamus. There was a Miſtake made by the *Commiſſioners of Sewers*, grounded upon this, that where the 23 *H.* 8. *cap.* 5. ſays that the Commiſſioners, in ſeveral Caſes there mentioned, ſhall certify their Proceedings into Chancery; afterwards by 13 *Eliz. cap.* 9. it is enacted that hereafter the Commiſſioners ſhould not be compell'd to certify or return their Proceedings, which they interpreted to extend to a Certiorari, and thereupon they refuſed to obey the Certiorari; but they were all committed; and yet the Statute does not give Authority to this Court to grant a Certiorari; but it is *by the Common Law* that this Court will examine if other Courts exceed their Juriſdiction; Per Holt Ch. J. in delivering the Opinion of the Court. Ld. Raym. Rep. 469. Paſch. 11 W. 3. in Caſe of Groenvelt v. Burwell.

their Orders are removeable here by Certiorari. * Raym. 186 S. C. accordingly.——Vent. 66. Paſch. 22 Car. 2. B. R. Smith's Caſe.——See Tit. Sewers (E) pl. 2.

Ld. Raym. Rep. 580. The King v. the Inhabitants of ..... in Glamorganſhire, S. C. ſays that the Orders were for levying Money by virtue of the Statute of 23 Eliz. cap. 11. for repairing Cardiff-Bridge.

21. Certain Orders of Juſtices, made purſuant to a private Act of Parliament for repairing Cardiffe-Bridge, were removed hither by Certiorari; and one Objection was made, that this Court could not ſend a Certiorari *to the Juſtices of the Peace in Wales*, becauſe it might be ſent by the Court of Grand Seſſions, which was as B. R. and which by this Means was skipp'd over and render'd uſeleſs. Sed non allocatur. 'Tis the conſtant Practice to ſend them into the Counties Palatine, and yet they have original Juriſdiction, and the ſame Courts within themſelves. The Council for the Welch Juriſdiction ſaid this differ'd, becauſe the Juriſdiction of Counties Palatine was derived from the Crown; but this was not regarded. 1 Salk. 148. pl. 7. Trin. 12 W. 3. B. R. Cardiffe-Bridge's Caſe.

It was objected that a Certiorari would not lie; and cited the Caſe of Ball v. Partridge, 1 Sid. 296. Sed non allocatur; for this Court will examine the Proceedings of all Juriſdictions erected by Act of Parliament; and if they, under Pretence of ſuch Act, proceed to incroach Juriſdiction to themſelves, greater than the Act warrants, this Court will ſend a Certiorari to them to have their Proceedings returned here, to the End that this Court may ſee that they keep themſelves within their Juriſdiction, and, if they exceed it, to reſtrain them. And the Examination of ſuch Matters is more proper for this Court; As in the Caſe in Queſtion, Whether the Act of Q. Eliz. impowers the Juſtices to raiſe Money to mend Wears, and to determine the Doubt upon the Act. As to the Caſes of Orders made by the Commiſſioners of Sewers, and of the Fens, the Court is * cautious in granting Certioraries, and firſt they make Enquiry into the Nature of the Fact, and what will be the Conſequence of granting the Writ, becauſe the Country may be drowned in the mean time, whilſt the Com-

Commiſſioners are ſuſpended by the Certiorari; but that is only a diſcretionary Execution of the Power of the Court.——Comyns's Rep. 86. pl. 54. Trin. 12 W. 3. B. R. The King v. .... ſeems to be S. C. but is very ſhort; ſays the Juſtices ought to return the private Act upon which their Order is founded, and that a Certiorari was granted.—— 12 Mod. 403. S. C. and ſays it was ruled that they ſhould make a Return, and recite the Statute in it.

* 12 Mod. 390. S. P. accordingly by Holt Ch. J. obiter.

22. A Certiorari lies to *exempt Juriſdictions*; per Holt Ch. J. in delivering the Opinion of the Court. 1 Salk. 148. pl. 13. Hill. 1 Ann. B. R. Croſs v. Smith. 12 Mod 644. S. C. & S. P. —3 Salk. 79. pl. 4. S. C. & S. P. —2 Ld. Raym. Rep. 837. S. C. & S. P. —— So that there is *no Court or Juriſdiction that can withſtand* a Certiorari; As in the Caſe of a cuſtomary Proceeding by foreign Attachment in London, if the Defendant cannot find Bail below, he may ſue a Certiorari, and upon putting in Bail in the ſuperior Court, the Cauſe will proceed there, and all the Proceedings below upon the Attachment are diſſolv'd; per Holt Ch. J. in the ſeveral Books above cited.

23. It ſeems to be admitted in the late Reports, that a Certiorari may be granted to remove any *Indictment from London or Middleſex*; but it is ſaid that he who prays it ought to give 3 *Days Notice* to the other Side. Alſo it is ſaid, that by a Certiorari to London *the Tenour* of the Indictment *only ſhall be removed* by the City Charters; and it ſeems that anciently that City inſiſted on a Privilege, that all Indictments and Proceedings for any Cauſe, except Felony, ſhould be tried and determined there, and not elſewhere. 2 Hawk. Pl. C. 287. cap. 27. S. 26.

(B. 2) *What Records* ſhall be *removed* by it.

1. If a Certiorari be awarded out of B. R. the laſt Day of Trinity Term to remove all Indictments of forcible Entry againſt certain Perſons, where they are not indicted at the Time of the Award of the Certiorari, nor at the Time of the Delivery of the Writ to the Officer, but after they are indicted in the Vacation before Michaelmas-Term, they ought to be removed by Force of this Writ. Mich. 37 & 38 Eliz. B. R. *Cheney's Caſe*, per Curiam. S. C. cited Arg. 2 Ld. Raym. Rep. 1200.

2. If a Certiorari iſſues to remove an Indictment of forcible Entry againſt ſeveral, naming them, whereas but 4 of them are indicted, yet it ought to be removed. Mich. 37, 38 Eliz. B. R. *Cheyney*, per Curiam.

3. If *Certiorari* iſſues *to Juſtices of the Peace to ſend the Indictment of J. N.* and *in the ſame Indictment* 20 *others* are indicted, yet this is a good Certificate of the Record, and the Juſtices of the Peace *ſhall not mention any thing of the others in their Certificate*; Per Markham Ch. J. Br. Record, pl. 57. cites 6 E. 4. 5.

4. A Certiorari *will remove any Indictment if it be before the Return thereof, tho'* it be *after the Teſte of the Writ*. Agreed per Cur. 2 Keb. 142. pl. 13. Hill. 18 & 19 Car. 2 B. R. The King v. Buck.

5. A Certiorari was brought *to remove an Indictment of Force againſt L. and T. unde indictati ſunt*. An Attachment was pray'd for not removing an Indictment againſt L. only. The Court held *this Writ joint and ſeveral*, but that a Writ of Error will not remove a Several Indictment. 3 Keb. 102. pl. 2. Hill. 24 Car. 2. B. R. The King v. Levet. S. C. cited Arg. 2 Ld. Raym Rep. 1199, 1200. Mich. 4 Ann. in Caſe of the Queen v. Bains; but it was anſwered by the other Side that this Caſe in 3 Keb. was only, that a Certiorari might be joint and ſeveral, which a Writ of Error could not be, which he agreed; but that then there muſt be ſeveral Words, as it muſt be intended that there were in that Caſe. Ibid. 1202 —— And ibid. 1203. Powell J. ſaid he thought they would have ſearched for the Writ in that Caſe of 3 Keb.

Keb. becauſe, notwithſtanding any thing ſaid in the Book, the Writ in that Caſe might be joint and ſeveral; and Holt Ch. J. ſaid that where a Report of a Caſe is doubtful, it ought to be verified by the Record.

Ld. Raym. Rep. 609. Mich. 12 W. 3. S. C. ſays the Return was of one Indictment againſt B. and of another againſt W. and another againſt F. in which they were indicted alone by themſelves. On Motion to quaſh the Indictment againſt B. it was held, that it was not removed before B. R. for this is not the Indictment intended, the Certiorari meaning the Indictment in which B. W. and F. were jointly indicted; but had it been Vel per quod aliquis eorum Indictatns exiſtit, it had been otherwiſe.——3 Salk. 78. pl. 2. S. C. & S. P.——S. C cited as of a Certiorari to remove *all Orders againſt A. B. and C* and the Caſe was, that there was a joint Order againſt A. B. and C. and another Order againſt B. and C. and another againſt A. only; it was reſolved, that the Joint Order was only removed, and not that as to B. and C. only, and the other againſt A. only. 2 Ld. Raym. Rep. 1200. Mich. 4 Ann. Arg. cites it as the Caſe of the King v. Foſſebrook; but ſays, that the Reaſon of the Reſolution was, becauſe the Court took it that the firſt was the only Order intended to be removed.——Ibid. Mr. Broderick ſaid, that the Caſe of Foſſebrook was as it is cited, but that it was reſolved by the three Judges, abſente Holt Ch J.——Ibid. 1203. Powell J. asked the Counſel, how they anſwer the Caſe of the King v. Foſſebrook.——2 Hale's Hiſt. Pl. C. 212. cites Mich. 22 Car. 1. B. R. Adjudg'd, that ſuch a Certiorari to remove all Indictments againſt A. and B. removes all wherein A. or B. are indicted, either alone, or together with other Perſons, and cites alſo 1 R. 3. 4. b. and 16 H. 7. 16. a.

6. *B. W. and F. were jointly indicted* at the Seſſions, and *B. was alſo ſeverally indicted, and W. F. and J. S. were indicted in another Indictment*, and a Certiorari was awarded, *to remove all Indictments in which the ſaid B. F. and W. were indicted, without ſaying, vel aliquis eorum Indictatus exiſtit.* Adjudged, that only the joint Indictment was removed, and that the Juſtices below may proceed on the others without Contempt. 1 Salk. 146. pl. 9. Mich. 11 W. 3. B. R. the King v. Brown, Wood, and Foſſebrook.

If A. B. C. and D. be actually indicted in one Indictment for one Offence, and a Certiorari be to remove all Indictments againſt A. and B. this will be ſufficient to remove the Indictment againſt A. and B. and alſo it removes the Indictment as to C. and D. For the Juſtices may deliver the Indictment per Manus Proprias. Mich. 37 & 38 El. B. R. Woodward's Caſe contra 6 E. 4. 5. a. 2 Hale's Hiſt. Pl. C. 213, 214.

But if the Indictment be but one, but the Offences ſeveral, as if A. B. C. and D. be indicted by one Bill for keeping ſeveral diſorderly Houſes, a Certiorari to remove this Indictment againſt A. and B. removes not the Indictment as to C. and D. for tho' they are all comprized in one Bill, yet they are ſeveral Indictments, and ſeveral Offences, and ſo the Record is in B. R. virtually and truly as to A and B. but as to C. and D. the Record remains below. 2 Hale's Hiſt. Pl. C. 214.

But if the Juſtices per Manus ſuas proprias deliver the Bill into Court againſt all of them, as they may, then if a Record be made of that Delivery, the Indictment is entirely removed againſt A. B. C. and D. becauſe not done upon the Writ of Certiorari, but per Manus ſuas proprias; but otherwiſe it is where the Offences are ſeveral, and the Indictment againſt A. and B. is removed by Writ, and by a Return indorſed upon the Writ, for then that ſingle Indictment that concerns A and B. is removed, and not the others, where the Offences are ſeveral, and ſeverally charged. 2 Hale's Hiſt. Pl. C. 214.

But, as I ſaid, if there be one Indictment againſt A. B. C. and D for one Murder or Burglary, another againſt the ſame Perſons for Robbery, and a third againſt the ſame Perſons for a Rape, a Certiorari to remove all Indictments againſt A. and B. removes all theſe ſeveral Indictments againſt A B. C. and D. for tho' in Law each of them be ſeverally a Felon, yet inaſmuch as they are jointly charged, they ſhall be all removed as to A. B C. and D. by Virtue of this one Writ, contrary to the Opinion of Markham 6 E. 4. 5. a. 2 Hale's Hiſt. Pl. C. 214.

S. P. held accordingly, Mar. 27 pl. 63. Trin. 15 Car. B. R. Anon.—— A. and B. were indicted of Murder. B. flies, and A. brought Certiorari to remove the Indictment into B. R. it was ſaid, that the whole Record was removed, and that there cannot

7. Two being indicted, one of them removed it by Certiorari, entring into Recognizance to carry it down to Trial; and it was reſolved, that the *Indictment* was *removed quoad both*, and that the Defendant who removed it *ſaves his Recognizance by trying it as to himſelf*; for that the Acquittal of one is not an Acquittal of the other, nor vice verſa; neither can it be exacted of him to enter into a Recognizance to try againſt both; and that, notwithſtanding the *other Defendant* had appeared below, and now by the Removal is put without Day, wherefore if he *do not come in above Gratis*, Proceſs of *Outlawry ſhall go againſt him*; and for this Cauſe it was, that before the Statute the Courſe was to grant no Certiorari's to remove Indictments from London or Middleſex, without the Defendant gave Bail to try it; and the Ch. J. ſaid, it is always indorſed on the Back of the Certiorari, at whoſe Requeſt it is granted; for tho' it be the King's Command, yet it is a Prayer of the Party, and the End of Certioraries is to do Juſtice, and prevent Vexation and Oppreſ-

ſion;

ſion; and if 2 be indicted jointly, and join in Plea, there ſhall go but one Venire Facias; ſecus if they ſever. 12 Mod. 601. Mich. 13 W. 3. The King v. Worſenholm and Weeks. be a Tranſcript in this Caſe, becauſe the Writ is Recordum

& Proceſſum cum omnibus ea tangentibus, but the Chief Juſtice doubted of it, and ſaid, that the Opinion of Markham, in one of our Books, is againſt it, and that it would be miſchievous ſhould it be ſo, becauſe in ſuch Caſe B. might be attainted by Outlawry without his knowing of it. Mar. 112. pl. 190. Trin. 17 Car. Anon.——2 Hawk. Pl. C. 292. cap. 27. S. 5. ſays, that if divers are indicted in the ſame Indictment, and ſome find Sureties, and others not, the Indictment ought to be removed as to thoſe who find Sureties, becauſe they ſhall not be prejudiced by the Default of the others; and that, as ſome ſay, it ſhall be removed as to the others alſo, and cites Keb. 231. pl. 51. 6 E 4. 5. a. and Mar. 111. [but miſprinted for 112]

8. A Certiorari iſſued to the Court of Ely, to certify *all Pleas tunc nuper levat'*. The Plea [Plaint] *was levied after the Teſte, and before the Return.* Per Cur. it was well removed; for a Certiorari, as well as a Recordare, ſhall remove *all Pleas pending at the Time of the Return.* Mod. 138. Hill. 1 Ann. B. R. Smith v. Croſs. 1 Salk 148. pl. 13. Croſs v. Smith, S. C. & S. P. accordingly. —12 Mod. 643. S. C.

but I do not obſerve S. P.——3 Salk. 79. pl. 4. S. C. but not S. P.——2 Ld. Raym. Rep. 836, 838. S. C. & S. P. held accordingly, per tot. Cur——2 Ld. Raym. Rep. 1305. Mich. 8 Ann. Anon. S. P. per Powell J. accordingly.——S. C. cited Arg. 2 Ld. Raym. Rep. 1202.

9. A Certiorari was *to remove omnes Ordines againſt A. and B. nuper Factor*; the *Order removed was againſt B. only*, and this Order appeared to be *made after the Teſte of the Writ.* The Queſtion was, whether this Order was well removed, and the Court ordered Counſel of both Sides to ſpeak to this Point, and after Argument the Certiorari was quaſh'd, becauſe it was *not ſufficient* to remove this ſeveral Order, and a new Writ was granted; *but it was agreed to be a good Writ to remove a joint Order againſt A. and B.* 2 Ld. Raym. Rep. 1199. Mich. 4 Ann. B. R. the Queen v. Bains. 1 Salk. 151. pl. 21. S. C. but this Point of the Order removed being made ſubſequent to the Teſte of the Writ, does not appear there.

(B. 3) Directed. To what Perſons.

1. SErjeant Hawkins ſays, 2 Hawk. Pl. C. 290. cap. 27. S. 43. that all the Precedents he is able to find of Certioraries *for the Removal either of Indictments or Recognizances from Seſſions, are directed either to the Juſtices of Peace for the County generally, or to ſome of them in particular by Name, and not to the Cuſtos Rotulorum*; and, according to Lambard, they are never directed to him; yet it is taken for granted in the Year-Book of H. 7. [2 H. 7. 1. pl. 2.] That after a Recognizance for the Peace is brought into Cuſtos Rotulorum, it ſhall be certified by him; but ſurely, if the Certiorari be directed generally to the Juſtices of the County, or any one of them, it may be as well returned by any of them, as by the Cuſtos Rotulorum; and he queſtioned whether it can be well returned by him, unleſs he do it as Juſtice of Peace, naming himſelf ſuch; but if there are ſufficient Precedents to warrant the directing the Certiorari to him as Cuſtos Rotulorum, there can be no Doubt but that a Return by him as ſuch will be good.

2. An *Aſſiſe is taken before one of the Juſtices of Aſſiſe only*, and the Clerk of Aſſiſe does not wait the coming of the other Juſtice of Aſſiſe, yet *the other Juſtice by Certiorari may certify the ſame Record.* Br. Record &c. pl. 81. cites 11 H. 7. 5. 2 Hawk. Pl. C. 290. cap. 27. S. 9. and cites S. C.

3. A Certiorari may be directed *to the Sheriff and Coroner to remove an Appeal by Bill before the Coroner*, becauſe the Sheriff has a Counter-Roll; *but*

but if the Certiorari be directed *to the Sheriff only* in Case of Appeal, or Indictment, or Death, it is not sufficient to remove the Record, because *he is not Judge of the Cause, but has only a Counter-Roll.* 2 Inst. 176.

* S. P. accordingly, 2 Hawk. Pl. C. 290. cap. 27 S. 42.

4. If * *one of the Justices of Assise dies* before the Return, a Certiorari may be awarded out of the Court of Common-Pleas to the Survivor, to certify the Verdict; if *both the Justices die*, the *Clerk of the Assise* may bring it in without a Certiorari, or a Certiorari may be awarded to the *Executors or Administrators* of them, to certify the Record. 2 Inst. 424.

S. P. notwithstanding Regularly it ought to be directed to the Judge of the inferior Court,

5. A Certiorari to remove a Record ought not to be made but *to an Officer known* to have the Custody of the Record, and upon a Surmise that he hath such a Record in his Hands; Per Roll Ch. J. and therefore we will not upon an Affidavit grant a Certiorari, but upon a Surmise made upon the Roll. Sty. 371. Pasch. 1653. B. R. Anon.

and in some Cases to others, as shall be most agreeable to the usual Course of approved Precedents, which seems to be the best Guide whereby to judge of this Matter, and accordingly it seems, that for an Indictment or Confession of an Approver before a Coroner, it shall be directed to the Coroner alone; and for an Appeal both to the Sheriff and Coroner; and for an Indictment in the Cinque Ports to the Mayor and Jurats; and for an Indictment at an Assise in a County Palatinate to the Chancellor of such County, who shall send for it to the Justices of Assise.

See Tit. Record (Q)

(C) *How* it shall be *certified.* In what Cases the *Tenor* of the Record shall be certified, and in what Cases the *Record itself.*

Hob. 135. pl. 181. S. C. & S. P. accordingly. — See (A) pl. 1. S. C.

1. WHERE the Court which awards the Certiorari cannot hold Plea upon the Record itself, **there only a Tenor shall be certified, because otherwise if the Record itself should be removed, there would be a Failure of Right afterwards.** Hill. 14 Jac. Banco, *Pie and Thrill.*

Hob. 135. pl 181. S. C. & S. P. accordingly — See (A) pl. 1. S. C.

2. As **in an** Information in Banco upon the Statute of Recusants, **if an** Indictment and Conviction **of the Defendant to be a Recusant is pleaded, and** thereupon Nul tiel Record is pleaded, **and a** Certiorari issues de Banco to the Justices of Peace **before whom the Conviction was, the Justices ought only to certify the Tenor, because the Common-Pleas cannot hold Plea upon the Record itself if it should be removed.** Hill. 14 Jac. Banco, *Pie and Thrill*, **resolved.**

3. If one brings *Debt on a Recovery* in an inferior Court, *as in a Court of Piepowders* &c. there it is not necessary for the Party to have the Record itself, nor the Tenor of it; *So* if one brings *Debt in C. B. on Damages recovered in B R. or in the Court of Norwich*; but if *Nul tiel Record be pleaded there*, it is sufficient if the Tenor of the Record be removed into Chancery by Certiorari, and sent thence by Mittimus. F. N. B. 242. (B) in the new Notes there (a) cites 7 H. 6. 19. See 19 H. 6. 79. & 80. Accordant Dyer 187.

4. Where one is to *sue Execution of a Record in another Court, as* where it is to sue Execution *in C. B. on a Recovery in Antient Demesne, or before Justices of Assise, or of Oyer and Terminer*, there the Record itself ought to be removed into Chancery by Certiorari, and the said Record with the Certiorari sent into C. B. by Mittimus; and *so if an Attaint is before sued on such a Recovery*, 34 H. 6. 251. *But when Execution is to be sued in C. B. upon a Record which remains in the Treasury there, as on a Fine, Recovery* &c. (Note, all those Records were removed into the Receipt of the Exchequer circa Temp. 9 H. 4. 37 H. 6. 17.) But where it is in the

the Chancery, as on a Petition among Parceners, Dyer 136. there they will not ſend in the Record itſelf, but a Certiorari to the Chamberlain and Treaſurer, and a Mittimus of the Tenor of the Record. See the Caſe 39 H. 6. 4. per Priſot. And if the Tenor of the Record be before the Certiorari filed in Chancery, they will not ſend the Certiorari into the Receipt (Treaſury), nor ſend in the Tenor which is there filed, but only *Tenorem Tenoris*; and it ſeems that is ſufficient. 17 H. 6. 17. 28. F. N. B. 242. (B) in the new Notes there (a).

5. Note, when a Man *recovers*, and *has not Execution*, and the *Records are removed into the Receipt*, *or* Treaſury, there the Party who would have Execution may ſue *Certiorari out of the Chancery to the Chamberlain and Treaſurer, to certify the Record in Chancery*, and when it comes there, they may ſend it *by Mittimus into B. R. if it came thence*, *and into C. B. if it came thence*, and there to ſue Execution; And per Moyle J. the Chancery do not uſe to write for the Record and Proceſs, but for the Tenor of the Record and Proceſs, but the Juſtices of Aſſiſe uſe to write for the Record and Proceſs, and the ſame is ſaid elſewhere for a Fine levied; Note a Diverſity. Br. Certiorari, pl. 1. cites 37 H. 6. 16.

6. If a Man be *convict before the Sheriff upon a Re-diſſeiſin*, *and Peſt-diſſeiſin*, then he ſhall not be delivered out of Priſon without the King's ſpecial Command, and then he ought to ſue a *Certiorari to remove the Record into B. R.* and there to agree with the King for his Fine. F. N. B. 190. (F).

7. Certiorari awarded out of B. R. directed *to the Cuſtos Brevium of C. B. to remove a Record of a Fine levied in the Time of P. & M.* the Tranſcript whereof was only removed before by Writ of Error, and the Error was found, and adjudged; and the Intent of this Certiorari was, that the Record of the Fine might be taken off the File, and cancell'd in B. R. and upon Precedents ſhewed, the Certiorari was granted. D. 274. b. pl. 44. Paſch. 10 Eliz. Bourne v. Ruſſell.

8. But where a Certiorari iſſued *to the Chief Juſtice of C. B. to remove a Record*, a Verdict was given by Niſi Prius, and an Attaint was brought againſt them in B. R. this Certiorari was not allow'd, no Precedent being to be found of ſuch Writ; for the Entry of the Clerk of the Treaſury in C. B. does not ſay Quod Recordum præd' removetur in B. R. virtute Brevis de Certiorando, but only virtute Brevis de Errore corrigendo ſub Magno Sigillo Angliæ; whereupon the Party purchaſed a new Certiorari out of Chancery pro Tenore Recordi only, which was certified to the Chancery accordingly, and ſent thence into B. R. by Mittimus. D. 274. b. 275. a. pl. 44, 45. Paſch. 10 Eliz. Bourne v. Ruſſell.

9. *A. and B. were indicted for a Murder.* *B. fled*, and *A. brings a Certiorari* to remove the Indictment into B. R. It was inſiſted that the whole Record ſhould be removed, and that there could be no Tranſcript of it, becauſe the Writ was to certify Recordum & Proceſſum cum omnibus ea tangentibus; but the Chief Juſtice doubted, and ſaid that the Opinion of Markham in one of our Books is againſt it, and ſaid it might be miſchievous; for ſo the other might be attaint here by Outlawry, who might know nothing of it. Mar. 112. pl. 190. Trin. 17 Car. Anon.

10. *In all Counties except London the Record itſelf is removed by a Certiorari*; admitted per Cur. Sid. 230. pl. 28. Mich. 16 Car. 2. B. R. But they of London by their Charter certify only Tenorem Recordi; ſo that the Record itſelf remains with them. Agreed. Sid. 155. pl. 5. Mich. 15 Car. 2. B. R.——Holt Ch. J. ſaid that it is an Error in the Clerks *in London*, that upon a Certiorari *they return only the Tranſcript*, as if the Record remained below; for in C. B. tho' they do not return the very individual Record, yet the Tranſcript is returned as if it were the Record itſelf, and ſo it is in Judgment of Law. 2 Salk. 565. pl. 2. Hill. 8 W. 3. B. R. The King v. North.——The very Record itſelf is to be removed in all Places except London, where they are obliged only to ſend up the Tranſcript; Per Forteſcue J. Quod non fuit negatum. Barnard. Rep. in B. R. Mich. 13 Geo. 1. Anon

11. On a Certiorari to return an Order, it was returned thus, viz. *Cujus quidem Tenor ſequitur in hæc Verba*; and becauſe it was not *Qui quidem Ordo ſequitur in hæc Verba*, it was quaſh'd. 1 Salk. 147. pl. 10. Paſch. 1 Ann. B. R. The Queen v. the Pariſh of St. Mary's in the Devizes.

(D) Certiorari. Lies in what Caſes.

Br. Certification of Aſſiſe, pl. 5. cites 21 E. 3. 3.

1. IF *Aſſiſe paſs in Pais*, and be *adjourn'd into Bank*, and *Judgment given there*, the Defendant cannot have Certification of Aſſiſe, nor Attaint there; but *ſhall remove the Record before the Juſtices of Aſſiſe again*, and there he may have Certification or Attaint. Quod nota; and it ſeems that the Removing ſhall be *by Certiorari*. But Quære inde of the Manner thereof. Br. Cauſe de Remover, pl. 16. cites 21 E. 3. 30.

2. If a Man be *indicted in the County of L.* the *King's Bench ſhall not write for the Body and the Record upon Surmiſe*, but upon Matter of Record; but ſhall be removed into the Chancery by Certiorari, and ſent into B. R. by Mittimus. Br. Corone, pl. 192. cites 41 Aſſ. 22.

3. A. brings a *Writ of Conſpiracy* againſt B. and others. This Conſpiracy was to *indict A. of a Felony*, of which he was arraigned and acquitted. The Defendants plead that the Indictment was *before* certain *Juſtices of Peace, who compell'd the Defendants to be Jurors* upon finding the Indictment, and that they with others were Jurors upon finding the ſaid Indictment &c. The Plaintiff *replies Nul tiel Record*. In this Caſe the Defendants have a *Day given them to bring in the Record*, and fail. The Plaintiff has Judgment. This Judgment was reverſed; for the Court of C. B. ought to have awarded a Certiorari to the Juſtices of Peace, to certify whether they have ſuch a Record; for they are an inferior Court to the Court of C. B. But in this Caſe, where the Court is ſuperior, or the Juriſdictions equal, Day is given to the Defendant to have the Record in Court by a certain Day. By the Juſtices of both Benches. Jenk. 114. pl. 23. cites 4 H. 6. 23.

4. A Certiorari *is to remove* a Thing *out of a Court of Record*. Br. Admeaſurement, pl. 6. cites 7 E. 4. 22.

Br. Re-attachment, pl. 27. cites S. C.

5. *Writ* is directed to the Sheriff, and *meſne between the Teſte and Return the King died; and alſo it was a peremptory Action which ought to be taken within the Year*, As *Appeal of Death*, or *Formedon againſt Pernor*, and the *Teſte was within the Year*, but the *Return after* the Year; yet ſuch Writs in theſe Caſes were brought into Bank by Certiorari, and Reſummons or Re-attachment awarded, which will ſave the Year. Quod nota bene. Br. Certiorari, pl. 12. cites 10 E. 4. 13.

6. A Man *diſtrain'd by* 20 *Sheep*. The Owner brought *Replevin*, and the *Defendant affirmed Plaint againſt him in a Baſe Court by Covin to have the Sheep attached, ſo that Replevin ſhould not be made*; by which the *Sheriff returned this Matter*, and the *Plaintiff pray'd Superſedeas for him and his Goods, becauſe this Court has the antient Seiſin*; and had it for Body, but not for Goods; but per Laicon, he ſhall have for both; and by ſeveral he may have Certiorari of all if he would. Br. Certiorari, pl. 17. cites 16 E. 4. 8.

7. Where a Man had *caſt Protection after Iſſue*, Certiorari iſſued out of Chancery to inquire whether he attended the Buſineſs of the King or his own proper Buſineſs, and certified that His own proper Buſineſs; by which the Chancellor granted Innoteſcimus, and the Protection was repealed, and Reſummons awarded immediately. Br. Certiorari, pl. 14. cites 21 E. 4. 20.

8. Cer-

8. Certiorari lies *to remove Rediſſeiſin, and poſt Diſſeiſin, and* to remove *Record out of one County to have Recovery in another County*; and lies *to remove Record out of a Franchiſe to the Common Law, to have Execution in a Foreign County, becauſe the Debtor has nothing within the Franchiſe*; and it lies *to remove Aſſiſe*. Br. Certiorari, pl. 18. cites F. N. B.

9. And *where Record is ſo removed from one Juſtice to another*, there *Writ ought to be directed to the new Juſtices to receive it*. Ibid.

10. And it *lies upon every Record which is in the Treaſury to have it removed into the Chancery, and ſent into Bank by Mittimus to have Execution upon it*; for the Juſtices of Bank cannot award Execution, if they have not the Record before them. Ibid.

11. And where *Deed is denied*, by which it remains in Court, there the *Party*, who ſhould have it after, *ought to have ſpecial Writ* to them, to have Delivery thereof. And it lies *to bring in Record which is pleaded in Bar in another Court*. *And* it likewiſe lies *to have Execution where the Juſtices are removed, and new Juſtices authorized*. *And* it lies *to remove Statute Staple to have Execution thereof*. *And* it alſo lies *to have Tenorem Recordi, and* in ſome Caſe *Tenorem Tenoris*. *And to remove Record out of a Franchiſe* into another Court. *And to certify Outlawry*. It lies *to remove Record of Acquittal of a Felon*. * *And* it lies *to remove Record before Juſtices of Oyer and Terminer*. *And to have Execution in a foreign County*. *And* it lies *to remove Record to have Charter of Pardon upon it*. *And* it lies to remove Record *to have it exemplified*. *And* it lies to remove Record *to have Attaint*. *And* to remove Record *from the Marſhalſea to have thereof Attaint*. *And* it lies to remove Record *of freſh Force*. *And* it lies *to the Cuſtos Brevium to certify Writs, Warrants of Attorney* &c. which concern the Record or Matter. *And* it lies *to the Juſtices of Sewers to make Certificate of their Preſentments &c*. *And* it lies *to certify whether J. N. againſt whom Exigent is awarded, be Peer of the Realm* to have Superſedeas; Quod Nota. *And* it lies *to the Eſcheator to certify Records and Inquiſitions, or Seizures* for the King before him, or made for him. *And* it lies *to certify the King in the Chancery who laſt preſented to ſuch a Benefice*. *And of the Value of ſuch Fees and Advowſons* &c. Br. Certiorari, pl. 18. cites F. N. B.

* The Court has refuſed to grant a Certiorari *to remove a Recognizance of Appearance before Juſtices of Oyer and Terminer* &c. becauſe the Court below is moſt proper to judge upon the whole Circumſtances of the Caſe, which are equitably to be conſidered whether it ought to be eſtreated or not. 2 Hawk. Pl. C. 288. cap. 27. S. 33.

12. A. was indicted of Murder in Eſſex, and outlaw'd, and the *Outlawry certified in B. R.* but as certified it is *erroneous*, becauſe the Exactus is Ad Comitatum, without ſaying Meum. The Attorney General ſhews that the *King had ſeiſed the Lands, and for aſſuring the King's Eſtate, and to prevent the Reverſal of the Outlawry*, prayed a Certiorari *to the Coroners*, whether the Exactus was Ad Comitatum (without Meum) and *upon their Return to amend it*; and there was a Precedent in the Time of E. 4. where one Stanley was indicted, and was in ſome Places wrote Stavely; and a Certiorari was awarded Here by the Court. Lat. 210. Plume's Caſe. Palm. 480. Trin. 3 Car. B. R. the S. C. in totidem Verbis.

13. Certiorari was denied to remove an *Information* exhibited in the Mayor's Court of London againſt a Wood-monger there, grounded *upon an Act of Common Council*, unleſs ſuch Act had appeared to be againſt Law; ſed adjornatur to hear Counſel of Both Sides. Sty. 211. Paſch. 1649. Anon.

14. On a Motion for a Certiorari *to remove an Indictment preferred againſt one in Newgate*, Roll Ch. J. ſaid, he lies there *for Murder, and is outlawed thereupon*, yet take a Certiorari to remove the Record, for his *Fact was the ſtabbing of a Man, and ſtabbing in its Nature is but Felony*,

ny, and is not Murder, altho' the Party cannot have his Clergy for it, by reaſon of the Statute made by King James againſt Stabbing, elſe by the Common Law he might have had it. Sty. 364. Hill. 1652, B. R. Anon.

15. The Court was moved on the Behalf of the Defendant, for a Certiorari *to remove* certain *Indictments* preferred againſt him *in London, for ſelling of Leather, to the End he may have an indifferent Trial notwithſtanding the Statute*, which *directs that the Indictment be preferred in the County where the Offence was committed.* Roll Ch. J. ſaid, there the Statute was made for the Eaſe of the Defendant, and therefore he may remove the Indictment, otherwiſe he ſhall be in worſe Caſe than he was before the Statute; therefore order'd a Certiorari. Sty. 356. Mich. 1652. B. R. Anon.

16. 12 *Car.* 2. *cap.* 23. *No* Certiorari *ſhall ſtay the Proceedings of the Juſtices in a Cauſe concerning the Exciſe.*

2 Hawk. Pl. C. 287. cap. 27. S. 28. ſays, it ſeems that the Court will not ordinarily, at the Prayer of the Defendant, grant a Certiorari for the Removal of an Indictment of Perjury or Forgery, or other heinous Miſdemeanor; for ſuch Crimes deſerve all poſſible Diſcountenance, and the Certiorari might delay, if not wholly diſcourage their Proſecution.

17. It was agreed by all the Juſtices not to grant Certiorari *to remove any Indictment of Perjury, Forgery, or any ſuch great Miſdemeanor*, becauſe it is a Miſchief commonly ſeen, that when it is removed by Certiorari they never proceed Here, and ſo the Matter goes unpuniſhed. Sid. 54. pl. 19. Mich. 13 Car. 2. B. R. Anon.

But by 5 *W & M. cap.* 11. *S.* 6. *if any Indictment be againſt any Perſon for not repairing Highways, Cauſeways, Pavements, or Bridges, and the Title to repair the ſame may come in Queſtion, upon ſuch Suggeſtion, and Affidavit made thereof, a Certiorari may be granted to remove the ſame into B. R. provided that the Parties proſecuting ſuch Certiorari ſhall find 2 Manufactors to be bound in a Recognizance, with Condition as aforeſaid.*

18. 22 *Car.* 2. *cap.* 12. *S.* 4. *All Defects of Repairs of Cauſeways, Pavements, Highways, or Bridges, ſhall be preſented in the County, and no ſuch Preſentment or Indictment ſhall be removed by Certiorari, or otherwiſe, out of the County, till ſuch Indictment or Preſentment be traverſed, and Judgment thereupon given.*

19. A *Conviction of forcible Entry upon View of Juſtices of Peace* may be examined upon a Certiorari, but no Writ of Error lies upon it; Per Cur. Vent. 171. Mich. 23 Car. 2. Anon.

20. A *Fine was taken in Cheſter*, which is a County Palatine, by Dedimus. Error was aſſigned, that no Time is mentioned when the Caption was taken, nor any Commiſſioners named, and prayed that it might be amended. Wythens J. ſaid, they would grant a *Certiorari to make a Fine good, but not to reverſe it*; and a Certiorari was granted *Ad Informandam Conſcientiam.* Comb. 26. Trin. 2 Jac. 2. B. R. Okey v. Hardiſtey.

Hawk. Pl. C. 218. cap. 76. S. 80 ſays, it has been reſolv'd, that if the Quarter-Seſſions, under Pretence of the Juriſdiction given them by theſe Statutes, take upon them to do a Thing manifeſtly exceeding their Authority, As to make an Order on Surveyors of the Highways, to make up their Accounts before a ſpecial Seſſions, their Proceedings may be removed by Certiorari into B. R. and there quaſhed; for the Quarter-Seſſions have no Manner of Power given them to intermeddle originally with ſuch Accounts, but only by way of Appeal; cites Mich. 12 Ann. the Queen v. Bramby.

21. 3 & 4 *W. & M. cap.* 12. *S.* 23. *Enacts, that all Matters concerning Highways, Cauſeways, Pavements, and Bridges mentioned in this Act, ſhall be determined in the proper County, and not elſewhere, and no Preſentment, Indictment, or Order, made by Virtue of this Act, ſhall be removed by* Certiorari *out of the County into any other Court.*

2 Hawk. Pl. C. 289. cap. 27. S. 38 ſays, that in the Conſtruction hereof it has been adjudged, that if the Party inſiſt on any Matter of Law

22. 7 & 8 *W.* 3. *cap.* 6. *No Certiorari ſhall be granted to remove a Suit for ſmall Tithes from the Juſtices of Peace, unleſs the Title of the Tithes comes in Queſtion.*

Law before the Juſtice of Peace, which is any way doubtful, as on a Cuſtom in a Pariſh to be diſcharged of a certain kind of Tithe &c. the Order may be removed within the Intent of the Statute; and in the Marg. there cites Hill. 6 Geo. the King v. Furnace.

23. *Indictment at Kirby in Weſtmoreland* on the 5 Eliz. for uſing a *Trade, not having been Apprentice* thereto 7 Years, and a Certiorari was prayed, but the Court doubted whether to grant it, becauſe the *Statute is, that it muſt be tried in the proper County*, ſo that if it be removed hither, it muſt be ſent down again by Procedendo, and not filed here ſo as to be quaſhed; but there having been ſeveral ſuch Certioraries granted, they granted one in this Caſe, and after granted another in a like Caſe in Trinity Term following, in the Caſe of one Woods of Norfolk. 12 Mod. 188. Paſch. 10 W. 3. the King v. Haggard.

24. A Certiorari lies upon a *Conviction of forcible Entry* upon the View of a Juſtice of Peace; Per Holt Ch. J. in delivering the Opinion of the Court. Ld. Raym. Rep. 469. Hill. 11 W. 3. 12 Mod. 390. S. C. & S. P. by Holt Ch. J.

25. The Cenſors of the College of Phyſicians having Power by their Charter, confirm'd by Act of Parliament, to fine and impriſon for ill Practice in Phyſick, condemned, fined, and committed Doctor Groenvelt for the ſame. Holt Ch. J. held, that *a Writ of Error would not lie, it being a Proceeding without Indictment or formal Judgment*, and not according to the Courſe of Common Law, *but that a Certiorari lies*; for no inferior Juriſdiction can be exempt from the Superintendency of the King in this Court. 1 Salk. 144. pl. 3. Trin. 12 W. 3. B. R. Dr. Groenvelt v. Burwell. Carth. 491. 494. S. C. & S. P. accordingly, by Holt Ch. J. in delivering the Opinion of the Court. ——12 Mod. 386. 390. S. C. accordingly.

Ld. Raym. Rep. 213. S C. but S. P. does not appear.——Comyns's Rep. 76. 80. S. C. & S. P. held accordingly.——Ld. Raym. Rep. 469. S. C. & S. P. and cites Cro. E. 489. [pl. 6. Mich. 38 & 39 Eliz. B. R.] Long's Caſe, where a Certiorari was awarded to remove an Indictment for Felony, where the Party convicted was burnt in the Hand, but no Judgment given, ſo that he could not have a Writ of Error; by Holt Ch. J. in delivering the Opinion of the Court.

26. 'Tis unuſual to ſend a Certiorari without *Special Cauſe*. 7 Mod. 118. Mich. 1 Ann. Anon.

27. N. borrowed 600 l. of a Feme Covert, and promiſed to ſend her fine Cloth and Gold Duſt as a Pledge. He ſent her ſome coarſe Cloth worth little or nothing, but no Gold Duſt. There was an *Indictment* againſt N. at the Old Baily *for a Cheat*. A Certiorari was granted, becauſe it was not a criminal Matter, but it was the Proſecutor's own Fault to repoſe ſuch a Confidence in N. beſides the Defendant offered to try it that Term, which would be a Benefit to the Proſecutor, who, by the Courſe of the Old Baily, could not try it ſo ſoon. 1 Salk. 151. Paſch. 4 Ann. B. R. Nehuff's Caſe.

28. A Certiorari is not a Writ of Right; for if it was, it could never be denied to grant it; but it has often been denied by this Court, who, upon Conſideration of the Circumſtances of Caſes, may deny it or grant it at Diſcretion; ſo that it *is not always a Writ of Right*. 8 Mod. 331. Mich. 11 Geo. Arthur v. the Commiſſioners of Sewers in Yorkſhire.

29. Where a Man is *choſen into an Office* or Place, by virtue whereof he hath a Temporal Right, *and is deprived thereof by an inferior Juriſdiction, who proceed in a ſummary Way*; in ſuch Caſe he is intitled to a Certiorari Ex Debito Juſtitiæ, becauſe he hath no other Remedy, being bound by the Judgment of the inferior Judicature. 8 Mod. 331. Mich. 11 Geo. Arthur v. the Commiſſioners of Sewers in Yorkſhire.

30. It was moved for a Certiorari *to remove an Indictment* found againſt the Defendant *for a Felony, in ſtealing ſome Hay*, from the Quarter-Seſſions of the Peace held for the Town and Corporation of Chipping-Norton, *upon Affidavits that the Defendant could not have a fair Trial there*; and he cited a Caſe between the King and Dowell, where a Certiorari Barnard Rep. in B. R. 7. The King v. Chipping-Norton, S. C. ſays the

Indictment was for Felony againſt a Clergyman, for only taking a

tiorari was granted to remove an Indictment from the Quarter-Seſſions of the Peace for Salop for the like Reaſon; and a Rule was made for the Proſecutor to ſhew Cauſe, which was afterwards made abſolute. 2 Ld. Raym. Rep. 1452. Mich. 13 Geo. The King v. Fawle.

Handful of Hay out of a Barn, which it was ſworn was but of the Value of a Penny, and they ſwore it was nothing but a malicious Proſecution. And the Caſe of the King and Powell was cited, where a Certiorari went to remove an Indictment out of the Seſſions of the County of Sarum. The Court ſaid they never did grant ſuch Certiorari but upon a particular Occaſion; but they made a Rule to ſhew Cauſe, and at the laſt Day of the Term they granted it.

31. The Defendant was *indicted at the Old Baily*, and *Motion was made for a Certiorari to remove the Indictment here*; *for that he was a Perſon of Diſtinction.* But the Court ſaid they would never do it upon that Account; for that would occaſion great Confuſion. They ſaid in ſome Caſes they did grant them, As *where it appeared that the Fact could not ſupport an Indictment*; as it was done in the Caſe of **Sir Humphrey Mackworth**, who was indicted at the Old Baily for Forgery; for that he, being Governor of a Company, ſet the Seal of the Company to a Deed without Authority; there, as it appeared to the Court that that Fact was not indictable, they did grant it. Barnard. Rep. in B. R. 5. Mich. 13 Geo. The King v. Puſey.

(E) Neceſſary. In what Caſes.

1. WHEN a *Juſtice is diſcharged*, or his Authority ceaſes, he *cannot certify a Warrant in his Hands without* certifying it by *Writ*, and *ſo if he be made Juſtice again*, becauſe his Power was once ceaſed; and *ſo* it ſeems *of other Records* in his Hands. Br. Record, 64. cites 8 H. 4. 5.

2 Hawk. P. C. 290. cap. 27. S. 44. ſays it ſeems agreed that no Re-

2. *Juſtices of the Peace ſhall not bring into B. R. any Record but* that which is *executory*, and no Acquittal of Felony which is *executed*; but this *ſhall come in by Writ by Certificate thereof.* Br. Record, pl. 59. cites 8 E. 4. 18.

cord which is executed, As by Acquittal &c. can be brought into a higher Court without a Writ; and that it ſeems agreed that if a *Juſtice of Peace, or other Judge of Record*, having taken a Recognizance or Inquiſition, or recorded a Riot, or done any other executory Matter within his Juriſdiction, *and have ſtill continued in the ſame Commiſſion* &c. without any Interruption, the Court of *B. R. ſhall receive ſuch Record from his Hands without any Writ of Certiorari.*

D. 163. a. pl. 54. Trin. 4 & 5 P. & M. Anon.— The *Clerk of the Aſſiſes* may bring in the Indictment *propriis Manibus*, if he pleaſes, without a Certiorari; per Bramſton Ch. J.

3. Several *Judges in their Circuits took* ſeveral *Verdicts*, and *dying in the Vacation before the Return of the Poſteas*, *theſe Verdicts ſhall be received by the Hands of the Clerk of the Aſſiſes*; and this is a better Way than to award a Certiorari for thoſe Verdicts to the Executors of the Judges; for the Clerk of the Aſſiſes was a ſworn Officer. Alſo the Entry ſhall in the common Form, viz. Poſtea ad quem diem venerunt partes & Juſticiarii ad Aſſiſas capiendas coram quibus &c. hic miſerunt Recordum ſuum; and againſt this Entry of Record no Averment can be received that the Judges were dead before the Delivery of the Poſtea; for this would be contrary to the Record; By all the Judges of England. Jenk. 216. pl. 59.

Mar. 112, 113. pl. 190. Mich. 17 Car. Anon ——— 2 Hawk. Pl. C. 290. cap. 27. S 44. S. P. and ſays it ſeems to be agreed; but ſays that the Executors or Adminiſtrators of a Judge can in no Caſe bring in a Record without a Writ to authorize them to do it. And it ſeems to be the ſtronger Opinion

Opinion, that neither a Juſtice who is out of Commiſſion at the Time, nor one who has been out of Commiſſion but is afterwards reſtored, can certify any Record without a Writ of Certiorari.

4. It was ſaid by Coke, that *the Chancellor, or any Judge of any of the Courts of Record at Weſtminſter, may bring a Record to one another without a Writ of Certiorari*, becauſe one Judge is ſufficiently known to another; but that other Judges of inferior Courts, nor Juſtices of Peace, cannot do ſo. Godb. 14. pl. 21. Paſch. 24 Eliz. B. R.

(F) At what Time.

1. NOTE per Catesby J. where *Certiorari with Mittimus* comes *to remove a Fine*, and the *Writ bears Date before that the Fine comes into Chancery*, yet is good. Br. Certiorari, pl. 19. cites 1 R. 3. 4.

2. *So* of Certiorari *to remove Indictments*, which Indictment *bore Date after the Certiorari.* Ibid. and cites Fitzh. Recordare, pl. 6. On a Motion for a Certiorari *to remove an Indictment* into B. R. againſt ſeveral Frenchmen for a Robbery; but *at the Time of the Motion there was no Indictment before a Juſtice of Aſſiſe*, Keeling Ch. J. ſaid, You may have a *Certiorari*; but it *muſt not be delivered till the Indictment be found*, and then the Judge has the Proſecutors there, and may bind them over, and ſo the Trial may be here. Mod. 41. pl. 91. Hill. 21 & 22 Car. 2. B. R. Anon.——Vent. 63. Lampereve & al' S. C.

3. It was moved for a Certiorari *to remove an Indictment of forcible Entry, that was once before removed hither, and after ſent down by a Procedendo, becauſe the Juſtices below will not grant Reſtitution.* Roll Ch. J. anſwered, there is a Plea put in, and in ſuch Caſe it is not uſual to grant a Certiorari, yet it may be that it may be granted, therefore ordered that the other Side ſhew Cauſe why it ſhould not be granted. Sty. 300. Mich. 1651. B. R. Anon.

4. A Certiorari *to remove an Indictment of Perjury* at the Seſſions, was *delivered to the Juſtices after the ſame was returnable.* The Court inclin'd that nothing can be removed by Certiorari after the Return. Keb. 944. pl. 3. Hill. 17 & 18 Car. 2. B. R. The King v. Rhodes.

5. Where a *Matter inquirable and puniſhable by the Regardors of a Foreſt only, is preſented before the Juſtices in Eyre*; the Court of B. R. reſolved that they *would not grant a Certiorari upon ſuch Preſentment, till after conviction there*, and that becauſe ſuch Offences againſt the Foreſt Law ſhould not go unpuniſh'd. Sid. 296. pl. 19. Trin. 18 Car. 2. Norfolk (Duke) v. Newcaſtle (Duke.) 2 Keb 81. pl. 78. The King v. Maxie, S. C. —— But it may be granted after Conviction, in order to give the Party, the Right of whoſe Freehold is concerned therein, an Opportunity ſo far to traverſe it. 2 Hawk. Pl. C. 288. cap. 27. S. 32.

6. N. the Defendant was indicted before Juſtices of Peace, and pleaded Not Guilty; and *after the Jury were gone to conſider of their Verdict*, he delivered in a Certiorari, and the Juſtices returned their Verdict, and held good; for it cannot be delivered *after the Jury is ſworn.* 1 Salk. 144. pl. 1. Hill. 8 W. 3. B. R. The King v. North. 2 Hawk. Pl. C. 294. cap. 27. S. 64. S. P. —— *At the Time an Indictment was trying, a Certiorari came* down from the Court of Chancery returnable in B. R. The Court ſaid that that Certiorari was void. Barnard. Rep. in B. R. 105. Mich. 2 Geo. 2. The King v. Steers.——See Tit. Habeas Corpus (E) pl. 2.

7. Certiorari to remove Indictments, muſt be *delivered before the Jury is ſworn*; Per Holt Ch. J. Cumb. 391. Mich. 8 W. 3. B. R. Anon.

7. Certiorari

6 Mod. 83. Mich. 2 Ann. Morley v. Stacker, S. P. [and as I remember was the S. C. and that Nash was the Constable, and Morley the Prosecutor, and Stacker the Deer Stealer.]

8. After a *Warrant* awarded to distrain, and Distress made, upon a *Conviction for Deer-stealing*, a Certiorari was brought to remove the Conviction; and after the Record was removed the Constable sold the Goods, but would not part with the Money, nor return his Warrant. The Court held that the *Constable might proceed in the Execution after the Certiorari, because it was begun before*; for a Certiorari is no more a Supersedeas than a Writ of Error on a Judgment in C. B. to stay the Execution on a Fi. Fa. already begun; that *B. R. have no Power over this Warrant, because it was granted before the Certiorari issued*, therefore they refused to make a Rule on the Constable to return it, *but* said, that *the Justices might fine him if he did not return it, or pay the Money to the Prosecutor.* 1 Salk. 147. pl. 12. Mich. 1 Ann. B. R. The Queen v. Nash.

But afterwards it was held that *Advantage must be taken of this Rule, upon the Motion to file the Order*; for that after it is filed, it is too late. Ibid. cites Mich. 4 Ann. B. R. the Case of the Inhabitants of Shellington.

9. A *Rule* was made *that no Certiorari shall be granted to remove any Orders of Justices, from which the Law has given an Appeal to the Sessions, before the Matter is determined on the Appeal*; and if an Order should be removed before Appeal, it should be sent down again; but if the Time of Appeal be expired, that Case is not within that Rule; Per Holt Ch. J. Ann. 1 Salk. 147. pl. 12. Pasch. 1 Ann. B. R.

1 Salk. 147. pl. 11. same Rule, but says that afterwards in Mich. 4 Ann. B. R. in Case of Shelington Inhabitants; it was held that Advantage must be taken of the Rule upon Motion to file the Order; because after it is filed, it is too late.

10. It is a Rule of Court that no *Order of Justices*, whereof an Appeal lies, be brought into B. R. by Certiorari *till after* [the Matter be determined on the] *Appeal*, and if any be, that it be sent back by *Procedendo*; for the original Order does not come up, but the Tenor of it as appears by the very Words of the Return. 7 Mod. 10. Pasch. 1 B. R. Anon.

6 Mod 17. The Queen v. Bothell, seems to be S. C. & S. P. held by Holt Ch. J. accordingly. —— S. P. by Holt Ch. J. accordingly, and cited the Case of Lisle and Armstrong,

11. The Defendant being convicted on an Indictment on the Statute 14 Car. 2. for beating certain Officers &c. obtained a Certiorari to remove the Indictment into B. R. and upon a Motion by the Attorney-General for a Procedendo, it was insisted that a Certiorari was not proper *after Conviction, and before Judgment*; because the Justices who tried the Fact were the most proper to set the Time. But per Cur. this Writ lies after Conviction and before Judgment &c. *because in some Cases a Writ of Error will not lie, but in this it will; because the Proceedings were grounded on an Indictment*, and therefore the Party grieved might have a Remedy by a Writ of Error, and for that it may not be so proper in this Court to set the Fine, a Procedendo was granted. 1 Salk. 149. pl. 15. Mich. 2 Ann. B. R. The Queen v. Porter.

on an Indictment of Murder, and a Case from Gloucester on an Indictment for Words, to the End that B. R. might give the Judgment for the greater Example; and said that they usually grant a Certiorari where it appears that it is such Conviction, on which no Writ of Error lies; but though we may grant a Certiorari, yet we will consider whether it be proper or not; and therefore since the Defendants have stood a Trial before the Justices, [viz. for Beating a Custom-House Officer] it is reasonable that the Justices give Judgment also, and let the Defendants bring their Writ of Error if they think fit; and to this Powell J. agreed. 2. Ld. Raym. Rep. 937. Trin. 2 Ann. The Queen v. Potter & al'. S. C. —— Holt Ch. J. held, that *if a Judge of Assise upon a Conviction there, doubted of the Judgment, he might remove the Record into B. R. by Certiorari*; and upon Judgment given here, a Writ of Error of a Record coram vobis residen' would lie. 1 Salk. 149. pl. 15. Mich. 2 Ann. B. R. in Case of the Queen v. Porter.

2 Hawk. P.C. 288. cap. 27. S. 31. says it seems agreed, that a Certiorari shall never be granted to remove an Indictment or Appeal after a Conviction, unless for some special Cause; as where the Judge below is doubtful what Judgment is proper; for unless there be some such Reason, the Judge who tried the Cause shall not be prevented from giving Judgment in it; for it cannot be intended but that he is best

beſt acquainted with the Circumſtances of it, and conſequently beſt able to Judge what Fine or other Puniſhment is proper for it.

(G) One or more Writs.

1. THE *Cogniſee of a Statute-Merchant ſued a Certiorari* directed *to the Mayor &c. before whom it was acknowledged*, and thereupon a *Capias iſſued* againſt the Cogniſor; and upon *non eſt inventus returned*, the Cogniſee *brought an alias Capias, but died before it was returned.* It was a Queſtion whether his *Executor* ſhould have a Sci. Fa. againſt the Cogniſor, or a new Certiorari to the Mayor &c. The Party *was adviſed to begin all de Novo*, as the beſt Method. D. 108. b. pl. 49. Paſch. 2 Eliz. Anon.

2. A Certiorari was awarded and *returned, that there was not any Warrant of Attorney entred for the Plaintiff in that Term wherein the Action was commenced, and Judgment given.* It was *ſurmiſed* to the Court by the Defendant in Error *as Amicus Curiæ, that there was Warrant of Attorney for another Term, and pray'd a new Certiorari*; and all the Court held that he might well have it. Cro. J. 277. pl. 7. Paſch. 9 Jac. B. R. Smith v. Skipwith. S. P. in *Error for aſſigned for Want of a Writ of Inquiry*, and Return was, that none was filed of that Term; but *afterwards the Defendant in Error filed it as of that Term, and takes out a Certiorari himſelf, which was returned that it was filed*; whereupon the Plaintiff's Counſel moved to quaſh the 2d Certiorari. The Court ſaid that they *ought to have entered a Caveat* to have prevented its being filed; but however made a Rule to ſhew Cauſe. Barnard. Rep. in B R. 12. Paſch. 13 Geo. 1. Shipman v Lethalier.——Ibid. 14. S. C. ſays, *the Certiorari taken out by the Defendant, was before In Nullo eſt Erratum pleaded*; and the Court ſaid that as here are 2 inconſiſtent Returns, they would certainly take that which made in Affirmance of the Judgment. And the Court agreed that the Parties may take out as many Certioraries as they pleaſe before In Nullo eſt Erratum pleaded, but after that they cannot take any out but upon Motion; and that the Court will grant thoſe ad informandam Conſcientiam Curiæ.

3. *One Perſon* ſhall have but one Certiorari, but ſeveral Perſons may have ſeveral Writs to certify; Per Cur. Cro. J. 597. pl. 20. Mich. 18. Jac. B. R. Johns v. Bowen.

4. Debt in B. R. upon an Judgment in C. B. The Defendant pleaded Nul tiel Record, and thereupon a *Certiorari was awarded*, to certify the Record returnable immediately. *After 8 Days expired, and no Record certified*, the Court was moved for an *Alias Certiorari with a Penalty*, which was granted. Palm. 562. Trin. 4 Car. B. R. Saltingſtall v. Garraway.

5. Upon Error brought of a Judgment upon non ſum Informatus in C. B. The Error aſſigned was, that it appeared by the Record, that the Declaration was before the Plaintiff had any Cauſe of Action. It was ſaid, if it be ſo, then there is a *wrong Original certified*; wherefore a new Certiorari was awarded to have the true Original certified. Sty. 352. Mich. 1652. Jennings v. Downes.

6. It was moved to quaſh a Certiorari, becauſe it was *in the Præterperfect Tenſe.* The Court was unwilling to quaſh it, till they had adviſed whether an alias Certiorari might be awarded, and the Doubt was becauſe in all Counties but London the Record itſelf is removed, and ſo no 2d Certiorari; but ſome thought the Record here not removed by the firſt Certiorari, but only a Hiſtory that there was ſuch a Record, and that therefore a 2d Certiorari ſhould iſſue; but after ſeveral Debates it was adjourned as to this Point. Sid. 229. pl. 28. Mich. 16 Car. 2. B. R. The King v. Brown & al'.

7. Nota, If a *Certiorari* be not returned, ſo that an *alias* be awarded, the Return muſt be as upon the firſt Writ, and the other muſt be returned *Quod ante adventum iſtius Brevis* the Matter was certified. Vent. 75. Paſch. 22 Car. 2. B. R. Anon.

8. A Certiorari was granted *to remove an Order concerning Money given and collected for Repair of a Bridge, but through the Careleſſneſs of the Attorney the Writ was not delivered in Time*, and ſo a Procedendo went. The Court was moved for a new Certiorari, and ſaid that in Theſaurus Brevium are ſeveral Precedents of an Alias Certiorari to remove an Indictment upon an inſufficient Return to the firſt, and this is no more, and that there are ſeveral in the Office of this kind; but the Court told them it was their own Fault not to deliver the firſt, and refuſed to help them. 2 Show. 330, 331. pl. 341. Mich. 35 Car. 2. B. R. The King v. Weaver.

9. A Certiorari was granted, but the *Return* thereof *was quaſh'd for ſome Irregularity*, and thereupon the Court was moved for another Certiorari; one of the Judges oppoſed the granting it, becauſe the Removal of the Orders by Virtue of the Certiorari would not determine the Right of the Plaintiff (who had been choſen Clerk to the Commiſſioners of Sewers by ſome of the Commiſſioners, but was turned out by others) which was the Reaſon of quaſhing the Return of the former Certiorari; but by the other 3 Judges the Certiorari was granted. 8 Mod. 331. 332. Mich. 11 Geo. 1. Arthur v. Commiſſioners of Sewers in Yorkſhire.

(H) Obtained or granted. How and by whom. In what Caſes, and wherefore.

1. 1 & 2 P. & M. cap. 13. NO *Writ of Certiorari ſhall be granted* to remove any Priſoner *out of any Gaol*, or *to remove any* Recognizance, *except the ſame be* ſigned by the *proper Hands of the* Chief Juſtice, or *in his Abſence* by one of the Juſtices of the Court out of which *the ſame Writ ſhall be awarded on Pain of 5 l. to be paid by any one that writeth ſuch Writ not being ſo ſigned.*

Certiorari is not to be allowed, without putting in *Sureties in open Court*; yet if the Party will not, the Clerk of the Peace muſt return it,

2. 21 Jac. 1. cap. 8. S. 5 & 6. *Whereas Indictments of Riot, forcible Entry, or Aſſault and Battery, found at the Quarter-Seſſions, are often removed by Certiorari, all ſuch Writs of Certiorari ſhall be delivered at ſome Quarter-Seſſions in open Court; and the Parties indicted ſhall, before Allowance of ſuch Certiorari, become* bound unto the Proſecutors in 10 l. with ſuch Sureties as the Juſtices ſhall think fit, *with Condition to pay to the Proſecutors, within one Month after Conviction, ſuch Coſts as the Juſtices of Peace ſhall allow; and in Default thereof, it ſhall be lawful for the Juſtices to proceed to Trial.*

and that the Parties did not put in Sureties, as Twiſden ſaid was adjudged in the Time of Judge Bacon, and for not returning it the Court granted an Attachment; Alſo the *Statute extends not to* Indictments of *forcible Entry, but only to Riots* &c. as hath been conceived, and the Juſtices cannot make any Order againſt returning it. Keb. 225. pl. 38. Hill. 13 Car 2. B. R. The King v. Mucklow.

If a Certiorari be awarded to Juſtices of Peace to certify an Indictment of Riot, or forcible Entry, or other Indictment of which the Stat. 21 Jac cap. 8. ſays that they ought not to be certified without Bail firſt taken, *tho' the Party will not give Bail according to the Statute, yet the Juſtices ought to make a Return of the Certiorari.* Sid. 70. pl. 7. Hill. 13 & 14 Car. 2 B R. a Nota there.——2 Hawk Pl. C. 292. cap. 27. S. 51. S. P. ſays the Juſtices will be in Contempt if they make no Return to it; for all Writs muſt be obey'd, unleſs good Cauſe be ſhewn to the contrary, and the proper Way of ſhewing it is to return it.

3. *Two Men and their Wives were indicted* upon the Statute *of forcible Entry.* They *brought a Certiorari to remove the Indictment*, and *one of them refuſing to be bound to proſecute* according to the Statute 21 Jac. cap. 8. the ſaid *Juſtices*, notwithſtanding the Certiorari, *proceeded to try the Indictment*; but it was reſolved, that where one of the Parties offers to find Sureties, altho' the others will not, yet the Indictment ſhall be removed, tho' the other refuſes; and that where the Statute ſays the Parties indicted ſhall be bound in the Sum of 10l. with ſufficient Sureties, as the Juſtices ſhall think fit, yet if the Sureties are worth 10l. the Juſtices cannot refuſe them. And further reſolved, that after a Certiorari brought, and a Tender of ſufficient Sureties, according to the Statute, all the Proceedings of the Juſtices of Peace are coram non Judice. Mar. 27. pl. 63. Trin. 15 Car. Anon.

4. A *Feme Covert* is not within the Statute of 21 Jac. to find Sureties. 2 Hale's Hiſt. Pl. C. 213. cites it as reſolved Trin. 15 Car. 1. B. R. Hancock's Caſe.

Mar. 27. pl. 63. Anon. S. P. and ſeems to be S. C.

5. On a Motion for a Certiorari, on Behalf of Ld. Morley, to remove an Indictment againſt him at the Seſſions upon the Statute againſt Hearing Maſs. The Court ſaid they did not ſee how a Certiorari could be granted *at the *Prayer of the Party*, but that it might be at the Prayer of the Counſel for the State. Sty. 295. Mich. 1651. Ld. Morley's Caſe.

* Mod. 41. pl. 91. Hill. 21 & 22 Car. 2. B. R. on a Motion to remove an Indictment for Robbery. Twiſden J ſaid he never knew ſuch Motion made by any but the King's Attorney or Solicitor. ——It has been adjudged that a Certiorari is by Law grantable for an *Indictment*; for the Court is *bound of Right to award it at the Inſtance of the King*, becauſe every Indictment is the Suit of the King, and he has a Prerogative of ſuing in what Court he pleaſes. But it ſeems to be agreed, that it is left to the *Diſcretion of the Court either to grant or deny it at the Prayer of the Defendant*; *and* agreeably hereto it is laid down as a general Rule, that the Court will *never grant it for the Removal of an Indictment before Juſtices of Gaol-Delivery without ſome ſpecial Cauſe*, As where there is juſt Reaſon to apprehend that the Court below may be unreaſonably *prejudiced againſt the Defendant*; or where there is ſo much *Difficulty in the Caſe*, that the Judge below deſires that it may be determined in B. R. or where the *King himſelf gives a ſpecial Direction* that the Cauſe ſhall be removed; or where the *Proſecution appears to be for a Matter not properly Criminal.* 2 Hawk. Pl. C. 287. cap. 27. S. 27.

6. *If any of the Perſons indicted put in Security, the Indictment muſt be removed for all*, becauſe it is only to ſecure Coſts; by Twiſden & Curiam; and Sir Humphry Mildmay was fined for not returning ſuch Certiorari; and *the Hands of the Juſtices need not be ſet to it* no more than the Sheriffs by Return of the Under-ſheriffs; and an Habeas Corpus, tho' not to be allow'd if under 5l. yet it muſt be returned that it is under 5l. Keb. 231. pl. 51. Hill. 13 Car. 2. B. R. The King v. Mucklow.

2 Hale's Hiſt. Pl. C. 212, 213. The Record ought to be removed into B. R. adjudged Mich. 1653. B. R.——

Ibid. 213. cites Trin. 15 Car. 1. Hancock's Caſe, S. P. reſolved.

7. Twiſden J. declared that there is a Rule made among the Judges, when any one *prays a Certiorari at a Judge's Chamber, to remove an Indictment out of London or Middleſex*, he ought to *give Notice* of his Deſire to the other Side 3 *Days before*, or otherwiſe the Certiorari is not to be granted. Raym. 74. Paſch. 15 Car. 2. B. R. Stamford (Earl of) v. Gordal.

8. *5 & 6 W. & M. cap.* 11. *S.* 2. *No Certiorari to remove a Cauſe* from the Seſſions in Term-time, *but upon* Motion and Rule of Court *of B. R. Defendant to give* Security to plead to Iſſue *&c.* and try the Cauſe the next Aſſiſes. *Recognizance to be returned with the Certiorari into the Court of B. R.*

9. *S.* 4. *In the Vacation a Writ of Certiorari may be granted by any of the Juſtices of B. R. whoſe Name, with the Name of the Party procuring it, ſhall*

ſhall be indorſed on the Writ; and ſuch Recognizance, as aforeſaid, ſhall be entered into before the Allowance thereof.

10. *S. 5. The ſame Law as to granting Certiorari in the* Counties Palatine.

11. 8 & 9 *W.* 3. *cap.* 33. *S.* 2. *The Party proſecuting any Certiorari to remove an Indictment from the Quarter-Seſſions*, may find 2 Manucaptors to enter into a Recognizance before any of the Juſtices of B. R. in the ſame Sum, and under the ſame Condition as is required by the Act 5 & 6 W. & M. cap. 11. whereof Mention ſhall be made on the Back of the Writ, *under the Hand of the Juſtice who took the ſame, which ſhall be as effectual to ſtay Proceedings as if taken before a Juſtice of Peace in the County; and it ſhall be* added to the Condition *of the Recognizance*, that the Party ſhall appear from Day to Day in B. R. *and not depart till diſcharged by the Court.*

These Statutes being in the Affirmative, as to the taking of Recognizances, do not take away the Power which the Juſtices of B. R. have by the Common Law of taking Reccognizanes upon their granting Certioraries; from whence it follows, That if any ſuch Juſtice granting a Certiorari ſhall take a Recognizance variant from that preſcribed by the Act, either as to the Sum or Condition &c. ſuch Recognizance will have the ſame Force as it would have had if theſe Statutes had not been made; but it is ſaid that the Certiorari, if procured by the Defendant, will not in ſuch Caſe be a Superſedeas to the Proceedings below, as it would have been at the Common Law; for the Statutes ſeem to be expreſs that the Seſſions may proceed, notwithſtanding any Certiorari procured by a Defendant, whereon ſuch Recognizance is not given as is expreſsly preſcribed. 2 Hawk. Pl. C. 292. cap. 27. S. 53.

12. A Scire Facias was brought on a *Recognizance* taken before a Judge upon granting a Certiorari to remove an Indictment from the Seſſions of the Peace, which upon Oyer was enter'd in hæc Verba; and was *for* 40 *l.* whereas the *Sum preſcribed by the Statute is* 20 *l.* And per Holt Ch. J. before 5 & 6 W. & M. cap. 11. any Judge might take a Recognizance, which is not taken away; but if it be *not according to the Statute*, which is in 20 l. the Certiorari will be no Superſedeas; yet whether it be or no, it is ſtill good as a Recognizance at Common Law. 2 Salk. 564. Paſch. 1 Ann. B. R. The Queen v. Ewer.

6 Mod. 17. S. C. but S. P. does not appear. —Ibid. 33. Mich 2 Ann.

13. A Certiorari, to remove an Indictment, had *no Bail indorſed* on it, and therefore the Court ſaid that it ſhould not have been allowed; for it was againſt the late Act of Parliament. 1 Salk. 149. pl. 14. Trin. 2 Ann. B. R. The Queen v. Bothell.

that without giving Bail to try it according to the Statute, it is no Superſedeas.

3 Salk. 80. pl. 6 The Queen v Whittle, S. C. & S P. —2 Hawk. Pl. C. 289. cap 27. S. 40. S. P.

14. It was held that in Writs of Certiorari granted *to remove Orders*, *the Fiat* for making out the Writ *muſt be ſigned by a Judge*, and the Writ itſelf need not; but in Caſe of Writs of Certiorari *to remove Indictments*, the *Fiat muſt be ſigned and the Writ too*, and that the latter is required by the late Act of Parliament. And Holt Ch. J. ſaid that if the Fiat had been ſigned on the ſame Day the Writ was taken out, that would have been well, becauſe it was before the Eſſoign-Day; but a Fiat *ſign'd this Term cannot warrant a Certiorari teſted the laſt Day of laſt Term.* 1 Salk. 150. pl. 19. Paſch. 4 Ann. B. R. The Queen v. White.

15. The Court ſaid, that they had lately agreed to a Rule, that No Certiorari ſhould be *granted by a Judge at his Chambers in Term Time.* Barnard. Rep. in B. R. Mich. 2 Geo. 2. the King v. Steers.

16. 5 *Geo.* 2. *cap.* 19. *S.* 2. *No Certiorari ſhall be allowed to remove any Order, unleſs the Party proſecuting ſhall enter into a* Recognizance with Sureties *before one Juſtice of Peace where ſuch Order ſhall have been made, or before one of his Majeſty's Juſtices of B. R.* in the Sum of 50 l. with Condition to proſecute without wilful Delay, and to pay *the Party, in whoſe Favour ſuch Order was made, within one Month after the ſaid Order ſhall be confirmed, their* Coſts to be taxed; *and in Caſe the Party proſecuting ſuch Certiorari ſhall not enter into ſuch Recognizance, or ſhall not perform the Con-*

Conditions aforeſaid, it ſhall be lawful for the Juſtices to proceed and make further Orders, as if no Certiorari had been granted.

17. *S.* 3. *The* Recognizances *to be taken as aforeſaid, ſhall be* certified into B. R. *and filed with the Certiorari and Order removed thereby; and if the Order ſhall be confirmed, the Perſons intitled to ſuch Coſts, within one Month after Demand made, upon Oath made of the making ſuch Demand and Refuſal of Payment, ſhall have an* Attachment for Contempt, *and the Recognizance ſhall not be diſcharged until the Coſts ſhall be paid, and the Order complied with.*

18. 13 *Geo.* 2. *cap.* 18. *S.* 5. *No Writ of Certiorari ſhall be allowed* to remove any Conviction, Judgment, Order, or other Proceedings before any Juſtice *or Juſtices* of Peace *of any County, City, Borough, Town Corporate, or Liberty, or the reſpective General or* Quarter Seſſions *thereof*, unleſs *ſuch Certiorari be moved or* applied for within 6 Kalendar Months next after ſuch Conviction *&c.* and *unleſs it be duly proved upon Oath, that* the Party *ſuing forth the ſame* has given 6 Days Notice *thereof in Writing to the Juſtice or Juſtices before whom ſuch Conviction &c. ſhall be made, to the End that ſuch Juſtice or Juſtices, or the Parties therein concerned, may ſhew Cauſe, if he or they ſhall think fit, againſt the granting ſuch Certiorari.*

(I) Removed by it. What is, or ſhould be. And How. And what is a good Removal.

1. *PRæcipe quod reddat* is brought *in London* &c. The *Tenant vouched Foreigner to Warranty*; the *Plea* ſhall be removed by Certiorari, and after the Warranty determined it ſhall be *remanded*. Br. Certiorari, pl. 16. cites 11 H. 4. 26, 27.

2. *But* where the *Action* is brought *in Bank, and L. has Conuſance of the Plea*, and *fails the Party of Right in their Franchiſe by Foreign Voucher*, Foreign Plea, or otherwiſe, the Re-ſummons lies to reduce it into Bank; for there it never ſhall be remanded into the Franchiſe; Per Hill and Hank. For *Conuſance is* granted *upon Condition*, Quod *celeris fiat Juſtitia, aliequin redeat.* Ibid.

3. The *Records of Aſſiſe* may be removed into Chancery *upon Change of the Juſtices*, and to be ſent to the new Juſtices by Mittimus. Br. Certiorari, pl. 20. cites F. N. B. 242.

4. *And Deed denied in one Court*, may be ſo *removed into another* Court. Ibid.

5. It is ſaid, that there is no Certiorari in the Regiſter *to remove Record out of a Court into C. B. immediately*; but, as it ſeems, it *ſhall be certified in the Chancery by Surmiſe, and then to be ſent into Bank by Mittimus*, which Matter was agreed in the Chancery. Br. Certiorari, pl. 20. cites 36 H. 8. & F. N. B. 242. Br. N. C. pl. 278. cites S. C.

6. Scire Facias; Note, that where the *Plaintiff in Aſſiſe in Ancient Demeſne* had *recovered the Land and Damages*, and becauſe the *Defendant had nothing there to render the Damages*, he *removed it into Chancery* by Certiorari, *and ſent it by Mittimus into C. B.* and there had *Scire Facias to have Execution* upon it; Quod Nota; and ſo ſee, that after Judgment no other Writ lies to remove Record but only Certiorari, tho' it be recovered in a baſe Court. Br. Certiorari, pl. 4. cites 39 H. 6. 3. 4.

7. A Judgment given in the Court at Dimchurch, being a Member of the Cinque Ports, was removed by Certiorari into B. R. and a Sci. Fa.

iſſued againſt the Defendant, to ſhew Cauſe why the Plaintiff ſhould not have Execution, and there being an Alias *Certiorari* in this Caſe, the Defendant demurr'd, for that it was *ſicut Prius*, when it ought to be *ſicut Alias*, but the Exception was diſallowed, and the Plaintiff had Judgment. Sty. 9. Paſch. 23 Car. Rook v. Knight.

Tho' the Certiorari removes the Recognizance to appear before the Juſtices of Aſſize &c. yet that does *not excuſe his Appearance*, but he ought

8. An *Indictment of Battery was found* at the Seſſions Billa vera, and *the Party entred into a Recognizance to go to Trial there the next Seſſions*; and this being ſhewn for Cauſe why the Certiorari ſhould not be granted, Roll Ch. J. ſaid, that the *Recognizance alſo may be removed by the Certiorari, and* thought *there could be no Hurt if the Indictment be remov'd*, and the Trial had at the Aſſizes, and ſhould it be removed into B. R. they would not quaſh the Indictment, but the Party ſhall plead and carry it down, and try it at the next Aſſizes at his own Charge. Sty. 328. Paſch. 1652. B. R. Anon.

to appear and procure his Appearance to be recorded, and he muſt likewiſe deliver the Writ; for purchaſing ſuch a Writ only is not ſufficient; and Judgment accordingly. Cro. J. 281. pl. 2. Trin. 9 Jac. B. R. Roſſe v. Pye.——Bulſt. 155. S. C. adjudged accordingly.——Yelv. 207. S. C adjudged accordingly.——2 Hawk. Pl. C. 294 cap. 27. S. 65. ſays, that this Opinion ſeems ſupported by the better Authority, tho' it has been holden otherwiſe, as in 2 Roll Abr. 492. (F) pl. 12. and Dalt. cap. 75.

Comb. 199. Drew v. Barſdell, S. C. the Court were of Opinion, that a Sci. Fa. might well be brought in B. R on a Recognizance remov'd hither out of C. B. by Certiorari, and that by reaſon of

9. After a Writ of *Error* upon a Judgment in C. B. and the *Judgment affirmed*, the *Plaintiff in the original Action moved for a Certiorari to remove into B. R. the Recognizance taken in C. B. upon the Allowance of the Writ of Error*, in order to bring a Sci. Fa. againſt the Bail. It was objected, that B. R. could not grant ſuch a Certiorari, becauſe the Recognizance is a Record, and therefore not to be removed by ſuch a Writ, for that removes only Tenorem Recordi; But on the other Side a Diverſity was taken between Bail taken in inferior Courts where it is upon the Roll itſelf, and ſo Part of the Record, and where *in the Courts of Weſtminſter*; for there *the Recognizance is taken by itſelf, and is Part of the Record on the Roll*, and therefore may be removed by Certiorari tho' the Record itſelf cannot, and it was granted accordingly. 4 Mod. 104. Paſch. 4 W. & M. in B. R. Barſdale v. Drew.

ſome Precedents ſhewn them at their Chambers. ——— Show. 343. 345. S C ſays, the Court, after Deliberation, and Search into Precedents, had Account of 7 or 8 in all, the firſt 30 Years ſince, but none on Debate; however, they ruled it good, for this Reaſon, as I ſuppoſe, becauſe Ampliat Juriſdictionem, and is no Prejudice to the Suitors, but rather an Advantage, becauſe no Writ of Error lies from hence upon ſuch Scire Facias, but in Parliament.

6 Mod. 61. S. C & S. P. per Cur. and that ſo it is if he will not uſe it till after the Jury ſworn;

10. A Certiorari *after Conviction ought to be to remove the Indictment and Conviction*, and if it mentions the Indictment only and not the Conviction, it may be quaſhed; and if the Party *takes it out before Conviction, but will not uſe it till after*, he ought to loſe the Benefit of it. 1 Salk. 150. pl. 17. Hill. 2 Ann. B. R. the Queen v. Dixon.

and the Writ was quaſh'd, and a new one granted to remove the Indictment, and Conviction thereupon, and ordered them to make it ſpecial, and to give the Proſecutor a Day thereupon above. ——— 3 Salk. 78. pl. 1. S.C.——2 Ld. Raym. Rep. 971. S.C. & S.P. per Holt Ch. J. accordingly.

3 Salk. 78. pl. 1 S.C. & S. P. —— 1 Salk. 150. pl. 17. S C. but S. P. does

11. On a Certiorari *to remove an Indictment after Conviction by Verdict*, a *Day in Court ought to be given* to the Party. 6 Mod. 61. Mich. 2 Ann. B. R. the Queen v. Dixon.

not appear.——2 Ld. Raym. Rep 971. S. C. & S. P. accordingly.

12. A Certiorari was quaſhed, becauſe it was *directed Juſticiariis ad Pacem aſſignatis*, omitting the Words *ad conſervandam*. 11 Mod. 172. pl. 10. Paſch. 7 Ann. B. R. The Queen v. Jay.

(K) Returned

(K) Returned or certified. By whom and How. And falſe Return puniſhed How.

1. IN *Debt upon Exigent*, the *Sheriff returned Quarto exactus*; the *Plaintiff averred that the Defendant is duly outlaw'd.* Certiorari ſhall be directed to the *Coroners*, to certify whether he is outlawed or not; and if they *certify that he is outlawed*, it ſhall be taken for perfect Record that the Defendant is outlawed, and the Sheriff ſhall be amerced. Br. Certiorari, pl. 2. cites 36 H. 6. 24.

2. If *Aſſiſe is taken before the one Juſtice of Aſſiſe, the Clerk of the Aſſiſe not expecting the coming of the other Juſtice of Aſſiſe*, yet *the other Juſtice by Certiorari* may certify the ſame Record. Br. Record, pl. 81. cites 11 H. 7. 5.

3. A Certiorari was *directed to two Clerks of the Parliament* to certify the Tenor of an Act of Parliament concerning the Attainder of the Duke of Norfolk, and *one* of the Clerks *made the Return.* The Queſtion was if the Return was good, ſince one alone had no Warrant to certify. See D. 93. a. pl. 24. Mich. 1 Mar. The Duke of Norfolk's Caſe. Upon Diminution alleged, a Certiorari iſſued *to A. and B. Juſtices of the Grand Seſſions of Angleſey*, which is *returned by one* of them *by his proper Name*, and well. D. 93. a Marg. pl. 24. cites 3. Jac. B. R.

4. Debt on a *Recovery in Briſtow*; it was traverſed and certified *under the Seal of Briſtow*; it was moved that it ſhould have been certified under the Great Seal, but the Court held that it was well enough; for ſuch is the Courſe upon Certiorari directed to inferior Courts. Cro. E. 821. pl. 17 Paſch. 43 Eliz. B. R. Butcher v. Aldworth. 2 Hawk. Pl. C. 294 cap. 27. S. 70. S. P. and ſays that if ſuch Court has no proper Seal, it ſeems that the Return may well be made under any other.

5. Certiorari *to the Recorder* cannot be *returned by the Deputy Recorder* in his own Name. Sty. 98. Paſch. 24 Car. B. R. Thin v. Thin. But if it be directed to a Recorder who is a Cuſtos Brevium, or to a Recorder and his Deputy, then it is good. Ibid.

6. Certiorari to remove a Record *Coram R. F. & Sociis ſuis.* The Record is *certified by R. F. and one other*, and 3 Juſtices held this well enough; but Twiſden e contra. Keb. 282. pl. 86. Paſch. 14 Car. 2. B. R. Reeve v. Brown. It was mov'd to quaſh a Return to a Certiorari, *directed to 2 Juſtices* of Peace, becauſe it *was only made by one.* But the Court over-ruled the Exception, becauſe they are Judicial Officers; upon which he took 2 others, viz. that the Return was *in Engliſh* and likewiſe *upon Parchment*, and both thoſe Courts allowed, and made a Rule upon them to make another Return, for this they ſaid was none. Barnard. Rep. in B. R. 113. Hill. 2 Geo. 2. The King v. The Inhabitants of Darlington.

7. Exception was taken upon a Conviction of one for carrying of a Gun, not being qualified according to the Statute, becauſe it was *before* ſuch an one *Juſtice of the Peace*, without adding *Nec non ad diverſas Felonias, Tranſgreſſiones &c. audiend' aſſign'*. And the Court agreed ſo it ought to be in Returns upon *Certioraries* to remove Indictments taken at Seſſions; but otherwiſe of Convictions of this Nature, for it is known to the Court, that the Stat. gives them Authority in this Caſe. Vent. 33. Trin. 21 Car. 2. B. R. Anon.

8. Nota, if a *Certiorari* be not returned, ſo that an *alias* be awarded, the Return muſt be as upon the firſt Writ, and the other muſt be returned

turned *Quod ante adventum iſtius brevis*, the Matter was certified. Vent. 75. Paſch. 22 Car. B. R. Anon.

9. All Certioraries though *directed to divers Juſtices*, may be *returned by one*, and ſo is the uſual Practice; Per Aſtry. Cumb. 25. Trin. 2 Jac. B. R. Anon.

5 Mod. 149. Hill. 7 W. 3. The King v. the Inhabitants of Wootton Rivers, S. C.

10. Where a Certiorari iſſues to *Juſtices of Peace* to return an Order, they *can only return it in hæc Verba*, and whatever they return more, the Court can take no Notice of. 2 Salk. 493. pl. 59. The Inhabitants of Weſton Rivers v. St. Peters in Marlborough.

—— 2 Hawk. Pl. C. 295. cap. 27. S. 75. ſays that whatſoever Matters are put into the Return of a Certiorari *by Way of Explanation* or otherwiſe, beſides thoſe which are expreſsly ordered to be certified, are put in without any Warrant or Authority, and conſequently ſhall be no more regarded by the Court above, than if they had been wholly omitted.

11. Certiorari *returned* by Clerk of the Peace was held ill, he not being the Perſon to whom the Certiorari was directed, but it ſhould have been returned by 2 Juſtices. 2 Salk. 479. pl. 27. Trin. 7 W. 3. B. R. Aſhley's Caſe.

(L) Variance and the Effect thereof, and falſe Returns.

Br. Variance, pl. 62. cites S. C. Br. Certiorari, pl. 6. cites S. C.

1. CErtiorari to remove the Indictment *of Stealing 2 Horſes*, and *the Indictment of one Horſe only* was certify'd in Chancery, and ſent into B. R. and for the Variance between the Writ and the Indictment, *they would not Arraign the Priſoner*, but he went Sine die; for they had no Warrant &c. Br. Corone, pl. 69. cites 3 Aſſ. 3.

2. In Aſſiſe the Record was removed by Certiorari and Mittimus before the Juſtices of B. R. and there was a Variance between the Writ of Certiorari, and the Record and Mittimus; for the one was *H. Grene* Juſtice, ſcilicet, the Record, and the Writ was *H. de Grene*, and ſo Surpluſage by the Word [de] and therefore the Juſtices would not proceed. Br. Variance, pl. 71. cites 28 Aſſ. 52.

3. A Certiorari was to remove a Record *cujuſdam Inquiſitionis capt' &c. in Curia noſtra* &c. but the *Record being in the Time of the former King*, the Court held the Writ ill, and that the Record *is not well remov'd*. D. 206. b. pl. 12. Mich. 3 & 4 Eliz. Anon.

4. A Certiorari was to remove an Indictment of *forcible Entry*, but the Return to it was a *Peaceable Entry and a Forcible Detainer*; ſo that there being no ſuch Indictment before them as the Certiorari mentions, it was inſiſted that it was no Contempt in the Juſtices not to make any Return. But per Cur. it is the uſual Courſe of the Court to make Certioraries in this Form, and therefore this is no Excuſe. Sty. 89. Hill. 23 Car. Chambers v. Floyd.

5. Upon a Certiorari brought to remove an Indictment for Barretry in Middleſex, 2 or 3 *Lines of the Indictment were left out*. It was agreed that if this Indictment had been certified out of London, it might be amended on Motion by the Original, becauſe by their Charter they certify only Tenorem Recordi, ſo that the Record itſelf ſtill remains with them, and the Court may amend by it; 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. Sid. 155. pl. 5. Mich. 15 Car. 2. B. R. The King v. Alcock.

6. A Certiorari was directed to *a Juſtice of Cheſter*, or his Deputy, and it was returned and ſubſcribed by ſuch a one *Chief Juſtice*. It was objected that the Return was ill, it not being by the ſame Perſon; and after divers Motions the Court held it good. Lev. 50. Mich. 15 Car. 2. B. R. Barrow v. Hewitt. Sid. 64. pl. 35. S. C. and the Court thought it a good Return, becauſe the Direction of the Writ implies the Superior, inaſmuch as it mentions the Deputy; and the Statute of * H. 8. cap. . ſtiles him the High Juſtice, and (High) and (Chief) are all one, and the Court will not intend that there is another Juſtice beſide him who made the Return; and Judgment Niſi &c.—— Keb 165. pl. 120. Mich. 13 Car. 2. B R. the S. C. adjornatur.——Ibid. 187. pl. 168. S. C. adjudg'd for the Plaintiff.——Ibid. 210. pl. 13. Hill. 13 Car. 2. S. C. but S. P. does not appear.

So where a Certiorari was directed to the *Juſtices of Ely*, and was returned by ſuch a one *Chief Juſtice of Ely*, the ſame was adjudged good; Lev. 50. in Caſu ſupra, cites it as lately adjudged in the Caſe of Harriſon v. Munford.——Sid. 64. cites it as the Caſe of Harriſon v Morthen, and held good there. ——Keb. 187 cites it as the Caſe of Harriſon v. Morpeth, in C. B. 1654.

* It ſeems that this, according to Keb. 187. ſhould be 2 & 3 E. 6. cap. 28.

7. A Certiorari was to remove an Order againſt T. S. concerning *Foreign Salt*, which being removed, appeared to be an Order touching *Salt*, without the Word (Foreign.) It was held that for this Cauſe it was not removed, there being no ſuch Order. 1 Salk. 145. pl. 4. Mich. 8 W. 3. B. R. Anon. 7 Mod. 97. Mich. 1 Ann. B. R. Anon. S. P. and ſeems to be S. C. notwithſtanding the Difference of the Year, and held accordingly; for a ſpecial Certiorari cannot remove general Orders, tho' a general Certiorari will remove ſpecial ones.

8. When a Preſentment in a Leet is removed by Certiorari, the *Stile of the Court muſt be ſet out exactly*; but there needs no ſuch Nicety in Pleading; per Holt Ch. J. 11 Mod. 228. Trin. 9 Ann. B. R. in Caſe of the Queen v. Jennings.

(M) Return. What is a Bad Return, and what No Return.

1. CErtiorari to remove Indictments was *returned, that at the Seſſions held at C. before T. B. and other Juſtices, to preſerve the Peace of the King* in the ſame County, and did *not ſay Ad diverſas Felon'* &c. according to their Commiſſion; and it ſeems there that the Party ſhall not be arraigned of the Felony ſpecified in the Indictment in B. R. becauſe it is not well removed for the Cauſe aforeſaid; and by ſome, no Record is before Juſtices of the Peace &c. becauſe 'tis removed. Quære thereof; Quære before whom the Record remains, becauſe it is doubted. Br. Indictment, pl. 32. cites 12 H. 7. 25.

2. Certiorari to the *County Palatine of Cheſter*. They *returned that they had Juriſdiction of the Cauſe, and that therefore they are not to certify it.* It was objected that this Return was too general; for they have not ſhew'd any Cauſe why they ſhould have Juriſdiction. Roll Ch. J. ordered them to ſhew Cauſe why they ſhould not make a better Return. Sty. 155. Hill. 1650. Allen's Caſe.

3. Indictment upon the Statute 5 Eliz. *for exerciſing a Trade* in a Borough, *not being bound Apprentice* to it; and upon a Certiorari to remove it into B. R. the Mayor made this Return, viz. *Humillime certifico quod ad Seſſionem pacis &c. per Juratores præſentatum exiſtit quod Billa ſequens eſt vera*, viz. *Quod prædict.* Berry *did exerciſe* &c. omitting the Cláuſe *Juratores pro Domino Rege præſentant quod &c.* The firſt Exception was, that *Billa ſequens eſt vera* is naught; ſed non allocatur, as to Comb. 262. S. C. Exception was taken that it is only an Hiſtorical Recital. Eyre J. ſeem'd to

allow the Exception; for every Indictment ought to begin Juratores pro Domino Rege ſuper Sacramentum ſuum præſentant, and it is a neceſſary Part thereof; But Holt Ch. J. ſaid it may be either Way, and that this is well enough, and tantamount. The Reporter adds a Quære.

that Part of the Return. 2d Exception was, that there is no Bill at all; for 'tis not ſaid that it was *preſented by the Jury*. Sed per Curiam, this is no Return to the Certiorari; for the Writ commands to return an Indictment, but this is none, therefore they could not quaſh it; neither would they ſuffer this Return to be filed, becauſe it was inſufficient, wherefore the Mayor was ordered to amend the Return. Et per Cur. a Return *quod humillime certifico*, is not good. Carth. 223. Paſch. 4 W. & M. in B. R. The King v. Berry.

4. A Certiorari iſſued *to remove a Conviction for Deer-ſtealing*, and the *Juſtices returned 2 Affidavits, and a Warrant to diſtrain*; and this Return was quaſhed as imperfect. 1 Salk. 146. pl. 8. Trin. 12 W. 3. B. R. The King v. Levermore.

5. On a Certiorari *to remove an Order*, the *Return was Cujus quidem tenor ſequitur in hæc Verba*, and not *qui quidem Ordo ſequitur in hæc Verba*, and it was quaſhed for that Reaſon. 1 Salk. 147. pl. 10. Paſch. 1 Ann. B. R. The Queen v. St. Mary's Pariſh in the Deviſes.

6. Certiorari *to remove a Conviction for ſelling Cyder without paying the Duty* on the late Statute, and the Juſtice made the *Return in Engliſh*; and upon a Motion to quaſh it, it was allow'd to be *good*. 1 Salk. 149. pl. 16. Mich. 2 Ann. B. R. Anon.

(N) Procedendo. In what Caſes.

1. *Priſoners* were *removed with their Indictments by Certiorari into B. R.* and all except one were put into the Cuſtody of the Marſhal, and this *one was remanded, becauſe Appeal was taken againſt him at N. before the Certiorari*, to which he *pleaded Not Guilty, and* Proceſs of *Diſtreſs awarded againſt the Jury*, and therefore he was remanded to Newgate, becauſe the Appeal ſhall not be diſcontinued. Br. Corone, pl. 161. cites 16 E. 4. 5.

2. A Certiorari was granted out of this Court *to remove certain Indictments of forcible Entries*, whereas *in Truth there was no Indictment of forcible Entry found againſt the Party*. Upon this a Superſedeas was pray'd to ſuperſede the Certiorari. Per Roll J. this Certiorari was gotten *by way of Prevention* for what might be done; but order'd a Procedendo to the Juſtices to proceed, notwithſtanding the Certiorari. Sty. 127. Trin. 24 Car. B. R. Anon.

2 Hawk. Pl. C. 294. cap. 27. S. 68. ſays that it ſeems ſo by the Common Law. And ibid. in Marg. ſays it was agreed in B. R. Hill. 6 Geo. The King v. Whitlow.

3. After Certiorari returned and filed, no *Procedendo* can go; per Cur. 6 Mod. 43. Mich. 2 Ann. Anon.

(O) The

(O) The Effect of a Certiorari. And Proceedings &c. after.

1. AFTER an *Indictment upon the Stat.* 8 *H.* 6. before *the Juſtices of Peace* in Eſſex, they *awarded Reſtitution*; *but before it was made there was a Certiorari delivered to the Cuſtos Rotulorum*, but *he would not open or read it till after Reſtitution* was made; and yet the Judges ſeem'd clear that the Reſtitution was well awarded and made. And a *Diverſity* was taken *between* an *Act Judicial and Miniſterial*; the Act of the Juſtices of Peace is injudicial, and their Negligence in not ſending a Superſedeas ſhall not prejudice; but where a Miniſter receives a Countermand, As if the Sheriff be ſuperſeded, this is a Diſcharge of the Authority which he had before; and if Juſtices of Peace receive a Certiorari, whatever they do afterwards is without Warrant; but all which the Sheriff does after, upon the Warrant before, is not erroneous; and yet their Negligence is puniſhable by Attachment, as a Contempt. Mo. 677. pl. 921. cites Hill. 45 Eliz. B. R. Fitzwilliams's Caſe. Cro. E. 915. pl. 5. S. C. the Reſtitution after the Certiorari was *held void*, becauſe the Hands of the Juſtices were thereby cloſed, it being an expreſs Prohibition to them, viz. Ulterius terminari coram Vobis nolumus, and ſo every Act done by their Authority after its Delivery is void.——Yelv. 32. S. C. and Re-reſtitution was granted upon great Deliberation, and the Cuſtos Rotulorum was much check'd by the Court for a Miſdemeanor.——Hawk. Pl. C. 154. cap. 64. S. 61. ſays it is certain that a Certiorari from B. R. is a Superſedeas to ſuch Reſtitution; for every ſuch Certiorari has theſe Words, Coram nobis Terminari volumus & non alibi, and conſequently it wholly cloſes the Hands of the Juſtices of Peace, and avoids any Reſtitution which is executed after the Teſte; but does not bring the Juſtices of Peace &c. into a Contempt, unleſs they proceed after the Delivering thereof.

2. If a Certiorari be directed *to Juſtices of Peace to remove an Indictment found before them*, they *cannot proceed, altho' the Record is not remov'd.* The 21 *Jac.* 1. *cap.* 8. *does not extend to* Indictments of *Felony*, *but only* to leſſer Acts againſt the Peace, as *Riots*, *Treſpaſs*, *Forcible Entry*, *and the like*, *they may proceed in theſe Caſes*, *notwithſtanding ſuch Certiorari*, *if he that ſues out ſuch Certiorari does not enter into a Recognizance* with Sureties to proſecute it with Effect, and to pay Coſts to him againſt whom the Treſpaſs was committed, if the Defendant does not prevail. Jenk. 181. pl. 64. A Certiorari to the Juſtices, tho' the *Day of Return is paſt*, is a Superſedeas to the Proceeding upon the Indictment; for there are expreſs Words for the Stay thereof, viz. Eo quod Rex non vult Feloniam illam terminari alibi quam coram ſe-ipſo &c. D 245. a. pl. 63. Mich. 7 & 8 Eliz.——2 Hawk. Pl. C. 293. cap. 27. S. 64. S. P. and ſays, that the Proceeding after is erroneous, notwithſtanding the Party who proſecuted it never make any other Suit to have the Record certified, but only by cauſing the Certiorari to be delivered.

3. After a Certiorari brought and Tender of ſufficient Sureties, according to the Statute, all the Proceedings of the Juſtices of Peace are coram non Judice; Reſolv'd. Mar. 27. pl. 63. Trin. 15 Car. Anon. 2 Hale's Hiſt. Pl. C. 213. Hancock's Caſe, S.P. reſolved, and ſeems to be S. C.

4. If an Indictment is removed by Certiorari, and *no Bail is put in*, you may proceed below without any Procedendo; Per Roll Ch. J. Sty. 321. Hill. 1651. B. R. Anon.

5. A Certiorari is no Superſedeas if it be *not delivered before the Return is expired.* 2 Hawk. Pl. C. 294. cap. 27. S. 64. Keb. 944. pl. 3 Hill. 17 & 18 Car. 2. B. R. the King v. Rhodes.

6. Whether a *Recognizance for the Good Behaviour* be *ſuperſeded* by a Certiorari. See 2 Hawk. Pl. C. cap. 27. S. 65.

7. All *Proceedings after a Certiorari allowed* are erroneous; Per Cur. 1 Salk. 148, 149. pl. 13. Hill. 1 Ann. B. R. Croſs v. Smith. 2 Hawk. 293. cap. 27. S. 62. S.P. ſays it is agreed by all the Books.

8. Cer-

S. P. 6 Mod. 33. Mich. 2 Ann. B. R. Anon.

8. Certiorari to remove Indictments is no *Superſedeas* by 5 & 6 W. & M. cap. 11. unleſs Recognizance be entred into in 20 l. 2 Salk. 564. pl. 3. Paſch. 1 Ann. B. R. the Queen v. Ewer.

1 Salk. 147. pl. 12. Mich. 1 Ann. B. R. the Queen v. Naſh, S. C. held per Cur. accordingly.

9. After a *Warrant iſſued out* upon the Act againſt Deer-ſtealing *to levy by Diſtreſs*, a Certiorari was brought, and the Record thereby removed up in B. R. but that could *not hinder the Execution.* 6 Mod. 83. Mich. 2 Ann. B. R. in Caſe of Morley v. Staker.

1 Salk. 147. the Queen v. Naſh, S. C.

10. If the *Warrant* was made *returnable before the Juſtices of Peace*, tho' the Record of Conviction be after moved into B. R. by Certiorari, yet they may *call the Conſtable to account* upon the Warrant; but if the Warrant was not made returnable, the Officer is not bound to return it. 6 Mod 83. Mich. 2 Ann. B. R. in Caſe of Morley v. Staker.

1 Salk. 147. the Queen v. Naſh, S. C.

11. If before Certiorari *Execution be done in Part*, notwithſtanding the Certiorari the Officer may go on with it. 6 Mod. 83. Mich. 2 Ann. B. R. in Caſe of Morley v. Staker.

2 Hawk. Pl. C. 295. cap. 27. S. 74. ſays, that the Perſon to whom a Certiorari is directed may make what Return to it he pleaſes, and the Court will not ſtop the filing of it on Affidavits of its Falſity, except only where the Publick Good requires it, (as in Caſe of the Commiſſioners of Sewers) or for ſome other ſpecial Reaſon; but regularly the only Remedy againſt ſuch a falſe Return, is an Action on the Caſe at the Suit of the Party injured by it, and an Information &c. at the Suit of the King.

12. On Certiorari to remove *all Inquiſitions of Forcible Entries* made upon J. S. the Juſtices *returned an Inquiſition of an Entry made by B. upon J. S.* and now *Affidavits were offered* to give the Court Satisfaction, *that the only Inquiſition before the Juſtices was an Inquiſition of a Force by A. and that the Precept was to ſummon a Jury to inquire of a Force againſt J. S. by A. and there they inquired of no other Force.* The Court would hear no Affidavits againſt the Return (which is Matter of Record) in order to make Reſtitution, but we may in order to have an Information filed againſt the Juſtice for this Abuſe. 6 Mod. 90. Hill. 2 Ann. B. R. Cowper's Caſe.

13. If the Party, that removes *Indictment*, does not enter into *Recognizance* to try it next Aſſiſes, or Term, or the Sitting within the Term, the Certiorari is no Superſedeas; and *Failure of Trying* is a *Forfeiture* of Recognizance, after which they will not hear a Motion in Arreſt of Judgment. 6 Mod. 43. Mich. 2 Ann. B. R.

2 Salk. 653. pl. 32. S. C. and ſame Rule.

14. The Court made it a Rule, that the Defendant ſhall never *carry to Trial* an Indictment removed in B. R. by the Proſecutor, without Leave of the Court. 6 Mod. 245. Mich. 3 Ann. B. R. in Caſe of the Queen v. Sir Jacob Banks.

2 Ld. Raym. Rep. 1199. the Queen v. Baines, S. C. and the Certiorari was quaſh'd, becauſe inſufficient.

15. An Order was made againſt A. and the Certiorari was *to remove all Orders againſt A. and B.* The Court held, that this *ſhall not remove the Order againſt A. alone*, but it ought to be to remove all Orders againſt A. and B. or either of them. 1 Salk. 151. pl. 21. Mich. 4 Ann. B. R. the Queen v. Barnes.

16. If there be a *Forcible Detainer*, and an Inquiſition taken, and then *a Certiorari to remove the Inquiſition*, and then there is *a new Forcible Detainer*, the Juſtices may, notwithſtanding the Certiorari, record the Force; but they cannot proceed to award Reſtitution; So if after the Inquiſition, and before the Certiorari, there had been a Forcible Detainer, the Juſtices might have recorded the Force, but all Proceedings upon ſuch Inquiſition are ſtopp'd. 1 Salk. 151. pl. 22. Paſch. 5 Ann. B. R. Kneller's Caſe.

17. A *Conviction* was *upon View* of 3 Juſtices *of a forcible Detainer*; if a Certiorari comes to them, yet they *may proceed to ſet a Fine and compleat their Judgment*, and it will be no Contempt; but the Juſtices having committed the Defendants to Goal to lie there till they ſhould pay a Fine

a Fine to the King, and no Fine being ſet, the Conviction was held naught and quaſhed, and Defendants diſcharged. 2 Ld. Raym. Rep. 1514. Hill. 1 Geo. 2. The King v. Elwell & al'.

(P) Coſts. In what Caſes.

1. 5 & 6 W. & M. cap. 11. *IF the Defendant procuring ſuch Certiorari be convicted, B. R. ſhall give reaſonable Coſts to the Proſecutor, if he be the Party injured, or if he be a Juſtice of Peace, Mayor, Conſtable or other Civil Officer, who proſecuted upon any Fact committed that concerned him, or them, as Officers to proſecute or preſent.*

2. *And Coſts ſhall be taxed according to the Courſe of the ſaid Court, and the Proſecutor, for Recovery of the ſaid Coſts, ſhall within* 10 *Days after Demand and Refuſal of the Payment of them upon Oath have an Attachment granted againſt the Defendant by the ſaid Court for his Contempt; and the Recognizance ſhall not be diſcharged till ſuch Coſts are paid.*

3. No more *Coſts* ſhall be *taxed* upon a Certiorari, than the Proſecutor has been at *ſince the Certiorari, and upon it*; and the Maſter is not to conſider the Coſts below. 1 Salk. 55. pl. 5. Paſch. 1 Ann. B. R. The Queen v. Sumers. 2 Hawk. Pl. C. 292. cap. 27. S. 56. S. P.

4. In Scire Facias upon a Recognizance removed by Certiorari, and upon Oyer entered in hæc Verba, the *Condition of the Recognizance* recited in the Scire Facias *was, that the Defendant ſhould give Notice of Trial, Proſecutori Et ejus Clerico*, whereas the Recognizance itſelf was Proſecutori *Aut ejus Clerico*; and per Curiam, this is a Variance and quite different; ſo the Defendant had Judgment. 3 Salk. 369. pl. 7. Paſch. 1 Ann. B. R. The Queen v. Ewer.

5. If an *Indictment* be removed by Certiorari from the Seſſions *into B. R.* and the Defendant is convicted, the Proſecutor is intitled to his Coſts by the Statute; Arg. 10 Mod. 193. Mich. 12 Ann. B. R.

(Q) Of the Proceedings of the Superior or Inferior Court after Certiorari iſſued.

1. PReſentments in Courts may be *removed into Chancery*, and be *ſent thence into B. R. and* the *Proceſs* ſhall be made *to amend the Nuſance*, or to repair the Bridge &c. Quod nota, and this it ſeems by Certiorari and Mittimus. Br. Certiorari, pl. 7. cites 38 Aſſ. 15. Br. Preſentment, pl. 10. cites S. C.

2. Where *Orders of Commiſſioners of Sewers* are removed into B. R. by Certiorari, the *Court does not file them*, but hear Counſel upon the Matter of them before filing; for if they are good, the Court muſt grant a Procedendo, which they cannot do after they are filed. 1 Salk. 145. pl. 6. Hill. 11 W. 3. B. R. Anon. Sed per Cur. Trin. 4 Ann. B. R. we will file them in any Cauſe where no apparant Danger is likely to enſue by the Delay. Cited 1 Salk. 145. in pl. 6. ——— There is a Rule in the Court of B. R. that no Order of Commiſſioners of Sewers ought to be filed without Notice given to the Parties concerned. Alſo it is every Day's Practice of that Court, before it will ſuffer the Return of a Certiorari for the Removal of the Orders of ſuch Commiſſioners to be filed, to hear Affidavits concerning the Facts whereon they are grounded; and if the Matter ſhall ſtill appear doubtful, to direct the Trial of feigned Iſſues, and either to file the Return, or ſuperſede the Certiorari, and grant a Procedendo as ſhall appear to be moſt reaſonable for the Trial of ſuch Iſſues, and to give Coſts againſt the Proſecutor of the Certiorari, if it appear to have been groundleſs. 2 Hawk. Pl. C. 288. cap. 27 S. 34.

3. If Certiorari goes to remove a Record, the Judge below is not in *Contempt for Proceeding* on the Record till *Service* of the Writ; but all *Proceedings upon it after* the Certiorari teſted are void; Per Cur. 12 Mod. 384. Paſch. 12 W. 3. Anon.

4. 'Twas moved for an Attachment againſt an Officer for executing by Diſtreſs an Order of Juſtices, for *levying* of *Money* for Repair of a Bridge, *after the Order* was *removed* by Certiorari; Per Holt Ch. J. there never is any formal Allowance of a Certiorari below; but to bring one in *Contempt*, the Diſtreſs muſt be *after the Certiorari preſented below*; and if a Warrant were delivered before that Time, the Way had been upon producing the Certiorari, to get a *Superſedeas* of it, and deliver it to the Officer, or elſe he cannot be in Contempt. 12 Mod. 499. Paſch. 13 W. 3. Anon.

5. Per Holt Ch. J. It ſhould be a *Rule* for the Future, that on moving *Indictments* here by Certiorari, we ſhould not hear *Motion in Arreſt* of Judgment till *Defendant's Appearance*. 7 Mod. 39. Trin. 1 Ann. B. R. Anon.

6. When one removes an *Indictment* by Certiorari, he *ought to appear above* the Term it comes in, or elſe he forfeits his Recognizance that he enters into for trying it; but ſuch Appearance need not be in Perſon, but *by his Clerk*, and without it he cannot have a Copy of the Indictment to quaſh it. 6 Mod. 220. Mich. 3 Ann. B. R. Anon.

7. The Defendant was *indicted at the Seſſions for a Nuſance, and pleaded Not Guilty*; and *after Iſſue joined, he obtained a Certiorari to remove the Indictment* into this Court, *and then demurred to it*; and now the Proſecutor moved for a Rule, that the Clerk of the Peace might return the Defendant's Plea in the Court below, in order to hinder his pleading De Novo; On the Contrary was cited Carth. 6. **The King v. Baker**, that in ſuch Caſe the Party is always admitted to waive the Iſſue below, and go to Trial upon Iſſue joined in this Court. The Court inclined that the Defendant ſhould abide by his former Plea; but it being a Matter of Practice, it was referred to the Clerk of the Crown, who after reported, that upon Certioraries to remove Indictments, the *Practice is not to return the Plea below, unleſs a Verdict had been given*. Mich. 11 Geo. 2. The King v. Carpenter.

(R) Bills in Chancery and Proceedings thereon.

2 Freem. Rep. 174. pl. 232. S. C.

1. RICH was Plaintiff upon a Certiorari Bill *to remove a Cauſe out of the Mayor's Court, his Witneſſes being out of that Juriſdiction*, and the Bill here was for an Account touching other Matters. Witneſſes being examined, the Defendant moved for a Procedendo, and inſiſted upon it; for that if the Cauſe ſhould be heard here, he could not be relieved, not having any Bill here, he being here but Defendant, though Plaintiff in the Mayor's Court. The Plaintiff's Counſel inſiſted that no Procedendo ought to be; for that *this Bill containing other Matters* could not be determined upon the Bill in the Mayor's Court, and that the Bill could not be divided; and that the Plaintiff in the Mayor's Court, might file his Bill in the Mayor's Court, in this Court, and direct it to the Chancellor, and have the ſame Remedy here as he could there. Ordered that the Cauſe ſtand to be heard on the Bill in this Court; and after hearing the Cauſe was diſmiſſed out of this Court. Chan. Caſes, 31. Mich. 15 Car. 2. Rich v. Jaquis.

2. Plaintiff brought a Certiorari Bill; the Defendant *pleaded a Decree in the Mayor's Court, and an Inrolement*, which was ſaid to be only Pronuncial;

nuncial; and it was referred to a Maſter to certify whether it was *before the Bill.* 3 Chan. Rep. 66. 24 July, 1671. Cook v. Delabere.

3. A Certiorari was not allow'd *to remove Proceedings by Engliſh Bill in the Lord Mayor's Court* into Chancery, and ſo a Demurrer held good, and a Procedendo ordered &c. 2 Chan. Rep. 108. 27 Car. 2. Sowton v. Cutler.

4. A *Bill was brought in the Lord Mayor's Court, upon an Agreement to take a Leaſe of a Houſe in Milk-ſtreet Market.* The Defendant there anſwered, that he was only a Truſtee for Allen, who promiſed to indemnify him; and in the Name of the ſaid Allen he brought a Certiorari-Bill, but a Procedendo was decreed. Fin. Rep. 224. Trin. 27 Car. 2. Doegood v. Allen.

5. A Certiorari-Bill may be brought *to remove a Cauſe out of a Court of Equity in a County-Palatine* into Chancery; by Ld. Keeper. Vern. 178. pl. 170. Trin. 1683. Portington v. Tarbock.

6. Two Plaintiffs here *ſue for Lands in the County-Palatine of Durham. One* of them *lives in Middleſex*, and *the other is an old infirm Man, and not able to follow the Suit*; therefore a Certiorari was granted to the Chancellor of Durham, to certify the Proceedings depending before him into this Court. Curs. Canc. 454. cites Chan. Rep. 62. [but it is miſcited.]

7. If on a Certiorari-Bill the Cauſe is brought on to Hearing, the *Court*, if they think fit, *may make a Decree, or ſend it back to the Mayor's Court to be determined there*; and ſometimes the Court ſends it back after Publication paſs'd, and a Subpœna ſerved to hear Judgment, and before the Hearing. 2 Vern. 491. pl. 443. Hill. 1704. Stephenſon v. Houlditch & al'.

For more of Certiorari in General, ſee **Aſſiſe, Habeas Corpus, Record, Sewers, Superſedeas,** and other Proper Titles.

Ceſſavit.

(A) By Statute. And of one where it ſhall be of another.

1. 6 E. 1. *cap.* 4. *IF a Man lets his Land to Farm, or to find Eſtovers in Meat or in Cloth, amounting to the 4th Part of the very Value of the Land; and he, which holdeth the Land ſo charged, ketteth it lie freſh, ſo that the Party can find no Diſtreſs there by the Space of 2 or 3 Years to compel the Farmer to render, or to do as it containeth in the Writing or Leaſe. 2dly, It is eſtabliſhed that, the 2 Years being paſt, the Leſſor ſhall have an Action to demand the Land in Demean by a Writ, which he ſhall have out of the Chancery. 3dly, And if he againſt whom the Land is demanded, come before Judgment and pay the Arrearages and the Damages, and find Surety (ſuch as the Court ſhall think ſufficient) to pay from henceforth, as it containeth in the Writing of his Leaſe, he ſhall keep the Land. 4thly,*

For the Expoſition of theſe Statutes, ſee the ſeveral Diviſions under this Head.

4thly, *And if he tarry until it be recovered by Judgment, he ſhall be barr'd for ever.*

2. *Weſtm.* 2. 13 *E.* 1. *cap.* 21. *Whereas in a Statute made at Glouceſter, cap.* 4. *it is contained, that if any leaſe his Lands to another to pay the Value of the* 4*th Part of the Land, or more, the Leſſor or his Heir, after the Payment hath ceaſed by* 2 *Years, ſhall have an Action to demand the Land ſo leaſed in Demean.* 2*dly, In like Manner is agreed, that if any with-hold from his Lord his due and accuſtomed Service by* 2 *Years, the Lord ſhall have an Action to demand the Land in Demean by ſuch a Writ.* 3*dly, Præcipe A. quod juſte &c. reddat B. tale Tenementum quod A. de eo tenuit per tale Servitium, & quod ad prædictum B. reverti debet eo quod prædictus A. in faciendo prædictum ſervitium per biennium Ceſſavit, ut dicitur.* 2. *And not only in this Caſe, but alſo in the Caſe whereof mention is made in the ſaid Statute of Glouceſter, Writs of Entry ſhall be made for the Heir of the Demandant againſt the Heir of the Tenant, and againſt them to whom ſuch Land ſhall be alien'd.*

3. If there be *Lord, Meſne, and Tenant*, and the *Tenant ceaſes for* 2 *Years*, the Lord ſhall have a *Ceſſavit againſt the Tenant Paravail, ſuppoſing that the Meſne in doing his Services per Biennium jam Ceſſavit*; for the *Ceſſer of the Tenant is a Ceſſer as to all the Meſnes*; Per Fitzherbert and diverſe Serjeants, and ſeveral e contra; and it ſeems that it cannot be Law; for then the Act of the Tenant ſhall prejudice the Meſne of his Meſnalty. Br. Ceſſavit, pl. 1. cites 27 H. 8. 28.

4. If an *Abbot loſes* by Ceſſavit, *this ſhall bind his Succeſſor.* Br. Ceſſavit, pl 34. cites Doct. & Stud. Lib. 2. Fol. 8.

5. *The ſame Law* ſeems to be *of a Biſhop*, and *Parſon of a Church.* Ibid.

6. *But* if *Baron and Feme, ſeiſed in Jure Uxoris*, loſe by Ceſſavit, it ſhall bind the Feme. Ibid.

(B) Lies of what.

Kelw. 105. pl. 18. contra.

1. IF Lands held *lie in ſeveral Counties*, the Lord may diſtrain; but Aſſiſe nor Ceſſavit does not lie; per Hill J. Br. Ceſſavit, pl. 21. cites 18 Aſſ. 1.

Br. Quare Impedit, pl. 30. cites [43] 42 E. 3. 15. that Ceſſavit lies of Advowſon; but Brooke ſays Quære inde; for it ſeems that Præcipe quod reddat does not lie of it, but Writ of Right, Darren Preſentment, or Qua. Impedit.——2 Inſt. 297. ſays it is holden that a Ceſſavit does lie of an Advowſon, and yet it is not in Demeſne; and Overt, and Sufficient to his Diſtreſs, cannot be pleaded.

2. Ceſſavit lies of an * *Advowſon*; for this lies in Tenure, and ſo it is adjudged about 22 E. 3. Per Vaviſor & Davers. But it does not lie in Tenure; per Townſend & Brian. Br. Ceſſavit, pl. 22. cites 5 H. 7. 37.

* Br. Ceſſavit, pl. 6. cites 43 E. 5. 15. S. P.

There muſt be a Tenure between the Feoffor and the Feoffee in Fee-ſimple; for a Ceſſavit lies not upon a Reſervation without ſuch a

3. Ceſſavit, *that the Tenant held of the Plaintiff by Homage, Fealty, Suit of Court and Rent*, and that in doing the Services aforeſaid per Biennium jam ceſſavit, and ſo the Writ and the Count is in Doing Services, and yet Ceſſavit *does not lie* of Homage nor of Fealty, *but of Things Annual*, viz. of *Rent*, and of *Suit of Court*, well; per tot. Cur. Quod nota. And the *Defendant ſaid that he held by Fealty and the Rent only*, abſque hoc *that he held by Homage, Fealty, Suit of Court, and the Rent Modo & Forma; and as to this Rent, the Land was always open to his Diſtreſs.* And per Priſot, if the Lord has no Court the Tenant may al-

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lege it; and per Littleton, he cannot *traverſe the Tenure by Homage* in this Action; for Ceſſavit does not lie of Homage. But per Priſot clearly, he may traverſe the Homage as above; for if he takes it only by Proteſtation, and the Plea is found againſt him, the *Proteſtation* ſhall not ſerve. Br. Ceſſavit, pl. 2. cites 33 H. 6. 44, 45. Tenure. 2 Inſt. 296. and ſays it was ſo adjudged in 11 E. 2.

4. Ceſſavit does not lie of *Homage and Fealty*; for thoſe *are not annual*, and yet the Count is that he holds by Homage, Fealty, 10s. Rent, and Suit of Court, and that in doing the Services aforeſaid per Biennium jam ceſſavit; for there is *no other Form*; but the Ceſſer *ſhall be intended of the Rent and Suit which are annual*, and not of Homage and Fealty. Br. Ceſſavit, pl. 23. cites 6 H. 7. 7. 2 Inſt. 296. S. P.

5. Ceſſavit lies of *Suit of Court*. Br. Ceſſavit, pl. 35. cites F. N. B. 209.

(C) For whom it lies.

1. *Tenant in Dower, or for Life, of a Seigniory*, ſhall have Ceſſavit if the Tenant ceaſes &c. Br. Ceſſavit, pl. 29. cites 32 E. 1. and 43 E. 3. 15.

2. If *two Coparceners* are *Lords*, and the *Tenant ceaſes*, and the *one Coparcener dies*, the other ſhall not have Ceſſavit; for it was given to him and to another who is dead; and hence it appears, that the *Heir* ſhall not have Ceſſavit *of Ceſſer in the Time of his Anceſtors*. Br. Ceſſavit, pl. 29. cites 33 E. 3. 2 Inſt. 402. S. P. and cites Ceſſavit 42. S. C. — F N B 209. (F) S. P and cites S. C.

by Wilby. ——8 Rep. 118. a. cites S. C and Pl. C. 110. a. and ſays the Reaſon is, that the Tenant before Judgment may render the Arrears and Damages &c. and retain his Land, which he cannot do when the Heir brings Ceſſavit for the Ceſſer in his Anceſtor's Time; for the Arrears, which incurr'd then, do not belong to the Heir, and this being againſt common Right and Reaſon, the Common Law adjudges the Act of Parliament void as to this Point.

3. *But* it ſeems, that where *two Jointenants are Lords*, and the Tenant ceaſes, and one dies, the other ſhall have Ceſſavit; for there the *whole is in the Survivor by the firſt Feoffor*, and not by him who dy'd. Br. Ceſſavit, pl. 29. cites 33 E. 3. Br. Ceſſavit, pl. 32. cites S. C. —— 2 Inſt. 402. cites S. C & S. P. —— F. N. B. 209. (F) S. P.

4. Ceſſavit was brought *againſt Tenant for Life*, the *Remainder over in Tail*, the *Reverſion to the Demandant*, and therefore by the beſt Opinion the Action does not lie; for it is ſaid there, that none ſhall have Ceſſavit if he has *not Fee in the Seigniory, and that he may recover the Fee-ſimple of the Tenancy*; and notwithſtanding that this Gift was made *to hold of the chief Lord*, yet Ceſſavit does not lie where the *Fee remains in the Demandant*. Br. Ceſſavit, pl. 9. cites 45 E. 3. 27. A Ceſſavit lies not againſt Tenant in Tail, or Tenant for Life, unleſs the Remainder be limited over to another in Fee ſo as he is Tenant to the Lord as Tenant by the Curteſy is. 2 Inſt. 295. and S. C. cited in Marg. ——*But* where the *Gift is* made *for Term of Life*, the *Remainder over in Fee*, the Ceſſavit lies; for there the Lord ſhall be compelled to change Avowry; *contra where the Donor has the Reverſion*. Br. Ceſſavit, pl. 9. cites 45 E. 3. 27.

5. Note, it is a good Plea in Ceſſavit, that the Father of the Demandant gave the Land to him in Tail; Judgment ſi Actio; for Ceſſavit does not lie *for the Donor or his Heir againſt the Donee, nor his Iſſue*. Br. Ceſſavit, pl. 3. cites 33 H. 6. 53.

6. *But* the Lord may have Ceſſavit *in the Degrees againſt the Tenant in Tail, or his Iſſue*, of a Ceſſer before the Gift, as it ſeems there. Ibid.

S. P. as to Eſtate for Life, or in Tail; but he in Reverſion ſhall not have Ceſſavit againſt the Donee in Tail, or Tenant for Life; for he in Reverſion is not Dominus within this Statute. 2 Inſt. 401.

7. *He who has a Seigniory for* Term of *Years*, ſhall not have Ceſſavit; but he who has a Seigniory *for* Term of *Life* may have Ceſſavit; the Diverſity is, inaſmuch as it is Præcipe quod reddat, which the Termor cannot have. Br. Ceſſavit, pl. 40. cites 9 H. 7. 16.

8. *So* of *Tenant by the Curteſy*. Br. Ceſſavit, pl. 29. cites Fitzh. Ceſſavit 59. 42.

9. If *Baron and Feme* are *intitled* to Ceſſavit *in Jure Uxoris*, and the *Baron dies*, the Feme ſhall have the Ceſſavit. Br. Ceſſavit, pl. 33.

But where a Man *gives in Tail*, the *Remainder over in Fee*, the *chief Lord* of whom the Donor held ſhall have Ceſſavit if the Tertenant ceaſes. Ibid.

10. *Donor in Tail* ſhall not have Ceſſavit. Br. Ceſſavit, pl. 35. cites F. N. B. 209.

In Ceſſavit brought *by the Donor againſt the Donee in Tail* the Writ was abated. Thel. Dig 173. lib 11. cap. 53. S 10. cites Trin. 19 E. 3. Ceſſavit 30. and that ſo agrees Mich. 28 E. 3. 95. and Mich. 33 H. 6 53. but ſays, the Writ of Ceſſavit lies well *for the Lord paramount againſt the Tenant in Tail*, the Remainder over, and ſays ſee the ſame Books.

11. If there be Lord, Meſne, and Tenant, and the Tenant paravaile ceaſes by two Years, the Lord ſhall have Ceſſavit againſt the Tenant, and ſuppoſe that the Meſne ceaſed. 2 Inſt. 402.

3 Bulſt. 253. cites S. C. 92. & 93. a. where it is ſaid, that where two

12. If the *Tenant ceaſes by one Year*, and the *Lord grants over his Seigniory*, and then the *Tenant ceaſes another Year*, neither of them is Dominus within this Act. 2 Inſt. 401. cites 2 Rep. 93. [a. Trin. 43 Eliz. in] Bingham's Caſe.

Accidents are requiſite, and the one happens in the Time of one, and the other in the Time of another, in ſuch a Caſe neither the one nor the other ſhall take Benefit of this, becauſe that both did not fail in the Time of any of them, and both are requiſite to the Conſummation of the Thing. ——Doderidge denied the Caſe of Ceſſavit in Bingham's Caſe 2 Rep. Palm. 417. Paſch. 1 Car. B. R.

(D) Againſt whom it lies.

1. THE *Leſſor* ſhall not have Ceſſavit *againſt his Leſſee for Life*. Thel. Dig. 173. lib. 11. cap. 53. S. 12. cites Mich. 11 E. 2. Ceſſavit 51.

2. And it does not lie *againſt Tenant in Dower the Reverſion to a Stranger*. Thel. Dig. 173. lib. 11. cap. 53. S. 12. cites Mich. 13 E. 2. Ceſſavit 51.

3. Nor *againſt Tenant for Life*, the *Reverſion to a Stranger*. Thel. Dig. 173. Lib. 11. cap. 53. S. 12. cites Trin. 8 E. 3. 407.

4. If the *Tenant infeoffs one who ceaſes*, or *is diſſeiſed by one who ceaſes*, in thoſe Caſes Ceſſavit lies well *againſt the Feoffee or Diſſeiſor*, without other Privity, or without other Seiſin than the Seiſin which was had by the Hands of the Feoffor or Diſſeiſee. Br. Ceſſavit, pl. 36. cites 19 E. 3. and Fitzh. Brief 249.

5. Ceſſavit will lie againſt *Tenant of the Franktenement*. Br. Ceſſavit, pl. 28. cites 29 E. 3. and Fitzh. Ceſſavit 43.

6. Ceſſavit *againſt* 3 *who made Default*, and at the Grand Cape *tendered their Law to be waged of Non-ſummons*, and *at the Day* 2 *made Default*, and the *third came and ſaid that he was Tenant of the Whole, and tendered the Arrearages*, & non allocatur; for they waged their Law in Common

Common before, and there he cannot ſay that the others had nothing, and alſo he cannot tender the Arrears for all; for as well as the other 2 may alien their Parts, they may forfeit their Parts. Br. Ceſſavit, pl. 4. cites 40 E. 3. 40.

7. *And* after he *ſaid that J. was ſeiſed, and infeoff'd the three, and to the Heirs of him*, by which he pray'd to be received for 2 Parts, and was received, and found Surety of 2 Parts only; for of the third he may loſe; for he is Party, therefore of this he ſhall not find Surety. Quod nota. Ibid.

8. It was ſaid that Ceſſavit lies *againſt Tenant for Term of Life*, the *Remainder over in Fee* &c. Nota bene. Br. Ceſſavit, pl. 20. cites 14 H. 6. 25. at the End.

(E) Brought How. And Abatement of Writ and Count.

1. CEſſavit *againſt A and B by ſeveral Præcipes*, and after the Writ was *that prædict' A. and B. tenent de eo per certa Servitia & quæ ad ipſum revertere debent eo quod præd' A. & B. &c. ceſſaverunt* &c. and held good, notwithſtanding that they joined in Tenure and in the Ceſſer. Thel. Dig. 107. Lib. 10. cap. 16. S. 2. cites Mich. 20 E. 2. Brief 826. Ceſſavit 48.

2. In Ceſſavit *againſt 2 by ſeveral Præcipes, that both hold of him per certa Servicia, & quod ceſſaverunt* in Common, and yet held good. Thel. Dig 113. Lib. 10. cap. 23. S. 3. cites Mich. 20 E. 2. Brief 826. Mich. 3 E. 3. 100. and ſays ſee 30 E. 3. 32. in Scire Facias accordingly.

3. A Man counted *that the Manor of D. was held of him, and that J. N. had enter'd into Part, and that the Tenant had ceaſed*, where he has alleged the whole Manor to be held, and that the Tenant having Part of the Manor had ceaſed in that Part, and yet the Writ good; and ſo it ſeems that the Services ſhall be apportion'd upon Diſſeiſin. Br. Ceſſavit, pl. 27. cites 8 E. 3. and Vet. Nat. Brev. Tit. Ceſſavit. Thel. Dig. 83. Lib. 9. cap. 5. S. 15. cites S. C.

4. In Ceſſavit a Man ſhall not put *Title in the Writ*, as which he claims eſſe Jus &c. Thel. Dig. 106. Lib. 10. cap. 14. S. 10. cites Hill. 10 E. 3. Brief 690. inaſmuch as it is given by the Statute.

5. In Ceſſavit the Writ was *Quod reddat terram quam Jo. de S. de eo tenuit per Servitia* &c. and which to him *reverti debet eo quod præd' tenens Ceſſavit* &c. and yet adjudged good, *without making any Privity* between Jo. de S. and the Tenant. Thel. Dig. 105. Lib. 10. cap. 13. S. 2. cites Mich. 11 E. 3. Brief 477. and that ſo agrees Mich. 19 E. 3. Brief 249.

6. In Ceſſavit the Writ was *in which he had not Entry unleſs by B. who held it of the Anceſtor of the Demandant* &c. and *ſuppoſed the Ceſſer in the now Tenant of the Land, without ſuppoſing the now Tenant to be Tenant to the Demandant*, and yet adjudged a good Writ. Thel. Dig. 105. Lib. 10. cap. 13. S. 3. cites Hill. 14 E. 3. Br' 269. and that ſo it is adjudged Hill. 48 E. 3. 4. and that the Ceſſer is well ſuppoſed in the preſent Tenant of the Land; and cites Paſch. 39 E. 3. 17.

7. In Ceſſavit of Land, if the *Demandant diſtrains for Fealty pending the Writ*, his Writ ſhall abate. Thel. Dig. 188. Lib. 12. cap. 23. S. 2. cites Trin. 20 E. 3. Ceſſavit 33.

8. If a Man brings Ceſſavit *againſt N. who aliens to S. pending the Writ*, and the *Demandant takes the Rent and Homage of S. and after recovers againſt N.* there S. ſhall avoid the Recovery; for by the Acceptance of

of the Rent and Homage the Writ is abated, and the Action extinct; per Stone. Quære. Br. Ceſſavit, pl. 15 cites 21 E. 3. 18.

9. And if he *receives Rent or Homage pending his Writ*, it ſhall abate. Thel. Dig. 188. Lib 12. cap. 23. S. 2. cites 21 E. 3. 23. 21 Aſſ. 6.

Ibid. ſays, ſee ſuch Matters M. 11 E. 3. and H. and M. 14 E. 3. and P. 16. E. 3. and M. 19 E. 3. and 48 E. 3

10. Ceſſavit *againſt B. ſuppoſing that C. held the Tenements of the Demandant, and that B. by two Years had ceas'd*; Grene ſaid, you ſhould have the *Writ in the Per*, and Wilby ſaid, he ſhall have it ſo, *where the Ceſſer was before the Entry, and not otherwiſe. And* where a Man *diſſeiſes my Tenant* I ſhall have Ceſſavit *of the Ceſſer after the Diſſeiſin. And* it ſeems by the Caſe, that where the *Tenant ceaſes and makes Feoffment*, the Ceſſavit ſhall be in the Per; *Contra* where the *Feoffee ceaſes*, there ſhall be no Degrees; *So againſt Diſſeiſor*; but where the Ceſſavit is *of the Ceſſer of the Diſſeiſee before the Diſſeiſin*, the Writ ſhall be *in the Poſt*; Per Stouf. *And* that if the *very Tenant leaſes for Life or in Tail*, [and the Leſſee] ceaſes by two Years, he ſhall have no Writ but as above, without making Mention of any Degrees. *And* ſo the firſt Writ awarded good, and therefore *it ſeems that it was of Ceſſer after the Alienation.* Br. Ceſſavit, pl. 17. cites 21 E. 3. 44.

Ibid. Brooke ſays, Quære of the Ceſſavit *againſt Tenant for Life, or in Tail, where he is not his Tenant*, but he in *Reverſion*; but where the *Remainder* is *over in Fee* it lies well. —— Where there are *Lord and Tenant*, and the *Tenant leaſes for Life*, the *Remainder in Tail, ſaving the Reverſion to the Tenant*, in ſuch Caſe the *Lord ſhall not have Ceſſavit againſt the Leſſee for Life*; but otherwiſe it is if the Remainder be in Fee. Thel. Dig. 172. lib. 11. cap. 53. S. 5. cites Trin. 45 E. 3. 27.

11. Ceſſavit *againſt A.* and *counted that B. held of him, and ceas'd*, and the Writ good, *without alleging any Entry*; Quære of this; for the Ceſſavit ſhall lie againſt the Tenant of the Franktenement; and therefore it ſeems that he ſhall allege no Ceſſer but the Ceſſer of him who is Tenant of the Franktenement, and holds of him. Br. Ceſſavit, pl. 28. cites 29 E. 3. and Fitzh. Ceſſavit 43.

12. In Ceſſavit againſt an Abbot *de uno Meſſ' quod Ro. dimiſit Richardo quondam Abb' Predeceſſori* &c. *which to the Demandant reverti debet eo quod prædictus Abbas in faciendo* &c. *ceſſavit* &c. the Ceſſer ſhall be intended in the Abbot againſt whom the Writ is brought. Thel. Dig. 99. lib. 10. cap. 9. S. 8. cites Paſch. 32 E. 3. Brief 291.

13. Ceſſavit *in quam non habet ingreſſum unleſs by J. N. who demis'd it to him, and who held it of him by certain Services, and which to the aforeſaid B. ought to revert per Formam* &c. becauſe the Tenant had ceas'd, and *alleged Seiſin in the Count by the Hands of J. N. the Feoffor*, and no Seiſin by the Hands of the Tenant, and yet the Writ good. Br. Ceſſavit, pl. 19. cites 39 E. 3. 14.

Thel. Dig. 105. lib. 10. cap. 13. S. 4. cites S. C. and ſays, this is by the Stat. of Weſtm. 2. cap. 43.

14. Ceſſavit, *ſuppoſing that the Anceſtor of the Demandant had given the Land to the Predeceſſor of the Tenant to find Maſs every Monday*, and that in doing Services he ceas'd, and the Tenant demanded Judgment of the Writ, becauſe it *is not expreſſed that the Tenant held of the Demandant*, and upon Argument non allocatur, but the Writ awarded good. Br. Ceſſavit, pl. 8. cites 45 E. 3. 15.

Thel. Dig. 173. lib. 11. cap. 54. S. 8. cites Mich. 14 E. 2. Brief 815. and that ſo agrees Hill. 14 E. 3. Brief 269. notwithſtanding that the *Entry* is *ſuppoſed before the Ceſſer.*

15. Ceſſavit was brought againſt W. of a Houſe, *ſuppoſing that he had not Entry unleſs by H. who held the Tenements of him by Homage, Fealty, and Suit of Court, and* 10*s.* and that the Tenant had ceas'd, and the Writ was awarded good, notwithſtanding that he alleged Seiſin in the one and Ceſſer in the other; Quod Nota; and after the Tenant demanded *Judgment of the Writ, becauſe the Predeceſſor of the Plaintiff gave the Houſe and a Shop to hold by one entire Service*, and it was awarded no Plea unleſs the Tenant will *ſay that the Shop is not Parcel of the Houſe, or allege a ſeveral Tenancy of the Shop* in Abatement of the Writ; Quod Nota; for it may be Parcel of the Houſe. Br. Ceſſavit, pl. 10. cites 48 E. 3. 4.

48 E. 3. 4. ——— And where a Man *by Deed gives Manor and Advowſon*, or Houſe and Shop, *by expreſs Words*, where the Advowſon is appendant, or the Shop is Parcel of the Houſe,

Houſe, yet it *is no Eſtopple after to ſay that the one was appendant and the other parcel*; by Finch; by which the Writ was awarded good. Br. Ceſſavit, pl. 10. cites 48 E. 3. 4.

Wherefore he *ſaid, that where the Demandant ſuppoſes the Tenements to be held by Homage, Fealty, and Suit of Court, and* 10 *s.* his *Predeceſſor gave to hold by* 10 *s. for all Services*, and as to this Open to his Diſtreſs, and the beſt Opinion there was, that the *Demandant ought to maintain the Tenure, and not to take Iſſue upon the being Open to Diſtreſs*; for where the one alleges Tenure of 10 s. and the other that of 2 d. it may be open to the one, and not to the other. Ibid.

16. Agreed that a Man may *plead to the Count as to Parcel, and in Bar for the reſt*, and there the Count ſhall not abate but for the Parcel; Quod Nota. Br. Ceſſavit, pl. 10. cites 48 E. 3. 4.

17. In Ceſſavit the Writ ſhall *abate for Parcel* for Default in the Count as to this Parcel, and ſtand for the reſt. Thel. Dig. 236. lib. 16. cap. 10. S. 25. cites 48 E. 3. 5.

18. The Lord *ſhall not allege Eſplees* in Ceſſavit or Eſcheat, for *thoſe are Ratione Dominii*, and by Seiſin therein, and *not by Seiſin in the Land.* Br. Ceſſavit, pl. 31. cites 21 H. 6. 22.

19. Ceſſavit does not lie of *Homage and Fealty*, for they are not annual, and yet the Count is, *that he holds by Homage, Fealty,* 10 *s. Rent, and Suit of Court, and that in doing the Services aforeſaid Per Biennium jam ceſſavit*; for *there is no other Form*; but the Ceſſer *ſhall be intended of the Rent and Suit which are annual*, and not of Homage and Fealty. Br. Ceſſavit, pl. 23. cites 6 H. 7. 7.

20. In Ceſſavit, if the *Tenant ſays* that *he held of the Plaintiff by ſeveral Tenures, and not by one entire Payment*, this goes to the Writ, and not to the Action; Per Cur. Br. Ceſſavit, pl. 42. cites 10 H. 7. 24. In Ceſſavit, ſuppoſing the Tenements to be held by one entire Tenancy, if the Tenant ſays, that he holds Parcel by certain Services, and other Parcel by others, and ſhews the Deeds of him whoſe Eſtate the Demandant has in the Seigniory, the Demandant may maintain his Writ, notwithſtanding thoſe Deeds. Thel. Dig. 227. lib. 16. cap. 7. S. 26. cites Mich. 14 E. 3. Ceſſavit 28.

21. The *Stat. W.* 2. 13 E. 1. cap. 21. *extends not to Rent-Service created upon a Fee-Farm, but* Ceſſavit upon a Fee-Farm *muſt be conceived upon the Statute of Glouceſter*, for which Purpoſe there are ſeveral Writs in the Regiſter. 2 Inſt. 401.

(F) Plea.

1. IN Ceſſavit *of a Toft*, the Tenant *pleaded* to the Writ, *that this Land which is called Toft is the Site of a Mill, and an* * *Eſtange Secke* &c. & non allocatur; but he was received after to *ſay, that he had nothing unleſs in Right of his Feme not named* &c. Thel. Dig. 90. lib. 10. cap. 1. S. 24. cites Trin. 14 E. 3. Brief 277. * Or a Pool let dry.

2. In Ceſſavit the Tenant ſaid, that he *had nothing but for* Term of *Life, the Remainder to another in Tail*, the *Remainder to the Leſſor* &c. Judgment of the Writ, yet the Writ was held good enough and maintainable. Thel. Dig. 173. lib 11. cap. 53. S. 11. cites 28 E. 3. 96.

3. In *Ceſſavit* the Tenant, where it is of *his* * *own Ceſſer*, ſhall not have the View, by which he ſaid, that *as to all but one Toft Not held of him, and to the Toft Open to his Diſtreſs, Priſt*; Tirwit ſaid, you ſhould ſay *Open to his ſufficient Diſtreſs*; but per Cur. Open to his Diſtreſs, is taken Open to ſufficient Diſtreſs, and ſo to Iſſue. Br. Ceſſavit, pl. 12. cites 2 H. 4. 5. * S. P. Br. Ceſſavit, pl. 18. cites 4 H. 6. 29. But *contra* if it be *of another's Ceſſer.*

4. In Ceſſavit the Demandant counted *that the Tenant held of him a Houſe and* 20 *Acres* of Land *by Homage, Fealty, and* 20 *s. Rent* &c. The

Tenant ſaid as to one Acre, Parcel of the Land in Demand, *he held it of the Demandant by Fealty and* 1 *d. for all Services*; *and* that he held 2 *other Acres*, Parcel of the Premiſſes, *by Fealty and a Half-penny for all Services*; *and* that he held 3 *Acres*, Parcel of the Premiſſes, *by Fealty and one Half-penny for all Services*; *abſque hoc* that he held &c. by one intire Service, *and to the reſt he did not hold of him*, and admitted for a good Plea. Br. Ceſſavit, pl. 18. cites 4 H. 6. 29.

In this Writ the Tenure between the Demandant and the Tenant is traverſable, becauſe this Writ is grounded upon the Tenure by Force of this Act; but in this Writ the Seiſin is not traverſable, becauſe it is not grounded upon the Seiſin; neither is the Quantity of the Services traverſable, but to be taken by Proteſtation; for whether he holds by more or leſs, the Ceſſavit lies. But in an Advowry the Seiſin is traverſable, for that it is grounded as well upon the Seiſin as the Tenure Alſo in the Ceſſavit the Land is to be recovered, and not the Services; and it is in its Nature a Writ, and the Jury ſhall meaſure in their Conſciences the Quantity of the Service. 2 Inſt. 296.

5. It was ſaid for Law that in Ceſſavit the *Seiſin is not traverſable, but the Tenure or the Ceſſer*; and yet per Danby, it will be hard to have Ceſſavit without Seiſin within Time of Memory. Br. Ceſſavit, pl. 41. cites 5 E. 4. 62.

6. In Ceſſavit it is no Plea *that the Land is ſufficient* to his Diſtreſs, but ſhall ſay *Open and Sufficient* to his Diſtreſs; for if it be incloſed, this is Cauſe to have Aſſiſe. Br. Ceſſavit, pl. 24. cites 10 E. 4. 1. 2.

Hors de ſon Fee is not a good Plea in Ceſſavit, becauſe the Tenure is traverſable. 2 Inſt. 296.

7. And, *as to Part*, the Defendant *ſaid* that it is *Out of the Fee of the Plaintiff*, & non allocatur. Ibid.

8. And it was brought *againſt Baron and Feme*, and *counted of* 7 *Acres held by* 8 *d.* and the Baron and Feme *pleaded to Iſſue*, and the *Baron at the Day made Default*, and *Petit Cape* awarded, and at the Day the *Baron made Default*, and the *Feme was received, and ſaid* that *as to one Acre ſhe held by Fealty and* 2 *d. which was Open and Sufficient to his Diſtreſs*, and *to another Acre ſhe pleaded in the ſame Manner*, and *to the reſt* ſhe ſaid *that ſhe held of him as above, abſque hoc* that ſhe held the 7 Acres of the Plaintiff Modo & Forma, prout &c. and ſo ſee that ſhe pleaded immediately upon her Reſceipt. Ibid.

Br. Brief, pl. 393. cites S. C.

9. Ceſſavit *of a Houſe and* 22 *Acres* of Land, and *alleged certain Services* &c. The *Tenant ſaid that he was not Tenant of the Moiety the Day of the Writ purchaſed, nor at any Time after* had he any Thing in this Moiety, *but J. B. was intire Tenant*; Judgment of the Writ; and per Littleton and Catesby, this is a good Plea *without anſwering to the reſt*, becauſe the Services are intire; for he alone cannot defend the Tenancy for the intire Services, nor tender the Arrears without his Companion. Br. Ceſſavit, pl. 26. cites 21 E. 4. 25.

10. In Ceſſavit the Writ was, that in his *Homage* nor *Fealty, Rent and Suit of Court*, and in doing the Services he ceaſed &c. and yet it does *not lie of Homage nor Fealty*, and yet good, becauſe *there is no other Form* of Writ. Br. General Brief, pl. 13. cites 7 H. 7. 2.

11. If the Demandant in the Ceſſavit be *outlawed in a Perſonal Action*, this Outlawry may be pleaded in Bar of the Action, becauſe the Arrearages are due to the King. 2 Inſt. 298.

(G) Judg-

(G) Judgment. And of the Tender of Arrears, and finding Surety for the Arrears.

1. IN a Ceſſavit *after the Inqueſt joined*, the *Tenant made Default, and at the Return of the Petit Cape* the Tenant *appeared, and offered to pay the Arrearages with Damages, and to find ſuch Surety as the Court would award*, which was received, becauſe he came before Judgment, and found Surety, viz. 3 Pledges, which bound their Lands to the Diſtreſs of the Lord in the ſame Form as the Tenant's Land is bound. 2 Inſt. 297. cites Trin. 9 E. 2. 65.

2. Dean and Chapter brought Ceſſavit. The Tenant ſaid that he did not hold of them, and it was found againſt him by Verdict at Niſi Prius, and *at the Day in Bank the Tenant came and tender'd the Arrears, and found Surety* &c. that he ſhould ceaſe no more; and the Court would not award, that if he at another Time ceaſed, the Land ſhould be liable to the reſt by reaſon of the Mortmain; but he had other Land in the ſame Vill, by which Shard awarded that he hold his Land in Peace, *and that if the Rent be any more arrear, that the Dean and Chapter ſhall diſtrain in all his other Lands in the ſame Vill; and that when he ſhall again ceaſe by 2 Years, he ſhall be bound to pay to the Dean and Chapter 40 s. and that he have Execution by Fieri Facias or Elegit*, and the Pain was enter'd in the Roll; and it was ſaid there, that the Statute does not mention that a Man ſhall tender the Damages with the Arrears; but by the Reporter it has been uſed that he tender Damages and Arrears. But M. 17 E. 3. 57. they would not ſuffer other Land to be made liable to the Diſtreſs of a Prior in Ceſſavit, by reaſon of the Mortmain; and after the Court awarded Damages of one Mark. And ſo ſee that the Tender of Arrears before Judgment above ſuffices, tho' it be after Verdict. Quod nota. Br. Ceſſavit, pl 16. cites 21 E. 3. 23.

3. In Ceſſavit the Tenant *pleaded that he did not hold of him, and* when the Inqueſt came, and *before Verdict*, the Tenant *confeſs'd to hold of him, and tender'd the Arrears of 4 Years*; and the *Demandant ſaid* that he was *Arrear by 12 Years*, and the Court took Inqueſt to inquire how long Time he was Arrear, and the *Inqueſt ſaid that by 9 Years*; and then the Tenant *tender'd the Arrears for 9 Years*; and well before Judgment, tho' it was *after Verdict*; and he offered Surety that if he was Arrear afterwards by 2 Years, that the Land ſhould anſwer the reſt; and the Court *awarded that if he be Arrear afterwards by one Year, that he ſhall have Scire Facias to recover the Land and Pledges, or Surety to pay 10 l.* For it may be that the Land is not worth the Rent if the Houſe decays. Quod nota. Br. Ceſſavit, pl. 5. cites 41 E. 3. 29.

4. *Surety* in Ceſſavit ſhall be found *in proper Perſon*, and *not by Attorney*. Br. Ceſſavit, pl. 11. cites 50 E. 3. 22.

6. In Ceſſavit *de Potura Pauperum*, he who is received *ſhall tender the Arrears according to the Value by the Year*; per Hank. which Thirn deny'd; for it is *not payable to the Demandant*; and therefore quære, in this Caſe, if the Demandant *ſhall recover Seiſin of the Land*, or if the Tenant upon this Matter ſhall be excuſed, and ſhall find Surety that he will not ceaſe again &c. Br. Ceſſavit, pl. 14 cites 12 H. 4. 24.

6. In Ceſſavit of *Maſſes, Suit of Court*, and the like, *where a Man cannot tender the Arrears*, yet this ſhall be in the Diſcretion of the Juſtices to put it into a Sum certain to the Plaintiff, in Recompence of the Suit or Maſſes. Br. Ceſſavit, pl. 38. cites 14 H. 4. 3. 4. Per Skrene and Thirn.

Where the Act ſays that he ſhall tender the Arrears, it is to be underſtood of ſuch Things as may be yielded, as Rent &c. but of Suit, Divine Service, and ſuch like, which cannot be yielded, Damages ſhall be paid for the ſame. 2 Inſt. 297.

7. In

7. In Ceſſavit the Tenant *pleaded Jointenancy with another of the Gift of J. K.* and they were at Iſſue, and when the *Jury appeared* the *Tenant ſaid* that *he would confeſs the Tenure, and tender the Arrears*; but they were in Doubt if the finding of Sureties ſhould be by Diſcretion of the Juſtices, or that the Demandant may relinquiſh the Sureties or not; and the Opinion of the Court was, that the Demandant cannot relinquiſh them, becauſe the *Statute is that he ſhall find Sureties, ſuch as the Court ſhall think ſufficient by the Statute of Glouceſter, cap.* 4. *But* the Surety ſhall *not* be *that the Land ſhall incur the Reſidue, when a Religious Perſon is Demandant, for Doubt of Mortmain*; but the *Collateral Surety*, or other Penalty, ſhall be taken. Br. Ceſſavit, pl. 25. cites 19 E. 4. 5.

8. *And* alſo, *if the Land* out of which the Rent and Services are iſſuing, *conſiſts of Buildings, or of other Profit caſual*, there he ſhall find Surety. Br. Ceſſavit, pl. 25. cites 19 E. 4. 5.

* See the Year-Book, pl. 1. S. C.

9. *And* if *Feme* be *received by Default of her Baron*, and ſhe will *tender the Arrears, and find Surety*, * [ſhe ſhall not find ſuch Surety] that the Land ſhall incur the Reſidue, becauſe [then] ſhe may at another Time loſe her Land if the Rent be arrear after the Death of her Baron. Ibid.

10. *And* Quære, if an *Infant* ſhall find Surety that the Land ſhall incur the Reſidue or other Collateral Surety for a Penalty. Ibid.

11. If Tenant of the Whole pleads that he was not Tenant the Day of the Writ purchaſed, nor any Time after, and this Matter is found againſt him, he *ſhall loſe the whole Land*; for it is peremptory. Br. Ceſſavit, pl. 26. cites 21 E. 4. 25. per Brian.

2 Inſt. 297. S. P. and cites S. C.

12. In Ceſſavit the Tenant ſhall tender the Arrears *in proper Perſon*, and not by Attorney, *tho'* he be a *Lord of Parliament*. Br. Ceſſavit, pl. 39. cites 15 H. 7. 9, 10.

13. He ought to *tender all the Arrearages*, for ſo are the indefinite Words to be taken, *as well before as after the 2 Years, and Damages to be allowed of by the Court*; but if the Demandant do not allege how much is behind over and above the 2 Years &c. and that be *found by the Jury* that finds the Iſſue, the Tenant need not tender more than for the 2 Years, becauſe it appears not of Record, or by neceſſary Conſequence, as ſuch Arrearages as incur hanging the Writ; and for any Arrearages incurred before this Tender the Lord ſhall not avow, becauſe the Tenant ought to have paid all. 2 Inſt. 297.

14. If *A. and B. be ſeiſed to them and the Heirs* of A. and B. *makes Default, A. may tender* for the whole in Reſpect of his Remainder. 2 Inſt. 298.

15. The Court may aſſeſs the *Damages by their Diſcretion.* 2 Inſt. 297.

For more of Ceſſavit in General, See **Abatement, Avowry, Evidence, Rent,** and other Proper Titles.

(A) Ceſſion.

1. DEAN *takes a Prebend* in the ſame Church, Quære if this makes a Ceſſion? D. 273. pl. 35. Paſch. 10 Eliz.

2. *Biſhoprick of Man* makes Ceſſion of a Parſonage in *England*. Lat. 235. Arg. cites it as ſo reſolv'd, 15 Jac. Palm. 344 to 351.

3. The *Trial of* whether Ceſſion or Not doth properly belong to the Common Law. Winch. 63. Paſch. 21 Jac. C. B. in Thornton's Caſe.

4. No Ceſſion by a Parſon's being made *titulary Biſhop*, as of Jeruſalem, Chalcedon, or Utopia; by Banks. Arg. Lat. 235. Trin. 2 Car. So of his being made a Biſhop in Italy; Arg. Palm. 349. and Ibid. 459. ſays, that as to what was ſaid by Banks in his Argument, nothing was ſaid to it.

5. The Election of an Incumbent to be a Biſhop does not make a Ceſſion, but the Vacancy *accrues by the Conſecration*, and not till then; Reſolv'd. Carth. 314, 315. Trin. 6 W. & M. in B. R. the King and Queen v. Biſhop of London and Dr. Lancaſter.

For more of Ceſſion in General, See **Prerogative**, **Preſentation**, and other Proper Titles.

(A) Chancellor of a Church.

1. CHancellor *is Vicar-General* to the Biſhop, and if the *Biſhop will not chuſe* a Chancellor the Metropolitan ought; for the Biſhop cannot be Judge in his own Conſiſtory, and therefore if the Biſhop provides *an inſufficient* Chancellor, it properly belongs to their Law to examine it; Per Richardſon Ch. J. Litt. Rep. 22. Hill. 2 Car. C. B. Doctor Sutton's Caſe.

2. A Prohibition was granted to the Spiritual Court, becauſe the *Biſhop articled againſt his Chancellor for Inſufficiency*, and other Miſdemeanors, and prayed that he might be deprived, which they have no Power to do; and they denied Sutton's Caſe, 1 Cro. 64. to be Law. 12 Mod. 47. Mich. 5 W. & M. Jones v. the Biſhop of Landaffe.

3. Chancellor of a Church *has a Freehold in his Office by Grant*, and not by Inſtitution and Induction as every Biſhop and Parſon has, and

 therefore

therefore for ſuch Office, the proper Remedy is an *Aſſiſe*. Cumb. 305. Mich. 6 W. & M. B. R. Jones v. the Biſhop of St. Aſaph.

For more of Chancellor of a Church in General, See other Proper Titles.

Chancellor.

Fol. 384.

(A) Chancellor. [His Antiquity &c.]

4 Inſt. 78. cap. 8. accordingly — As for its Antiquity in this Realm, it is of no leſs, as our learned Selden conceives, than King Ethelbert's Time, who was the firſt Chriſtian King of the Saxons; for in a Charter of his to the Church of Canterbury, bearing Date in the Year of Chriſt 605. amongſt other Witneſſes thereto, there is Augemundus Referendarius mentioned; where Referendarius, (ſaith he) may well ſtand for Cancellarius; and that the Office of both (as the Words applied to the Court are uſed in the Code, Novels, and Story of the declining Empire) ſignifying an Officer, who received Petitions and Supplications to the King, and made out his Writs and Mandates as a Cuſtos Legis; and though (ſaith he) there were divers Referendarii, as ſometimes 13, then 8, then more again, and ſo divers Chancellors in the Empire; yet one eſpecially here exerciſing an Office of the Nature of thoſe many, might well be ſtiled by either of thoſe Names. Dugd. Orig. Jurid. 32. cap. 16. S. 2.

1. THERE were Chancellors in England before the coming of the Normans into this Realm, Jan. Anglorum 127. for it is cited that Reimbold was Chancellor to King Edward the Confeſſor; and there are divers other Chancellors cited [to have been] before this William.

2. Mich. 14 Jac. B. R. upon Evidence at the Bar, a Charter of William the Conqueror was ſhewn under the Seal of the ſaid King, which was ſubſcribed by ſeveral Lords as Witneſſes, in which I ſaw that it was ſubſcribed per Mauricium Regis Cancellarium, after the Biſhops, and before the Abbots.

S. P. But if the Chancellor's Preſentation recites it to be under 20 l. per Ann. where it is above 20 l. per Ann. The Preſentation is void, for ſuch belongs not to the Chancellor, and before Induction, the King may revoke ſuch Preſentation. Jenk. 292. pl. 33. cites Hob. 214. Ld. Chancellor's Caſe.

3. The Chancellor ſhall have the *Preſentation to all Benefices* of the King *under* 20 *Marks*. Br. Preſentation, pl. 17. cites 38 E. 3. 3. 4.

4. That the *Kings before the Conqueſts had not any Seals*, (the Cuſtody of which in ſucceeding Times, was one of the principal Duties belonging to this Office of Chancellor) Ingulphus (who lived in the Norman Conqueror's Days) ſeemeth ſomewhat poſitively to affirm. Nam Chirographorum confectionem Anglicanam (ſaith he) quæ antea, uſque ad Edwardi Regis Tempora, Fidelium præſentium Subſcriptionibus cum crucibus aureis aliiſque ſacris ſignaculis firma fuerunt; Normanni condemnantes, Chirographa Cartas Vocabant, & Chartarum firmitatem, cum cerea impreſſione, per unius cujuſque ſpeciale Sigillum, ſub Inſtillatione trium vel quatuor teſtium aſtantium, conficere conſtituebant &c. Dugd. Orig. Jurid. 33. cap. 16.

5. Of

5. Of what *Power and Authority* the Chancellor was in theſe elder Times, or what his Office, is not eaſily made out, the reading, allowing, and perhaps *dictating Royal Grants, Charters, Writs* &c. *keeping and affixing the King's Seal to them*, as the learned * Sir Henry Spelman thought, and may alſo be gathered from Mr. Dugdale's Diſcourſe of the Chancery, was the greateſt Part of their Truſt and Imployment, and that he had *no Cauſes pleaded before him untill the Time of Ed.* 3. and thoſe not many till the Reign of Hen. 4. nor are there any Decrees to be found in Chancery before the 20th of Hen. 6. Be *his Power and Office*, what it would then, it *was leſs than that of the Juſticiary*, who was next to the King in Place of Judicature; by his Office he preſided in the Exchequer, the Chancellor ſitting on his left Hand, as Gervaſe of Tilbury tells us, and by his Office was the firſt Man in the Kingdom after the King; and that under his own Teſte, he could cauſe the King's Writ to be made out, to deliver what Sum he would out of the Exchequer. The Chancellor was the firſt in order on the left Hand of the Juſticiary; and as he was a great Perſon in Court, ſo he was in the Exchequer, for no great Thing paſſed but with his Conſent and Advice, that is, nothing could be ſealed without his Allowance or Privity, as it there appears. Brady's Preface to the Norman Hiſtory, 152 (F) 153 (A). * Spelm. Gloſs. Fol. 106. 107.

6. Conſtituting a Chancellor, does not *conſtitute a Court of Equity*, as in the Caſe of Chancellor of the Garter &c. There was a Chancellor of the Court of Augmentations, and yet neither of them ever held a Court of Equity; Per Hale Ch. J. 2 Lev. 24. Mich 23 Car 2. B. R.

7. The Chancellor (during the Time of the Grand *Juſticiar)* before the Breaking the Courts into diſtinct Juriſdictions, *had the Cuſtody of the Seal*, and therefore *iſſued all Originals returnable before the Juſticiar.* But when the Juriſdictions were diſtinguiſhed, the Originals *relating to Civil Pleas* were returnable *before the Juſtices of C. B.* But the Originals *in Treſpaſs* might be returnable in either Court, becauſe the Plea was Criminal as well as Civil, but *B. R.* themſelves *made out the Proceſs in Criminal Matters*; for in this they ſhared with the Power of the Chancery, though the Chancery continued to be the Foot and Baſis of a Civil Juriſdiction; but the Criminal Juriſdiction was returned Coram Rege, and not Coram Juſticiariis de Banco. Gilb. Hiſt. View of Exch. 7. 8.

(B) Chancellor. Keeper. Writs Original. [Not to be delay'd or ſold.]

1. **Mirror of Juſtices Fol.** 3. b. **it was ordained that the Court of the King was open to all Plaintiffs; Per Quod, they ſhould have, without Delay,** Writs remedial as well upon the King upon the Queen, as upon other of the People of every Injury, but in or Vengeance of Life and Member, or Plaint held without Writ.

2. **Mirror of Juſtices,** * **Fol.** 3. **it was** ordained by ancient Kings, that every one ſhould have out of the King's Chancery, a Writ remedial upon his Complaint without Difficulty; **& ibidem, Fol.** 27. **S.** 13. **in the Title of the perſonal Offences at the Suit of the King, there it is thus (&c.)** I ſay for our Lord the King, that Sim. there is perjured, and has falſified his Faith againſt the King; for that whereas the ſaid Sim. was the King's Chancellor, and was ſworn that he would not ſell, deny, nor delay Right, nor a Writ remedial to any Plaintiff; the ſame Sim. * 4 Inſt. 78 cap. 8.

Sim. such a Day &c. sold to such a one a Writ of Attaint, or other Remedial, and would not grant it to him for less than for half a Mark; & ibidem, Fol. 64. cap. 5. among the Abuses of the Law it is said that one is, that Writs remedial are vendible, and that the King sends to the Sheriffs to take Surety for so much to our use for the Writ; for by the Purchase of those Writs it may be one destroy his Enemy tortiously; & ibidem, Fol. 70. cap. 5. among the Defaults of the great Charter upon the 25 cap. Nullus liber homo &c. this Point is said, that the King grants to his People, that he will not sell Right, nor deny nor delay it, and it is disused by the Chancellor, who sells the Writs remedial, and calls them Writs of Grace; Ibid. Fol. 50. Ordenance de Judgment, by this Seal only is a Jurisdiction assignable to all Plaintiffs without Difficulty; and to do this the Chancellor is chargeable by Oath in Obedience of the King's Charge, that he shall not sell, deny, or delay any Right, nor a Writ remedial to any.

3. Bracton lib. 5. De exceptionibus, cap. 17. Sunt quædam brevia formata super certis casibus de cursu & de Communi concilio totius regni (*) concessa & approbata, quæ quidem nullatenus mutari poterint absq; consensu & voluntate eorum, & ibidem pertinet ad regem, ad quamlibet injuriam compescendam remedium competens adhibere. Brevia tamen Communia inter omnes pro jure generaliter debent observari cum sint originalia, & actionibus originem præstent.

*Fol. 385.

4. Rotulo Parliamenti 46 E. 3. Numero 38. The Commons pray, that as in the Great Charter it is contained quod nulli negabimus, nulli vendemus, aut differemus justitiam vel rectum, to the Intent that of some Fines which are taken in Chancery in many Writs contrary to the said Statute, to the great Impoverishment of the People, of which they pray a Remedy, the said Statute be declared.

ANSWER.

1. [5.] The King will use as he and his Ancestors have done before these Days, and will charge his Chancellor, that the Fines be reasonable, according to the Estate of the Person.

(C) * Chancellor. Keeper.

* Of the Keeping and Re-delivery of the Great Seal, and receiving the same, or another on certain Occasions.

1. 10 E. 1. ROTULO Clauso Membrana 6. Hic 31 Martii venit Bathonienſis & Wellenſis Episcopus Cancellarius regis de Episcopatu suo ad Curiam, quo die Sigillum fuit ei liberatum; And there Membrana 7. Memorandum 13. Feb. apud Garcot recessit Bathonienſis & Wellenſis Episcopus Cancellarius regis a Curia versus Episcopatum suum, quo die Sigillum fuit liberatum in Garderoba regis; Per manum Johannis de L. &c. 12 E. 1. Membrana 4. Cancellarius recessit de D. to S. & liberavit Sigillum J. de R. & W. de S. Custodiend'. Simile, 18 E. 1. membrana, 14. 18 E. 1. Rotulo finium Membrana, 17.

2. 14 Ed. 1. Membrana 4. Cancellarius transfretravit ad partes Franciæ cum Rege cumq; Sigillo ipsius Regis. 16 Ed. 1 M. 4. his Return with the King, cum magno sigillo. 17 E. 1. Rot. finium, M. 4.

3. 20 E. 1. Rotulo Cauſo M. 21. Memorandum quod die Sabbati ante Festum Simonis & Judæ, Anno 20. apud Berewick obiit venerabilis pater Burnell Cancellarius regis, & magnum Sigillum regis

quod

quod fuit in Cuſtodia ſua liberatum fuit in Garderoba regis Cuſtodiend' eadem Garderoba ſub ſigillo Willielmi de Hamelto qui inde brevia conſignavit uſque diem Mercurii proximo ſequentem quo die iter arripuit verſus Wells cum corpore præd' Roberti. 20 E. 1. **Rotulo Finium M. 2, & Rotulo Scotiæ M. 7. the ſame Memorandum 21 E. 1. Rotulo Finium M. 26.** Magnum ſigillum domini regis Commiſſum Johanni de Langton cuſtodiendum in præſentia &c. qui die craſtino inde brevia conſignavit.

4. 25 E. 1. **Rotulo Clauſo M. 7. The** Chancellor delivered the Great Seal to the King, and received another Seal of the King's Son, which ſhould be uſed in the Abſence of the King.

5. 6 Ed. 1. **Rot. Finium Memb. 24. Memorandum quod die Veneris proxima poſt feſtum Sanctæ Scolaſticæ Virginis apud Dover venerabilis pater R. Bathonienſis & Wellenſis Epiſcopus** Cancellarius regis transfretavit ad partes tranſmarinas & Sigillum fuit tunc liberatum in Garderoba regis ſub Sigillo Domini Johannis de Kerby cui Cancellarius injunxit in receſſu ſuo quod negotia Cancellariæ expediret, 6 Ed. 1. **Rot. Cartarum (*) Membrana 2 Parte 15, 16. 7 Ed. 1. Rotulo Patentium, M. 15.** Redelivery **of the Seal** upon the Return of the Chancellor. * Fol. 386.

6. 25 Ed. 1. **Rot. finium M. 6. Dominus** Johannes de Langton **Regis** Cancellarius in Navi Regis in qua rex tunc fuit paratus ad tranſfretandum in Flandriam liberavit eidem Regi magnum Sigillum ſuum quod idem rex ſtatim recepit & illud tradidit domino de Beneſtede ad Cuſtodiendum; **and after in the Abſence of E. 1. his Son,** locum tenens regis liberavit præfato **domino Johanni de Langton** præd' Regis Cancellario Sigillum regis, quo dum idem erat in Vaſconia uti in Anglia conſuevit, qui quidem Johannes Sigillum a manibus domini Edvardi ſtatim recepit & in craſtino inde brevia conſignavit, 27 E. 1. M. 15. upon the Return of the King the ſaid Chancellor, under his Seal, delivered to the King the Seal which he uſed in his Abſence, and he delivered it to his Treaſurer to be kept in the Treaſury; and at the ſame Time the King delivered the Great Seal, which he carried with him into Flanders, to the ſaid J. de Langton ſub Sigillo ſuo.

7. 2 E. 2. **Rot. finium M. 8, 9.** de liberatione magni Sigillo &c. He is made Ld. Chancellor of England, or Ld. Keeper of the Great Seal, per

8. 2 E. 1. **Rot. Patentium M. 8. Memorandum quod die Veneris in feſto Sancti Matth. Apoſtoli** magnum Sigillum regis liberatum fuit Roberto Burnell Archidiacono Eborum apud Windſor, & Statim inde conſignavit brevia Cancellariæ tam de curſu quam de præcepto.

traditionem magni Sigilli ſibi per dominum regem, and by taking his Oath. Forma Cancellarium conſtituendi regnante Henrico ſecundo fuit appendendo magnum Angliæ ſigillum ad collum Cancellarii electi. Some have gotten it by Letters Patents at Will, and one for Term of his Life; but it was holden void, becauſe an ancient Office muſt be granted, as it has been accuſtomed. 4 Inſt. 87.

9. 5 E. 1. **Rotulo Patentium M. 17.** de Sigillo Hibernico mutato.

10. 1 E. 3. **Clauſo 2. Pars M. 11. dorſo, A** new Great Seal made with ſome Alteration, and the old Seal broke, **and a** Command to the Sheriff of every County to publiſh it in pleno Comitatu, and to ſhew there the new Seal.

11. **Statutum de Forma mittendi extractas ad Scaccarium in Magna Charta 2 Parte, Fol. 47. b.** The King to **our dear William de Airemyn,** Keeper of our Rolls of the Chancery, and to his Companions, Keepers of our Great Seal, ſalutem.

12. **Rotulo Parliamenti 14 E. 4. Numero 26. the** Chancellor is called **the** Chief Juſtice in the Realm.

Before this Act the Ld. Chancellor had not always the Custody of the Seal.

13. 5 *Eliz. cap.* 18. *Makes the Authority of Lord Chancellor and Lord Keeper to be all one.* D. 211. b. Marg. pl. 33.

For more of Chancellor in General, see **Chancery** (D) and other Proper Titles.

Fol. 370.

Chancery.

(A) Chancery &c.

1. 31 H. 6. cap. 2. A Great Forfeiture for not appearing after Proclamation made; but this continued but 7 Years.

Nota per Curiam, where a Bill in Chancery is adjudged insufficient upon Demurrer, the Defendant shall not have Damages; for the Statute only says where the Suggestion is found true or not true; whereas in this Case, as here, the Truth is not tried. Br. Costs, pl. 19. cites 7 E. 4. 14. ——— Fitzh. Damage, pl. 44. cites S. C. ——— 4 Inst. 83. says that this Act extends to the Chancellor proceeding in a Course of Equity, and not to a Demurrer in Law upon a Bill, but upon Hearing the Cause, and that by reason of these Words in the Act (duely found and proved.)

2. 17 R. 2. cap. 6. Item, Forasmuch as People be compell'd to come before the King's Council, or in the Chancery, by Writs grounded upon untrue Suggestions; that the Chancellor for the Time being, Maintenant after that such Suggestions be duly found and proved untrue, shall have Power to ordain and award Damages after his Discretion, to him which is so travail'd unduely as afore is said.

Prynne's Abr. of Cotton's Records, 410. cites the same Petition.—4 Inst. 83. cap. 8. cites the same.

3. 2 H. 4. Numero 69. the Commons pray, that all Writs or Letters of the Privy Seal of our Lord the King, directed to divers of the King's Liege People to appear before our Lord the King in his Council, or in his Chancery, or in his Exchequer, upon a certain Pain comprized therein, for the Time to come shall be altogether ousted, and that every of the King's Liege People shall be treated according to the rightful Laws of the Land anciently used.

ANSWER.

This should follow under the same Letter, and so the Pleas proceed which have been divided by the Error of the Printers.

1. [4] Such Writ shall not be made unless in Cases where it seems necessary, and this by the Discretion of the Chancellor, or King's Council, for the Time being.

(A) [A. 2]

Prynne's Abr. of Cotton's Records, 422. cites same

2. [1.] 4 H. 4. Numero 78. The Commons pray, reciting the Statute of 25 E. 3. That none shall be taken by Petition or Suggestion made to the King or his Council &c. unless by Indictment or Pro-

Proceſs by original Writ, and alſo the Statute of 42 E. 3. That no Man ſhall be put to anſwer without Preſentment before Juſtices &c. Notwithſtanding which Statutes, after this many of your Lieges have been grieved by divers Writs and Letters, ſome by ſimple Suggeſtions, without any thing found iſſuing out of Chancery upon a certain Pain comprized in them, to appear before you in your Chancery or Council, ſome by Writs out of the Exchequer &c. others to appear before your Council by Privy Seal &c. to the great Hindrance of your Lieges, and againſt your Laws and Statutes aforeſaid. May it pleaſe you to ordain, that the Statutes aforeſaid henceforth be fully kept; and further to ordain, that the Writs and Letters aforeſaid be altogether ouſted, and that none of the King's People be forced to appear or anſwer by any ſuch Writ or Letter, nor be put to loſe their Goods and Chattels, and that he, which for the Time to come, makes any Suggeſtion againſt any of your Subjects to yourſelf, your Council, Chancellor or Treaſurer, or before your Barons of the Exchequer, may find good and ſufficient Sureties to aver his Suggeſtion; to the end, that if he who is ſo accuſed, of his own Accord comes to the Place where the aforeſaid Suggeſtion is, and traverſes the aforeſaid Suggeſtion, his Traverſe may be received without Delay; and if it be found againſt him who made ſuch Suggeſtion, and for him who was ſo accuſed, he ſhall recover his Damages againſt the Accuſer, to be taxed by the ſame Inqueſt (*) by which he is ſo acquitted, having Regard to the ſlender Coſts and Labour for his Defence; and further, ſhall make Fine and Ranſom, and his Body taken to abide in Priſon for one Year, for the Falſity aforeſaid, and that this Ordinance ſhall extend as well to the Time paſt as to come, as to Suggeſtions depending not yet diſcuſſed.

Petition —See the Juriſdiction of the Court of Chancery vindicated, a Treatiſe printed at the end of 1 Chan. Rep. 34-37.

* Fol. 371.

ANSWER.

1. [2.] The King will charge his Officers to abſtain more from ſending for his Lieges than they have done before theſe Days, but it is not the Intention of the King that the ſame Officers ſhould ſo much abſtain that they cannot ſend for his Lieges in Matters and Cauſes neceſſary, as hath been done in the Time of your [* good Progenitors] our Lord the King himſelf.

Prynne's Abr. of Cotton's Records, 422. the ſame Anſwer. * See the Juriſdiction of the Court of Chancery vindicated, at the end of 1 Chan. Rep. 36. 39.

(B)

2. [1.] 4 H. 4. Numero 110. In the Petition upon which the Act of 4 H. 4. cap. 23. touching Examinations and Judgments is made, another Part of the Petition is ſuch, [viz.] And in the ſame Manner as it belongs let every Matter be which can be determined by the Common Law, and that a due Pain be ordained in this preſent Parliament againſt thoſe who purſue the contrary, and this for God and the Safety of all the Eſtates of the Realm.

Prynne's Abr. of Cotton's Records, 424. ſays, the Print touching Pleas Real and Perſonal, cap. 23. agrees with the Record.——See the Treatiſe called, The Juriſdiction of the Court of Chancery vindicated, at the End of 1 Chan. Rep. touching this Statute, Fol. 42, 43. &c.

ANSWER.

1. [2.] It is anſwered before among the Petitions of the Commons, Numero 78. intending that which is next here before.

This by Miſtake of the Printers was made Letter (C) in Roll.

(D) Chan-

(D) Chancellor. *What* Things *he may do*; what not.

4 Inſt. 80. cap. 8. ſays, that in theſe Caſes, if the Parties deſcend to Iſſue, this Court cannot try it by Jury, but the Lord Chancellor or Lord Keeper delivers the Record by his proper Hands into B. R. to be tried there, becauſe for that Purpoſe both Courts are accounted but one, and after Trial had to be remanded into the Chancery, and the Judgment to be given; but if there be a Demurrer in Law, it ſhall be argued and adjudged in this Court.

1. IF Suits are there upon Recognizances, Statutes, Attachments, Treſpaſs or Debt, againſt the Officers of the Court, he ought to adjudge according to the Courſe of the Common Law. 11 E. 4. 9.

4 Inſt. 83. cap. 8 cites the ſame Petition.—— Prynne's Abr. of Cotton's Records, 548. ſame Petition.

2. 3 H. 5. Numero 46. The Commons prayed, that whereas many People perceived themſelves greatly grieved, becauſe the Writs called Writs of Subpœna & certis de cauſis made and ſued out of your Chancery and Exchequer of Matters determinable by your Common Law, which were never granted or uſed before the Time of the late King Rich. that John Waltham, late Biſhop of Sarum, of his Subtilty found out and began ſuch Novelty againſt the Form of the Common Law of your Realm, as well to the great Loſs and Hindrance of the Profits which ought to ariſe to you, our Sovereign Lord, in your Courts, as in Fees and Profits of your Seals, Fines, Iſſues and Amerciaments, and ſeveral other Profits to be taken in your other Courts, in Caſe the ſame Matters were ſued and determined by the Common Law; inſomuch, that no Profit does ariſe to you from ſuch Writs, but only 6 d. for the Seal. And alſo, becauſe that your Juſtices of the one Bench, and of the other, when they ought to intend their Place concerning Pleas, and to take Inqueſts for the Delivery of your People, they are occupied about the Examination of ſuch Writs, as well to the moſt great Vexation, Loſs, Coſts and of your Lieges, which are delayed for a long Time from the Sealing of their Writs ſued in your Chancery, becauſe of the great Occupations concerning the ſaid Examinations, which neither profit you nor your Liege People, in which Examinations there (*) is a great Noiſe by divers People not learned in the Laws, without any Record or Entry in your ſaid Places, and which Pleas cannot have an end unleſs by Examination and Oath of the Parties, according to the Form of the Law Civil, and Law of the Holy Church, in Subverſion of your Common Law &c. and therefore they pray, that every one who ſues ſuch Writ thereafter, may put all the Cauſe and Matter in the Writ, and if any one perceives himſelf grieved by ſuch Writ for Matter determinable by the Common Law, let him have an Action of Debt for 40 l. &c.

* Fol. 372.

ANSWER.
The King will adviſe.

(E)

4 Inſt. 83. cap. 8. ſame Anſwer.— Prynne's Abr. of Cotton's Records, 548. ſame Anſwer.

1. ROT. Parliamenti 14 Ed. 3. Numero 33. An Ordinance was made touching the Priory of Weſt Shirborne &c. and if any Thing be done againſt this Ordinance, that then the Chancellor of England ſhall have Power to hear the Complaint by Bill, and thereupon to proceed in the ſame Manner as is uſually accuſtomed to do daily in a Writ of Subpœna in Chancery.

2. In

2. In a Case moved by Mr. Chamberlaine, where the Lord Chancellor had *referred the Matter to be tried at the Common Law* touching Remainders upon a Lease, whether good in Law or no, and the Judges had given Judgment upon the Case in another Point, in the King's Bench, so as the Lord Chancellor remained still uncertain of that Point, called the Judges *into the Exchequer Chamber*. Cary's Rep. 46. cites 1 Jac.

(F) *Of what* Things they may *hold Plea*, and of what not.

1. ROT. Parliamenti 45 Ed. 3. Numero 24. The Commons pray, That it may please the King and his good Council to grant that no Plea be henceforth pleaded in Chancery, unless the King be properly a Party in the said Plea, or that the Plea touch the Office of the Chancery, and that all Manner of Pleas which are there yet held, or pending in the same Chancery, be sent to the Common Law, and that none who pursue there, or to the Council by Bill, be henceforth delayed of a convenient Remedy, as they most grievously have been.

Prynne's Abr. of Cotton's Records, 45 E. 3. Numero 24. is not the same Petition or Point, nor do I observe it any where there in the same Year.

2. 2 H. 4. Rotulo Parliamenti Numero 65. The Commons pray, That whereas, for the Discussion of all Pleas in Matters traversed in Chancery, the Judges are drawn into Chancery out of their Places, in Aid of the said Discussion, to the great Hindrance of the Business of the Common Law of the Realm, and to the great Damage of the People, that it be ordained that upon such Traverses the Record be sent in Banco Regis, or Banco, there to be discuss'd and determin'd, saving Liveries to be made in Chancery &c.

Prynne's Abr. of Cotton's Records, 2 H. 4. Numero 65. is not same Point.

* *ANSWER.*

1. [3] The Chancellor may do it by his Office, and let it be as it hath been used before these Days, by the Discretion of the Chancellor for the Time being.

* This by Mistake of the Printer was made Letter (G)

2. Chancery has Power to hold Plea of *Sci. Fa. for Repeal of the King's Letters Patents* of *Petitions*, *Monstrans de droit*, *Traverses of Offices*, *Partitions in Chancery*, of *Scire Facias upon Recognizances in this Court*, Writs of *Audita Querela*, and Scire Facias in the Nature of an Audita Querela, *to avoid Executions in this Court*, *Downments in Chancery*, the Writ *De Dote Assignanda upon Offices found*, *Execution upon the Statute Staple or Recognizance*, in Nature of a Statute Staple upon the Act of 23 H. 8. but the Execution upon a *Statute Merchant* is returnable, either into B. R. or into C. B. and all Personal Actions by or against any Officer or Minister of this Court in respect of their Service or Attendance there. 4 Inst. 79, 80.

(G) [The Effect of Mispleading.]

2. [1] MIspleading in Matter of Form shall be prejudicial in no Case in Chancery, altho' it be in a Thing in which they hold Plea according to the Common Law. 14 E. 4. 7.

The Reason there given is, for that it cannot be said to be a

Court of Conscience, if the Act of the Clerk in the Pleading should cause the Party to lose the Advantage of his Suit, and of all his Costs. Ibid. pl. 8.——Staundf. Prerog. 77. a. cap. 23. cites S. C. and that it was where one had traversed an Office which was sent into B. R. to be tried, and had forgot to sue

ſue his Sci. Fa. and yet he was ſuffered to go again into Chancery to pray a Sci. Fa. upon the firſt Traverſe; for it was ſaid, that Chancery is a Court of Conſcience, and therefore the Thing that was amiſs may be reformed at all Times.

In the Chancery by the Chancellor *a Man ſhall not be prejudiced* there *by Miſpleading, or for want of Form*, but *Secundum Veritatem Rei*, and we ought to adjudge according to Conſcience, and not according to the Allegation; for if a Man ſuppoſes by Bill that the Defendant has done a Tort to him, to which he ſays nothing, if we have Conuſance that he has done no Tort to him, he ſhall recover nothing, and there are *two Powers* and Proceſs, viz. Potentia *Ordinata & Abſoluta*. Ordinata is as a Law Poſitive, as a certain Order; but the Law of Nature has no certain Order, but by whatever Means the Truth can be known &c. and therefore it is ſaid, Proceſſus abſolutus &c. and in the Law of Nature it is requir'd that the Parties be preſent &c. or that they be abſent by Contumacy, viz. where they are warned and make Default &c. and the Truth to be examined. Br. Juriſdiction, pl. 50. cites 9 E. 4. 15. —— Br. Conſcience, pl. 4. cites S. C. ——— Br. Dette, pl. 119. cites S. C.

(H) *Of what Things* they may have Conuſance in Chancery. The *Ordinary Power*. [As to Inrolments.]

1. 4 E. 1. Rotulo clauſo Membrana 3. in Dorſo Angelinus de Gyſes conveys Lands to Walter de Helum, and in the end of the Conveyance (*) it is mentioned Quod præd' Angelinus venit in Cancellariam Regis, & dedit præd' Waltero Seiſinam prati præd' cum Pertinentiis in forma præd', and there is a Sale made by the Abbot and Convent de Fontibus to certain Merchants acknowledged by the Abbot in Chancery, and inrolled de 62 Saccis Lanæ & Collecta Monaſterii ſive Clacks Loke &c. (It ſeems both theſe were Inrolments in Chancery.)

* Fol. 373.

2. 20 E. 1. Rotulo clauſarum Membrana 12 dorſo, Conventio facta inter Richardum filium Alani Comitem Arundell & Robertum Epiſcopum Bathonenſem & Wellenſem quam 12 Januarii Anno 12. recognoverunt in Cancellaria & Comes petit ut irrotuletur & patet &c.

3. 2 E. 1. Rotulo clauſarum Membrana 8 dorſo, Acquittances for the Receipt of Money among common Perſons inrolled in Chancery.

(I) Of *what Actions* it may hold Plea.

Writ *founded upon a particular Act of Parliament, ſhall make Mention of the Act*, as where it is enacted, *that the Chancellor calling to him the Juſtices of the one Bench, and the other may determine Cauſes of Diſſeiſin between A. & B. and ſhall call B. by Subpœna*; this Writ ſhall be Special and not General; Per Omnes, except Littleton, and hence it ſeems that the Chancellor cannot determine Plea of Land or Diſſeiſin without Act of Parliament. Br. Brief, pl. 487. cites 14 E. 4. 1.

1. IT cannot hold Plea of Pleas of Land. 20 H. 6. 32. b.

2. It may hold Plea of Treſpaſs. 20 H. 6. 32. b.

3. So it may hold Plea of Debt. 20 H. 6. 32. b.

4 Inſt. 85. cap. 8. S. C.

4. *Whether there was ſuch a Manor as A. in Deed or Reputation* at ſuch a Time, Or *whether Lands in B. were* at that Time *Parcel of the Manor* or no ought to be tried at Common Law, and not in Chancery; by the Opinion of all the Judges. 2 And. 163. pl. 89. Mich. 42 & 43 Eliz. The Earl of Worceſter v. Sir Moyle Finch.

5. The

5. The *Complainant alleg'd a Diſſeiſin to be committed of Bl. Acre at the Time of a Bargain and Sale made to him thereof.* It was the Opinion of all the Judges, on a Reference to them by the Queen, that this ought to receive Trial at the Common Law and not in Chancery. 2 And. 163. pl. 89. Mich. 42 & 43 Eliz. in Caſe of Worceſter (Earl of) v. Sir Moyle Finch. 4 Inſt 85. cap. 8. S. C.

6. If *A. conveys Land to B.* and *at the Time of the Conveyance, A. had only a mere Matter of Equity* to be relieved by, or only a Right at the Time. B. his Vendee ought not to be relieved in the Chancery; and if the Perſon in Poſſeſſion of any of the Lands had any Title to them, he ſhall not be bound by Decree in Chancery from defending the ſame at and by the Common Law; By the Opinion of all the Judges on a Reference by the Queen. 2 And. 163, 164. pl. 89. Mich. 42 & 43 Eliz. in Caſe of Worceſter (Earl of) v. Sir Moyle Finch. 4 Inſt 85. cap. 8. S. C.

7. When the *Suit* is *for Evidence, the Certainty whereof the Plaintiff ſurmiſeth he knoweth not, and without them he ſuppoſeth that he cannot ſue at the Common Law.* It was reſolved that if the *Defendant makes no Title* to the Land, then *the Court hath* juſt *Juriſdiction* to proceed for the Evidence; *but if he makes Title* to the Land by his Anſwer, then the *Plaintiff ought not to proceed*; for otherwiſe by ſuch a Surmiſe, Inheritances, Freeholds, and Matters determinable by the Common Law, ſhall be decided in Chancery in this Court of Equity. 4 Inſt. 85, 86. Mich. 42 & 43 Eliz. Worceſter (Earl of) v. Sir Moyle Finch.

(K) What *Power* the Chancery hath.

1. THE Engliſh Court of Chancery, is no Court of Record. 37 H. 6. 14. b. per Priſot. Br. Error, pl. 95. cites 37 H. 6. 13. S. P. ——— Yelv. 227. Arg. cites 38 H. 6. S. P. but ſeems miſ-printed, and that it ſhould be 37 H. 6. ——— 4 Inſt. 84. cap. S. S. C. & S. P. ——— In Caſes were the Court of Chancery proceeds according to the Courſe of the Common Law, as in the Caſe of Privilege, of Scire Facias upon Recognizances, Traverſes of Offices and the like, it is a Record; but as to Proceedings by Engliſh Bill in Courſe of Equity, it is no Court of Record; for thereupon no Writ of Error lies as in the other Caſes. 3 Inſt. 71. cap. 19. ——— Ibid. 123. cap. 24. S. P. that the Court of Equity in the Proceeding in Courſe of Equity, is no Court of Record, and therefore it cannot hold Plea of any Thing whereof Judgment is given, which is a Judicial Matter of Record.

2. The Chancellor by a Decree cannot bind the Right of the Land, but can only bind the Perſon; and if he will not obey it, the Chancellor may commit him to Priſon till he obeys it. 27 H. 8. 15. per Knightly. S. P. But Judgment at Common Law is to recover the Thing, and ſhall bind the Right; Note the Diverſity. Br. Judgments, pl. 2. cites 27 H. 8. 15. ——— Br. Judges, pl. 1. cites S. C. accordingly. ——— Br. Juriſdiction, pl. 53. cites S. C. & S. P. ——— 4 Inſt. 84. cap. S. S. P. and cites S. C.

3. *Partition* made in Chancery is good, and may be ſent into C. B. and Execution may be made thereof there by Scire Facias and well. Br. Juriſdiction, pl. 114. cites 29 Aſſ. 23.

4. *Aſſiſe* was *awarded of Damages for the Plaintiff upon Certificate of the Biſhop that the Tenant was a Baſtard*, where the *Parliament had wrote to the Juſtices of Aſſiſe to ceaſe*, and yet they proceeded as above, by which the *Chancellor reverſed this Judgment* before the Council, and adjudged it in the ſame Plight as it was upon the Certificate &c. and this remitted to the *Juſtices of Aſſiſe* again, who proceeded and gave Judgment

ment for the Plaintiff, becauſe the Biſhop had [certified] the Tenant a Baſtard, but they *had no Regard to the Reverſal before the Council*; for this is no Place where Judgment may be reverſed, Quod nota. And ſo ſee that they had no Reſpect to the Matter of the Reverſal. Br. Judges, pl. 13. cites 39 E. 3. 14.

5. If a Feme be *indow'd in Chancery*, and after the *Land is recovered from her*, ſhe may have *Scire Facias there*, to be indowed de Novo. Br. Juriſdiction, pl. 114. cites 43 Aſſ. 42.

6. In *Debt upon an Obligation* the *Chancellor ſent Superſedeas to them of C. B. becauſe at another Time he had decreed the Matter in Chancery*; and the Court ſaid, that it was nothing to the Purpoſe, and they would not obey it; for they have as High an Authority to proceed upon their Common Pleas as the Chancellor has, But *Superſedeas of the Privilege by his Privilege of the Chancery, they would allow*; for otherwiſe it ſhould be inconvenient by Reaſon of the Attendance in the Chancery; Nota. Br. Superſedeas, pl. 19. cites 37 H. 6. 13.

If Matter in Conſcience ariſes upon the Attachment,

7. *Attachment* in Chancery *againſt Clerks* of the Chancery, ſhall be try'd by Common Law, and not by Conſcience. Br. Juriſdiction, pl. 112. cites 8 E. 4. 6. and 37 H. 6. accordingly.

the Chancellor cannot adjudge according to Conſcience, but according to the Common Law; and as for the Conſcience, the Defendant ought to make a Bill to the Chancellor, and then he may judge according to Conſcience. Br. Conſcience, pl. 15. cites 8 E. 4. 5. by the Juſtices.

8. Superſedeas of *Privilege of the Chancery* was caſt in the Exchequer *for a Clerk* of the Chancery, againſt Thomas Young, Juſtice, which was not allow'd for certain Cauſes. Young asked, What if the Chancellor will command me upon Pain that I ſhall not ſue him? Billing anſwer'd you are not bound to obey it; for this *Command is contrary to Law*. Br. Judges, pl. 12. cites 9 E. 4. 53.

9. In Treſpaſs the *Verdict paſs'd* for the Father, and an *Injunction* came to him out of Chancery *that he ſhould not proceed to Judgment* on Pain of 100 l. and the Court ſaid that if the Plaintiff would demand Judgment, they would give him Judgment. Br. Judgments, pl. 86. cites 22 E. 4. 37.

10. The Chancery may *write to the Mayor of Calais*, and *Writ of Error* ſhall iſſue from the Chancery *to Calais of Judgment given there*, and the Chancery may *hold Plea upon Scire Facias*, and other ſuch Writ which appertain to them, *as well extra Terminum as infra Terminum*. Br. Juriſdiction, pl. 16. cites 21 H. 7. 33.

11. The King cannot grant a *Commiſſion to determine any Matter of Equity*; but it ought to be determined in the Court of Chancery, which hath Juriſdiction in ſuch Caſe Time out of Mind, and had always ſuch Allowance by the Law; but ſuch Commiſſions, or new Courts of Equity, ſhall never have ſuch Allowance, but have been reſolved to be againſt Law, as was agreed in Potts's Caſe. 12 Rep. 113. Hill. 11 Jac. The Earl of Derby's Caſe.

12. Courts of Equity cannot *agere in Rem*, but upon the Equity of it; for it is a certain Rule, that Decrees in Court of Equity ſhall not bar in *Action* brought by *Common Law*, and therefore if Chancery ſhall make *Decree on a Covenant*, on which Action lies at Common Law, the Party, notwithſtanding the Decree, may have his Action; or if a Bill be exhibited in Chancery for *Legacy or Marriage-Portion*, which Bill is *diſmiſs'd*, this tolls not the Remedy which the Party has at Common Law; per Glin. 2 Sid. 122. Mich. 1658. B. R. Came v. Moye.

13. Where the Court of Chancery have Power to *examine in a ſummary Way*. MS. Tab. April 21ſt, 1727. Paxton v. Orlebar.

(L) *What*

(L) *What Persons* may be there *relieved* in Equity.

1. THE Chancellor himself may. 16 E. 4. 4. b. Urenbridge Chancellor was.

2. But he cannot make a Decree in his own Cause. Hill. 11 Jac. in Chancery, between *Sir John Egerton and the Lord Darby*, resolved. 12 Rep. 113. The Earl of Derby's Case, S. C. but in such Case where he is Party, the Suit shall be heard in the Chancery here coram Domino Rege.—4 Inst. 213. cap. 37. S. C. resolved accordingly; and also that his Deputy cannot decree any Cause wherein he himself is Party; for he cannot be Judex in propria Causa; but in that Case he may complain in the Chancery of England——See (M) pl. 4. S. C.

Such Decree is merely void; Coke Ch. J. Roll Rep. 246. pl. 16. said it was so held by him and Doderidge in Kelley's Case, as to a Decree by the Chamberlain of Chester, who is Chancellor there, and seems to be S. C.——Ibid. 331. pl. 38. Coke Ch. J cites S. C.——3 Bulst. 117. S. C. cited by Coke Ch. J.

3. The King may sue in Chancery for Equity. Tr. 14 Jac. in the Chancery, between *the King and the Lord William Howard*, it was so admitted, and resolved by the two Chief Justices in Chancery.

(M) In *what Cases* the Suit may be there. [In regard to other Courts.]

1. 27 E. 1. ROtulo finium Membrana 1. Petition in Cancellaria Angliæ de Terra in Hibernia.

2. If an erroneous Judgment be given in a Copyhold-Court of a common Lord, in an Action in Nature of a Formedon, a Bill may be exhibited in Chancery, in Nature of a false Judgment, to reverse it. Hill. 8. Ja. Scaccario, cited to be one *Patteshul's Case*. S. C. cited by Tanfield J. Lane 98. Hill. 8 Jac. in the Exchequer, as a Case in which he was of Counsel in Ld. Bromley's Time, where it was debated at large, and decreed accordingly.

3. If a Decree be made in an inferior Court of Equity, this upon a new Bill exhibited in Chancery may be decreed there, to give the more Strength and Aid to the first Decree; As if a Decree be made against one for the Queen in Court of the Queen, which the Defendant will not obey, upon a new Bill exhibited in Chancery this may be confirmed and decreed there, for the better Aid of the first Decree. M. 16 Ja. in Chancery, *Sir Robert Floyd's Case*, adjudged.

4. A Man cannot sue in the Chancery of Chester for a Thing which in Interest concerns the Chancellor there, because he cannot be his own Judge, and therefore he may in this Case sue in the Chancery of England; for otherwise there shall be a Failure of Right. H. 11 Ja. in Chancery, between *Sir John Egerton and the Lord Darby and Kelly*, resolved by the Chancellor, Coke and Doderidge. Quod vide cited H. 13 Ja. B. R. Fol. 374. See (L) pl. 2. S. C. and the Notes there.

5. If the *Defendants dwell out of the County-Palatine*, if any of the County-Palatine have Cause to complain against them for Matter of Equity, for *Lands or Goods within the County*-Palatine, the Plaintiff may complain in the Chancery of England, because he hath no Means to bring them to answer, and the Court of Equity can bind only the Person; Resolved by the Lord Chancellor, the Ch. J. of England, the Master of the Rolls, and 2 Judges.

12 Rep. 113. Hill. 11 Jac. The Earl of Derby's Case.

ſon; for otherwiſe the Subject ſhall have juſt Cauſe of Suit, and ſhould not have Remedy; and when particular Courts fail of Juſtice, the general Courts will give Remedy; ne Curiæ regis deficerent in Juſtitia exibenda. 4 Inſt. 213.

6. A *Bill* was brought *againſt an Executor of a Citizen of London, who lived out of the Juriſdiction, to* come and *give Security to the City for the Orphan's Portion*, according to the Cuſtom of the City. The Defendant by his Anſwer ſubmitted to do as the Court ſhould direct, but being no Freeman would not be ſubject to the Orders of the City. It was urged by the Recorder, that this Court uſed to aſſiſt the City in ſuch like Caſes, and on Petition uſed to grant Subpœna's to Perſons to appear before the Mayor in his Court; to which it was anſwer'd, that *this Cuſtom concerns the Country as well as the City*, and muſt be tried by Verdict; and it is inconvenient for Country-Gentlemen to be put to give Security to the Orphans Court by Recognizance. Ld Keeper decreed the Plaintiffs to try the Cuſtom. Chan. Caſes 203. Paſch. 23 Car. 2. London Mayor &c. & Byfield v. Slaughter.

7. Chancery cannot by any Decree bind the *Iſle of Man*; nor if they ſhould decree, could they execute the Decree there, it being out of the Power of any Sheriff. It was ſo held by the Plaintiff's Counſel. Chan. Caſes 221. Hill. 23 & 24 Car. 2. in Caſe of the Duke of Athol v. the Earl of Derby.

8. In a Bill *by way of Appeal from an inferior Court*, the Plaintiff therein muſt complain of the Injuſtice done him by the inferior Court; but is not obliged to aſſign any particular Errors, which is the Difference between a Bill of Appeal and a Bill of Review; but in this they agree, viz. that both muſt be upon the ſame Evidence, and you cannot examine De Novo, tho' in the Spiritual Court they examine over and over again, and proceed upon new Allegations; and Jeffries C. ſeemed to incline, that a Bill of Appeal would lie from an inferior Court to the Chancery, as at Common Law the B. R. corrects all inferior Courts. Vern. 442. pl. 417. Hill. 1686. Addiſon v. Hindmarſh.

(N) * What *Things* ſhall be *relieved* in Equity.

* In what Caſes a Man may be reliev'd againſt his own Oath, ſee Tit. Own Oath (B)— So againſt his Own Act, ſee Tit. Own Act (A)—

1. I have heard my Lord Coke cite two Verſes for this out of Sir Thomas Moore,

Three Things are to be helpt in Conſcience,
Fraud, Accident, and Things of Confidence.

4 Inſt. 84. cap. 8. S. P. 1ſt, All Covins, Frauds, and Deceits, for which there is no Remedy by the ordinary Courſe of Law. The 2d is Accident, As where the Servant [of] an Obligor, Mortgagor &c. is ſent to pay the Money on the Day, and he is robb'd &c. Remedy is to be had in this Court againſt the Forfeiture, and ſo in like Caſes. The 3d is Breach of Truſt and Confidence, whereof there are plentiful Authorities in our Books.——The Juriſdiction of the Court of Chancery is generally thus divided; and by *Accident is meant* when a Caſe is diſtinguiſhed from others of the like Nature by *unuſual Circumſtances*; *for* the Court of Chancery can *not controul the Maxims of the Common Law*, becauſe of general Inconveniences, but *Only when* the Obſervation of the Rule is attended with ſome unuſual and particular Circumſtances, that *create a perſonal and particular Inconvenience*; per Ld. Cowper. 10 Mod. 1. Trin. 8 Ann. in Canc. Anon.

Br. Conſcience &c: pl 23. cites S. C. where a Man bound

2. If a Man comes to be remedileſs at the Common Law by his own Negligence, he ſhall not be relieved in Equity; As if he pays a Statute or Obligation without Acquittance, and after is ſued thereupon, he ſhall not be relieved in Equity; for he was

was not bound to pay it without an Acquittance. 22 E. 4. 6. b. in a Statute-Merchant paid the Money without an Acquittance, and the Chancellor ſaid that the Conuſee could not deny the Payment, and therefore he demanded of the Juſtices if he might award a Subpœna; and Fairfax ſaid he could not, becauſe then Matter of Record would be defeated by 2 Witneſſes, and he was not bound to pay the Statute nor an Obligation, unleſs the Obligee would make a Releaſe or Acquittance; and Huſſey ſaid that it is better here to make him pay the Sum twice than to alter the Trial of the Law; for he is not bound to pay unleſs the other will give a Releaſe or Acquittance; and the Chancellor agreed as to the Statute, which is a Record; but not as to the Obligation, which is only Matter in Fact.

3. If two Men are bound to another, and the Obligee releaſes to one, ſuppoſing this will not diſcharge the other, yet Ignorantia Juris non excuſat, and therefore he ſhall not be thereupon relieved againſt the other in a Court of Equity. 12 Ja. between *Harman and Cam*, in B. R. a Prohibition was granted accordingly to the Council of the Marches; and Mich. 14 Ja. a Conſultation denied.

4. *Subpœna* brought by *R. againſt C.* becauſe *R. had Land extended* to him *in Ancient Demeſne by Statute-Merchant*, and after *C. purchaſed the Land, and had Recovery by Sufferance in the Court of Ancient Demeſne upon Voucher, and recover'd and enter'd, and ouſted R.* and he brought Subpœna, and it was held that he, viz. *R. cannot falſify the Recovery, and therefore he ſhall be reſtored by the Court of Chancery* by Conſcience. Quod nota; for *there is no Remedy at the Common Law* thereof. Br. Conſcience, pl. 8. cites 7 H. 7. 11.

5. *And* by the Chancellor, where *Feoffment* is made *upon Confidence* the Feoffor has no Remedy by the Common Law; but he ſhall have Remedy in the Chancery by Conſcience. Ibid.

6. *So* where *a Man pays Debt without Specialty, which is due by Obligation*, there is no Remedy by the Common Law; but he ſhall have Remedy in the Chancery by Conſcience. Ibid. 7 H. 7. 12. a S. P. but is of paying a Debt due by Bond, without having the Writing delivered to him.——A *Bond* enter'd into for Payment of Money, upon the Payment whereof the *Teſtator promiſed to deliver up the Bond* to be cancell'd, the Money was paid, but the Bond not delivered up. The Teſtator dies. Afterwards the Obligor ſued the Executor in the Court of Requeſts for Relief in Equity, and to have the Bond delivered up. The *Executor ſuggeſts that he knows nothing of the Payment of the Money*, being no ways privy thereunto, and ſo prays a Prohibition, this being more proper for a Trial at Law. The other pray'd a Procedendo, for that he had no Remedy to be relieved at the Common Law, in regard that this Promiſe made by the Teſtator to deliver up the Bond, is ſuch a Perſonal Aſſumpſit as that the ſame Moritur cum Perſona, and therefore a Procedendo was granted, there being juſt Cauſe for him in this Caſe to proceed in the Court of Requeſts, and there to be relieved. Bulſt. 158. Trin. 9 Jac. Strong's Caſe.

7. *So if* one be *bound to J. S. to the Uſe of W. N.* and after *J. S. releaſes the Debt*, W. N. ſhall have Remedy in Chancery by Conſcience. Br. Conſcience, pl 8. cites 7 H. 7. 11.

8. *So* where a Man is *indebted without Specialty, and dies*, his Executors ſhall not be charged by the Common Law, but in the Chancery by Conſcience. Ibid.

9. No Court would relieve *long Leaſes for* 1000 *Years, by which the King was defeated of the Wards*; per Richardſon J. And he ſaid that Ld. Elſemere uſed to ſay that there were 3 Things which he never would relieve by Equity, and that thoſe were long Leaſes as aforeſaid; 2dly, *Concealments*; and 3dly, *Naked Promiſes*. Litt. Rep. 3. Hill. 2 Car. C. B. Anon. Such Leaſe ſhall be taken to be made by Fraud and Colluſion; per Tanfield Ch. B. And Coke Ch J. ſaid that the Ld. Chancellor would not relieve ſuch a Leſſee in Court of Equity, becauſe the Beginning and Ground of it is apparent Fraud. Godb. 191, 192. pl. 273. Trin. 10 Jac in the Court of Wards in Cotton's Caſe.

10. C. was Tenant for Life of a *Wharf*, which was *carried all away by an extraordinary Flood*, and he brought his Bill to be *relieved againſt the*

the Payment of his Rent. But all the Relief he had was only againſt the Penalty of a Bond which was given, [and forfeited] for Non-payment of the Rent; and the Defendant was ordered to bring Debt for his Rent only. Cited by Maynard, Arg. Chan. Caſes 84. as about 17 Car. 2. The Caſe of Carter v. Cummins.

11. A *Sale* made *of Lands* purſuant to the Statute of Draining, *at a moſt unreaſonable Under-Value, by the Commiſſioners of Sewers*, was pray'd to be ſet aſide, upon a Suggeſtion likewiſe of *Combination between the Leſſee and one of the Conſervators*; but denied, becauſe it would be contrary to an Act of Parliament, and would deſtroy the whole Oeconomy for the Preſervation of the Fens. 2 Chan. Caſes 249. Hill. 30 & 31 Car. 2. Brown v. Hammond.

12. In Matters within the Juriſdiction of this Court it will relieve, *tho' nothing appears which ſtrictly ſpeaking may be called illegal.* The Reaſon is, becauſe all thoſe Caſes carry ſomewhat of Fraud with them, tho' it be not ſuch Fraud as is properly Deceit, but ſuch Proceedings as lay a particular Burden or Hardſhip upon any Man; it being the Buſineſs of this Court to relieve *againſt all Offences againſt the Law of Nature and Reaſon*; per Ld. C. Talbot. Caſes in Equ. in Ld. Talbot's Time, 40. Mich. 1734. in Caſe of Boſanquet v. Daſhwood.

(O) Of *what Caſes* they may hold Plea.

Roll Rep. 120. pl. 3. Anon. ſeems to be S. C. & S. P. held accordingly, and a Prohibition granted.

1. If a Man enters into Land where &c. for a Condition broken, he whoſe Eſtate is defeated by this ſhall not have any Relief in Equity, unleſs the Condition was broke by Diſceit or Practice of him who enters for the Condition broke. Hill. 12 Jac. B. R. reſolved, and a Prohibition granted. Mich. 11 Jac. B. R. between *Glaſcock and Rowly*, per Curiam.

——See 2 Bulſt. 142, 143. S. C.

Roll. Rep. 120. pl. 3. Anon. S. C. & S P. accordingly.

2. But otherwiſe it had been if the Condition had been broke by Diſceit, or Practice of him who enters for the Condition broke. Hill. 12 Jac. B. R. reſolved. Mich. 12 Jac. B. R. between *Glaſcock & Rowly*, reſolved, and a Prohibition denied.

(P) In what Caſes a Man ſhall be relieved, *where* he hath *deprived himſelf of his Remedy at Common Law*, by his own Act.

See (Q) pl. 7. S. C.

1. If a Man be Lord of a Copy-hold Manor, and a Copy-hold Tenant in Fee of the Manor ſurrenders it to the Uſe of one for Life, the Remainder to *B.* in Fee, and the Tenant for Life dies, and B. pays no Fine for his Admittance, but after dies, and it deſcends to his Son; and after the Son ſurrenders it to the Uſe of J. S in Fee, and no Fine paid for it, and alſo the Rent for the Tenement was for ſeveral Years arrear; and after the Lord of the Manor grants the Manor in Fee to J. D. and after in a Court of Equity ſues J. S. for the Rent arrear, and the Fines which were due before the Sale of the Manor to J. D. and

and alleges in his Bill, that the Copyholder had free Land intermixed with his Copy-hold Land, ſo that he could not know where to diſtrain for it; yet a Prohibition lies, (*) becauſe he hath deprived himſelf of his Remedy by his own Act, Scilicet the Sale of the Manor, and therefore ſhall have no Remedy in a Court of Equity, eſpecially in this Caſe he ſhall not have Remedy againſt J. S. the Purchaſor, for the Fines and Arrears of Rent due before his Purchaſe. Mich. 10 Car. B. R. between *Serjeant Hutchman* Plaintiff, and *Finch and Block* Defendants, reſolved per Curiam; and a Prohibition granted accordingly to the Court of Requeſts, though this Matter being there pleaded, was before over-ruled upon Demurrer to the Bill. * Fol. 375.

2. A Woman Adminiſtratrix ſued in the Court of Requeſts, complaining that ſhe *took Adminiſtration of her Husband's Goods thinking he was out of Debt, except ſome ſmall Sums* which he owed to Labourers &c. *which ſhe had paid*; and *afterwards Debt upon Specialties were brought againſt her*, upon which ſhe obtained an Injunction there, but a Prohibition was granted per tot. Cur. Cro. J. 535. pl. 20. Paſch. 17 Jac. B. R. Jobbin's Caſe.

3. A. a *Termor* for Years orders a Scrivener to make an Aſſurance thereof to B. rendering Rent according to an Agreement between them; and the Scrivener *grants the intire Term rendering Rent*. A. ſhall have no Remedy in Equity for the Rent, for if the Aſſurance is bad, and yet there ſhall be a Remedy, to what Purpoſe is the Common Law. 2 Roll Rep. 434. Trin. 21 Jac. Hudſon v. Middleton.

4. An *Annuity was granted by the Father to the Younger Son*, who delivers the Deed to a Friend *who loſes it*. And the younger Son ſues the Eldeſt at the Council at York. Doderidge ſaid there was not any Remedy or Ground of Equity in this Caſe; for *the Deed might be upon Condition*, or other Limitation; *and* the Deed might *be loſt by Practice* or Covin, to charge the Heir abſolutely This Caſe was referred to Juſtice Hutton. H. 2 Car. Noy 82. Vincent v. Beverlye. Lat. 148. Hill. 2. Car. Brightman's Caſe, S. P. but there the Delivery was to one of his elder Brothers to keep, who went into Ireland, and in the Removal of divers Writings this Annuity was loſt, and now he ſued in the Council of York for his Annuity againſt his eldeſt Brother who was to pay it, and grounded his Suit upon this Equity. Per Doderidge, he ſhall not be relieved here; for it was his own Folly to deliver them to ſuch Perſons as had no more Care of them; and perhaps there was a Condition, or the like in the Deed, or a Limitation whereby the Annuity ſhould be determined; and he by Combination would loſe the Writing, to charge the eldeſt Brother abſolutely; but if the Deed had been loſt Caſually, as by Fire or the like, there he ſhall have Relief in Equity; as it was in the Caſe of Vincent v. Beverley.

——— See tit. Faits. (U. a) (W. a) and tit. Surety (B)

5. If the *Leſſor enters upon his Leſſee* and ſuſpends his Rent, he ſhall not have Remedy in Equity; Per Doderidge obiter & non fuit negatum. Lat. 149. Trin. 2 Car. Noy 82. S P. in totidem Verbis.

6. C. purchaſed Church Lands in the Rebellion in Fee, and afterwards ſold them to H. and *covenanted that he was lawfully ſeiſed &c.* but ſome Proof was that it was *declared upon the Sealing, that* the *Vendor ſhould undertake for his own Act only* It was decreed that the Defendant, who had recovered by Judgment at Law, ſhould acknowledge Satisfaction on the Judgment and pay Coſts. Chan. Caſes, 15. Mich. 14 Car. 2. Coldcot v. Hill. Ibid. The like Caſe and Decree, ſaid to be 6 Months before, between Farrer & Farrer.

7. If *after Aſſignment of a Bond*, the *Aſſignee* ſues the Bond and *gets Judgment*, and the Judgment affirmed in Error, and after Execution taken out; but before the Return thereof, the *Aſſignor gives a Warrant of Attorney to acknowledge Satisfaction* upon Record, and thereupon a Superſedeas is ſued out to ſtop the Execution; and upon Motion to ſet aſide the Superſedeas, this was held relievable only in Equity. 10 Mod. 102. Mich. 11 Ann. B. R. Parker v. Lilly.

(Q) What *Things* may be *relieved* there, *not againſt a Maxim in Law.*

S. C. cited Lat. 146. See tit. Faits (U. a) (W. a) and Surety (B) Underwood v. Stancy.

1. IF a Man loſes his Oligation in which J. S. is bound to him, yet he ſhall not be relieved for the Debt in a Court of Equity, becauſe it is againſt a Maxim in Law to have an Action upon this, without ſhewing it in Court. Mich. 3 Car. B. R. between *Miller & Reames* per Curiam, a Prohibition granted to [the Court of] Requeſts, and they would not grant a Procedendo, though there was an Affidavit made that the Obligation was loſt.

2. If a Man ſeiſed of Lands in Tail for a valuable Conſideration, bargains and ſells to another in Fee, and Covenants that he and his Wife will levy a Fine for the better Aſſurance to the Bargainee; and it is agreed that 30 l. Parcel of the Conſideration, ſhall be paid to the Baron upon the Conuſance of the Fine by the Baron and Feme, and after the Baron and Feme acknowledge a Fine before a Judge in the Circuit in the Vacation; and after the ſaid 30 l. is paid, and received by the Feme, the Baron being Sick in his Bed, and after the Baron dies before the Term, and thereupon the Feme ſtops the Paſſing of the Fine, and after brings a Writ of Dower, the Bargainee ſhall have no Remedy in Equity againſt the Dower, becauſe it is againſt a Maxim in Law, that a Feme Covert ſhall be bound without a Fine. Mich. 5 Car. between *Hody & Lunn*, reſolved by the Maſter of the Rolls, Juſtice Jones, and the Maſters in Chancery, and the Plaintiff diſmiſſed accordingly as to Dower; and they then ſaid it was ſo reſolved before in Maſter *Dew's* Caſe, one of the 6 Clerks; but the Court agreed, that if the Feme had any perſonal Eſtate, as Executrix or Adminiſtratrix to her Husband, ſhe ſhall be liable for that; and thereupon a Commiſſion was granted to inquire of the Aſſets.

See (P) pl. 1. S. C.

3. If A. be ſeiſed of a Manor in which there are Copy-holders of Inheritance rendring Rent, and the Rent being Arrear, the Lord bargains and ſells the Manor to J. S. by which he hath deſtroy'd his Remedy to diſtrain, and admit that he could not have an Action of Debt for theſe Arrearages, as if they had been due out of a Freehold, he ſhould not, yet he ſhall not be relieved in Equity for them, becauſe it is againſt a Maxim in Law in as much as by Law he hath by his own Act deſtroy'd his Remedy. P. 10 Car. B. R. between *Serjeant Hitcham* Plaintiff, and *Finch & Block* Defendants reſolved, and a Prohibition granted to the Court of Requeſts accordingly after a Demurrer upon this Matter there over-ruled.

4. In former Times the *Chancellor uſed to ſend for the Judges, to know when Equity ſhould be admitted againſt the Common Law, and when not*; becauſe it is not to be altered for every Fancy, and it was a great Doubt in what Points Equity ſhould hold Place; agreed by Doderidge and Chamberlain J. 2 Roll. Rep. 434. Trin. 21 Jac. B. R.

(R) What

(R) What *Things* may be relieved there. *Not* a Thing *against a Maxim in Law.*

1. THE Chancery ſhall not relieve a Man againſt a Maxim of the Law upon a Matter of Equity, by which the Maxim ſhall be croſſed, for this is to (*) make a new Law. M. 16 Jac. between *Roſwell & Every*, by the Chancellor, Dodderidge and Hutton reſolved. * Fol. 376.

2. An Executor cannot be compelled to account in a Court of Equity for Things received by the Teſtator as Bailiff or Receiver &c. becauſe he is diſcharged by good Reaſon, by a Maxim of the Common Law, becauſe his Teſtator might have waged his Law, and might have had better Knowledge to diſcharge himſelf than the Executor may. M. 13 Jac. B. R. between *Powel & Harris*, Per Curiam reſolved; Contra M. 14 Jac. B. R. where a Prohibition was denied twice by the Court, in ſuch Caſe to the Council of York, between Wilbye & Powel. Roll Rep. 263. pl. 33. S. C. & S. P. accordingly; Per Cur. And a Prohibition was granted to the Marches of Wales, (where the Bill was brought) Niſi &c. Afterwards the Court ſeemed to be of the ſame Opinion, but the Prohibition was ſtay'd by Aſſent, and the Matter referred to Arbitrators.

3. [So] An Executor or Adminiſtrator cannot be charged in a Court of Equity for a Contract made by the Teſtator, of which no Remedy lies at Common Law; for this is againſt a Maxim of Law. Contra M. 4 Jac. B. R. between *Richardſon & Sir Moyle* *Finch*, Per Curiam. G. borrow'd Money of A. to whom S. was Executor, and being poſſeſs'd of a Term for 5 Years, ſecured it to A. by Deed, with a Proviſo of Redemption. G. ſued S. in the Court of Requeſts upon this; and ſhewed further that there was a Verbal Agreement between them, that if the Money was not paid at the Day A. ſhould take the Corn growing on the Land, and if the Corn amounted to the Value, G. ſhould have his Term again, and that he reap'd the Corn, which well ſatisfied the Money, and yet he continued Poſſeſſion of the Term, which after came to S. and is now expired, and ſo pray'd that the Defendant might account for the Profits. The Defendant moved for a Prohibition. Per Richardſon tho' the Truſt is contrary to the Indenture, yet ſuch Averment is good, notwithſtanding the Proviſo; but becauſe the Executor ſhall account to no one but the King, and the Years are now ſpent, and tho' he occupied himſelf, yet the Profits are Aſſets; and if he ſhall recover in a Court of Equity, there ſhall be a Devaſtavit againſt the Executor, and a Prohibition was granted per tot. Cur. Litt. Rep. 221. Mich. 4 Car. C. B. Goffe v. Skipton.——Hct. 117. S. C. but is only a bad Tranſlation of Litt. Rep.

Inteſtate took the Profits of the Lands of the Plaintiff, being within Age, *by Force of a Truſt repoſed in him by the Father* of the Plaintiff by his laſt Will, the yearly Value of which Lands was 80 l. and the Inteſtate took the Profits *from the 23d Year of Queen Eliz. till the 33d Year of her Reign, and with Parcel of the Profits purchaſed Lands in Fee*, which deſcended to his Heir, *and left Aſſets to his Adminiſtratrix*, one of the Defendants, *to ſatisfy the Plaintiff*, all Debts paid. The Queſtion was, whether in this Caſe the Adminiſtratrix might not be charged in Equity for the ſaid mean Profits? And Sir Thomas Egerton, Maſter of the Rolls, ſaid that he had ſeen a Caſe in Chancery in Anno 34 H. 6. reſolved by all the Judges of England remaining in the Tower, that where the Feoffees to Uſe took the Profits of the Land, and received the Rents, and made their Executors, and died, leaving Aſſets to ſatisfy all Debts, over and above the ſaid Rents and Profits, that the Executors ſhould be charged to ſatisfy Ceſty que Uſe for the ſaid Rents and Profits; and accordingly it was decreed in Mears's Caſe againſt the Defendant; but whether the Heir ſhould be contributory or no, it was doubted. 4 Inſt. 86, 87. Mich. 37 & 38 Eliz. in Canc. Mears v. St. John, Adminiſtrator of Alnion.

4. One Jointenant cannot ſue his Companion in a Court of Equity for the taking of all the Profits, becauſe it is againſt a Maxim in Law. M. 13 Jac. B. R. between *Fin and Smith* reſolved, and a Prohibition granted. Roll Rep. 338. pl. 53. S. C. and a Prohibition was granted to the Court of Requeſts where the Suit was; for the Law gives him no Remedy.——In ſuch Caſe there is no Remedy, unleſs it were done on an Agreement or *Promiſe* to Account. Cary's Rep. 29. 8 June, 44 Eliz. Anon.—— See Tit. Prohibition (I. a) pl. 4. Portington and Beaumont.

Two

Two Tenants in Common were of a Hall and a Parlour within the Hall, and the one suffered the other to come into the Hall, but kept the Parlour within it locked; it was ordered in the Court of Requests, that their Remedy is at Common Law, but for the inner Room they confess an Ouster, and Prohibition was granted, and pray'd to be dissolv'd, but Haughton J. said it could not; for this is an Ouster at Common Law. 2 Roll Rep. 434. Trin. 21 Jac. B. R. in Case of Hudson v. Middleton.

5. If an Infant sells Lands for Money, and purchases other Lands with the Money, yet this Sale by the Infant shall not be help'd by the Chancery, because the Person of the Infant is advanced by a Warrant in Law. M. 16 Ja. in *Roswell and Every*, by the Chancellor, Dodderidge and Hutton.

6. The Assignee of a Covenant cannot sue in a Court of Equity to have Benefit of the Covenant, for this is against the Law to assign a Covenant. M. 11 Ja. B. R. between *Woodford and Honand*, per Curiam, a Prohibition granted to the Court of Requests for such a Suit there.

7. An Executor in a Court of Equity ought not to be compelled to pay Legacies before Obligations forfeited, for this is against the Common Law. Mich. 11 Ja. B. R. between *Wigglesworth and Everet*, resolved.

* Br. Conscience, pl. 13. cites S. C. and says it was in a Manner agreed, that if the Vendee confesses this Matter, he shall render the Land to the Feme, and otherwise the Feoffee in Use shall be recompenced for the Land. ——Fitzh. Subpœna, pl. 5. cites S. C. accordingly. ——— S. C. cited Roll Rep. 219. pl. 23. Trin. 13 Jac. B. R. Arg. in Rushwell's Case.

8. If a Feoffment had been made to the Use of a Feme, who took Husband, and they had sold the Land to a Stranger for Money, and the Feme had received the Money, and upon the Request of the Baron and Feme, the Feoffees had made an Estate to a Stranger accordingly. After the Death of the Baron the Feme might have brought a Subpœna in Chancery against the Feoffees, and recovered, for the Chancery shall not help this void Sale made by a Feme Covert, for she could not consent to it, and all the Act was the Act of the Husband only, and the Receipt of the Money by her was not to any Purpose, inasmuch as she could not have any Advantage thereof, but the Baron. * 7 E. 4. 14. b. by all the Justices and Chancellor; accordingly this Case was agreed M. 16 Ja. in Chancery by the Chancellor, Dodderidge and Hutton, in *Roswell's* Case. † 18 E. 4. 12.

† See pl. 9. S. C.

Br. Conscience, pl. 28. cites S. C accordingly Br. Testament, pl. 13. cites S. C.

9. If a Feme makes a Feoffment to her own Use, and after takes Husband, and after makes her Will, that the Feoffees shall make an Estate in Fee to her Husband, and dies, this Devise shall not be made good by Chancery, because all Acts by a Feme Covert are void, and the Law of Conscience follows this. 18 E. 4. 11. b. by all the Justices. and by all, præter Tremaile, the Will is void; and yet per Vavisor, Feme Covert may make Testament, by Agreement of her Baron, of an Obligation made to her before the Coverture, and of Paraphernalia, viz. her Apparel.

Roll Rep. 192. pl. 32. Pasch. 13 Jac. B. R. Rushwell's Case, S. C. and Ibid. 218. pl. 19. Trin. 13 Jac. B. R. S. C and 219 pl. 23. S. C. but S. P. does not appear clearly, but seems to be intended ibid. 220 in Principio.

10. If a Man had devised Lands to another for a valuable Consideration at the Common Law, before the Statute of Wills, where there was no Custom to warrant it, this could not be help'd by Chancery, because this is against a Warrant of the Common Law. M. 16 Ja. in *Roswell and Every's* Case, agreed by the Lord Chancellor, Dodderidge and Hutton.

Fol. 377.

11. If a Man that is Non compos Mentis aliens Land, this shall not be restored to himself by Chancery upon a Matter of Equity, against

gainſt the Maxim of the Common Law. Mich. 16 Jac. in *Roſwell and Every's* Caſe, by the Lord Chancellor and Doddridge agreed. Roll Rep. 219 pl. 23. Ruſhwell's Caſe, S. C. but S. P. does not appear, but cites 4 Rep. Beverley's Caſe, that a Man of Non Sanæ Memoriæ ſhall not be aided in Chancery to avoid his own Obligation, becauſe it is againſt a Maxim in Law.

12. A Purchaſer of a Reverſion ſhall compel the Leſſee in Chancery to attorn, where he hath no Means to compel him by the Common Law; for this is a particular Miſchief not againſt any Maxim. Mich. 16 Jac. in *Roſwell's* Caſe, agreed per Doddridge, according to ſeveral Precedents in Chancery ſhewed to him. I do not obſerve this Point any where in Ruſhwell's Caſe, S. C. reported in Roll Rep.—See Tit. Rent (M. c) per totum.

13. If there be Leſſee for Life, the Remainder for Life, the Reverſion or Remainder in Fee, and the Leſſee in Poſſeſſion waſtes the Land, tho' he is not puniſhable by the Common Law during the Remainder, yet he may be reſtrained in Chancery; for this is a particular Miſchief; and tho' he is not puniſhable during the Continuance of the Remainder, yet it is a Tort, and he is puniſhable after. Mich. 16 Jac. in *Roſwell's* Caſe, agreed per Doddridge, according to the Precedents of the Court of Chancery which were before cited. Mo. 554 pl. 748 Paſch. 41 Eliz. Ld. K. Egerton ſaid, that he had ſeen a Precedent in Time of R. 2. where in ſuch Caſe it was decreed in Chancery, by the Advice of the Judges, on Complaint of the Remainder-man in Fee, that the firſt Tenant ſhould not do Waſte, and that an Injunction was granted. — See Tit. Waſte (R. a) (S. a) per totum.

14. If by the Uſage of a certain Country Land is to lie in Common every third Year, and the Owner of this Land by Deed leaſes this Land for 20 Years then next enſuing, provided every third Year, when the Land is to lie in Common, ſhall not be reckoned among the 20 Years; tho' this Proviſo is void by the Common Law, yet it ſhall be help'd by the Chancery, and the Leſſee ſhall have the 20 Years, leaving out every third Year; for this is not againſt any Maxim of Law, but it is according to the Intent of the Deed. Mich. 16 Jac. in Chancery, between *Fleet and Cooper* decreed.

15. If there be an Agreement upon Marriage between A. and E. that a Jointure ſhall be made by Grant of a Rent to B. (the Father of A. the Feme) his Executors and Aſſigns for the Life of the Feme, and that for Default of Payment B the Father ſhall have an Eſtate for certain Years in the Land, out of which this iſſues, if A. the Feme ſo long lives, and after the Rent is granted accordingly, and by ſeveral ſubſequent Acts the Grant is confirmed, and the Wife of C. the Father of E. the Baron, joins in a Fine with C. her Huſband, for the better Settlement thereof, and after both the Barons grant a Leaſe for Years, in Truſt for the Feme of C. to the Intent that ſhe ſhould pay the ſaid 80 l. Rent to A. the Feme, and that ſhe herſelf ſhall have 40 l. a Year, and that if the Rent be not paid, that the Leaſe ſhall be void; after B. the Father of A. dies, without making any Aſſignee of the Rent, by which the Rent is extinct in Law; yet this ſhall be made good againſt the Wife of C. and the Leſſees in Truſt for the Wife of C. becauſe ſhe gave her Conſent thereto by Fine, and the Truſt is to be guided in a Court of Equity. Tr. 3 Car. between Sir *Richard Buller v. Cheverton and Polkwheel*, decreed in Chancery by Juſtice Jones.

16. A Court of Equity cannot compel an Executor to perform a Decree made there againſt the Teſtator before a Statute acknowledged by him. Mich. 12 Jac. B. R. between *Walter and Heyford*, per Curiam, and a Prohibition granted accordingly to the Council of York. Roll Rep. 86. pl. 36. S. C. accordingly.—A Decree in Chancery againſt an Executor ſhall not be ſatisfied before an Obligation made by the Teſtator, which becomes due after his Death; Per Roll J. Sty. 38. Trin 23 Car. B. R. in Caſe of Eeles v. Lambert.

17. If two ſubmit themſelves to the Arbitrament of J. S. of all Controverſies, ita quod &c. de Præmiſſis &c. and J. S. makes an Award of Part only, ſo that the Award is void in Law, this ſhall not be made good in a Court of Equity; becauſe the Award was merely void by Law. P. 7 Jac. B. between *Robinſon and Biſs* adjudged, and a Prohibition granted to the Council of York.

18. If a Man for 100 l. aſſumes to make a Leaſe for 21 Years, and dies, his Heir is compellable, in a Court of Equity, to make the Leaſe; (*) for this is againſt the Common Law. Mich. 3 Jac. B. between *Chapman and Boier*, per Curiam.

*Fol 378.

19. If a Feme, Tenant in Dower, ſues in a Court of Equity for Damages, where her Husband did not die ſeiſed, a Prohibition lies; for it is againſt the Common Law. Mich. 5 Jac. B. between *Sweetman and Revet*, reſolved, and a Prohibition granted to the Court of Requeſts accordingly.

20. If A. grants a Rent out of Land to B. and after grants the Land to the Son and Heir in Fee, and covenants that it is diſcharged of all Incumbrances præter the ſaid Rent, and after B. loſes his Deed of the Grant of the Rent, and therefore ſues in a Court of Equity for the Rent, a Prohibition lies; for it is a Maxim in Law that none ſhall recover ſuch Rent without ſhewing of a Deed.

B. R. between *Beverly and Unite*; a Prohibition granted to the Council of York; and Mich. 2 Car. a Conſultation was pray'd, and denied, but refer'd.

21. If a Man ſues in a Court of Equity to have Seiſin of a Rent-ſeck, a Prohibition lies for the Cauſe aforeſaid; for this would be to make a new Law. Mich. 2 Car. per Doderidge. M. 5 Car. B. R. between *Norris and Price*, agreed per Curiam, where the Rent commenced by Grant.

Mo 805. pl. 1092. Mich. 5 Jac. in Canc. in the Caſe of Shute v. Mallory,

22. But if a Rent be deviſed by Will in Writing, a Court of Equity may compel the Tenant of the Land to give Seiſin, becauſe by Intendment the Tenant of the Land was Inops Conſilii at the Time of the Deviſe. Mich. 5 Car. B. R. between *Norris and Price*, per Curiam, upon a Prohibition to Wales.

S. P. cited by Ld. C. Elleſmere as decreed, becauſe without Seiſin the Deviſee has no Remedy, and yet the Rent is in the Deviſee by the Deviſe.——Ibid. 626. pl. 829. Trin. 42 Eliz. Webb v. Webb, the Tertenant was decreed in Chancery to pay a Rent-ſeck deviſed by a Will out of Land, notwithſtanding no Seiſin was had of it; and ſays that 44. a like Decree was in Caſe of Ferrey v. Tanner.—— See Tit. Rent, (M. c) per totum.

23. A Prohibition was pray'd to the Court of Requeſts upon this Suggeſtion, that *one Executor ſued another to account* there; and an Executor at the Common Law, before the Statute of Weſtm. 2. cap. 11. could not have an Account for Cauſe of Privity, and now by that Statute they may have an Account, but the ſame ought to be by Writ, and therefore no Account lies in the Court of Requeſts. Mar. 99. pl. 171. Trin. 16 Car. Anon.

But where M. was Proprietor of 36 Shares in the New River Water, and had agreed to ſell 14 Shares thereof to B and

24. If a Man has *Land ſubject to the Payment of a Rent-charge*, and *grants Part* of the Lands *to B. and covenants that that Part ſhould be diſcharged of the Rent*, yet this is not ſuch a real Covenant that ſhall run with the Land, and charge the other Lands with the Whole; but it is only a Perſonal Covenant, which muſt charge the Heir only in reſpect of Aſſets. Hard. 87. Mich. 1656. between Cook and Arundel, decreed in Scaccario accordingly.

there being a Charge on the 36 Shares of 500 l. a Year Rent to the Crown in Fee, and 100 l. a Year to H, for Life. M. covenanted to diſcharge the ſaid 14 Shares which he had agreed to ſell to B. from thoſe Rents; and it was decreed that the Plaintiff who claimed under B. ſhould enjoy the ſaid 14 Shares diſcharged of thoſe Rents, and that the other 22 Shares ſhould be ſubject to the Plaintiff's Indemnity therein,

therein, notwithſtanding it was inſiſted that H.'s Covenant to diſcharge the 14 Shares of thoſe Rents was merely Perſonal, and did not, nor could charge the whole Rents upon the 22 Shares. Chan. Caſes, 212. Trin. 23 Car. 2. Cornbury v. Middleton.

25. In Caſe of an Executor who commits a Devaſtavit and dies, his Executor ſhall be charged in Chancery, tho' he cannot be charged at Common Law. Admitted. Chan. Caſes 303. Mich. 29 Car. 2. in Vanacre's Caſe. Ibid. 304. in a Nota, ſays that the Executor in Caſe of a Devaſtavit is in Nature of a Truſtee of an Eſtate; but that in the principal Caſe the Teſtator was a Treſpaſſor, to which the Executor is no ways liable.

(S) In what Caſes a Man ſhall be *relieved againſt a Statute.*

1. WHERE there is an apparent Fraud, or a dubious Caſe by Law, of which the Party could not have Conuſance, there it ſhall be aided by a Court of Equity againſt a Statute. Mich. 16 Jac. ſaid by the Lord Chancellor in *Long's Caſe*, and *Roſwell's Caſe*.

2. As if after the 13 Eliz. cap. 10. a Dean and Chapter had leaſed Lands to the King for a valuable Conſideration, at which Time the Law was taken, that the King was not bound by the Statute, ſo that ſuch Leaſe was good, and the King aſſign'd it over, and now the Law is taken that the Law is contrary, ſcilicet, that the King is bound by the Statute; yet this ſhall be made good by this Court againſt the Statute, becauſe he could not know the Law in a Matter ſo doubtful. Mich. 16 Jac. B. R. in Chancery, between *Long and the Dean and Chapter of Briſtol*, adjudged, and decreed that the Leſſee ſhall enjoy it, paying 200 l. to the Dean and Chapter; and ſuch a Decree was made between *Maudlin-College and Wood.*

3. If the Father, by his Will in Writing, deviſes Lands to his younger Son, and the elder Son knowing thereof enters into the Land, and diſſeiſes the Father, and ſo continues till the Death of the Father, by which the Will is void, yet becauſe it was made void by Deceit and Covin, it ſhall be made good by Chancery. Mich. 16 Jac. by the Lord Chancellor in *Roſwell's and Every's Caſe.*

4. If a Man in a Court of Equity ſues for a Rent, and the Defendant pleads the Statute of Limitations of 32 H. 8. and alleges that the Plaintiff &c. had not any Seiſin of the Rent within 60 Years, according to the Statute, and ſhews that this which is demanded is no Rent-ſervice; for he ſhews that King E. 6. was ſeiſed of the Land, the Court ought not to proceed againſt the Statute to relieve the Party; for it is againſt the ſaid Statute; and if the Courts of the Common Law are bound by the Statute, the Courts of Equity are alſo bound; and when a Man hath but one Right * of Action, if the Action is taken away the Right is taken away, otherways where he hath a Right of Entry. Mich. 14 Car. B. R. between *Mountague and Goldſmith*, which concerned the Hoſpital of St. Catharine's, reſolved per Curiam, and a Prohibition granted accordingly to the Court of Requeſts. In what Caſes Relief may be had in Equity againſt the Statute of Limitations, ſee Tit. Limitation (T) per totum.— By Juſtice Foſter and Bankes Ch. J. a Truſt * Fol. 379.

is not within the Statute of 21 Jac. cap. 16. of Limitations, and therefore no Lapſe of Time ſhall take away Remedy in Equity for it; but for other Actions which are within the Statute, and the Time elapſed by the Statute, there is no Remedy in Equity; and that (they ſaid) was always the Difference taken by my Ld. Keeper Coventry; but Juſtice Crawley ſaid that he had conferr'd with the Lord Keeper, and that he told him that Remedy in Equity was not taken away in other Actions within this Statute. Mar. 129. pl. 207. Mich. 17 Car. Anon.

5. If

See Roll Rep. 192. pl. 32. Ruſwell's Caſe, S. C. but S. P. does not clearly appear; but is as to the Executors being committed for a Contempt to the Court.

5. If a Man, having Lands held in Capite, conveys 2 Parts of his Lands to Uſes within the Statute of 32 & 34 H. 8. of Wills, and after deviſes that his Executor ſhall ſell the other 3d Part for the Payment of his Debts, and dies; and the Executor, by Force of a Decree in Chancery compelling him to it, ſells the Land for a valuable Conſideration, and with the Money pays the Debts to which the Heir is liable, being due by Obligation, ſo that the Purchaſer hath much Equity of his Side, yet this 3d Part being void by the Common Law, and 32 & 34 H. 8. it ſhall not be made good againſt the Statutes by Chancery, becauſe it is directly againſt the Statutes; for this would croſs the Statutes, and then it would be in the Power of the Court of Chancery to make a new Law. Mich. 16 Jac. in Chancery, between *Roſwell and Every*, reſolved by the Lord Chancellor, the Maſter of the Rolls, and Juſtice Doderidge, and Juſtice Hutton, upon Argument, and a Decree before made to the contrary reverſed accordingly.

6. If Tenant in Tail makes a Leaſe for Years not warrantable by the Statute of 32 H. 8. this ſhall not be made good in Chancery upon a good Matter of Equity. M. 16 Jac. in *Roſwell's Caſe*, per Hutton.

Hob. 203. pl. 256. S. C. reſolved by Ld. Keeper, and Hobart, Ch. J. Aſſiſtant.—S. P. accordingly by Chamberlaine J. 2 Roll Rep. 434. Trin. 21 Jac.—See Tit. Tayle (E)

7. So if Tenant in Tail bargains and ſells the Lands, yet this cannot be made good in Equity againſt the Statute, by which he is diſabled to bar his Iſſue. Hobart's Reports, between *Cavendiſh and Worſly*, reſolved.

8. A Teſtament Naval or Military made of Lands without Writing, for want of ſuch Things requiſite thereto, yet this Deviſe per Parol ſhall not be helpt againſt the Statute. Mich. 16 Jac. in *Roſwell and Every's Caſe*, by the Lord Chancellor.

9. If the *Leſſee of a Prebendary or Biſhop mortgages his Leaſe, and after the Day pays the Money*, and then *ſurrenders, and takes a new Leaſe* from the Prebendary or Biſhop, he hath Equity againſt the Mortgagee; but *if the Prebendary &c. dies*, this Equity will not make the ſecond Leaſe good againſt the Succeſſor againſt the Statute, which binds all Men, and has no ſaving of ſuch Rights of Equity, and the Chancellor cannot add to the Statute to make a Saving, which the Statute has not made. 1 Chan. Caſes 228. Paſch. 16 Car. 2. in Caſe of Cooke v. Bampfield.

See Tit. Faits (Q. a) Averments as to Deeds in Equity.

(T) Chancery, and Courts of Equity. In what Caſes a Man ſhall be *relieved* there *againſt a Deed not againſt the Agreement of the Parties.*

But ſee Tit. Waſte (R. a) pl 20. the Caſe of Vane v. Barnard, and the Notes there, where the contrary was decreed in Chancery;

1. If a Man makes a Man makes a Conveyance of a Houſe to the Uſe of himſelf for Life, without Impeachment of Waſte, the Remainder to another, and after the Leſſee will pull down the Houſe, yet he in the Remainder ſhall not be relieved in the Court of Requeſts upon an Averment that their Agreement was, that the Leſſee ought not to do any voluntary Waſte, for he ſhall have no Averment againſt a Deed. Mich. 8 Jac. B. *Alice Parawick's* Caſe reſolved, and a Prohibition granted.

and ſee ſeveral other Caſes there to the like Point. And ſee alſo (S. a) ibid.

2. If A. leases Lands to B. without Impeachment of Waste, and after B. builds a Barn upon Part of the Land, to put in certain Tithes which he obtained by Lease of another, and after the Lease of the Tithes being expired, and having no Use of the Barn, he suffers it to lie without Use, per quod Beggars inhabit there in their Passage, which draws an Inconvenience to the Neighbours, and thereupon B. pulls down the Barn before the End of his Lease of the Land, and thereupon A. sues him in the Court of Requests for Damages, and B. there justifies by Force of the Clause without Impeachment of Waste, and the other Matter, and notwithstanding a Decree was there made, that B. should pay 10 l. Damages to A. for it, a Prohibition lies in this Case, because this is against the express Agreement of the Parties. Mich. 14 Car. (*) B. R. between the Master of the Hospital of St. *Oswald and Salway*, resolved per Curiam, and a Prohibition granted accordingly. * Fol. 350.

3. But if a Lessee for Years, without Impeachment of Waste, about the End of his Term, intends to cut down all the Timber Trees, an Injunction lies out of a Court of Equity upon this Matter, to stop the cutting down of the Trees, notwithstanding the Agreement of the Parties, because this is against the Good of the Publick to destroy the Trees, and the Suit there is to hinder and prevent it, and not to have any Damages after it was done. Mich. 14 Car. B. R. in the said Case of Salway, said per Brampton, that this was the Bishop of *Winton's* Case, which was referred out of the Chancery to the Judges, and by their Advice, an Injunction granted for the Cause aforesaid. S. C. cited by Ld. C. Nottingham. 2 Freem. Rep. 55. pl. 61. Pasch. 1680. that an Injunction was granted. See Tit. Waste (R. a) pl. 14. S. C. and the Reason.—— And 2 Freem Rep 54, 55. Ld. Chancellor said, that if there be Tenant for Life, without Impeachment of Waste, if he goes to pull down Houses &c. to do Waste maliciously, this Court will restrain, altho' he has express Power by the Act of the Party to commit Waste; for this Court will moderate the Exercise of that Power, and will restrain extravagant hnmorous Waste, because it is Pro Bono Publico to restrain it; and he said, he never knew an Injunction denied to stay the pulling down of Houses by Tenant without Impeachment of Waste, unless it were to Serjeant Peck, in my Lord Oxford's Case, and he said he did believe he should never see this Court deny it again.

5. In Debt the Case was, that where *a Man had bought certain Debts of one B. due to him by several, for* 40 *l.* and was to bind himself in an Obligation for the 40 l. and sued in Chancery for Conscience, because it is a Chose en Action, and therefore he has nothing for his Money, and cannot sue for it, but the Vendor may sue and release, and therefore he brought Subpœna to be discharged of the Obligation in Conscience, and the Defendant appeared, and the Chancellor awarded that the Obligation shall be brought in to be cancell'd, and for not doing it the Obligee was committed to the Fleet, there to remain till he did, and there he remained, and sued the Obligation, and the Defendant pleaded this Matter in Bar, and by the best Opinion it is no Plea; for per Prisot and others, the *Chancery is not a Court of Record, but to repeal Patents of the King upon a Sci. Fa. and upon Pleas of Debt* &c. there *between Parties privileged, and such Pleas discuss'd there is a good Bar at the Common Law*, for upon those Writ of Error lies in Parliament; but *as to Matters of Subpœna there it is no Court of Record*, and therefore of this does not lie Writ of Error, and when the Party cannot have Writ of Error if the Court errs, there by such Awards he shall not be barr'd; for the Chancery can only examine the Conscience, and if they make a Decree, and the Party refuses to obey it, they can do no more than award him to Prison, there to remain till he does, and if he will remain in Prison there is no Remedy; for there he may proceed at Common Law, and the *Decree is no Bar.* Br. Jurisdiction, pl. 53. cites 37. H. 6. 1 Cary's Rep. Rep. 23. cites S. C. and because he had not Quid pro quo, but only Things in Action, and the Seller would not bring Action upon them for the Benefit of the Vendee, it was ordered here, by the Assent of the Judges, thereto called, that the Vendor should bring in the Obligation to be cancell'd.

5. *A. poſſeſſed of a Term* for Years, *aſſigned the ſame to Truſtees, and* then *purchaſes the Fee*, and then *ſettles the ſame on his Wife for her Jointure, and dies*; the *Wife, in Conſideration of Money, releaſes to the Executors all her Right to the Perſonal Eſtate*, and afterwards *the Fee is evicted*, and it appearing by the Proof, that the Agreement which begot the Releaſe, was before the Title to the Inheritance was avoided, and concerning that which was then looked upon as Perſonal Eſtate, and not touching the Leaſe; and that, notwithſtanding the Releaſe, the Feme continued the Poſſeſſion. It was reſolved, *that the Releaſe ſhould not bar* or prejudice *the Plaintiff's Title in Right to the Leaſe*; and it was decreed, that ſhe ſhould hold for ſo many Years as ſhe lived, and that if the Leaſe were renewed, ſhe paying proportionably to her Eſtate for Life, that the Jointureſs ſhould hold for ſo many Years as ſhe lived, and then to go to the Executors. Chan. Caſes 47. Paſch. 16 Car. 2. Bawtry v. Ibſon.

6. A *Bond was* entered into before the Wars, conditioned *to pay* 40 *l. a Year, for* 12 *Years, out of the Profits of an Office, which was* [afterwards] *taken away by the Uſurpers.* The *Office was revived*, and the Obligor being ſued upon the Bond, he exhibited his Bill to be relieved againſt the Bond. The Obligee inſiſted, that the Office continued ſome Part of the 12 Years, and being now revived, the Obligor ought to pay the 40 l. a Year for 12 Years, or be diſmiſſed; for the Obligee, having the Law with him, ought not to be hurt in Equity, without Satisfaction according to the Condition. Decreed, that the Obligor pay the 40 l. for ſo many Years as the Office continued, and thereupon the Bond to be delivered up. Chan. Caſes 72. Hill. 17 & 18 Car. 2. Lawrence v. Braſier.

7. B. *purchaſed a Manor*, and a little *before the Purchaſe a Copyhold eſcheated*, which was *not intended to paſs*, and therefore was left out of the Particular, but the Conveyance was ſufficient in Law to paſs it. The Vendor exhibited a Bill to be relieved, and had a Decree to hold of B. the Purchaſor. 2 Vent. 345. Trin. 32 Car. 2. in Canc. Beverſham's Caſe.

8. Where a Man *buys Land in another Man's Name, and pays Money*, it will be in Truſt for him that pays the Money, tho' no Deed declaring the Truſt, for the Statute of 29 Car. 2. called the Statute of Frauds, does not extend to Truſts raiſed by Operation of the Law. 2 Vent. 361. Paſch. 35 Car. 2. Anon.

9. It is not a true Rule, that *where an Action cannot be brought at Law on an Agreement for Damages*, there a Suit will not lie in Equity for a ſpecifick Performance; Per Ld. C. Macclesfield. 2 Wms's Rep. 244. Mich. 1724. in Caſe of Cannel v. Buckle.

In what Caſes the *Intention* ſhall be favoured in Equity, ſo as a Deed ſhall be conſtrued by it, See Tit. Intent (C)
In what Caſes Chancery will relieve *againſt Securities* given, See Tit. Securities, and the ſeveral Diviſions there.

(U) What Perſons, *in reſpect of their Eſtate*, ſhall be Bound [by Agreement made with Perſons intereſted before in the ſame Thing.]

1. IF a Man poſſeſſed of *a* Leaſe for Years as Executor of J. D. agrees, for a good Conſideration, to convey it to J. S. and after, before it is done, dies inteſtate, and after J. N. takes Letters of Adminiſtration

nistration of the first Testator, he is not bound in Equity to convey it according to the Agreement of the Executor, altho' the Executor, during his Time, had Power to dispose of it at his Pleasure; because the Administrator comes paramount this Agreement, and is to dispose of it for the Soul, and for the Payment of the Debts of the first Testator. Pasch. 13 Car. in Chancery, between Sir *Gamaliel Capel*, Defendant, at the Suit of Sir *Robert Wiseman*, decreed by the Lord-Keeper, he having the Opinion of Justice Jones, Barkly, and Crawly, in the same Case, as he said, their Opinions being accordingly.

2. So if there be two Jointenants of a Lease for Years, and one agrees to assign his Moiety, and dies before it is done, this Agreement shall not, in Equity, bind the Survivor, because he comes paramount the Agreement. Pasch. 13 Car. in Chancery, in the said Case of *Wiseman*, agreed by the Lord-Keeper, and he said, that it was also the Opinion of 3 Judges; and he said also, that so was their Opinion, that if the Baron be possessed of a Term in the Right of his Wife, and agrees to assign it to another, and dies before it is done, this shall not in Equity bind the Feme. If a Jointenant agrees to alien, and does it not, but dies, it would be a strange Decree to compel the Survivor to perform the Agreement;

Per Cur. 2 Vern 63. pl. 56. Pasch. 1688.

3. If the Father, being seised in Fee of Land, and being indebted to several Creditors, mortgages this Land to J. S. for Money paid upon Condition of Redemption, and after it is forfeited to the Mortgagee for Non-payment at the Day, and then the Father dies, and after the Son and Heir of the Father, who is liable to the Debts of the Creditors, joins with the Mortgagee in a Conveyance to another Purchasor, and this is made for Money also also given to the Heir, yet the Creditors of the Father shall not have any Remedy in Equity against the Son for the Money by him received for his joining in the Assurance, because in Law he had no Power of the Estate. M. 15 Car. B. R. resolved in Chancery by the Lord-Keeper, Justice Jones and Berkly, as it was said by Justice Jones and Berkly.

4. A *Copyholder for Life, where there was a Widow's Estate by Custom, agrees to sell his Estate, and enters into Bond, that the Purchasor should enjoy.* The *Bill* was brought by the Purchasor *against the Widow, to bind her* by this Agreement, but the Court dismissed the Bill, with Costs; for if such Contracts for Copyholds should be decreed, all Lords would be defrauded of their Fines &c. 2 Vern. 63. pl. 56. Pasch. 1688. Musgrave v. Dashwood.

(X) In what Cases one may *sue in* a Court of *Equity*, *where* he hath *Remedy at Common Law.*

See Tit. Plea and Demurrer (H) —See Tit. Demurrer.

1. If a Man, for a good Consideration, promises to another to make to him a Lease of certain Land, and does not perform it, he shall not sue upon this Promise in a Court of Equity, because he may have an Action upon the Case at Common Law, altho' in this he shall recover Damages (*) only, and not the Lease itself, whereas in a Court of Equity he should be compelled to make the Estate according to the Promise. Pasch. 14 Jac. B. R. between *Bromage and Jennyng* resolved, and a Prohibition granted accordingly to the Marches of Wales. Roll Rep. 368. pl. 21. S. C. and it being urg'd * Fol. 381. that this was usually done in Chancery, Coke, Doderidge and

Haughton replied, that without Doubt a Court of Equity ought not to do so, for then to what Purpose is

is the Action upon the Case and Covenant? and Coke said, that this will subvert the Intent of the Covenantor, when he intends to have it at his Election, either to lose the Damages, or to make the Lease, whereas here they would compel him to make the Lease against his Will, and so it is if a Man be bound in a Bond to infeoff another, he cannot be compelled to make a Feoffment; and by Doderidge, if a Decree be made that he should make a Lease, and he will not do it, there is no other Remedy but to imprison his Body, and the Serjeant who moved it, confessed that he did it against his Conscience by reason of the Use, and a Prohibition was granted accordingly. ——So where a like Suit was in the Court of Requests, and it was urged that it is the ordinary Course in a Court of Equity; but Jones J. said, that tho' it be so in the Court of Chancery, yet it shall not be suffered in the Court of Requests. Lat. 172. Mich. 2 Car. Molineux's Case.

2. If B. sues D. in the Court of Marches of Wales by English Bill, for that whereas A. leased to B. certain Lands for Years reserving Rent; the Lessee entered into an Obligation of 100 l. for the Payment of the Rent during the Lease; and after B. assigned the Term to D. who promised B. to save him harmless from the said Obligation of 100 l. against A. and to pay the future Rent as it should become due, a Prohibition lies, because in this Case nothing is to be recovered but only Damages; so that this is meerly but an Action upon the Case, and the said Court cannot hold Plea by English Bill in Actions upon the Case where the Damages exceed 50 l. 37. 11 Car. B. R. between *Blunt & Heming*, per Curiam, a Prohibition granted.

Hob. 202. 203. pl. 255. S. C. and says it was resolved by Ld. K. Bacon, and the Master of the Rolls and Ld. Hobart himself, that this Cause was not fit for Chancery but for the Common Law, unless all Causes that were triable naturally by the Common Law, and by Jury should be made examinable and determinable in Chancery per Testes, which were to confound Jurisdictions and make Common Law and all the Course thereof needless, and a Handmaid to Chancery; and so at length the Cause was absolutely dismissed.

3. If a Conveyance of Land be made with a Power of Revocation, and a Question is made in Chancery upon a Suit there, whether there was a Revocation or not; this shall not be tried there, but ought to be dismissed to be tried at Common Law. Hob. Reports, 274. between *Manwering & Dennis* resolved.

4. Subpœna in Chancery by W. & B. *to answer of certain Goods and Chattles to the Value &c. which J. B forfeited to the King, by Reason that he was attainted of Treason, and which came to the Hands of the Defendant, and which the King gave to the Plaintiff by his Letters Patents* &c. and the *Defendant demanded Judgment* of the Subpœna; *for the Plaintiff may* upon this Matter *have Detinue at the Common Law*, and then he shall not sue in Chancery by Subpœna; for Subpœna does not lie but where he has no Remedy at the Common Law, and then when the Common Law fails, he shall have Subpœna in Chancery; and per Cur. the Subpœna lies well, by which *the Defendant was commanded to make Inventory of all the Goods* which he had of the said J. B. by the next Day, or else he should be committed to the Fleet. Br. Conscience, pl. 6. cites 39 H. 6. 26.

5. A. made a Deed of *Feoffment* to his own Use to B. but gave *no Livery* of Seisin. A. dies. C. his Heir brings a Subpœna against B. but by Morton Master of the Rolls, C. was denied help here, because B. had nothing in the Land; and *if he abate*, there is Remedy at Common Law against him. Cary's Rep. 21. cites 18 Ed. 4. 13.

6. In *Trespass* in B. R. the *Defendant was found Guilty to the Damage of* 20 *l.* and the *Defendant obtained Injunction* in the Chancery to the Plaintiff, *that he should not proceed to the Judgment Subpœna* 100 *l.* Hussey and Fairfax Justices said, if you pray Judgment, we will give Judgment; and where the Party is injoined, his Attorney may pray Judgment, and if the Attorney be injoined, then the Party may pray it, and 100 *l. is not leviable by the Law*, and as to the Imprisonment in the Fleet, if the Chancellor puts you there, then we at your Complaint will send for you by Habeas Corpus, and deliver you. Br. Conscience, pl. 16. cites 22 E. 4. 37.

7. The

7. The Defendant refuſed to anſwer the *Receipt of Rent* and demurred, for that the Plaintiff may have Remedy by Law for the ſame; therefore ordered a Subpæna to be awarded to make direct anſwer. Cary's Rep. 101. cites 20 Eliz. Dixe & Cantrell v. Lintoft.

8. Upon the Hearing of the Cauſe, it appeared, that the Suit was to be relieved of a *Promiſe* made by the Defendant to the Plaintiff, *to ſurrender a Leaſe upon Payment of* 100 *Marks* by the Plaintiff unto him, and for that the Matter is meet for the Common Law, therefore diſmiſſed. Cary's Rep. 135. cites 22 Eliz. Grevill v. Bowker.

9. When any *Title of Freehold, or* other *Matter determinable by the Common Law, comes incidently in Queſtion* in this Court, the ſame cannot be decided in Chancery, but ought to be referred to the Trial of the Common Law, where the Party grieved may be relieved by Error, Attaint, or by Action of higher Nature. 4 Inſt. 85.

10. In a Suit *in the Marches* of Wales, the *Queſtion was whether by a Proviſo in an Indenture to lead the Uſes of a Fine to make Leaſes for* 21 *Years or* 3 *Lives, a Leaſe made was purſuant* to that Power; and a Prohibition was granted, becauſe this is a Matter determinable at Common Law, and that Court ought not to intermeddle with it. Cro. C. 347. pl. 15 Paſch. 12 Jac. B. R. Fox v. Prickwood. Bulſt. 216. cites S. C. accordingly. — But the Court of Chancery will determine ſuch Point; See Chan. Caſes, 17. Hill. 14 & 15 Car. 2. The Lord Marquiſs of Antrim v. The Duke of Buckingham. ——— 2 Freem. Rep. 168. pl. 214 S. C. in totidem Verbis.

11. A *Thing which may be tried by a Jury at Common Law*, is not triable in Chancery; for in the firſt Caſe, if they give not their Verdict according to their Evidence, an Attaint lieth; but in the other there is no Remedy. Mar. 93. pl. 159. Hill. 16 Car. Anon.

12. Bill for an Account of Money collected by Authority of Commiſſioners of *Sewers* diſmiſſed; for the Commiſſioners are to take the Account, and not the Chancery; Per Finch K. Chan. Caſes, 332. Trin. 22 Car. 2. Anon.

13. Bill by the *Heir* to be relieved againſt a *Judgment againſt his Anceſtor*. The Judgment Creditor *pleads* that he had brought a Sci. Fa. againſt the now Plaintiff, who pleaded that he had no Aſſets by Deſcent, and therefore needs no Relief of this Court, and that this Bill tends to the falſifying his Plea at Law to the ſaid Sci. Fa. which Plea the Court allowed; Fin. Rep. 69. Hill. 25 Car. 2. Rives v. Richards.

14. 'Twas objected that where a Man has a Title at Law, he ought to purſue his legal Remedy, and ſhall not have a Decree in Equity, but that is not always ſo, and the daily Practice in this Court in many Caſes is otherwiſe; As where a *Creditor by Bond* or the like, brings his Bill for a *Diſcovery of Aſſets*, and having *proved* Aſſets here, he ſhall have a Decree for his Debt, and not be put to proſecute at Law for the ſame, and in many ſuch like Caſes the Court never ſends the Plaintiff to Law where a Title appears for him; Arg. Vern. R. 429. Hill. 1686. in Caſe of the Earl of Kildare v. Sir Maurice Euſtace.

15. Chancery never decreed a Suit when it might *decree a Remedy*, As in the Caſe of a Deviſe of Land, or where a Bond is taken in Truſt and the Truſtee refuſes to let his Name be made Uſe of, the Court will decree the Duty and not an Action to be brought in the Truſtee's Name; Arg. Vern. R. 438. Hill. 1686. in Caſe of the Earl of Kildare v. Sir Maurice Euſtace.

16. Bill *againſt Executor for a Debt due by Defendant's Teſtator*, and ſecured by a Bill of Sale of Goods; Executor denied he knew or believ'd there was any ſuch Debt, and though the *Debt was proved in Chancery*, yet Plaintiff was ſent to Law to recover his Debt; but the Bill retained till after the Trial had, and if Plaintiff recovered at Law, then he might *reſort back for Account of Aſſets*. 2 Vern. 192. pl. 174. Mich. 1690. Gorray v. Uſtwick.

17. *Aſton ſtood engaged to A. by ſimple Contract to pay him* 10 *l. for curing his Son* &c. and *A. brought a Bill* in Chancery for this 10 l. *ſuggeſting that the Agreement was not in Writing, and that the Witneſſes who could prove it were either dead or beyond Sea.* The Defendant Aſton *pleaded that the Agreement was made in the Preſence of W. R. now living in Holland, and traverſed the reſt of the Suggeſtion*; and this being over-ruled in Chancery, Aſton now moved for a Prohibition, becauſe this is no more than an Indebitatus Aſſumpſit at Common Law; and if this Proceeding ſhould be allow'd, it would be to the Subverſion of the whole Frame of the Common Law; beſides the granting a Prohibition would prevent the claſhing of Juriſdictions, and there are ſeveral Precedents in the Regiſter of Prohibitions, Ne ſequatur ſub ſuo periculo. The Court appointed to hear Counſel on both Sides, but the Cauſe was agreed. 3 Salk. 82, 83. pl. 2. Paſch. 8 W. 3. Aſton v. Adams.

18. If J. S. a *Jointreſs* brings her Bill to have an Account of the Real and Perſonal Eſtate of her late *Husband*, and to have Satisfaction thereout for a Defect of Value of her Jointure-Lands, which he had *covenanted to be and* to *continue of ſuch Value*; and the Defendant inſiſts that this is a Covenant which *ſounds only in Damages*, and properly determinable at Law; tho' it be admitted that a *Court of Equity cannot regularly aſſeſs Damages, yet* in this Caſe *a Maſter* in Chancery *may* properly *inquire into the Value* and Defect of the Lands, *and report it* to the Court, which may decree ſuch Defect to be made good, or ſend it to be tried at Law upon a *Quantum Damnificat'*. Abr. Equ. Caſes, 18. pl. 7. Mich. 1699. Hedges v. Everard.

19. Where a Bill was brought for *Dower* inter al' the Bill was diſmiſs'd as to that, becauſe ſhe had her Remedy at Law. 3 Chan. Rep. 162. Paſch. 7 Ann. Wallis v. Everard.

20. Where one *recovered in a Trover againſt a Servant of the African Company*, Equity would not relieve, becauſe the Plaintiff in Equity might at Law have defended himſelf. Chan. Prec. 221. pl. 180. Trin. 1703. Langdon v. the African Company.

21. *Breach of Covenants* is triable at Law; for a Court of Equity cannot ſettle Damages. MS. Tab. March 17, 1719. Stafford v. the Mayor of London.

22. The Maſter of the Rolls ſaid he agreed that the Court ought to be very tender how they help any Defendant after a Trial at Law, in a Matter where ſuch Defendant had an *Opportunity to defend himſelf*; but yet it will in ſome Caſes, *As* if the Plaintiff at Law *recovers a Debt, and the Defendant afterwards finds a Receipt under the Plaintiff's own Hand for the very Money in Queſtion.* Here the Plaintiff recovered by Verdict againſt Conſcience, and tho' the Receipt were in the Defendant's own Cuſtody, yet not being then appriſed of it, he ſeems intitled to the Aid of Equity, it being againſt Conſcience that the Plaintiff ſhould be twice paid. 2 Wms's Rep. 425, 426. Mich. 1727. in Caſe of the Counteſs of Gainsborough v. Gifford.

23. *So* if the *Plaintiff's own Book appeared to be croſs'd, and the Money paid* before the Action brought. Ibid. 426.

(Y) At what *Time* a Man may be relieved there. [*After Judgment &c.*]

1. IF a Man brings an Action of Debt upon an Obligation in B. and after the Defendant exhibits a Bill in a Court of Equity, ſhewing good Matter of Equity, and after the Plaintiff recovers in Bank, and

and there by Agreement of the Parties, and Mediation of the Court according to the Equity of the Cauſe, the Plaintiff takes a certain Sum of the Defendant in Diſcharge of the Debt, Damages and Coſts, if the Defendant proceeds after in the Court of Equity to have Relief there, a Prohibition ſhall be granted, becauſe the Matter is now ended in an equitable Courſe by the Agreement of the Defendant himſelf. A Prohibition was granted to the Council of the Marches, between *Grubb and Oliver*, in this Place; and Trin. 15 Jac. B. R. a Procedendo was pray'd, and per Curiam denied for the Cauſe aforeſaid.

2. A Cauſe ſhall not be examined upon Equity in the Court of Requeſts, Chancery, or other Court of Equity, after Judgment at the Common Law. Hill. 11 Jac. B. R. a Prohibition granted. M. 12 Jac. B. R. *Glanfield's Caſe*, per Curiam. M. 13 Jac. B. R. between *Dr. Gouge and Wood*. Paſch. 14 Jac. B. R. *Skipwith's Caſe*, a Prohibition granted to the Requeſts. Paſch. 7 Jac. B. adjudged, and a Prohibition granted to the Council of Marches. M. 7 Jac. B. *Curtes's Caſe*, adjudged, and a Prohibition granted to the Council of York.

After a Judgment in B. R. for the Plaintiff, in which the Caſe was, that G. the Plaintiff ſold to C. the Defendant a Jewel of Gold with a Diamond, affirming it to be a good Diamond, whereas it was only a Topaz, and ſo C. was deceived; it being ſold to him for 360 l. whereas it was worth but 20 l. C. gave a Bond to one H. for 600 l. in Truſt for G. and G. brought an Action in H.'s Name, and had Judgment by Confeſſion of C. but C. afterwards finding the Cheat preferr'd his Bill in Chancery, and brought a Writ of Error to reverſe this Judgment, but the Judgment was affirmed; but afterwards upon an Hearing in Chancery, it was decreed that G. take his Jewel again and 100 l. and that G. ſhould procure H. to releaſe and acknowledge Satisfaction; and for not performing this Decree G. was impriſon'd. But upon a Habeas Corpus brought in B. R. the Court firſt let him to Bail, and the next Term diſcharged him; for that this Decree and Impriſonment, as Coke Ch. J. ſaid, was againſt Law, being after a Judgment at the Common Law. Cro. J. 343. pl. 11. Paſch. 12 Jac. B. R. Courtney v. Glanvill.——Roll Rep. 111. pl. 54. Glanfield v. Courtney, S. C. and G. was diſcharged by Conſent of the whole Court.——2 Bulſt 301. S. C. Coke Ch. J. ſaid they would always protect the Law of the Land; and G. was bail'd by the Court of B. R. but was preſently after his Delivery taken again, and committed to the Fleet by the Ld. Chancellor, and afterwards was bail'd again by B. R.——Mo. 838. pl. 1131. Glanvill's Caſe, S. C. and that B. R. bail'd G. a 2d Time.——S. C. cited Mod. 60.

3. If A. be the King's Farmer of a Warren, but the Inheritance is in the King, and B. brings an Action of Treſpaſs againſt A. in B. R. and has a Verdict in Point, and Judgment accordingly that there is not any Warren; it ſeems that this ſhall not bind the King, but that he may ſue after in a Court of Equity; for this was but a Perſonal Action, and binds not the King at Common Law, and therefore he is at large, as if no ſuch Thing had been done. Contra M. 12 Jac. B. R. between *Wright and Fowler*, per Curiam.

4. If C. and F. bring a Prohibition in B. R. againſt W. and upon a Demurrer there a Conſultation is granted, and after the King and the ſaid C. and F. ſue in the Dutchy-Court, pretending Matter of Equity of Diſcharge, and that the ſaid W. claims the Tithes by the Patent of the King, which they pretend to be void, a Prohibition ſhall be granted, becauſe this is after * Judgment here in B. R. and alſo no Matter of Equity appears. M. 13 Jac. B. R. between *Coates and Sir Henry Warner*, reſolved, and a Prohibition granted.

Roll Rep. 53. pl. 23. Hill. 12 Jac. B. R. the S. C. but * Fol. 382. S. P. does not appear. —Ibid. 252. pl. 20. S. C. reſolved that no Court of Equity can meddle after a Judgment, and the Prohibition was granted by the whole Court.——3 Bulſt. 120. Warner v. Suckerman and Coates, S. C. and a Prohibition granted per tot. Cur.

5. In *Quare Impedit* by an Abbot the *Defendant confeſs'd the Action*, by which Judgment was given, Et quod ceſſet executio till the *Covin* be inquired. Br. Colluſion &c. pl. 1. cites 18 H. 8. 6.

6. The Defendant, notwithſtanding an *Injunction* delivered unto him, *got a Judgment* upon an Action of Debt in the Common Pleas, and

'twas

'twas decreed upon the hearing of the Cauſe, that the Defendant ſhall, within 14 Days next after the Decree, reſort to the Record in the Common Pleas, whereupon the ſaid Judgment is enter'd, and thereto *confeſs of Record a full Satisfaction* of the ſaid Judgment. Cary's Rep. 64. cites 2 Eliz. Fol. 126. Colverwell v. Bongey.

No Relief after Judgment. Toth. 266. cites Trin. 17 Jac. fol. 909.

7. *Judgment and Execution* was had at Law, the Plaintiff preferr'd his Bill to be relieved; but diſmiſs'd, and had no Relief. Toth. 265. cites Farrington v. Wolwich, 12 El. Fo. 118. Bolt v. Reignolds, the like 12 El. Fo. 129.

Huet v. Hurſton.——It was ſaid by the Court, that when *Judgment* is given in this Court againſt another, *and Execution* upon it, and the *Sheriff levies the Money*, the Ld. Keeper cannot order that the Money ſhall ſtay in the Sheriff's Hands, or order that the Plaintiff ſhall not call for it; for notwithſtanding ſuch Order he may call for it. Mar. 54. pl. 81. Mich. 15 Car. Anon.

8. *Debt upon a ſingle Bill ſatisfied*, and the Bill not delivered was ſued, and Execution gotten, and yet retain'd in Chancery, notwithſtanding a Motion to be diſmiſs'd, becauſe *after Judgment and Execution*; for it was ſaid the Judgment and Execution may ſtand, and this Suit for that he formerly paid. Cary's Rep. 106. cites 21 & 22 Eliz. Owen v. Jones.

9. A Bill to be relieved upon *Bond* after Judgment and Execution, and becauſe *no material Matter alleged* for Maintenance thereof, therefore diſmiſſed. Cary's Rep. 108. cites 21 & 22 Eliz. Adams v. Doddeſworth.

10. Executrix brought an *Indebitatus Aſſumpſit againſt* the Defendant, as *Executor, upon a Promiſe of his Teſtator*, and had a *Verdict and Judgment* in B. R. which was *reverſed for Error in the Exchequer-Chamber*, and afterwards the Widow exhibited a Bill in Chancery, ſuggeſting all this Matter, and prayed to be relieved. The Defendant demurr'd to the Bill, but the Demurrer was over-ruled, for the Lord Keeper made no Difference, where the Party comes into Chancery either after the Reverſal, or before any Suit commenced at Law; and ſaid, that by Advice of all the Judges, he had allowed Bills for Debts againſt Executors without Specialty, with an Averment that they had Aſſets, but ſaid he would conſer with the Judges. Moor 556. pl. 755. Trin. 31 Eliz. Maſters v. Burde & al'.

11. One Knight acknowledged a *Statute* to the Defendant and another, *not to alien or waſte his Land*, and *afterwards leaſed it to the Plaintiff*, the Statute being acknowledged in Conſideration of Marriage, and now, by reaſon of the Leaſe ſo made, the Defendant, being the Survivor, Conuſee extends the Statute; yet ordered, in reſpect the *Leaſe is no Waſte*, the Conuſee not to receive any Benefit by the ſaid Statute. Toth. 275. cites 37 Eliz. li. A. fo. 655. Mathew v. Weſt and others.

See the Treatiſe called, The Juriſdiction of the Court of Chancery vindicated, publiſhed at the End of Chan. Rep. fol. 78. &c. where this Caſe is commented upon.

12. The *Queen granted a Leaſe of Lands to T. rendring Rent, and for Non-payment to be void*; then ſhe *ſold the Reverſion to Sir M. F. who, becauſe the Rent had been arrear ſeveral Years before, tho' then paid, entered, and avoided the Leaſe, it being adjudged a Limitation, and void without Office*; and afterwards T. exhibited his Bill in Chancery, ſetting forth, that at the Time of Non-payment of Rent, which was 9 Eliz. he ſent it by his *Servant*, who *was robbed*, which, when he knew, he *paid it immediately the Day after to the Queen, who accepted thereof, and he continued the Payment till* 30 *Eliz. when the Reverſion was ſold to Sir M. F.* and ſo prayed to be relived. The Defendant, Sir M. pleaded the Proceedings againſt the Plaintiff at Common Law, and the Judgment obtained againſt him; and it was reſolved by all the Judges of England, that if the Complainant had exhibited his Bill before Judgment was had againſt him at Law, he might have been relieved, but now he came too late; therefore Sir M. F. who was committed for not performing the Decree,

Decree, being brought up by Habeas Corpus, was diſcharged ; cited by Coke Ch. J. Cro. J. 344. as Mich. 39 & 40 Eliz. Sir Moile Finch v. Throgmorton.

13. The Defendant had Execution and Judgment *upon two Recognizances and a Statute*, amounting to 300 l. but in reſpect it was *a ſleeping Statute*, the Court ordered the Obligor to be diſcharged out of Execution, and the Plaintiff's Poſſeſſion of the Lands to be delivered. Toth. 267. cites 5 Jac. l. A. fo. 319. Gayner v. Lucas.

14. *Judgment* againſt the Defendant *in Debt, upon the Statute of* 13 Eliz. againſt *Uſury*, and Day given to move in Arreſt of Judgment; in the mean time he exhibited his Bill in Chancery, and procured an Injunction to ſtay Judgment and Execution, notwithſtanding which, the Court granted Both ; for the Stat. 27 Ed. 3. cap. 1. and 4 H. 4. cap. 23. expreſsly enjoin, that after Jndgment given the Parties ought to be quiet, and ſubmit to it, and ſuch Judgment ought not to be avoided but by Error or Attaint. Cro. J. 335. pl. 4. Hill. 11 Jac. B. R. Heath v. Ridley.

2 Bulſt. 194. S. C. and Coke ſaid, that it is much to be wondered, that no one would bring an Information upon thoſe Statutes in ſuch Caſes againſt the Party procuring ſuch Injunctions after Judgment at Common Law ; for be it in Plea Real or Perſonal, after Judgment given the Party ought to be quiet, and to ſubmit to it.

15. *Treſpaſs* was brought *in B. R. by a Tenant of Dutchy Lands*, and Judgment againſt him. *Afterwards he brought an Engliſh Bill in the Dutchy Court*, whereupon B. R. granted a Prohibition. And Coke Ch. J. ſaid, that if any Engliſh Court holds Plea of a Thing whereof Judgment is given at Common Law, a Prohibition lies upon the Statutes of 27 E. 3. cap. 1. and 4 H. 4. cap. 23. Mo. 836. pl. 1129. Mich. 12 Jac. Wright's Caſe.

16. A Bill to be relieved upon an Action of the Caſe upon an *Accompt*, after a Verdict, Judgment, and Execution at Law was *referred again to Law*, becauſe a Verdict paſſed upon the Oath of one Vintner, who was *thought not to have dealt fairly at the Trial, and after* the Cauſe referred to this Court for Equity. Toth. 87. cites Hill. 15 Car. Mallery v. Vintner.

17. It was agreed, that a Court of Equity cannot meddle with a Cauſe after it hath received a lawful Trial and Judgment at the Common Law, *altho' the Judgment be ſurreptitious.* Mar. 83. pl. 138. Paſch. 17 Car. B. R. Thompſon v. Hollingſworth.

18. Plea and Demurrer to a Bill, it being after Verdict, Judgment, and *Execution at Law* was allowed, tho' the Action at Law was for Money won by Gaming. Ch. R. 243. 15 Car. 2. Hunby v. Johnſon.

So after *Verdict, Judgment, and Writ of Error.* Ch. R. 248.

16 Car. 2. Sewell v. Freeſton.——Chan. Caſes 65. S. C. the Suggeſtion being of *Matters in Defendant's Cognizance, which Plaintiff could not prove at the Trial.*—— Bill has been allowed for Matter *diſcovered after the Trial.* Chan. Caſes 65. cites Payton v. Humfreyes.

19. Bill *after Verdict* in an Action on the Caſe, *ſuggeſting a Matter in Defendant's Knowledge, which Plaintiff could not prove at the Trial.* It was referred to Precedents. 3 Ch. R. 17. Anon.

For a Matter *delivered after the Trial* ſuch a Bill had been brought. ibid. cited as the Caſe of Peyton v. Humphreys.

20. An Action of *Trover for Bonds cancell'd by Defendant at Law*, and now Defendant at Law brings a Bill to be relieved after Trial and Judgment, becauſe the *Penalties of ſome were recovered, and others were paid.* Defendant here pleads the Verdict and Judgment, and the Plea was allowed ; and Bridgman K. confirmed the ſame, only *ordered, that Defendants muſt anſwer, whether they know what the Jury gave their Verdicts upon, whether the Penalties or Monies paid ?* and No further Proceedings to be if they do not know and conſent ; but afterwards, Dec.

13. 1670. 22 Car. 2. it was ordered by Archer J. that the laſt Order be diſcharged, and the Plaintiffs may reply. 3 Ch. R. 54. 22 Car. 2. Rawlins v. Rawlins.

21. After two Verdicts in *Ejectment*, whether the Fines of Copyholders were certain or arbitrary, the Court would not relieve the Plaintiff *other than for the Preſervation of Witneſſes*. 2 Ch. R. 76. 24 Car. 2. Smith v. Sallett.

22. A Verdict at Law *as to the Value of a Portion* given in Marriage was pleaded and allowed. 2 Chan. Caſes 250. Hill. 30 & 31 Car. 2. Shuter v. Gilliard.

23. A Verdict and other unjuſt Proceedings in an *Inferior Court* were ſet aſide, and the Plaintiff in that Court ordered to pay all the Coſts there and here. Fin. R. 472. Mich. 32 Car. 2. Vaux v. Shelly and Thompſon.

24. After a Recovery at Law the Defendant brings a Bill, and ſuggeſts that Money was paid in Part of the Goods, but *the Receipts loſt*, and therefore prays a Diſcovery. The Defendant here demurr'd, and 'twas allow'd, becauſe after a Verdict. Vern. 176. Tr. 1683. Barbone v. Brent.

25. A Bill was brought to be relieved againſt an apparent Fraud; but after long Debate was *diſmiſs'd*, and principally becauſe the Plaintiff did not apply to this Court till after Verdict and Judgment. 2 Chan. Caſes, 95. 98. Paſch. 34 Car. 2. Lee v. Boles.

26. Executor ſent a Letter to a Creditor of the Teſtator's, owning a Mortgage to Teſtator for 300l. The Creditor afterwards brought Debt on Bond againſt the Executor, who directed his Attorney to plead ſpecially Riens ultra to ſatisfy Debts of a higher Nature; but he by Miſtake pleaded generally *Plene Adm'*. The *Executor's Letter, owning the Mortgage for* 300*l.* was produced, on which *Verdict* and *Judgment* pro Quer. The Executor brings his Bill, and proves that there were 2 prior Mortgages on the ſame Eſtate, which before were unknown to him, ſo that the Mortgage to the Teſtator *was worth nothing*, and was relieved, and Injunction granted to ſtay Proceedings at Law, Per the Lords Commiſſioners. 2 Vern. 146. Trin. 1690. Robinſon v. Bell.

27. *Captain of a Man of War* took the Defendant's Ship at Sea, being an *Interloper*, out of the Limits of the Eaſt-India Company's Charter. She was condemn'd in the Admiralty, and Ship and Goods delivered over to the King's Uſe. The Defendant, who was the Owner and Freighter of the Ship, brought Trover and recover'd 1300l. Damages. The Plaintiff brings a Bill to be relieved againſt this Judgment. The Defendant pleaded the *Judgment*, and the Plea diſallow'd, and Injunction till Hearing, Per Lords Commiſſioners. 2 Vern. 155. Trin. 1690. Tyrrell v. Beake.

2 Vern. 239. pl. 222. Raw v. Pole, S. C. and affirmed in Dom. Proc.

28. Relief after Judgment *in Ejectment*, becauſe of *Fraud by Conſtruction* in the Settlement in Jointure engroſs'd by Tenant in Tail in Remainder. Chan. Prec. 35. Mich. 1691. Raw v. Potts.

29. A *Bond pro Eaſiamento & Favore*, if reduced to a Judgment, is not avoidable at Law, nor ever relievable here; per Ld. Wright. Chan. Prec. 200. Trin. 1702. in the Caſe of Ive v. Aſh.

30. A Verdict in *Trover* was directed to be given for the Defendant, the *Sale* of the Goods to the Plaintiff *being proved fraudulent*; but for *want of the Defendant's proving a Copy of the Judgment*, by which he, as Bailiff, took them in Execution, the Jury, by an after Direction for that Reaſon, only found for the Plaintiff. On a Bill by Defendant at Law, ſetting forth this Matter, he was relieved, and the Plaintiff at Law decreed to pay Coſts, and a perpetual Injunction granted againſt the Judgment. Chan. Prec. 233. Trin. 1704. Kent v. Bridgman.

31. Bill to be relieved againſt a Forfeiture for Non-payment of Rent, by a Tenant at a Rack-Rent, after a *Recovery in Ejectment*. It was inſiſted

ſiſted for the Defendant, that the Rule for Relief in Equity againſt Forfeitures of this Kind did not extend to a *Tenant at a Rack-Rent*, where the Rent muſt be ſuppoſed equal to the Value of the Land, and therefore not in the Nature of a Penalty to avoid the Leaſe at Law upon Non-payment of Rent, by virtue of a Clauſe of Re-entry; that the Rule extends only to beneficial Leaſes where Fines have been paid, or great Sums laid out in Improvements &c. where the Tenant is a ſort of a Purchaſor of Part of the Intereſt in the Term. In thoſe and the like Caſes the Clauſe of Re-entry is in Nature of a Penalty, and therefore relievable in a Court of Equity, upon making Satisfaction to the injur'd Party, and Payment of Coſts. Beſides the Plaintiff here might have ſtaid Proceedings upon the Ejectment, upon Payment of the Arrears of Rent, and ſo might have been relieved at Law, and therefore after Trial and Judgment ought not to have come here, when he might have had the ſame Remedy at Law. Per King C. I don't like giving Relief here in theſe Caſes after a Judgment at Law; but the Precedents are too ſtrong for me; and decreed, upon Payment of the Rent and Coſts at Law and in Equity, the Defendant to make a new Leaſe for the Remainder of the Term to the Plaintiff; but ordered a Covenant to be inſerted for the Tenant to repair during the Term, tho' no ſuch Covenant was in the former Leaſe. MS. Rep. Mich. 12 Geo. in Canc. Taylor v. Knight.

(Z) Chancery and Courts of Equity. *Decree reviewed.* In what Caſes it may be.

1. IF in Chancery a Decree be againſt a Statute, as the Caſe was againſt the Statute of Wills, by which the Common Law is affirmed, that where the Land is held in Capite one Third Part ſhall be ſuffered to deſcend to his Heir, and the Father deviſes all for Payment of Debts, which is void for a third Part, and the Chancery confirms it for this Third Part by a Decree, and this Matter appears within the Decree, this Decree may be re-examined and reverſed, becauſe it is againſt the Statute, and ſo the Chancery errs in Law. Tr. 15 Ja. in Cancellaria, between *Roſwell and Every*, adjudged upon a Demurrer per Bacon the Lord Keeper; and after M. 16 Jac. the Decree reverſed accordingly by the Advice of Juſtice Doderidge and Juſtice Hutton, Aſſiſtants to the Court.

2. So if the Chancellor errs in a Decree in a Matter of Law, and it appears within the Decree, as if the Chancellor makes a Decree upon the Law upon his own Opinion againſt the Opinion of the Judges, this Decree may be reviewed for this Error in Law. Trin. 15 Jac. in Cancellaria, in *Sir George Reynel's Caſe*, adjudged upon a Demurrer by Bacon, the Lord Keeper. Tr. Jac. in Camera Scaccarii. Per Curiam, This Bill of Review is in Nature of a Writ of Error. * 27 H. 8. 15. there was a Matter of Law, and adjudged that it might be reverſed there. * S. C. cited Arg. Lane 70. and ſee there the like Point in the Caſe of Arden v. Darcy; Trin. 7 Jac. in the Exchequer.

3. But if the Chancellor errs in his Decree upon a Matter in Fact, this Decree is final, and cannot be reviewed, becauſe they cannot go to a new Examination of Witneſſes now; for after Publication this cannot be done. Tr. 15 Jac. in Cancellaria, this was ſo held by the Lord Keeper in the ſaid Caſe. Tr. 8 Jac. between *Ardent and Darcy*, per Curiam. On a Bill of Review the *Cauſe of Review muſt* ariſe and *appear upon the Caſe as ſtated.*

4. So

in the Decree, and the Fact must be admitted as there ſtated, and that tho' the Fact whereon the Court gave Judgment were miſtaken, yet there is no ground of a Bill of Review, but the Fact in this Caſe muſt be admitted true and the Decree is Matter of Record and can be tried only by the Record; but in miſtaking the Fact, the proper Courſe had been to have gotten the Cauſe re-heard before the Decree had been ſigned and inrolled. 2 Freem. Rep. 182. pl. 251 16 June 16 Car. 2. Combes v. Proud —— Chan. Caſes, 54 55. S. C and in much the ſame Words.—— Chan. Caſes, 105, 106. Paſch. 20 Car. S. P. Haynes v. Harriſon ——2 Keb. 279. pl. 46. Mich. 19 Car. 2. Harriſon v. Haynes, S. C. that by Ld. Keeper Bridgman, a Decretal Order not inrolled, cannot on Allegation of Matter of Fact omitted be ſtay'd, but the Party muſt have a Bill of Review; but if Matter of Fact be omitted, this is Cauſe to appeal to the Houſe of Lords.

4. So if the Chancellor errs in his Conſcience upon a Matter of Fact proved before him, there may be a Review upon this Matter, becauſe there needs no new Examination; but this may be reviewed upon the old Depoſitions, and this is uſual.

Ibid. cites 15 Jac. Nudigate v. Davis. Jo. 147. pl. 5. S. C. reſolved accordingly, on a Reference out of Chancery.

5. No Bill of Review admitted *on new Matter*. Cary's Rep. 82. cites 3 Jac. Lovegrace v. Webb.

6. If a *Decree* be made by Commiſſioners *upon the Statute of* 43 Eliz. cap. 4. of *Charitable Uſes*, *and Exceptions put in againſt* it *in Chancery*, and there heard, examined, *and confirmed in Part*, *and altered in Part*, it was reſolved that it cannot upon a Bill of Review be further examined; for it takes its Authority by the Act, which mentions but one Examination, and is not to be reſembled to the Caſe where a Decree is made by the Chancellor by his ordinary Authority. Cro. C. 40. pl. 2. Mich. 2 Car. between Windſor and the Inhabitants of Farnham.

Chan. Rep. 231. 14 Car. 2. S. C.

7. After a Decree made in Point of Right, any Matter that might have been pleaded in *Abatement* is not ſuch an *Error as* to ground a Bill of Review. N. Ch. R. 86. Lady Cranborne v. Dalmahoy.

2 Freem. Rep. 178. pl. 239. S. C. & S. P.

8. *Confeſſion ſubſequent* to a Decree is no *Ground for* a Bill of Review, ſaid to be a Rule. Chan. Caſes, 143. Hill. 15 & 16 Car. 2 in Caſe of Curteſs v. Smalridge.

2 Freem. Rep. 178. pl. 239. S. C. & S. P.

9. The *Want of any Evidence or Matter which might have been uſed in the firſt Cauſe*, and *of which the Party had then knowledge*, is not any ground for a Bill of Review; Arg. and ſeems admitted. Chan. Caſes, 43, 44. Hill. 15 & 16 Car. 2. in Caſe of Curteſs v. Smalridge.

Bill of Review does not lie, becauſe nothing can appear to the Court on the Body of this Decree to alter it; Arg. 2 Freem. Rep. 179. pl. 242. S. C.

10. Where a Bill is to be relieved on a *Fact not in Iſſue*, *nor appearing in the former Cauſe*, a Bill of Review will not lie for it; Arg. Chan. Caſes, 44. Hill. 15 & 16 Car. 2. in Caſe of Read v. Hambey.

Bills of Review are allowed *only on Errors apparent in the Record*, *or on new Matter diſcovered ſince the Decree*. G. Equ. R. 184. Hill. 12 Geo. 1.

2 Chan. Rep. 66. S. C. the Plaintiff would now examine to a Matter of Tender and Refuſal,

11. Bill of Review was demurred to, becauſe it *exhibited New Matter*, whereas it was of Defendant's Knowledge at the Time of the Anſwer and Hearing, though there was no Proof then of it, but it came to Light afterwards. Ld. Keeper Bridgman in Effect diſmiſſed the Bill, but then gave Time to ſearch Precedents. 3 Chan. Rep. 76. 77. Trin. 1672. Chambers v. Greenhill.

which he could not prove before the Hearing, but now ſince the Decree ſigned and inrolled he can prove it. The Court ordered Precedents to be ſearched, and Precedents being now produced by the Plaintiff, his Lordſhip declared that they ſeemed of no Weight to the Plaintiff's Purpoſe, and diſmiſſed the Bill of Review.——3 Chan. Rep 76. ſays the Caſe of Colt v. Colt, was cited were the Defendant ſet forth Deeds that made a Title by Anſwer, but were afterwards loſt and a Decree againſt them, but upon coming to light afterwards, the Bill of Review was admitted; but Ld. Keeper ſaid this Caſe was not like the other. ——Vern 417. Arg. cites Morgan's Caſe, where upon a Bill of Review, the Plaintiff could not produce the Deed, and ſo failed at the Hearing of making out his Equity, and though the Deed came afterwards to his Hands, which plainly made out the Title, yet it was adjudged to be a Right without a Remedy, and the Defendant to be without Relief.

12. This Difference was taken by the Chancellor, Where a *Matter in Fact was particularly in Iſſue before the former Hearing*, though you have *new Proof*

Proof of that Matter, upon that you ſhall never have a Bill of Review. But where a *new Fact* is alleged, *that was not at the former Hearing*, there it may be a Ground for a Bill of Review. 2 Freem. Rep. 31. pl. 35. 1677. Anon.

13. The Court would not make *Error by Conſtruction*, and where a *Decree is capable of being Executed* by the ordinary Proceſs and Forms of the Court, and where Things come to be in ſuch a State and Condition; after a Decree made an *original Bill is requiſite*, and a ſecond Decree upon that, before the firſt Decree can be executed. In the firſt Caſe, whatever the Iniquity of the firſt Decree be, yet till it be reverſed, the Court is bound to aſſiſt it with the utmoſt Proceſs the Courſe of the Court will bear; for in all this the Conſcience of the preſent Judge is not concerned, becauſe it is not his Act, but rather his Sufferance, that the Act of his Predeceſſor ſhould have its due Effect by ordinary Forms; but where the common Proceſs of the Court will not ſerve, but a new Bill and a new Decree is become neceſſary to have the Execution of a former Decree, which in itſelf is unjuſt, the Court will not make it its own Act by building on ill Foundations, and charge his own Conſcience with promoting an apparent Injuſtice. 2 Ch. Rep. 127. 29 Car. 2. Lawrence v. Berney.

14. On a Bill of Review, the Party cannot *aſſign for Error* that any of the Matters decreed are contrary to the Proofs in the Cauſe, but muſt ſhew ſome *Error in Law* appearing in the Body of the Decree, or *new Matter* diſcovered ſince the Decree made, and that not without leave of the Court. Vern. 166. pl. 158. Paſch. 1683. Melliſh v. Williams.

15. When a Decree comes to be reverſed on a Bill of Review, it ought to be either, becauſe it was *unjuſt in Matter of Law* ariſing within the Body of the Decree, or for that the Court wanted or exceeded its *Juriſdiction*; Per North K. Vern. 292. in Caſe of Fitton v. E. of Macclesfield.

16. Bill of Review for that on *Account ſettled by the Maſter*, whoſe Report was decreed; the Maſter had *allowed Intereſt upon Intereſt*, by jumbling Principal and Intereſt together, and then allowing Intereſt for the firſt Total directed to be examined and rectified as to the Point, but the Reſt of the Decree to ſtand. 2 Chan. Caſes, 153. Mich. 35 Car. 2. Ld. Renelagh v. Thornhill.

17. Upon a Bill of Review no Proofs are to be admitted, but ſuch as were in the original Cauſe. N. Ch. R. 196. 1691. Taylor v. Wood.

18. *Forgetfulneſs or Negligence* of Parties under no Incapacity is no Foundation for a Bill of Review. MS. Tab. Jan. 13. 1719. Ludlow v. Macartney.

19. Ought not to be brought but for *manifeſt Errors appearing on the Face of the Decree* or for *new Matters ariſing ſince* the Decree, of which no Advantage could have been taken without Leave of the Court to bring ſuch Bill upon new Matters diſcovered. MS. Tab. March 1. 1726. Aſhton v. Smith.

20. After a Decree for Payment of a Sum of Money and a Rent-charge out of a Manor, and to charge the Defendant with the Rent and Arreares, who was no Party to the Grant of the Rent-charge, a Bill of Review will *not lay*, *for that the Charge exceeds the Value of the Rent of the Lands*; for the Value is no new Matter, and it was not excepted to in the former Suit, and therefore now remedileſs; and 'tis like the Caſe of an *Executor* who *cannot plead Want of Aſſets after the Debt decreed.* 3 Ch. R. 88. Trin. 1635. Counteſs of Suffolk v. Harding.

(Z. 2) Bill of Review. By and againſt whom.

N. Ch. R. 52. S. C. in totidem Verbis. — 2 Freem. Rep. 148. pl. 193. Earl of Carliſle v. Globe, S. C. & S. P. accordingly, per Cur. — Vern. R. 291. in Caſe of Fitton v. Earl of Macclesfield, S. P. Arg.

1. BILL of Review will *not lie* but againſt thoſe who were *Parties* in the original Bill, as where C. *mortgaged Lands to A.* in Fee, and *covenanted* and gave Bond *to pay the Money*, but did not. *A. died, leaving G.'s Wife his Heir at Law. G. and his Wife brought a Bill* againſt C. *for the Money, or if not paid, then to foreclose* him, and it was decreed accordingly. C. upon diſcovering that *A. had left an Executor to whom A. had given the Money*, he brought a Bill of Review againſt G. and his Wife before the Time ordered for Payment by the Decree, ſetting forth this Matter, and pray'd the Direction of the Court to whom he ſhould pay the Money, and to have the Bond delivered up. And this was all by an original Bill and not by a Bill of Review; the Court held that in this Caſe, a *Bill of Review would not lie, becauſe the Executor was not Party to the former Bill.* 3 Chan. Rep. 94. Hill. 1659. The Earl of Carliſle v. Goble & Ux'. and other Executors of Andrews.

Nelſ. Chan. Rep. 96. S. C. & S P. and ſeems to be taken from Chan. Caſes

2. *Plaintiff* has a Decree, and afterwards *brings a Bill* of Review *to have more allowed* him; Defendant demurred, and inſiſted that a Review lies only for him againſt whom the Decree or Diſmiſſion is; after a long Debate the Demurrer it over-ruled. Chan. Caſes, 53. Paſch. 16 Car. 2. Glover v. Portington.

3. A Bill of Review lies *only for him againſt whom the Decree or Diſmiſſion is.* 2 Freem. Rep. 183. pl. 252. 14 May, 16 Car. 2. Glover v. Portington & al'.

4. A *Deviſee cannot maintain* a Bill of Review being not in Privity to the Teſtator againſt whom the Decree was. Chan. Caſes 123. Hill. 20 & 21 Car. 2. Slingsby v. Hale.

5. A *Pariſh is ſued*, and 4 are named to defend. A Decree is againſt them. Another *Pariſhioner*, who is *no Party or Privy*, may have a Bill of Review, becauſe he is *grieved* by the Decree; Per Ld. Chancellor. Chan. Caſes 272. Hill. 27 & 28 Car. 2. Brown v. Vermuden.

6. *Aſſignee* cannot in any Caſe have a Bill of Review. Arg. Vern. 417. pl. 396. Mich. 1686. in the Caſe of Barbone v. Searle.

(Z. 3) Bill of Review. On what Terms.

2 Freem. Rep. 172. pl. 225. S. C. in totidem Verbis.

1. A Decree was obtained for a great Sum of Money; a Bill of Review was brought, and *new Matter aſſigned.* The Rule of Court was pleaded, that the Defendant ought firſt to pay the Money before the Bill ſhould be brought into Court. But upon giving *good Security for the Money*, the Court diſpenſed with the Rule. Chan. Caſes 42. Hill. 14 Car. 2. Savil v. Darrey; and ſays, The like Caſe between Baſton and Biron, by Order of the Houſe of Peers about 1662.

2. Per Cur. In a Bill of Review *all Things are to be performed according to the former Decree, that do not extinguiſh the Right*; otherwiſe the Non-performance is a good Plea in Bar; As if Writings are to be brought into Court, or Coſts paid, but not to releaſe the Right, or make a Conveyance, becauſe that would deſtroy the Right. Not bringing in Writ-

ings

ings according to the Decree ſought to be reverſed, nor giving Security for the Coſts in the Bill of Review, was pleaded in the Cauſe between Okeover & Poole. 2 Freem. Rep. 88. pl. 97. Mich. 1683. Fitton v. Ld. Macclesfield.

3. Plaintiff was allowed to bring a Bill of Review *without paying the Coſts decreed in the original Cauſe*, amounting to 150 l. and for which he (as was ſaid) had been in Execution near 20 Years, upon making Oath he was not worth 40 l. beſides the Matter in Queſtion, and beſides a Suit depending between the ſame Parties to foreclose a Mortgage, the Debt being pretended to be over-paid. Vern. R. 264. pl. 259. Mich. 1684. Fitton v. the E. of Macclesfield.

4. Tho' an *Order is made* by the Ld. Keeper, *for diſpenſing with Coſts* on bringing a Bill of Review, yet *the ſame ought to be ſet forth in the Bill* of Review. Arg. Vern. 292. pl. 285. Hill. 1684. in Caſe of Fitton v. Ld Macclesfield.

5. The Plaintiff was not allowed to bring a *Bill of Review* unleſs he performed the Decree, or would ſwear he was unable to do it, and would ſurrender himſelf to the Fleet to lie there till the Matter on the Bill of Review was determined. Vern. 117. pl. 103. Hill. 34 & 35 Car. 2. Williams v. Melliſh.

6. The original *Bill* was brought *to ſettle the Boundaries of the Plaintiff's Manor*, and upon the firſt Hearing an *Iſſue was directed* out to be tried at Law, and there was a *Verdict for the Plaintiff*; upon the Equity reſerved there was a final *Decree for quieting the Plaintiff's Poſſeſſion, and that Defendants ſhould pay Coſts &c.* Defendant moved for Leave to file a Bill of Review upon an *Affidavit by* his *Solicitor, that certain new Evidence* was *diſcovered, ſince the Verdict and Decree, in Favour of the Defendant*; that this new Matter now diſcovered was a ſufficient Ground for a Bill of Review, as well as any Error apparent in the Decree itſelf &c. The Queſtion was, if the Biſhop ſhall have Leave to file the Bill of Review before he has *paid the Coſts* decreed againſt him? It was inſiſted on by the Counſel for Sir Henry Lyddall, that the Party ought not to file a Bill of Review before he has performed the Decree, and that this is conſtantly allowed for good Cauſe of Demurrer to a Bill of Review, and that Payment of Coſts is Part of the Decree, which ought to be performed as well as any other Part of it, and an old Book of Orders and Rules of the Court, printed in 1623, was produced, wherein there was a *Rule* Tempore Bacon C. and another in the Year 1656, to the Effect following, viz. *That no Bill of Review ſhall be allowed till after the Decree performed in all Parts, unleſs ſuch Performance would extinguiſh the Party's Right or Title at Law*, (As a Conveyance of Land, Releaſe &c) and alſo there muſt be Leave of the Court for filing ſuch Bill of Review &c. That a Bill of Review would be a Suſpenſion of the Payment of the Coſts decreed, and that Sir Henry Lyddal would be kept out of his Coſts till the Bill of Review determined, and if the Biſhop (who is of a great Age) ſhould happen to die, Sir Henry would loſe them quite, for he cannot revive the Suit for Coſts only &c. E contra it was ſaid for the Biſhop, that the Rules produced on the other Side were *obſolete*, and had been out of Uſe for ſeveral Years in many Particulars, and therefore were not to be taken as ſtanding Rules of the Court; that for many Years laſt paſt Bills of Review have been brought, without Leave of the Court, upon Motion or Petition, and it was never inſiſted on as irregular; that in *Lieu thereof a Depoſit of 50 l. is left with the Regiſter upon filing the Bill of Review*, ſo that it is plain theſe old Rules have not been obſerved of late Years. That ſoon after the Reſtoration, the Rules and Orders of the Court were reviſed and corrected by Clarendon C. and that theſe laſt are taken now to be the ſtanding Rules and Orders of the Court, as they are printed, and called Ordines Cancellariæ, and in that Book

MS. Rep. 7 December, 4 Geo. Sir Henry Lyddal v. the Biſhop of Durham.

Book there is no ſuch Order as they have inſiſted on the other Side; that a Bill of Review is like a Writ of Error at Law, which ſuſpends the Execution of the Judgment. The Coſts decreed is not a Duty, but a Conſequence only of a Decree againſt the Party; that if the Decree be revers'd, of Conſequence the Coſts are gone, and therefore ought to wait the Event of the Bill of Review. Per Cowper C. I think *the old Orders* that have been read *are reaſonable and juſt*, and ought to be obſerved to prevent unconſcionable Delays by Bills of Review, which would be brought in all Cauſes of Conſequence and Value, if they might be filed without Leave of the Court, and before the Decree performed, and I think *Payment of Coſts ought to be performed rather than any other Part of the Decree*, eſpecially in this Caſe, where the new Matter diſcovered was in the Power of the Party, and it was his Fault and Neglect it was not diſcovered ſooner; ſo let the Event of the Bill of Review be what it will, the other Side ought to have Coſts, as in the like Caſe of a New Trial granted upon the like Grounds. Where a Sum of *Money* is *decreed*, the Money muſt be paid before a Bill of Review is filed, tho' it muſt be refunded if the Decree be revers'd upon the Bill of Review; but in the preſent Caſe, if the Decree ſhould be revers'd, yet the Coſts ought not to be refunded, which makes it a much ſtronger Caſe. I think the *Party himſelf ſhould make an Affidavit that this New Matter was diſcovered ſince the Decree*, and that the Affidavit of a Solicitor is not ſufficient; for the Biſhop himſelf, or ſome other Agent of his, might be informed of this Matter before, at leaſt if the Biſhop, by reaſon of his Age, high Station and Quality, may be excuſed from making an Affidavit of the particular Matters and Facts, yet, at leaſt, he ſhould have an Affidavit to corroborate that of his Solicitor, but this *Affidavit of the Solicitor alone is not a ſufficient Ground for a Bill of Review*, and therefore the Counſel for the Biſhop muſt take nothing by their Motion; Per Cowper C.

7. Upon every Bill of Review to reverſe a Decree, the *Plaintiff muſt depoſit 50 l.* with the Regiſter *to anſwer Coſts* of Suit to the Defendant. 2 Wms's Rep. 283. Trin. 1725. Anon.

8. If brought *upon new Matter, as* upon a *Deed diſcovered* by the Plaintiff *ſince the former Decree*, the Plaintiff muſt have the *Leave of the Court* for filing ſuch Bill, tho' not neceſſary in the Caſe above for reverſing a Decree for Error appearing on the Face thereof. Ibid. 284.

9. *But* in the principal Caſe, the Plaintiff having depoſited the 50 l. and annexed an *Affidavit* to the Bill, *that the Deed* on which the Bill of Review was founded *came firſt to the Plaintiff's Knowledge after pronouncing the Decree*, the Bill was allowed upon Plaintiff's paying the Coſts of Defendant's Motion to diſmiſs the Bill, becauſe it was filed without the Leave of the Court. Ibid. 284. Anon.

10. No Bill of Review lies *without paying the Duty decreed.* MS. Tab. Jan. 21, 1717, Biſhop of Durham v. Lyddell.—March 1, 1726, Aſhton v. Smith.

(Z. 4) Bill of Review. At what Time.

1. BILL of Review was *diſmiſſed*, for that it was a *long Time* ſince the Decree was made, and the Plaintiff reſted under it without any Complaint. 2 Chan. Rep. 46. 22 Car. 2. E. of Caſtlehaven v. Underhill.

2. Ap-

2. *Appeal to the Houſe of Lords* from a Decree in Chancery, and on Petition of the Appellants to examine Witneſſes in the Cauſe, it was rejected, and the Petition *diſmiſs'd*, and now the Appellants bring a Bill of Review; and 'twas decreed that the Defendants ſhould anſwer the Bill of Review, or demur on the Errors therein, and the Benefit of the Order of Diſmiſſion in Parliament ſaved to the Defendants. Fin. Rep. 468. Mich. 32 Car. 2. Needler v. Kendall & Hallet.

3. A *Bill* having been *taken pro Confeſſo*, a Bill of *Review* was brought, and a *Demurrer* having been put in to it, was *allow'd*; and now a new Bill of Review being brought the Defendant *demurr'd*, and for Cauſe ſhewed that a Bill of Review lies not *after a Bill of Review*, and the Demurrer was allow'd. Vern. 135. pl. 124. Hill. 1682. Dunny v. Filmore. 2 Chan. Caſes 133. S. C. and the Bill of Review diſmiſs'd, becauſe of the former Bill, tho' there was manifeſt Error not only in the Form of the Court, but alſo in the Right, viz. 2 Heirs, having Title as Heirs, one of them Plaintiff had a Decree for the Whole, whereas he had Title only to a Moiety; and Ld. Keeper North who diſmiſſed the Bill ſaid, that there was no Remedy but in Parliament, and there is a Nota, that there was no anſwer to put in, but the Bill taken Pro Confeſſo. —See Tit. Pro Confeſſo (A) pl. 4. S. C.—Vern. 417. pl. 396. Arg. cites S. C. that upon a Bill of Review the Court had decreed the whole Eſtate to the Plaintiff; and that though it appeared, even upon the Face of the Decree, that the Plaintiff had a Title but to one Moiety only, yet it was there reſolved that no Bill of Review would lie upon a Bill of Review, and the Defendant was left without Remedy. —The firſt Bill of Review was diſmiſs'd, but not on the Merits, and a 2d was allowed; but it was ordered not to proceed without performing the Decree made on the original Bill. Fin. Rep. 162. Mich. 26 Car. 2. Ruton v. Aſcough.

4. Tho' there is no Limitation of Time for bringing a Bill of Review, yet after a *long Acquieſcence* under a Decree Chancery will not reverſe it, but upon very apparent Errors; per Ld. Keeper North. Vern. 287. pl. 285. Hill. 1684. Fitton v. Earl of Macclesfield.

5. 'Twas ſaid by ſome at the Bar, that a *Fine and Non-claim* is a *Bar* to a Bill of Review, if the Party was not in Priſon &c. Vern. 290. Hill. 1684. in the Caſe of Fitton v. Earl Macclesfield.

6. A Man cannot bring a Bill of Review *after a Demurrer allow'd to a former* Bill of Review; per Jefferies C. Vern. 441. pl. 413. Hill. 1686. Pitt v. the Earl of Arglaſs.

7. It was agreed by Court and Bar, that the Courſe of the Court is, before any Bill of Review is granted, the *former Decree ought to be executed, if the Cauſe* of the Bill of Review *be not ſuch as extinguiſhes the whole Right* and Foundation of the Decree, *As a Releaſe*; and that is a good Plea in Bar of a Bill of Review, that the former Decree is not executed; and it was ſaid that tho' Bills of Review be in Nature of a Writ of Error, yet it is not favoured in Equity; for upon Writ of Error (and that only in ſome particular Caſes) one need only to give Bail to pay Principal and Coſts; but in Bill of Review the Decree ought to be actually complied with; and beſides there ought to be Security for Coſts. But a Caſe of **Palmer v. Denby** was cited, where, in the Caſe of an Executor, it was granted without Execution of the Decree. 12 Mod. 343. Mich. 11 W. 3. in Canc.

(Z. 5) Pleas to Bills of Review. And what may be aſſigned for Error.

See (Z. 4) pl. 5. 7.

1. THE *Defendant* anſwered the Bill of Review, but ſo as that ſome Matter *in his Anſwer would bring into Examination ſome Part of the Decree, as it was ſigned and inrolled*; on which Anſwer, as to

that Part, there was a Demurrer, becauſe this would tend to Perjury and Infiniteneſs to re-examine Things examined and decreed; of which Opinion the Court was; but as well the Defendant's Counſel as the Court ſaid there could be no Demurrer upon an Anſwer in Equity. Serjeant Glyn, for the Plaintiff, ſaid he had known it. The Court made an Order, that there ſhould be no Examination of that which had been examined; and that was the Rule. 2 Freem. Rep. 181. pl. 249. 23 June, 16 Car. 2. Williams v. Owen.

2. To a Bill of Review the Defendant *pleaded the former Decree ſign'd and inroll'd*, and that there was no Error ſhewn in it, and the ſame Matter was fully heard and examined, and ſettled, which now was endeavoured to be examined again, and the Plea was allow'd. Fin. R. 209. Paſch. 27 Car. 2. Evans v. Canning.

3. It was objected againſt the Bill of Review, that they had *aſſigned Errors collected from the Proofs in the Cauſe, that did not appear in the Body of the Decree.* But the Ld. Keeper obſerved that was occaſioned by the ill Way they had got of late in drawing up Decrees in general, without particularly ſtating the Matters of Fact; and ſaid the *Plaintiff in a Bill of Review ſhould not be concluded* by it, *unleſs the Matter of Fact were particularly ſtated in the Decree.* 1 Vern. 215. pl. 212. Hill. 1683. Bonham v. Newcomb.

2 Chan. Caſes 161, 162. Broad v. Broad, S. C. accordingly; and it is there ſaid Arg. that the Plaintiff in a Bill of Review cannot allege Matter of Fact contrary to what is ſtated in the Decree to be proved.

4. A Debate aroſe touching the Stating of the Matters of Fact in a Decree, and it was complained that the Regiſters now drew up Decrees in ſuch a manner as that no Bill of Review could be brought; for they only recite the Bill and Anſwer, and then add, That upon the reading the Proofs, and hearing what was alleged on either Side, it was decreed ſo and ſo; and never mention what particular Facts were allowed by the Court to be ſufficiently proved, and what not, that ſo upon a Bill of Review it might appear to the Court what Facts the Decree was grounded on. The Ld. Keeper declared he would not allow of that Way of drawing up Decrees in general; but that the *Facts that were proved ſhould be particularly ſo mentioned in the Decree*; *otherwiſe* if a Bill of Review was brought, *thoſe Facts ſhould be taken as not proved*; for elſe a Decree could never be reverſed by a Bill of Review, but all erroneous Decrees muſt be reverſed upon Appeals. 1 Vern. 214. pl. 211. Hill. 1683. Brend v. Brend.

5. *No Objection* is to be made on a Bill of Review *that is not aſſign'd for Error.* MS. Tab. Jan. 8, 1717. Watkins v. Price.

6. *Objection to a Maſter's Report* cannot be aſſigned for Error upon a Bill of Review. MS. Tab. 8 Jan. 1717. Watkins v. Price.

7. *Matters* already *ſettled, or which might have been put in Iſſue in the original Cauſe*, ſhall never be drawn into Examination upon a Bill of Review. MS. Tab. Jan. 13, 1719. Ludlow v. Macartney.

8. Bill of Review is uſual upon *Diſcovery of new Evidence.* MS. Rep. Hill. Vac. 15 March 1734. S. S. Company v. Bumſtead.

(Z. 6) Coſts and Damages. In what Caſes. On Bills of Review.

3 Chan. Rep. 15, 16. S. C. Directions were

1. THE *Defendant had a Decree for Money.* The *Plaintiff* by Bill of Review *reverſed this Decree, and the Money decreed to the Plaintiff.* Per Cur. on Search of Precedents, the *Defendant ſhall not pay Damage*

mage for this Money. 2 Freem. Rep. 181. pl. 247. 23 May, 16 Car. 2. given to search for Precedents
Jackſon v. Eyre.

whether Damages had been given on a Bill of Review, and no Precedents were now produced, and it was confidently affirmed that there was no Precedent of any Coſts or Damages given on a Bill of Review, and *compared it to a Judgment in a Writ of Error*, where the Judgment is, *that the Party ſhall recover quicquid amiſit per Judicium prædictum*, but no Damages or Coſts; and in this Caſe it was ruled that there ſhould be none.—— Nelſ. Chan. Rep. 83. Jackſon v. Digry, S. P. accordingly in much the ſame Words, and ſeems to be S. C.

2. A Bill of Review was brought, and demurr'd to; and afterwards the Counſel for the *Plaintiff in the Bill of Review moved the Court to diſcharge the Bill, as not being regularly filed, upon Payment of Coſts out of the* 50 *l. depoſited* in Court upon the Filing thereof, and the ſame was granted by Lord C. Cowper. MS. Rep. Mich. 4 Geo. The Biſhop of Durham v. Sir Henry Lyddal.

(A. a) Coſts. [In what Caſes in General. And How.]

1. THE Plaintiff ſhall not recover any Coſts in Chancery, **tho' he recovers the Thing for which he ſues, As a Deed, or ſuch like, which is not recovered in Damages.**

2. Where a Feme is *newly endow'd in Chancery*, there ſhe ſhall not recover Damages; for thoſe of the Chancery do not give Damages. Br. Damages, pl. 195. cites 42 Aſſ. 32. and 43 E. 3. 32.

3. Damages ſhall not be given *to the Defendant in Chancery* by Statute, *but only where the Bill is found true or falſe*, and *not where* the Bill is found *inſufficient in Matter*; for this is out of the Caſe of the Statute. Br. Damages, pl. 163. cites 7 E. 4. 14. per Cur.

4. Foraſmuch as it is informed, the Trial of the *Truth of the Matter reſteth altogether in the Declaration of the Defendant*, it is therefore ordered that the Defendant ſhall be examined upon Interrogatories to be adminiſter'd by the Plaintiff; upon whoſe Examination, if the Matter fall not out for the Plaintiff, then the *Plaintiff to pay the Defendant's Coſts*, and the Cauſe to be diſmiſs'd. Cary's Rep. 64. cites 2 Eliz. Fol. 122. Fifield v. Vimore.

5. The Plaintiff *at the Day* appointed *for Hearing appeared not*, therefore the Defendant is diſmiſs'd with Coſts. Cary's Rep. 64. cites 2 Eliz. Fol. 125. Fincham v. Backwood.

6. The *Defendant* being *ſerved with a Proceſs*, found the *Cauſe ſet down for Hearing*, and attended, and was diſmiſs'd with Coſts, becauſe the *Plaintiff was not ready*. Toth. 108, 109. cites 15 Eliz. Clayton v. Leigh.

7. The Defendant is adjudged to pay to the Plaintiffs 40 s. Coſts, for ſuing out Proceſs of *Contempt* againſt him, *being diſcharged by her Majeſty's General Pardon*. Cary's Rep. 79. cites 18 & 19 Eliz. Jones & Paris v. Jones.

8. The Plaintiff *ſhewed the Defendant a Writ*; but did deliver him neither Note of the Day of his Appearance, neither did the ſame appear unto him by the Schedule, Label, or any other Paper, and the Defendant appearing found *no Bill*. It is ordered the Defendant be allowed good Coſts, and an Attachment againſt the Plaintiff for ſuch Serving. Cary's Rep. 83. cites 19 Eliz. Brightman v. Powtrell.

9. Coſts to *Witneſſes ſerved to teſtify*, having no Charges tender'd unto them, nor any Interrogatories put in for them to be examined upon. Cary's

Cary's Rep. 87, 88. cites 19 Eliz. Pearce & Ux' v. Crawthorne & White.

10. Coſts *paid* to a Witneſs *before he be examined.* Cary's Rep. 88. cites 19 Eliz. Belgrave v. the Earl of Hertford v. Drury.

11. Subpœna ſerved at the *Suit of an unknown Man*, and *no Bill in Court*, the Server to pay Coſts. Cary's Rep. 92. cites 19 Eliz.

12. The Plaintiff was adjudged to pay the *Defendant* 37 s. 6 d. Coſts, for that he *being ſerved* with a Subpœna in Hillary-Term appeared, and by his Anſwer *diſclaim'd*, and yet after the Plaintiff ſerved him with a Subpœna to rejoin; but afterwards the ſame Coſts were diſcharged by Motion, for that the *Defendant had, before the Coſts, put in his Rejoinder*; but upon a Diſclaimer no Coſts is to be allow'd. Cary's Rep. 156. cites 21 Eliz. Read v. Hawſted, als. Lane.

13. The Defendant was *taken upon a Commiſſion of Rebellion* at the Plaintiff's Suit, and required his Coſts to be allowed him. The Court asking the Opinion of the Clerks, it was agreed with one Conſent, that he ſhould have his Coſts allowed, therefore ordered accordingly. Cary's Rep. 156. cites 21 Eliz. Morgan v. Ap John Gowge.

14. The Plaintiff is adjudged to pay to the Defendant 50s. Coſts for *proſecuting Proceſs of Contempt* againſt him, and *no Contempt proved.* Cary's Rep. 117. cites 21 & 22 Eliz. Wrayford v. Weight & Hingeſton.

15. The *Plaintiff, as ſole Executor to R. M. exhibited a Bill againſt the Defendants for the ſame Matter, for which the Plaintiff and D. G. as Executors to the ſame M. exhibited another Bill*, and order'd, that both Bills ſhould be referr'd; and if both for one Cauſe, the Defendants ſhall be diſmiſſed from one of the Bills with Coſts. Cary's Rep. 125. cites 21 & 22 Eliz. Maunder v. Wright and Allis.

16. A Defendant *examined touching a Contempt, and diſcharged* thereof, ſhall have Coſts of Courſe, if a *Commiſſion* be not preſently taken out to prove it; and if he prove it not, then *increaſe of Coſts.* Toth. 134. cites 37 Eliz. Atkinſon v. Ailoff.

17. If a Man *excepts againſt an Anſwer*, and hath it referred, if thereupon it falls out to be *good*, the Defendant ſhall have Coſts for that Trouble upon Motion. Toth. 149. cites Hill. 39 Eliz. Beſwick v. Fox.

18. A Bill was exhibited againſt an Executor, to be relieved againſt a Bond given by Plaintiff to the Teſtator. The Court decreed for the Plaintiff, and 140 l. Coſts were taxed. The Defendant moved to have the Coſts diſcharged, becauſe an Executor is not liable to Coſts. It was inſiſted, that an Executor, in all Caſes at Law, where he is Defendant, pays Coſts if the Judgment is againſt him, As De BonisTeſtatoris ſi &c. But it was ruled, that an *Executor*, being *Defendant in Equity, ſhall not pay Coſts*, becauſe it is without Precedent. Hard. 165. Hill. 1659. in the Exchequer, Twiſleton v. Thelwell.

19. Where a Man applies to be reliev'd againſt the Penalty of a Bond, and is ordered in Chancery to pay Intereſt and Coſts, it will *extend to Coſts at Law as well as in Chancery.* 3 Ch. R. 5. Hill. 14 Car. 2. Haſl v. Higham.

2 Freem. Rep. 181. pl. 247. S. C. accordingly. —Nelſ. Chan. Rep. 83 Jackſon v Digry, S. C. accordingly.

20. No *Damages* or *Coſts* were given *on a Bill of Review*, and it was ſaid, there was no Precedent of any, and compared it to a Judgment in a Writ of Error, where the Judgment is, that the Party ſhall recover, Quicquid amiſit per Judicium prædict' but no Damages or Coſts. 3 Ch. R. 15. 23 May, 16 Car. 2. Jackſon v. Eyre.

21. *Subpœna* was ſerv'd *on Defendant's Servant, who gave no Notice to Defendant*, who was proſecuted for Contempt to a Serjeant at Arms; Per Cur. tho' the Want of Notice is ſufficient to diſcharge the Contempt, yet Defendant ſhall pay Plaintiff's Coſts, elſe Plaintiff may be put to Charge without any Fault of his; for Prima Facie the Service was

was good, and Ground enough for Plaintiff to go on with Proceſs of Contempt, and ſo ſhall have his Coſts. Hard. 405. pl. 6. Paſch. 17 Car. 2. in Scacc. Duncomb v. Hide.

23. Coſts from their Time of being tax'd ſhall *carry Intereſt*, and ſhall charge the Aſſets by Deſcent. 2 Chan. Rep. 247. 34 Car. 2. Lady Dacres v. Chute.

24. When a Defendant has demurred, he may aſſign another Cauſe of *Demurrer at the Bar*, paying Coſts, and if ſuch Demurrer is over-rul'd, he ought, in Strictneſs, to pay double Coſts; but when a Defendant has pleaded, and there is no Demurrer in Court, he cannot demur at the Bar, tho' he would pay Coſts. Vern. 78. pl. 72. Mich. 1682. Durdant v. Redman.

25. *Demurrer* allowed, but without any Coſts, becauſe it was a Demurrer only, without any Anſwer, and came in by *Commiſſion*; per North K. Vern. 282. pl. 279. Mich. 1684. Elme v. Shaw.

26. Ld. Chancellor Jefferies declar'd, that he would not allow of the Rule of diſmiſſing a *Bill* on 20 s. Coſts, but ordered, that for the Future the Defendant ſhould have the Coſts, he ſhould ſwear he was out of Purſe; but in ſuch Affidavit he muſt ſpecify the Particulars, that the Court may judge of the Reaſonableneſs, if there ſhould be Occaſion. Vern. 334. pl. 328. Mich. 1685.

North K. made a Rule, that for the future a Maſter ſhould tax Defendant his full Coſts. Vern. 116. Anon.

27. One may *add a new Defendant* without paying Coſts, ſo as ſuch Addition does not make the other Defendant's to change their Anſwer. 12 Mod. 561. Mich. 13 W. 3. in Canc. Anon.

28. 4 & 5 *Annæ, cap.* 16. *S.* 23. *Gives Defendant full Coſts where the Bill is diſmiſſed for* want of Proſecution.

29. Coſts are *not always to follow the Event of a Cauſe*; As where the *Defendants claimed* 800 *l.* to be due to them, and upon Reference to the *Maſter*, he *reported* 180 *l. due, and no more*, the Court would not give the Defendants Coſts, tho' the Balance was in their Favour, becauſe they would have over-charged 620 l. and it being in the Caſe of a Charity, the Plaintiffs were ordered their Coſts, becauſe they had been ſerviceable to the Charity, by eaſing them of the 620 l. Debt which was claimed againſt them; and the Court ordered the ſame to be paid out of the improved Rents of the Charity. Wms'. Rep. 576, 577. Trin. 1717. Att. Gen. at the Relation of the Overſeers of Illington v. the Brewers Company.

30. The *Heir at Law*, or *Heir Male to the Honour of a Family*, ſhall not pay Coſts if there be *probable Cauſe to contend for the Family Eſtate.*— *As* where he found a Deed by which a Remainder veſted in him, and not being privy to a Revocation made thereof purſuant to a Power reſerved; it was not only lawful, but reaſonable for him to make an enquiry by Bill; Per Ld. Ch. Parker. Wms's Rep. 482. Mich. 1718. Shales v. Sir John Barrington.

31. If a *Legatee or Creditor* not Party to the Cauſe, *comes in before the Maſter*, he ſhall have his Coſts; for it was in his Power to have brought a Bill for his Legacy or Debt, which would have put the Eſtate to farther Charge; Per Ld. C. Macclesfield. 2 Wms's Rep. 26. Trin. 1722. Maxwell v. Wettenhall.

32. If the Plaintiff *in an Iſſue directed* out of Chancery, *gives Notice of Tryal, and does not countermand it in Time*, Chancery on Motion will give Coſts without putting the Defendant to move the Court at Law where the Iſſue is to be tried. 2 Wms's Rep. 68. Trin. 1722. Anon.

33. A *Bill* was *diſmiſſed with Coſts*, and *the Perſon*, who was *intitled* to Coſts, *died before they were taxed*; there is no Relief to be had in this Caſe. Sel. Caſes in Canc. in Ld. King's Time, 21. Trin. 11 Geo. 1. Anon.

34. *Decree* was had *by Default*, and a Petition for Re-hearing; the *Perſon in Poſſeſſion of the Decree, did not attend at the Re-hearing*; Bill diſmiſſed with Coſts as to the Petitioner. Sel. Caſes in Ld. King's Time, 50. Mich. 11 Geo. 1. Wilſon v. Dabbs.

35. On a *Bill* by A. Lord of the Manor of D. againſt B. Lord of the Manor of S. *to ſettle the Boundaries of the Manor of D.* (the Parties inſiſting upon different Boundaries) it was ordered that they give a Note to each other of their Boundaries, and the Matter to be tried in a *feigned Iſſue*, which being afterwards *found for the Defendant on* 3 *ſeveral Trials*; (the 2d having been certified by the Judge to be againſt Evidence) and thereby the Boundaries appeared to be as given in by the Defendant. It was admitted that as to the Coſts of the 3 Trials, the Plaintiff muſt pay them; but his Counſel urged that as to the Coſts here, the *Bill was in Nature of a Bill of Partition*, in which Caſe neither ſide pay Coſts. But the Maſter of the Rolls, though he allowed the Objection to have ſome Weight, Held that as the *Defendant had no Bill* here, and the Plaintiff might have tried the Matter at Law, and more eſpecially ſince *no Part of the Iſſue is found for the Plaintiff*, he ſhould be within the Common Rule and pay Coſts throughout; and diſmiſſed the Bill with Coſts. 2 Wms's Rep. 376. Mich. 1726. Metcalf v. Beckwith.

36. Note, The Courſe of the Court is, that where a *Cauſe is brought on upon a Bill and Anſwer*, and the Plaintiff's *Bill is diſmiſſed* as againſt a Defendant, there *only* 40 *s. Coſts* is to be paid by the Plaintiff; *but if the Plaintiff has a Decree* againſt the Defendant, though upon Bill and Anſwer only, there if the Plaintiff has Coſts given him, it muſt be *Coſts to be taxed*. 2 Wms's Rep. 387. Mich. 1726. Anon.

37. A *Witneſs examined on a Commiſſion depoſed, reflecting Words upon* . . . . . for which he was ordered to pay Coſts; but upon a Motion to diſcharge the Order, Ld. C. King ſaid that he found the Commiſſioners on both ſides attended at the Examination, and ſince it was their fault to take down any Depoſition that was Scandalous or Impertinent, he diſcharged the Order. 2 Wms's Rep. 406. Hill. 1726. Anon.

But the Reporter makes a Quære, If the *Interrogatory had led to it*, whether the Counſel ſigning them would not have been liable to Coſts? But that it ſeems in the principal Caſe it did not, it being the laſt General Interrogatory. Ibid.

38. If an *Anſwer* be *reported Scandalous or Impertinent*, the Coſts by the Rule of the Court are to lie upon the Counſell; Arg. and not denied. 2 Wms's Rep. 406. Anon.

39. If there be a *Decree for Coſts*, and the *Defendant dies before Taxation*, the Coſts are loſt; Arg. and admitted on the other Side, that if not aſcertained on the Death of the Party, they are in ſome Caſes loſt; but where they are to be looked upon *as a Duty* and not as Coſts only, as where the Suitor having paid the Regiſter his Fee for making an Entry, which he neglected, by Means whereof the Proceedings were irregular and the Defendant obliged to pay 58 l. Coſts; the Regiſter muſt re-imburſe the Suitor, and though he dies before the Coſts aſcertained, yet his Executor ſhall be liable. For this was not a bare Miſbehaviour, but the Receipt of the Fee amounted by Implication of Law to a Promiſe and Agreement to procure an Entry; and it was ſo held by Ld. C. King. 2 Wms's Rep. (657) Mich. 1731. James v. Philips.

(B. a) *How* the *Suit* ſhall be *proſecuted*, [or rather in what Caſes Inferior Courts of Equity, exceeding their Authority ſhall be prohibited.]

1. UPON a Suit in a Court of Equity, if the Court will compel the Defendant to ſtand to their Award, a Prohibition ſhall be granted, for this is againſt Law; for if they have Juriſdiction of the Thing, they may compel him to perform it without an Obligation. H. 13 Jac. B. R. *between Atkinſon & Hobbs*, a Prohibition granted to the Council of York.

2. If there be a Suit before the Council of the Marches of Wales, and the Cauſe is diſmiſſed, but referred to certain Perſons to hear and determine it, and this is without the Conſent of the Defendant; but thereupon the Referrees make an Order, and certifie it to the Court, and for Non-performance thereof the Court (*) impriſon him; a Prohibition lies, for the Court cannot make Strangers Judges in the Caſe without the Aſſent of the Parties. M. 8 Car. B. R. *between Mayow & Mayow* reſolved, and a Prohibition granted. S. P. Where a Suit was exhibited in the Court of Requeſts; Arg. Mar. 102. Trin. 17 Car. C. B. * Fol. 383.

and ſays that by referring the Merits of the Cauſe, the others they would create Courts of Equity without Number.

(C. a) Examination of Witneſſes *in Perpetuam rei Memoriam.*

1. IF a Man aſſumes to J. S. in Conſideration that he will marry his Daughter, that he will pay him 500 l. after the Death of J. D. in this Caſe, becauſe the Witneſſes are old; and J. D. is as young as J. S. ſo that the Witneſſes to prove the Promiſe may die before J. D. and ſo J. S. ſhall be without Remedy for his Promiſe, he may exhibit his Bill in Chancery, and examine Witneſſes to prove it, in which he, that made the Promiſe, may join in Nature of an Examination in perpetuam rei memoriam. M. 19 Jac. in Chancery, *between Sir Edward Tirrel & Sir Thomas Co.*

2. Witneſſes were examined *by Commiſſion before Anſwer*, in regard they were *old*. Cary's Rep. 67, 68. cites 2 Eliz. Fol. 171. Sir Radmus Bagnold v. Green.

3. The Plaintiff exhibited his Bill to examine Witneſſes in perpetual Memory *touching a Leaſe* of Lands, which he, and thoſe by whom he claimeth have *enjoyed* 40 *Years*; the *Defendant* by Anſwer *claimeth the Lands as Copyhold of Inheritance to S.* who is Owner of the Inheritance, and *within Age*; and therefore pray'd that no Witneſſes might be examined till S. be of full Age. And yet becauſe the *Witneſſes being old*, and may die in the Interim, therefore a Subpœna is awarded againſt the Defendant, to ſhew Cauſe why a Commiſſion ſhould not be granted. Cary's Rep. 156, 157. cites 21 Eliz. Hearing v. Fiſher.

4. A Bill to examine Witneſſes in perpetual Memory, touching Common, not thought fit; *but a Bill upon the Title, and to examine*, and Publication thereupon, *and then to go to Law*. Toth. 80. cites 38 & 39 Eliz. Throckmorton v. Griffin.

5. A

5. A Bill to examine Witneſſes in perpetual Memory, concerning *Common*, was retained. Toth. 85. cites 11 Car. Pott v. Scarborough.

6. Witneſſes were examined *to ſupport an Entail.* Ch. Rep. 174. Anno 1659. Cooper v. Tragonwell.

A. and B. had *each of them purchaſed a Reverſion expectant on the Death of the Tenant for Life.* A. brought a Bill to examine his Witneſſes to preſerve their Teſtimony, and to be admitted to try his Title in the Life-time of the Tenant for Life; but foraſmuch as B. a Purchaſor was a Defendant, the Court would do nothing in it, but diſmiſs'd the Plaintiff's Bill; and he loſt his Land for want of examining his Witneſſes. Cited per Ld. Rawlinſon, Trin. 1690. Vern. 159. as the Caſe of Seyborn v. Clifton.

7. Witneſſes were examined to *prove a true Deed of Uſes of a Fine*, whereby the Lands were limited to the Conuſor and his Wife for Life, and after to the Plaintiff their eldeſt Son in Tail, and to diſprove a 2d Deed of Uſes forged, limiting the Remainder to the Heirs of the Survivor of the Conuſor and his Wife. At the Time of the Fine levied J. S. had an Eſtate for Life in the Lands, and is ſtill living, but the Conuſor and his Wife are dead. The Conuſor ſold the Lands, and made a Title by the forged *Deed of Uſes*. The *Purchaſor* demurr'd to the Bill; but becauſe the Plaintiff could not try his Title at Law, the *Tenant for Life being living*, and that therefore this Court is obliged in Juſtice to preſerve a Title at Law, which cannot at preſent be tried by reaſon of ſuch Impediment, the Demurrer was over-ruled. Nelſ. Ch. Rep. 125, 126. Anno 20 Car. 2. Seaborn v. Chilſton.

8. Bill was to perpetuate the Teſtimony of Witneſſes *to prove a Will and Codicil.* The Defendants *plead a Suit in the Prerogative Court*, concerning the Validity of the ſaid Codicil, where that Matter is proper to be determined. The Court allowed the Plea *quouſque* it is determined in the Spiritual Court, whether the ſaid Codicil is to be proved or no, but without Coſts. Fin. Rep. 67. Hill. 25 Car. 2. Rogers v. Bromfield & al'.

9. *The Method is* firſt to exhibit a Bill in Chancery, and therein to ſet forth a Title, and that the Witneſſes to prove it are old, and not likely to live, by which the Plaintiff is in Danger to loſe it, and then to pray a Commiſſion to examine them, and a Subpœna to the Parties concerned to ſhew Cauſe, if they can, to the contrary; and theſe Depoſitions are not to be uſed againſt any other than the ſame Defendants, or thoſe claiming under them. See Fin. Rep. 391. Trin. 30 Car. 2. Maſon v. Goodburne, in Marg.

10. Bill *to bring a Deed into Court*, and to perpetuate the Teſtimony of Witneſſes, and decreed. Fin. Rep. 391. Trin. 30 Car. 2. Maſon v. Goodburn & Fellowlove.

S P. Vern. 312. in pl. 308. One who is *in Poſſeſſion of a Common, Piſchary, Rent-charge* &c. may bring a Bill

11. Bill by a *Commoner* (againſt whom an Action was brought at Law by another Commoner, and 10l. Damages recovered) to examine his Witneſſes *to prove his Right* of Common in Perpetuam rei Memoriam. Per Cur. ſuch Bill is not to be admitted here; A Commoner ought not to come here to prove his Right of Common, till he has recovered at Law in Affirmance of his Right. Vern. 308. Hill. 1684. Pawlett v. Ingreſs.

to examine his Witneſſes in Perpetuam &c. tho' he has *not eſtabliſhed his Title at Law.* But if one that is out of Poſſeſſion brings ſuch Bill, a Demurrer will be good. But where *the Plaintiff ſuggeſted that the Defendant threaten'd to diſturb him &c. when his Witneſſes ſhould be dead*, if the Defendant not only threaten'd but actually *did diſturb by Fiſhing &c. daily*, in ſuch Caſe the *Defendant ſhould plead that he did daily diſturb the Plaintiff, and therefore the Plaintiff ſhould ſeek Remedy at Law*; or if the Plaintiff had * ſhewn in his Bill that Defendant had actually diſturbed him, then the *Demurrer* had been proper, but not for barely threatning. Chan. Prec. 531. Trin 1720. The Duke of Dorſet v. Serj. Girdler.

* Decreed per Ld. Keeper Wright. See Chan. Prec. 532. Winn v. Hatty.

12. On a Bill to perpetuate the Teſtimony of Witneſſes touching a *Right to a Way*, the Plaintiff muſt ſet out the Way exactly in his Bill

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per & trans as he ought to do in a Declaration at Law. But by North Ld. Keeper, ſuch trivial Things as Ways, Rights *of Common or Water-Courſes*, ſhall not be examined into, or at leaſt not till after a Recovery at Law; for the Examination coſts more than the Value of the Thing; and in the preſent Caſe the Plaintiff is either diſturbed in his Way, or he is not; if he be, he has his Remedy at Law; and if he be not, he has no Reaſon to complain. But for the Plaintiff 'twas ſaid, that the Bill charged that the *Plaintiff's Tenant was in Combination with the Defendant*, and would not ſuffer the Plaintiff to bring an Action in his Name. Vern. 312. pl. 308. Hill. 1684. Gell v. Hayward.

13. If a Bill be exhibited for the Examining of Witneſſes in Perpetuam rei Memoriam, if the *Plaintiff therein prays Relief*, the Bill ſhall be diſmiſs'd. 2 Vent. 366. Paſch. 36 Car. 2. in Canc. Anon.

14. Deviſee ſhall not examine Witneſſes in Perpetuam rei Memoriam, to *prove a Will againſt a Purchaſor without Notice*, till the Will has been eſtabliſhed by a Verdict at Law; per Ld. C. Jeffries. Vern. 354. pl. 350. Hill. 1 & 2 Jac. 2. Bechinall v. Arnold.

Nor any one elſe, if he be under no Impediment of trying his Title at Law. Vern. 441. pl. 415. Hill. 1686. Parry v. Rogers.

15. If Witneſſes are examined to perpetuate Teſtimony, and afterwards *a Witneſs dies*, yet the *Depoſitions ſhall not be Evidence, but only between the Parties to the Suit.* Arg. Carth. 80. Mich. 1 W. & M.

16. A Bill was brought *to diſcover a Title* to Land, and *for an Account of the Profits, and to perpetuate Teſtimony &c.* The Defendant anſwered as to the Title, and demurred as to the perpetuating Evidence, in regard the Plaintiff might bring his Ejectment and examine his Witneſſes at the Trial. And upon *Affidavit that the Plaintiff's Witneſſes were infirm, and unable to travel*, the Demurrer was over-ruled by the Maſter of the Rolls, and after by the Lord Chancellor on a Re-hearing; but his Lordſhip admitted, that without ſuch an Affidavit the Demurrer would have been good, it being a common Suggeſtion in a Bill; but when ſworn, if ſuch Demurrer ſhould be allowed, it would introduce great Inconvenience and Hardſhips, and a Failure of Juſtice. Wms's Rep. 117. Hill. 1709. Philips v. Carew.

17. It is a poſitive Rule that where there is any *Doubt on the Proofs*, a *Will* will not be eſtabliſhed againſt an Heir without *a Trial at Law*. 9 Mod. 90. Hill. 10 Geo. 1. Dawſon v. Chater. Ibid. cites Ld. Mountague's Caſe in the Houſe of Lords ſo decreed, tho' he himſelf had proved the Will in Doctors-Commons as to the Perſonal Eſtate.

(D. a) Bills in Chancery. For what they may be brought, and in what Caſes they lie, in General.

1. A Bill was brought *for an Account of a Perſonal Eſtate*, and decreed. 2 Ch. Caſes, 43. 32 & 33 Car. 2. Colſton v. Gardner. *Account.* See Tit. Account (D. a) &c.

2. Chancery has *Admiral Juriſdiction* by the Statute 31 H. 6. N. 66. or 68. which was never printed, and *Letters of Reprizal* may be *repealed* in Chancery after a Peace, notwithſtanding the Letters Patents are, that no Treaty of Peace ſhall prejudice them. Vern 54. pl. 51. Paſch. 1682. The King v. Carew. *Admiral Juriſdiction.*

Alien. 3. Chancery cannot compel one to *execute a Truſt for an Alien*; Per Roll J. Sty. 21. Paſch. 23 Car. B. R. in Caſe of the King v. Holland.

Alimony. 4. *Alimony* was decreed in Chancery on a Suit by the Wife and her Brother, againſt the Husband, to be paid her for a Year and an half. Chan. Rep. 44. 6 Car. 1. Lasbrook v. Tyler.

See Tit. Baron & Feme.

Bail Bonds. 5. Bill to be relieved againſt a *Bail Bond fraudulently aſſigned* by the Sheriff. Vern. 87. pl. 76. Mich. 1682. Izrael v. Narbourn.

Bankrupts. 6. Chancery will not intermeddle with Commiſſioners of *Sewers Accounts*; otherwiſe in Caſe of Receivers by Authority in Caſe of Commiſſioners of *Bankrupts*. Chan. Caſes 232. Trin. 26 Car. 2. Anon.

7. One that *has been examined by Commiſſioners of Bankrupts*, may be examined, or put to anſwer to the *ſame Matter* in Canc. 2 Chan. Caſes 73. Mich. 33 Car. 2. Perrat v. Ballard.

8. *Bankrupt or No Bankrupt* is only triable at Law, and ſo a Bill was diſmiſſed. 2 Chan. Caſes 153. Mich. 35 Car. 2. Harding v. March.

Beyond Sea. 9. Bill may be brought in Chancery to foreclose Mortgage of Lands out of the Juriſdiction of the Court, (as of the *Iſlands of Sarke, Guernſey*, &c. which are governed by the Laws of the Dutchy of Normandy) if the Perſon be here, or otherwiſe there might be a Failure of Juſtice, and Chancery *agit in Perſonam & non in Rem.* 1 Salk 404. 4 Ann. in Canc. Anon.

2 Vern. 494. pl. 445. Paſch. 1705. Toller v. Carteret, S. P. and ſeems to be S. C. and Ld. Keeper over-rul'd the Plea to the Juriſdiction for the Reaſon here given, and alſo, becauſe the Grant was of the whole Iſland.

Boundaries. 10. The Point *being* * *Parcel no Parcel* decreed, and being uncertain, the *Lands lying intermix'd*, ordered to be ſet out, notwithſtanding the Defendant, by general Words, in a Bargain and Sale, have enjoyed the ſame long. Toth. 126, 127. cites 9 Jac. Dean of Windſor v. Kinnerſley.

* S. P. by the Opinion of the Judges. Toth. 210. cites the Caſe of Egerton v. Egerton. —— * S. P. Toth. 210. cites Paſch. 2 & 3 Car. Hobby v. Bonby. —— S. P. Toth. 210. cites Paſch. 12 Car. Mr. Page's Report of Hetly v. the Earl of Suffolk.

11. A Suit to ſet out *Boundaries*. Toth. 84. cites Mich. 2 Car. Tipping v. Chamberlain.

12. On a Bill to ſettle Boundaries between *Freehold and Borough Engliſh* Lands, a Commiſſion was ordered to be directed to certain Perſons, as well to take the Defendant's Anſwer, as alſo to ſet forth the Metes and Bounds, and to return Terrars and Boundaries, which was done accordingly, and by Conſent of the Parties the Court decreed the Boundaries, and that the ſame be ratified to all Intents, as if the ſame had been judicially pronounced upon a full Hearing in Court. Nelſ. Chan. Rep. 14. by Ld. Coventry, 7 Jac. 1. Spyer v. Spyer.

13. Decreed for *Precincts* and Parcels. Toth. 130. cites 8 Car. Mayor of Norwich v. Dean of Norwich.

14. Bill was brought for a Commiſſion to ſet out the Boundaries *of a Parcel of Freehold Land, of about 12 Acres, ſuggeſted to be intermix'd with Copyhold* Lands, and undivided, and *which Defendant had recovered at Law* as belonging to him, and that the Metes and Bounds of the ſaid Freehold Lands were deſtroy'd. The Plaintiff offered to ſet out 12 Acres of Copyhold Lands in lieu thereof, ſo as Suits at Law might be avoided, and he indemnified from a Forfeiture to the Lord of the Manor. But it appearing by the Defendant's Anſwer, that the Lands by him claimed and recovered are a diſtinct piece of Ground, and incloſ'd, and

and known by the Name of H. and not intermix'd, a Commiſſion was denied. Fin. Rep. 17. Mich. 25 Car. 2. Davenport v. Bromley.

15. *Four Acres* of Lands which the Plaintiff had Title to, being intermix'd with Lands of Defendant *in a great Field*, and which, by *Ploughing and other Means, were ſo deſtroyed, that they could not be diſtinguiſhed* from the other Lands of the Defendant's, a Commiſſion was decreed to ſet out the Metes and Bounds of the ſaid 4 Acres. Fin. Rep. 96. Hill. 25 Car. 2. Boteler v. Spelman.

16. *Lands* were *leaſed for three Lives* to the Defendant's Father, who had Lands of his own contiguous. The *Fences were* afterwards *thrown down, and Boundaries deſtroyed.* The Plaintiff (Grandſon of the Leſſor) brought his Bill for a Diſcovery thereof, and alſo of what was in Arrear for Rent &c. and the Court ordered Defendant to anſwer as to the Boundaries. Fin. Rep. 239. Mich. 27 Car. 2. Glynn v. Seawen.

17. A Commiſſion was decreed to ſet out Boundaries, whereby 60 Acres of *Copyhold* might be *diſtinguiſhed from the Freeholds of other Perſons.* Fin. Rep. 162. Mich. 32 Car. 2. Wintle v. Carpenter.

18. Bill for *Rents* purchaſed by the Plaintiff of *2 s. and 3 s. per Ann.* ſuggeſting conſtant Payment Time out of Mind, but that they could not recover at Law, not knowing the Nature of the Rent, whether Rent-charge, Service, or Seck, and the Boundaries of the Land being uncertain, ſo could not declare at Law ſo preciſely as was required in an Avowry; but Defendant deſiring the Matter might be tried at Law, an Iſſue was directed to try if any and what Rents was iſſuing out of all or any of the Lands in the Bill mentioned. Vern. 359. pl. 354. Hill. 1685. Cox v. Foley.

Where a Rent-charge was granted to be iſſuing out of Lands, but the Lands charged lying intermix'd with others, and the Boundaries ſo confuſed that the Plaintiffs could not diſtrain, and therefore pray'd Relief by Bill; A Commiſſion was ordered to ſet out the Lands, and the ſame was returned and certified accordingly. Chan. Caſes 145, 146. cites it as a Precedent produced to the Court, as of 12 Car. 2. Bowman, alias, Boreman v. Yates.——Same Precedent cited as produced, Nelſ. Chan. Rep. 121, 122.——S. P. mention'd Chan. Rep. 63. in 8 Car. 1. Harding v. Suffolk (Counteſs.)

19. The Plaintiff's and Defendant's Lands lying contiguous, the Bill was to diſcover the Boundaries of the Defendant's Eſtate, alleging the ſame fully appeared by the Deeds and Writings in his Hands. The Defendant demurr'd. 2 Vern. 38. pl. 34. Hill. 1688. Hungerford v. Goreing.

Catching Bargains.

20. A Gentlewoman took the Death of her Husband ſo heavily, that ſhe ſaid ſhe would never marry again. Her Son gave her 10 l. to pay 100 l. *when ſhe ſhould marry*; which ſhe took. Afterwards ſhe married. Decreed to repay the 10 l. only. Ow. 34. Trin. 31 Eliz. Anon.

2 Ch. Caſes 241. Taylor v. Rudd, S. P. but the Demurrer was over-ruled, and Defendant ordered to anſwer.

21. A Widow gave a *Bond of 100 l. to B. on Condition of her marrying again*, and B. gave 100 l. Bond payable to the Widow's Executors if ſhe did not. The Widow marries. Decreed the Bond to be delivered up. 2 Vern. 215. pl. 197. Hill. 1690. Baker v. White.

Chambers in Inns of Court.

22. A Bill in Equity will not lie *to redeem a Mortgage of Chambers in an Inn of Court*; but Application muſt be made to the Bench, and if not redreſs'd there, then to the Judges of the Society; and the Courts at Weſtminſter have always declined meddling therein. And in the principal Caſe the Maſter of the Rolls ſaid he would not meddle with it; but the Benchers themſelves having recommended it to the Plaintiffs to come hither, and left them at Liberty to make this Application, therefore he thought ſuch Bill proper, and decreed a Redemption. 2 Wms's Rep. 511. Hill. 1728. Rakeſtraw v. Brewer.

Upon this Cauſe coming before the Lord Chancellor, he obliged them to ſhew that the Benchers would not determine the Matter, but had given Leave to go to Law; and ſaid that this Regard ought

ought to be had to all the Societies of Law, that all their Diſputes may be terminated among themſelves; and that Ld. Keeper Wright refuſed to hear a Cauſe of this Nature, and ſent it back to the Benchers. In this Caſe the Court determined the Right, and ordered that the Benchers ſhould ſettle what was due for Principal, Intereſt, and Coſts, and to take Accounts of the ſeveral Receipts and Allowances. Caſes in Chancery in Ld. King's Time, 56. 11 Geo. S. C.

Collateral Securities.

23. Bill was diſmiſs'd where it was brought to be relieved on *Collateral Security* and Supplementary. Chan. Caſes, 301. Mich. 28 Car. 2. Barns v. Canning & Pigot.

A Vendor of Lands takes a Leaſe of them at a certain Rent, with Condition of Re-entry, and gives Collateral Security for the Payment of the Rent, and a Power to re-enter. The Rent was arrear, and a Re-entry was made, and poſſeſs'd the ſame ſeveral Years. The Vendor could have no Relief againſt the Collateral Security, without paying the Arrears of the Rent due before the Re-entry as well as after, the Lands ſold being worth but 160 l. a Year, whereas they were ſold as worth 250 l. a Year, and the Leaſe taken was at that Rent. Chan. Caſes 261. Trin. 27 Car. 2. Anon.

Conformity.

24. *Bills of Conformity* have been long ſince *exploded*, and there is no ſuch Equity now in this Court; per North Ld. Keeper. Vern. 153. pl. 142. Paſch. 35 Car. 2. in Alderman Backwell's Caſe.

For a Horn.

25. Bill was brought by the Heir at Law *for a Horn*, by which the Land was held; and North Ld. Keeper was of Opinion the Heir would be well intitled to the Horn at Law. Vern. 273. pl. 270. Mich. 1684. Puſey v. Puſey.

Jointreſs.

See Tit. Jointreſs.

26. Bill was brought to have *Recompence on the Eviction of a Jointure, on the Statute of* 27 *H.* 8. 10. 2 Vern. 666. pl. 593. Mich. 1710. Counteſs of Derby v. Ld. Derby.

Juriſdiction Special.

27. Where a Matter is determined by a *Court erected by an Act of Parliament*, and the Matter was proper for their Juriſdiction, Chancery will not *intermeddle*. Fin. Rep. 319. Mich. 29 Car. 2. Combs v. Kingſton.

28. On Demurrer and Plea to a Bill to have an *Account of the Profits of* the Mendippe *Mines* in Somerſetſhire, they plead a *Special Act of Parliament*, which *had given Juriſdiction* of all Matters ariſing within the Mines to the Courts of *exclusive of all other Juriſdictions*. Per Ld. Chancellor, the Plea is not good, becauſe altho' you plead an excluſive Juriſdiction, yet you do *not aver that there is any Court of Equity there*. Vern. 58. pl. 55. Trin. 1682. Strode v. Little.

29. *And* this is *not like the* Juriſdiction of the *Sewers*, where this Court cannot intermeddle, becauſe there was a *new Juriſdiction created and reſerved intire to itſelf*; but here the Juriſdiction of determining Matters relating to theſe Mines is transferr'd to the Courts of which are ancient Courts, in which by the Common Law this Court did interpoſe in equitable Matters. Vern. 59. pl. 55. Trin. 1682. Strode v. Little.

Law Matters.

But to bring an Action of Trover it is common. Arg. Vern. 307. in Caſe of the Eaſt-India Company v. Evans; and cited the Printer's Caſe in this Court.

30. A Bill, which was *only preparatory to* the bringing *an Action on the Caſe*, was demurr'd to and allow'd. Toth. 72. Trin. 38 Eliz. Williams v. Nevil.

31. If A. diſſeiſes me of Land, and builds a Houſe on this Land, I ſhall have a *Judgment* for this; and he is not to go into Chancery to be relieved for this; per Coke Ch. J. 3 Bulſt. 116. Mich. 13 Jac. The King v. Dr. Goudge.

32. The

32. The Court of Chancery will not try or *aſcertain Damages recovered* at Law in an Action of Covenant, but ordered the Parties to Law on the *Covenant*. 2 Ch. R. 62. 23 Car. 2. Hooker v. Arthur.

33. In ſome Caſes even for a *Treſpaſs*, a Bill is proper in this Court, as where by the ſecret Contrivance a Man cannot eaſily prove it, as for inſtance, if a Man in his own Grounds digs a Way under Ground to my Mineral &c. Per North K. Vern. 130. pl. 114. Hill. 1682. in Caſe of East India Company v. Sandy's.

But ordinarily it lies not to diſcover a *Tort*, as to diſcover a *Treſpaſs in Lands or Goods*; Arg. 2 Chan. Caſes, 66. in the Stationer's Caſe.

34. Where a *Man ran away with a Casket of Jewels*, he was ordered to anſwer, and the Parties own Oath allowed as Evidence in Odium ſpoliatoris; cited per North K. Vern. 308. pl. 300. Hill. 1684. in Caſe of the East India Company v. Evans & al'.

35. Bill to *be quieted in the Poſſeſſion of an ancient Ferry uſed with a Rope over the River Ware* in Com. Durham, againſt 20 Defendants, who had cut the Rope, to avoid the Multiplicity of Actions &c. Per Parker C. You may have *Treſpaſs* for cutting the Rope; a Ferry is in Nature of an Highway, and a Bill does not lie to be quieted in the Poſſeſſion of an Highway. 'Tis true a Bill in Chancery does lie to be quieted in the Poſſeſſion of Common &c. but that is of a different Nature, this is a Navigable River, and the Rope to the Ferry is an Obſtruction to the Navigation; if the Plaintiff has any ſuch Right, there is a proper Remedy for him at Law, and therefore Bill diſmiſt with Coſts. MS. Rep. Paſch. 13 Ann. Hilton v. Lord Scarborough & al'.

Lunacy.

36. The Court will not retain a Bill to examine Point of *Lunacy*. Toth. 227. cites 10 Jac. Bonner v. Thwaite.

Manors.

37. Bill *to diſcover ſeveral ancient Cuſtoms of a Manor*, and for a Commiſſion to examine Witneſſes to perpetuate their Teſtimony; Defendant demurred for Want of Parties, and that it was a Matter examinable by a Jury, and the Cuſtoms not to be eſtabliſhed in this Court. Ordered to anſwer the Cuſtoms and other Matters charged in the Bill, whereby to bring the ſame in Iſſue, and leave was given to amend the Bill and make *all the Tenants Parties* (ſuch of them as will give them Letters of Attorney ſo to do) Plaintiffs, and the Reſt of them Defendants thereunto; but the Benefit of the Demurrer as to the eſtabliſhing the Cuſtoms in this Court, was reſerved to the Hearing. Fin. R. 114. Hill. 25 Car. 2. Hudſon, Fiſher & al.' v. Fletcher.

38. Bill by Lord of a Manor *to eſtabliſh an Uſage* and Cuſtom ever ſince H. 8th's Time, for the Lord upon the Preſentment of 7 Copyholders, and that agreed to be the by major Part of the Homage, *to incloſe waſte Ground to build upon*, and upon rendring ſeveral Court Rolls and hearing all Parties decreed to be eſtabliſhed, and that the Lord might grant Leaſes and Eſtates at Pleaſure, after ſuch Preſentment and Agreement. Fin. R. 263. Trin. 28 Car. 2. Lady Wentworth v. Clay, Jeffries, Hall & al'.

39. Bill to be relieved *pro Certo Letæ*, Curia Adviſare Vult. 2 Vern. 278. pl. 26. Mich. 1692. Chaſin v. Gawden.

Meaſures of Lands.

40. It was decreed what was a *Yard Land*, and how to ſet the ſame out. Toth. 131. cites 12 Car.

41. Where the Quantity of a *Yard Land* is *not known*, a Commiſſion ſhall Iſſue to ſet out ſo much Land as the Commiſſioners ſhall think fit, upon Common Intendments. Toth. 186. cites Hill. 14 Car. Biſhop of Hereford v. Awberry.

Peace Bills.

42. Bill of Peace *to prevent Multiplicity of Suits* proper for a Court of Equity, As whether a Lord of a Manor had a *Grant of a Free Warren*, and if he had, whether there was *ſufficient Common left for the Reſt of the Tenants*; and a new Trial at Law directed on thoſe Points. Vern. 22. pl. 15. Mich. 1681. How v. the Tenants of Bromſgrove.

So if one *Commoner* ſues another for oppreſſing the Common, or uſing it where he ought not, and recovers a Shilling or other ſmall Sum for Damages; if another Commoner ſues likewiſe a Bill, that the ſecond Plaintiff may accept the *like Damages* for what is paſt, to prevent Charges at Law, is a Bill *of Peace* and proper in this Court. Vern. 308. pl. 302. Hill. 1684. Pawlett v. Ingreſs.

But where the *ſame Plaintiff* has brought *ſeveral Ejectments againſt the ſame Defendant for the ſame Lands*, and 5 or more Verdicts have been given for the Defendant; a Bill of Peace is not ſo proper in this Caſe, one Man being able to contend with another. G. Equ. R. 2. Earl of Bath v. Sherwin. — 10 Mod. 1. Anon. ſeems to be S. C.

Perjury.

43. *Perjury* to be examined here, Palſe v. Brown, *notwithſtanding the Cauſe was diſmiſſed.* Toth. 222. cites 16 Eliz. Fo. 401.

S. C. & S. P. and it was affirmed by the Officers of the Court, that by the Order and Cuſtom of the Court, he ought to be examined upon Interrogatories. Cary's Rep. 97. 20 Eliz.

44. Defendant was ordered to anſwer a *Bill of Perjury.* Toth. 73. cites 19 Eliz. Phillips v. Benſon.

45. Whereas the Plaintiff's Bill againſt the Defendant *for willful Perjury*, the Defendant hath demurred, which this Court alloweth not of. It is ordered that a Subpœna be awarded to the Defendant to anſwer. Cary's Rep. 90. cites 19 Eliz. Woodcock v. Woodcock.

46. 40 l. Coſts given for *Perjury.* Toth. 222. cites Mound v. Culme, Mich. 14 Car.

Quieting Poſſeſſion.

47. The Plaintiff exhibited, thereby ſhewing, that there is a Queſtion and *Controverſy between two* Defendants, *for the Reverſion of a Manor* of Aldwell, *which he holds for Years by Leaſe* made thereof to him by one Anthony Marmyon, and that he doth not know to which of them the Rent and Reverſion is due, and therefore deſires, that upon *Payment of his Rent into this Court*, according to the Covenants and Articles of his Leaſe, he may be diſcharged, and ſaved harmleſs from Moleſtation, Suit, and Trouble for the ſame Rents, by the Defendants, or either of them; wherefore it is ordered, that an *Injunction* be awarded againſt the Defendants *not to moleſt the Plaintiff* for his ſaid Rent, during his ſaid Contention, ſo as the Plaintiff pay his Rent in this Court. Cary's Rep. 65, 66. cites 2 Eliz. fol. 141. Alnete v. Bettam and Marmyon.

Rent-Seck.

48. Where a Man made Title to a *Rent-ſeck*, of which there was *no Seiſin*, nor for which he had any Action at the Common Law, and prayed Help here, it was denied, upon Conference had by the Ld. Keeper with the Judges. Cary's Rep. 7. cites Mich. 1596.

Solicitors.

See Tit. Solicitors.

49. A Bill may be brought *for Solicitor's Fees* if the Buſineſs was done in this Court, and ſo it may be, tho' done in another Court, if it relates to another Demand made by the Plaintiff in this Court; Per North K. Vern. 203. pl. 198. Mich. 1683. Earl of Ranelagh v. Thornhill.

Statutes. Judgments &c.

50. Where a *Statute* is extended, it cannot be tried in an Ejectment *whether* it be *ſatisfied or not*, but the only Remedy is by Scire Facias ad Computandum, or Bill in Canc. but otherwiſe it is on an *Elegit*; for there the Debt and yearly Value appear on Record, and it may well be known when the Debt is paid, and may come in Evidence on a Trial in an Ejectment. Arg. Vern. 50. Paſch. 1682. in Caſe of the Earl of Huntington v. Greenvill.

51. Bill

51. Bill for *Relief againſt a Bond and Judgment*, which was decreed on Plaintiff's paying what remained due, and Intereſt, and Coſts at Law, and then the Bond to be delivered up, and Satisfaction acknowledged, the Plaintiff giving a Releaſe of Errors, and on failing ſo to do, the Bill to be diſmiſſed. Fin. R. 417. Hill. 31 Car. 2. Morrice v. Hollibarton and Pledger.

Trees.

52. Felling of *Trees* is to be ſtaid in Equity, ſo far as that the Pannage may not be taken away. Toth. 210. cites 36 Eliz. Corham's Caſe.

See Tit. Trees.

Truſts.

53. Bill *to oblige Defendant to accept a Truſt*, and propoſing reaſonable Terms for the Truſtee, in caſe he would accept, which the Truſtee (the Defendant) accepting, was decreed accordingly. Fin. R. 32. Mich. 25 Car. 2. Clifton & al' v. Sacheverell.

See Tit. Truſts.

54. A Bill *to compel Truſtees to enter to preſerve contingent Remainders* is of the firſt Impreſſion, for their Title is merely at Law; Per King C. and ſays, it did not appear in the Cauſe that the Truſtees refuſed to enter. 9 Mod. 132. Hill. 11 Geo. 1. Reeves v. Reeves.

Unnatural Things.

55. A. differing with his Mother about the Repairs of the Manſion-houſe, ſettles his Eſtate on his Brother, but firſt takes a Bond of 500 l. Penalty from him, in his Siſter's Name, that he ſhould never *ſuffer his Mother to come into the Houſe*. The Bond was decreed to be delivered up and cancell'd, it being againſt the Law of Nature to prohibit a Son to cheriſh his Mother. Vern. 413. pl. 391. Mich. 1686. Traiton v. Traiton.

Wager of Law.

56. There ought to be no more Help in Chancery than there is at Commou Law, againſt him that hath *waged his Law in Debt*, tho', peradventure, falſely. Cary's Rep. 7. cites 15 H. 7. Duplege's Caſe.

Way.

57. An Order for a Commiſſion *to ſet out Meetways and Cauſeways* moved in Preſence of Mr. Egerton, of Counſel with the Defendant. Cary's Rep 107. cites 21 & 22 Eliz. All Souls College v. Everall.

58. A Bill to be relieved for a *Way* which has been *aboliſhed*, a Commiſſion to ſet it out. Toth. 85. cites 8 Jac. Savill v. Timperly.

59. A Piece of *Ground ſold, but no Reſervation of a* Highway, but decreed that a Way ſhould be continued as formerly. Toth. 133. cites Mich. 3 Car Powel v. Parſons.

60. A *Highway* decreed. Toth. 133. cites 10 Car. Wootton v. Wootton.

For more of this ſee the ſeveral Titles throughout this Work.

(E. a) Relief. Againſt what Perſons. The King.

1. G. *Leaſed to S. and W. in Truſt for the Wife and Children of G.* and after *G. and W. are attainted of Treaſon* &c. by this a *Moiety of the Term veſted in W. is forfeited to the King*, and S. is Tenant in Common with the King. It was agreed, that the King ſhall not, in Equity, be ordered to perform the Truſt, for as *the King* cannot be ſeiſed to an Uſe, ſo his Eſtate *cannot be* * *ſubject to a Truſt*, and there is no Equity againſt the King. Lane 54. Trin. 7 Jac. Wike's Caſe.

* S. P. Hard. 468. Arg. in Pawlet v. Attorney-General.

2. *Lands were mortgaged by P. to L. in Fee*, and enter'd into a Statute and Recognizance to pay the Money at the Day. The *Money was not paid at the Day. L. dies. His Son and Heir is attainted of Treaſon. The King ſeiſes.* The Executor of L. extends P.'s Lands on the Recogni-

zance

zance. P. by Bill againſt the King and the Executor, ſuggeſts that he could not pay the Money at the Day and Place by reaſon of the Plague, and that afterwards L. accepted the Intereſt, and waived the Forfeiture. The Queſtion on Demurrer was, whether P. could have a *Redemption againſt the King?* It was argued that he could not, but that he muſt preſer his Petition of Grace and Favour. Hale Ch. B. ſaid he had declared his Opinion in **Lord Cleveland's Caſe**, that in Natural Juſtice Redemption of a Mortgage lies againſt the King; but he ſaid his Opinion is, that the King cannot be compell'd to reconvey, but that an Amoveas Manum only lies in this Caſe. Baron Atkins was ſtrongly of Opinion that the Party ought in this Caſe to be relieved againſt the King, eſpecially as he is the Fountain of Juſtice and Equity, and the not doing it would derogate from his Honour. Hardr. 465. Trin. 19 Car. 2. in Scaccario. Pawlett v. the Attorney-General.

(F. a) Bill. Joinder. Who may join, or be join'd, in a Bill.

1. IF there be an Agreement in a Pariſh by a *Veſtry Order, that* 100 *l. per Ann. ſhall be paid to A. for a yearly Lecture in the Pariſh*, in a Bill for the Recovery thereof, the Court held that all the Parties to the Order ought be made Defendants, otherways the Plaintiff cannot have a Decree. Hard. 333. Mich. 15 Car. 2. Henchman v. Ayer.

2. There was an Engliſh *Bill* in the Exchequer *againſt Harris, to ſhew by what Title he held ſuch a Meadow, which (as was alleged) appertained to the Office of Keeper of Glouceſter-Caſtle* granted to the Plaintiff for Life, *and againſt the other Defendants*, as Brewers of the City of Glouceſter, *every one of which, as the Bill ſuggeſted, was by Cuſtom obliged to pay an annual Sum to the ſaid Officer.* To which Bill the Defendants demurr'd, becauſe the Bill is concerning *Things of ſeveral diſtinct Natures, and* is brought *againſt ſeveral Perſons*, which will occaſion ſeveral Anſwers and Examinations; and if they were ſuffered to be put all into one Bill, each Party would be obliged to take Copies of what no ways concern'd his own Cauſe, whereby the Charge would be increaſed to no Purpoſe; and of that Opinion was the whole Court. Hard. 337. pl. 7. Mich. 15 Car. 2. Berk v. Harris & al'.

3. As if a *Parſon* ſhould *prefer a Bill* againſt ſeveral Perſons, viz. *againſt ſome for Tithes, and* againſt *others for Glebe*, this is naught. Hard. 337. pl. 7. Mich. 15 Car. 2. in Caſe of Berke v. Harris & al'.

4. *But for Tithes only* it is well *againſt ſeveral Pariſhioners*, becauſe they are *of the ſame Nature.* Hard. 337. pl. 7. Mich. 15 Car. 2. in Caſe of Berke v. Harris & al'.

5. If a *Lord of a Manor* would *prefer one Bill againſt divers Tenants for ſeveral diſtinct Matters and Cauſes*, As *Common, Waſte, Several Piſcary* &c. this were naught, tho' the Ground and Foundation of the Suit, viz. the Manor, be an intire Thing. Hard. 337. pl. 7. Mich. 15 Car. 2. in Caſe of Berke v. Harris & al'.

5. *One Tenant of a Manor* cannot bring a Bill *to quiet him in a Cuſtomary Right which is common to all the other Tenants*; for the End of ſuch Bills is, that where ſeveral Perſons having the ſame Right are diſturb'd, on Application to the Court, to prevent Multiplicity of Suits, Iſſues will be directed, and one or two Determinations will eſtabliſh the Right of all Parties concerned on the Foot of one common Intereſt; but in all thoſe Bills either all Parties join, or a determinate Number in the Name of themſelves, and the reſt preſer a Bill; whereas in this Caſe one only brings

brings the Bill on the General Right, and not on the Foot of any particular distinct Right; and the Bill was dismiss'd with Costs. Select Cases in Chancery in Ld. King's Time, 74, 75. Trin. 2 Geo. 2. Baker v. Rogers.

(G. a) Abatement of Suits in Chancery. In what Cases; and by what.

1. PLaintiff exhibited his Bill as well in his own Name as in his Wife's Name, concerning a *Promise* made by the Defendants *to the Plaintiff and his Wife to make them a Lease* of the Manor of A. *during their Lives.* The Defendants demur, for that the Plaintiff ought to have a Bill of Revivor against them; for that his *Wife is dead since the Bill* exhibited. The Demurrer was disallowed; for the Promise was made during the Coverture, and the Plaintiff claims not the same in Right of his Wife, therefore the Defendants are ordered to answer directly to the Bill. Cary's Rep. 88. cites 19 Eliz. Thorne v. Brend, Wilkinson &c.

2. The *Plaintiff* (pending the Suit) *conveys over his Interest*, but *in Trust*, and yet the Court would hold no longer in his Name. Toth. 103, 104. cites 1584. Hill v. Portman. Cary's Rep. 140. cites 22 Eliz. S. C. that the Defendant was *in Possession at the Time of the Bill exhibited*, and the *Plaintiff enter'd upon him.* The Defendant desired that either he might have an Injunction for his Possession, or else that the Cause might be *dismiss'd*, which the Court thought reasonable; and it is ordered that the Plaintiff shall shew Cause why it should not be granted.

3. *Administrator in Nature of* a *Guardian to* an *Infant*, being *Executor*, exhibits on his Behalf a Bill in Chancery. The *Infant (depending the Suit) comes of* full *Age.* This abates not the Bill, by the Opinion of the Lord Chancellor Egerton. Cary's Rep. 31. cites 7 Feb. 1602. 45 Eliz.

4. A *Feme Sole*, *Defendant*, *having a Commission to examine* Witnesses, F. R. C. marries, and after the Marriage the Witnesses are examined on that Commission, and held good, and the Depositions ordered to stand. Toth. 163. cites 10 Car. Winter v. Dancie. pl. 1, 2. C. P.

5. A *Feme Sole exhibited a Bill*, but *before the Hearing the Cause she married*, and afterwards the *Cause was decreed for her.* On a Bill of Review to reverse the Decree this was assigned *for Error*, for that the Cause being abated by the Marriage, there was no Foundation for such Decree. The Defendant demurr'd, because it appeared not in the Body of the Decree, but quite Dehors; nor was it proper for any but the Defendant to take Advantage of it, and it was Matter of Abatement only, and did not concern the Right; and after a Decree made in Point of Right, any Matter that might be pleaded in Abatement was not such Error as to ground a Bill of Review upon; and the Court was of that Opinion, and allow'd the Demurrer. Nelf. Chan. Rep. 85. Cranborne (Viscountess) v. Delmahoy. Chan. Rep. 231. 14 Car. 2. S. C. and the Court, assisted by the Judges, held the Demurrer good, and dismiss'd the Plaintiff's Bill of Review. 2 Freem. Rep. 165. pl. 219. S. C. resolved accordingly.

6. If a Cause has slept 12 *Months* in Court, there shall be no Proceedings had upon it without first serving a *Subpœna ad faciendum Attornatum.* Per Ld. Keeper. Vern. 172. pl. 165. Trin. 35 Car. 2. Anon.

7. If the Attorney-General of the Dutchy-Court exhibits an *Information* in Behalf of a Part-Owner of Coal-mines, the *Relator's Death* abates the Suit. Chan. Prec. 13. Trin. 1690. in Caſe of Vermuden v. Heath.

8. A Feme Covert was Executrix, and a Bill was brought againſt her Baron and her for a Legacy. They put in their Anſwer, and Witneſſes are examined, and Publication paſſes, and then the Baron dies. The Court held that the *Death of the Baron* is no Abatement in this Caſe, and that the Wife is bound by the Anſwer and Depoſitions; but in Caſe of the *Wife's Inheritance* it might be otherwiſe. 2 Vern. 249. pl. 234. Mich. 1691. Shelberry v. Briggs.

9. Where a Bill *wants proper Parties*, it is Diſcretionary in the Court, either to *diſmiſs the Bill*, or to give Leave for an *Amendment*, on Payment of the Coſts of the Day; but in the principal Caſe, two Leſſees brought a Bill, ſuggeſting the third to be dead, whom they, in Abatement of a Suit at Law brought by Defendants in this Court as Plaintiffs at Law, afterwards ſwore to be living, the Court thought, that if in any Caſe a Bill ought to be diſmiſſed, it ought in this, and diſmiſſed it accordingly, but without Prejudice to another Bill. Wms's Rep. 428, 429. Paſch. 1718. Stafford v. City of London.

Wms's Rep. 277 pl. 66. Finch v. Ld. Winchelſea, is not S. P.

10. *Truſtees were decreed to convey to certain Uſes*, and it was referred to *the Maſter to ſettle* the Conveyance, after which the *Ceſty que Truſt in Fee dies*; the Maſter proceeded, and reported, that he approved ſuch a Draught of a Conveyance. An Exception was taken, that the Suit abated by the Death of Ceſty que Truſt, and that the Maſter had no Power to proceed till the Suit was revived; but the Court over-ruled the Exception; *for* clearly, *when there are ſeveral Plaintiffs or Defendants*, the *Death of any* of them made an Abatement of the Suit *only as to themſelves*, and the Suit continued as to the reſt who were living; and therefore, as to the Defendants, the Truſtees, they might well execute a Conveyance of the legal Eſtate, and were not to wait for any Thing that was to be done by others. Abr. Equ. Caſes, 2. Mich. 1727. Finch v. Ld. Wincelſea.

11. It was ſaid, that it was every Days Practice to *order Money out of Court to the Party intitled by the Decree*, notwithſtanding the Death of ſome of the Parties. Abr. Equ. Caſes 2. Mich. 1727. Finch v. Lord Winchelſea.

12. The *Death* of any of the Parties, Plaintiffs or Defendants, abates the Suit. P. R. C. 1.

13. *So* does the *Marriage a Feme Plaintiff*, but not of a Feme *Defendant*. P. R. C. 1.

(H. a) Bill of Revivor. Who may have it.

1. THE Plaintiff and her Husband exhibited their Bill againſt the Defendant; the *Husband dies*; the Wife, now Plaintant, exhibits a Bill of Revivor, and good. Cary's Rep. 100. 20 Eliz. Alice Parrot v. Randall & Cowarden.

2. An *Aſſignee* cannot revive a Suit. Toth. 272. cites Haſelwood v. Reynolds, in 23 & 24 Eliz.

3. An *Executor* (his *Teſtator dying after Publication*) could not be permitted to exhibit a new Bill to make further Proofs, but was held to a Bill of Revivor. Toth. 272. cites Ferney v. Lawne, 30 Eliz.

4 Hus-

4. Husband and *Wife* joined in a Bill for 200 l. Arrearages by Year to her due; ſhe *died before Hearing*; he, after her Death, exhibted a Bill of Revivor, and ſerved Proceſs to hear Judgment; yet, upon an Objection that the Defendant ſhould firſt have been called to anſwer, the Hearing was put off. 1591. Toth. 271, 272. Cecil v. the Earl of Rutland.

5. Windham being a *Widow*, *had a judicial Order for the Subſtance of the Matter*, and a *Commiſſion to make Proofs*, and after *ſhe married* the Defendant, ſuppoſed it needed a Revivor, and ruled not. Toth. 272. cites 37 Eliz.

6. If one exhibits a Bill or *Information*, and is *not the Party aggrieved*, as an Informer on a penal Statute, or a Miſdemeanor, if he dies, it was ruled, that his Heir, Executor, or Adminiſtrator, ſhall not have a Bill of Revivor, but the Attorney General may. Noy 100. Mich. 43 & 44 Eliz. Anon.

7. R. H. made the *Plaintiff and* his *Widow joint Executors* of his Will, but *upon this Condition*, *That if his Widow married*, *her Executorſhip ſhould ceaſe*, *and then the Plaintiff ſhould be ſole Executor*. A *Bill was exhibited* by the Executors, and an Anſwer put to it, and ſeveral *interlocutory Orders made*, *and* amongſt the reſt, *an Order by Conſent*, *to refer the whole Matter in Difference to the Arbitration of another Perſon*. Then the *Widow died*, and now the Queſtion was, Whether there could be any farther Proceedings on this Bill? or whether there muſt be a Bill of Revivor? And it being referred to Ch. J. Bridgman upon this Point, he was of Opinion, that there muſt be a Bill of Revivor. A Bill of Revivor was brought to revive all the former Proceedings, and particularly that Order made by Conſent, but diſallowed as to this on Demurrer. Nelſ. Chan. Rep. 108. 18 Car. 2. Hamden v. Brewer. Chan. Caſes 77. S. C. but there it is, that the Widow married, and held accordingly.

8. A Plaintiff who is a *Purchaſor* cannot maintain a Bill of Revivor. 2 Freem. Rep. 132. pl. 160. Hill. 21 & 22 Car. 2. Bacchus's Caſe.

9. B. being a *Purchaſor*, exhibited a Bill of Revivor againſt the Defendant, and revived the Suit by Order, and the Defendant joined in examining Witneſſes, and the Cauſe coming to be heard, the Bill was diſmiſſed; for that the Plaintiff, as Purchaſor, cannot maintain a Bill of Revivor, for that there wanted other Parties at the Hearing. Chan. Rep. 39. Hill. 21 & 22 Car. 2. Backhouſe v. Middleton. As *Deviſee* cannot bring a Bill of Revivor, not being in Repreſentation to the Deviſor, but in 3

Nature of a Purchaſor. Chan. Caſes 174. S. C.——See (O. a) pl. 1. Clare v. Wordell.

10, Where there are *ſeveral Plaintiffs*, *and the Bill* after Hearing *abates*, ſome of them, without the reſt, may revive the Cauſe. 2 Chan. Caſes 80. Mich. 33 Car. 2. in a Nota, in the Caſe of Exton v. Turner.

11. Per Cur. An *Aſſignee* ſhall not have a Scire Facias to revive a Decree that is not ſigned and inrolled; but *after the Decree is inrolled*, an Aſſignee may briag a Scire Facias to revive it, in like Manner as at Law, if there be Judgment for an Annuity, and the Annuitant afterwards ſells the Annuity, the Vendee ſhall have a Scire Facias upon this Judgment. But though the Lord Keeper diſallowed the Scire Facias, yet it was without Coſts, becauſe the Defendant might have demurred, but did not. Vern. 283. pl. 282. Mich. 1684. Dan v. Allen. Vern. Rep. 426. pl. 401. Hill. 1686. Dun v. Allen, S. C. ſays the Sci. Fa. was diſcharged by Ld. Keeper North, becauſe the Plaintiff not coming in Privity, was not intitled to ſuch Writ. And in this Caſe it was inſiſted that the Plaintiff ought to have brought an Original Bill to have a parallel Decree made, in which it may be uſed as a good Argument or Inducement to the Court to make a like Decree, if no ſufficient Reaſons are ſhewn to the Contrary; but the Maſter of the Rolls now decreed that the former Decree ſhould be confirmed and reviewed, and executed. The Reporter adds a Quære.

12. *Adminiſtrator gets a Decree and dies* before Inrolment, or any further Proceedings; *Adminiſtrator de Bonis Non* may revive this Decree within Executor of an Adminiſtrator can-

not receive a Decree obtained by

within the Equity of 30 Car. 2. cap. 6. 2 Vern. 237. pl. 220. Mich. 1691. Owen v. Curſon.

the Adminiſtrator, but it ought to be brought by the Adminiſtrator de Bonis non of the Inteſtate. G. Equ. Rep. 234. Arg. in Caſe of Barnwell v. Ruſſel.

13. Mortgagor brings a Bill *to redeem*, an *Account* is decreed, and a Report made, and divers Proceedings thereon, and Orders made for Plaintiff to pay Coſts and deliver Poſſeſſion to the Defendant. The Mortgagee dies. *Executor of Defendant* was allowed in Canc. to revive the Suit, and the Proceedings confirmed in Dom. Proc. and the Court thought the Plaintiff *Executor of that Executor*, has the ſame Right to revive upon the Death of her Husband, as he had on the Death of his Father. 2 Vern. R. 296. pl. 218. Trin. 1693. Lady Stowell v. Cole.

2 Vern. 384. pl. 351. Mich. 1700. S. C. but S. P. does not appear.

14. The *Plaintiff's Inteſtate* had *obtained a Decree* againſt the Defendant *for Payment of* a Sum of *Money, and alſo for Conveying of Lands* and Delivery of Deeds; but before any thing was done upon it, died inteſtate; and the Plaintiff having brought a *Scire Facias* to revive the Decree, the *Defendant demurs*, becauſe the *Heir* was *not made a Party*, and *a Decree cannot be revived by Parts*; and if the Heir will not join as Plaintiff, he ought to have been made Defendant. On the other Side it was ſaid that the Heir and Adminiſtrator are not jointly concerned, and *each may proſecute pro Intereſſe ſuo*, and cannot join; and if he had been made Defendant, the Decree would not have been revived againſt him, becauſe the Bill could only have prayed it might have been revived as to the perſonal Eſtate; and the Court over-ruled the Demurrer, and ſaid it was like a Judgment at Law in Waſte, where there *may be 2 Revivors*. It being then objected that the Scire Facias is to revive the whole Decree, whereas it ought to be only as to the Perſonalty, the Court *allowed the Demurrer as to the Realty*, but ordered the Decree to be revived as to the Perſonalty. Mich. 1701. Abr. Equ. Caſes, 3. Ferrars v. Cherry.

* S. P. Wms's Rep. 263. Per Lord Harcourt. Trin. 1714. in Dones's Caſe.

15. Where there is a *Decree for an Account, and Defendant dies*, his Repreſentative may revive as well as the Plaintiff, * both being in Nature of Plaintiffs. Chan. Prec. 197. pl. 158. Paſch. 1702. Kent v. Kent.

——Ibid. 743. Arg. Mich. 1721. in Hollinſhead's Caſe.

16. If a *Creditor* is *admitted by Order to come in* before the Maſter *and prove his Debt*, and pay his Contribution he is entitled to revive, if the Cauſe abates. Trin. 1702. Abr. Equ. Caſes, 3. Pitt v. the Creditors of the Duke of Richmond.

March 13. 1722. Wingfield v. Whaley.

17. One who *claims only as Heir at Law by Proviſion or by Formedon*, cannot revive, but muſt bring his Original Bill. MS. Tab. May, 1721. Osbourne v. Uſher.

18. *Bill of Partition* brought *by ſeveral* Perſons, *one dies, who deviſes his Part to a Co-plaintiff, and makes him Executor*; he brings a Bill of Revivor, to which it was demurred. It was ſaid that *Bills of Revivor*, and *Bills in Nature of Bills of Revivor* are very different; A Bill of Revivor can only be by the Heir as to the Realty, and by an Executor, or Adminiſtrator as to the Perſonalty. On Bill of Revivor, the Eſtate continues the ſame as before Abatement, but here, in Caſe of a Deviſee who is a Purchaſer, the Eſtate is altered, and a Purchaſer can never revive, and cites 1 Chan. Caſes, 174. and an anſwer muſt be put in and Publication paſs, though poſſibly he may have Benefit of Orders &c. The Demurrer was allowed, but leave given to amend the Bill, and revive as Executor; and an *Original Bill, in Nature of a Bill of Revivor as Deviſee, was thought the moſt proper Method*. Sel. Chan. Caſes in Ld. King's Time, 53, 54. Mich. 11 Geo. 1. 1725. Huet v. Ld. Say & Seal.

19. It

19. It was held that if *ſome* of the *Plaintiffs refuſed to join* in bringing a Bill of Revivor, that the others may bring ſuch Bill, and *make thoſe who refuſed Defendants*. Abr. Equ. Caſes, 2. Mich. 1727. in Caſe of Finch v. Ld. Winchelſea.

20. *And* it was agreed that a *Defendant* might bring a Bill of Revivor *as well as* a *Plaintiff*. Abr. Equ. Caſes, 2. Mich. 1727. in Caſe of Finch v. Ld. Winchelſea.

21. Upon the late *Statute relating to Inſolvent Debtors*, it was reſolved by the Barons of the Exchequer, that the *Aſſignee of the Inſolvent Debtor* is not enabled by this Act to bring a Bill of Revivor as the Debtor himſelf might have done, no more than an Aſſignee *under a Statute of Bankruptcy*. M. 12 Geo. 2. Bowman v. Ridley & Harriſon.

22. *But* it was agreed that either might bring a *Bill in Nature of a Bill of Reviver*. And Parker B. ſaid that were it is Res Integra, he ſhould very much doubt whether an *Aſſignee* of a Bankrupt, as in the preſent Caſe of an Inſolvent Debtor might not bring ſuch a Bill, for he thought the Words in the Statute ſufficient to enable him; but that the Law was now ſettled. M. 12 Geo. 2 in Caſe of Bowman v. Ridley & Harriſon.

(I. a) Bill of Revivor. Againſt whom.

1. NOTICE given to a *Stranger* of a Bill of Revivor is Neceſſary, 'tis improper to make him a Party not being in Privity, and ſo they muſt loſe the Witneſſes examined on the firſt Bill. Chan. Caſes, 152 Mich. 21 Car. 2. Style v. Boſvile.

2. A *Decree* and *Sequeſtation* was had againſt A. —A. dies.—The Decree being for a perſonal Duty, ought not to be revived againſt the Defendant as Heir, and diſmiſſed the Bill, though it was for Money payable on Account of a Charity. 2 Chan. Rep. 244. 34 Car. 2. Univerſity Colledge in Oxford v. Foxcroft.

Vern. 166. pl. 157 S. C. Ld. Keeper inclined that it could not be revived againſt the Heir, but took Time to conſider of it, and would be attended with Precedents.——Where a Sequeſtration iſſues as Meſne Proceſs, it determines by the Death of of the Party; but where it iſſues after a Decree, though for a Perſonal Duty only, it is otherwiſe. Vern. 58. pl. 54. Trin. 1682. Burdett v. Rockey.

3. A Man marries an *Adminiſtratrix*. Plaintiff gets a Decree againſt him and her for 1000 l. out of the Eſtate of the Inteſtate. She *dies*. Whether Plaintiff could proceed againſt the Husband without reviving and bringing an *Adminiſtrator of the Adminiſtratrix* before the Court? Vern. 195. pl. 177. Mich. 1690. Jackſon v. Rawlins.

But the Reporter ſays it ſeems that the Huſband is not bound to anſwer it farther than the Value of the Eſtate which he had with his Wife.

4. A *defective Execution of Agreement* was decreed to be *ſupplied*, and in this Caſe the *legal Eſtate was in A. and B.* and the *Equity of the Fee* was *in C.* It was referr'd to the Maſter to ſettle the Conveyance; after which *Ceſty que Truſt in Fee dies*. The *Maſter* being attended afterwards by the Plaintiffs, reported that he *approved a Draught of a Conveyance*, which was *only from A. and B.* in whom the legal Eſtate was, to the *Uſe of the Plaintiff's according to the Decree*. Per Cur. This is well, notwithſtanding the Death of Ceſty que Truſt; but if the Plaintiffs ſhould hereafter deſire a *Conveyance of the equitable Intereſt*, they muſt revive againſt the *Heirs* at Law of the *Ceſty que Truſt*; and ſo in all Caſes where any Thing was required to be done by the Repreſentatives of the Party dying. Abr. Equ. Caſes 2. Mich. 1727. in Caſe of Finch v. Ld. Winchelſea.

(K. a) Bill of Revivor. How.

1. IN a *Bill of Revivor upon a Bill of Revivor*, there was a Demurrer to it; and the Queſtion was, whether it would lie or not? And. 7 Rep. Kenne's Caſe, and Robinſon's Caſe. 2 Rep 186. being cited in Point that it lies not, and divers Precedents being cited out of Chancery that it does lie, the Court, in regard of the Difficulty and Conſequence of the Caſe, adjourned it till Precedents were ſearched; but the Chief Baron ſeemed to be clearly of Opinion that it lies, and that it is not like a Bill of Review, or an Action per Journeys Accounts. Afterwards in Mich. Term the Court agreed that it well lies, upon reading two Precedents in Point in the Court of Chancery, eſpecially in caſe of Death, as here 2 *ſeveral Defendants died one after another*; *but* if *one* be *named Defendant in the original Bill who is yet alive*, he *ought not to be named in the Bill of Revivor*, becauſe the Suit never abated as to him; but if he be named in the Bill of Revivor only, there he may be named in every Bill of Revivor afterwards, becauſe he was not named a Defendant in the original Bill; ſed adjornatur. Hardr. 201. pl. 6. Mich. 13 Car. 2. in the Exchequer. The Attorney-General v. Sir Edward Barkham.

2. A Suit cannot be revived *in Part*; but the whole Proceeding, viz. Bill, Anſwer &c. and all Orders muſt ſtand revived, Arg. and agreed by the Counſel of the other Side. 2 Chan. Caſes 80. Mich. 33 Car. 2. in Caſe of Exton & al' v. Turner.

3. *Notice* given to a *Stranger* of a Bill of Revivor is neceſſary. 'Tis improper to make him a Party, not being in Privity; for if they go by original Bill, they muſt loſe the Witneſſes examined on the firſt Bill. Chan. Caſes 152. Mich. 21 Car. 2. Style v. Boſvile.

4. Adjudged that where the Suit abates the Plaintiff may *either bring an original Bill*, or a Bill *of Revivor*, at his Election. Vern. 463. pl. 441. Trin. 3 Jac. 2. Spencer v. Wray.

(L. a) Bill of Revivor. In what Caſes.

2 Freem. Rep. 177. pl. 238. S. C. in totidem Verbis, only the Word (produced) is there, as it ſeems it ſhould be, (* *pronounced.*)

1. A *Decretal Order* was * produced in 1657. for ſeveral Matters; and *after the Cauſe had depended upon Account* 3 *Years*, *a Decree was drawn*, wherein the firſt Decretal Order was recited; but *Part of the Matter* thereby *decreed was omitted in the Decretal Part of the Decree itſelf*; *and ſoon after the Decree was ſigned and inrolled the Defendant died.* A *Scire Facias was ſued to revive*, and in the Proſecution thereupon the Plaintiff diſcovered the Omiſſion, and ſo could not have the Benefit of that Part which was omitted in the Decree that way, and the Defendant being dead could not help that Omiſſion by a Motion upon the Surprize. The Bill now was a Bill of Revivor, to revive ſo much of the Decree as was omitted as was alleged; howbeit in Truth the Bill was to the whole Decree. It was pleaded that the Decree being inrolled, a Bill of Revivor did not lie, but a Scire Facias. Ordered that the Plea and Demurrer be over-ruled. Chan. Caſes 37. Mich. 15 Car. 2. Williams v. Arthur.

2. Part

2. Part of a Decretal Order, as it was ſigned and inrolled, was left out of the Entring Book in the Regiſter's Office, which directed an *Allowance to the Defendant*; and in reſpect of the ſaid Omiſſion in the Order, the Maſter made not ſuch Allowance; but upon Exceptions to the Report the Allowance was made. 3 Chan. Rep. 72. Hill. 1671. Tredcroft v. White. Fin. Rep. 36. Mich. 25 Car. 2. S. C.

3. *After a Decree ſigned and inrolled* the Plaintiff brought a Bill of Revivor, the *Suit having abated*; whereupon the Defendant inſiſts that the Plaintiff ought not to have brought a Bill of Revivor in this Caſe, but to have taken out a *Subpœna in the Nature of a Scire Facias to revive the Decree*, the ſame being ſigned and inrolled in the Life-time of the Plaintiff's Teſtator, therefore the Defendant demurs to the ſaid Bill. The Plaintiff inſiſts that it is at the *Plaintiff's Election* to revive the ſaid Decree inroll'd, and to have Execution thereof by Bill or Subpœna in the Nature of a Scire Facias; and as this Caſe is, the whole Proceedings could not be revived by Subpœna, in regard ſeveral Proceedings have been relating to Coſts ſince the Decree, which Proceedings can be only revived by Bill, and therefore the moſt proper Courſe was to revive all Things by Bill. This Court held the ſaid Bill to be well brought, and held the Demurrer inſufficient. 2 Chan. Rep. 67. 24 Car. 2. Croſter v. Wiſter.

4. The Plaintiff brought a *Bill* againſt the Defendant *for an Account*, and after brought *Aſſumpſit at Law for Part of what was included in the Bill*, ſo was ordered to make Election on which he would proceed. He *elected going to Law, and an Injunction as to proceeding here.* On the Trial at Law it appeared by the Witneſſes, that there were Accounts between them. The Counſel finding they had miſtaken the Action, never controverted the Defendant's Proof, but *ſuffered a Nonſuit*; ſo the Plaintiff *moves for Leave to revive*, which was oppoſed by the Defendant, the Plaintiff having made his Election. But the Ld. Chancellor gave Leave to revive, and declared the only *End of the Injunction was that he ſhould not proceed on both together*; not that chuſing one in which he miſcarries, ſhould preclude his Right. It is not a Favour, but Ex Debito Juſtitiæ he might bring a new Bill; and is it not of Juſtice to make the coming at Right as expeditious and as little expenſive as poſſible? For on a new Bill, after much Time and Money ſpent, you would be but where you are on a Bill of Revivor. The Caſe of one Collett was quoted as a Point. Sel. Chan. Caſes in Ld. King's Time, 4. Mich. 11 Geo. 1. Hindford (Earl) v. Decoſta.

5. *Bill was diſmiſs'd with Coſts*, which were *taxed.* A Bill of *Revivor was brought ſingly for Coſts*, to which it was demurr'd. In arguing the Demurrer it was inſiſted, that tho' the conſtant *Rule* be *that where a Bill is diſmiſs'd with Coſts the Party cannot revive for that*, that *muſt be taken* to be *where they are not taxed and liquidated to a Sum certain*; for then it becomes a Duty; and tho' the Bill be diſmiſs'd, it is not ſo much out of the Court but the Party, in conſequence of ſuch Diſmiſſal, is liable to the Proceſs of the Court by Subpœna, Attachment &c. The Ld. Chancellor ſaid it is a Rule that, unleſs *in Account*, where *both Parties are Actors*, they cannot revive; but he knew no Inſtance of Revivor in ſuch a Caſe as this, and ſaid that it is very odd; but the Rules of the Court muſt be obſerved, and the Demurrer was allow'd. Sel. Chan. Caſes in Ld. King's Time, 54, 55. Hill. 1725. 11 Geo. 1. Thorn v. Pitt.

(M. a) Bill of Revivor. In what Caſes. Where the Bill abates.

1. NO Defendant, in caſe of *Abatement* before the Decree ſigned, can revive. 2 Chan. Rep. 193. 32 Car. 2. Glenham v. Statville.

2. Where there are *ſeveral Plaintiffs, and the Bill* after Hearing *abates*, ſome of them without the reſt may revive the Cauſe. 2 Chan. Caſes 8. Mich. 33 Car. 2. in Caſe of Exton v. Turner.

2 Vern. 297. pl. 287. Trin. 1693. S. C. & S. P.

3. Where a *mutual Account is decreed*, and there happens an *Abatement*, the *Defendant* in ſuch Caſe may revive. 2 Vern. 219. pl. 200. Hill. 1690. The Ld. Stowell v. Cole.

4. In an *Injunction Cauſe*, where it abates by the *Death of either the Plaintiff or Defendant*, the Rule is that the Court ſhall be *moved* to revive *within a ſtated Time*, or elſe the Injunction be diſſolved. Select Caſes in Chan. in Ld. King's Time, 24. Trin. 11 Geo. 1. Anon.

(N. a) Bill of Revivor. Neceſſary. In what Caſes.

1. IT is ordered, that a Subpœna be awarded againſt the Defendant, to be *examined upon Interrogatories*, whether before his Anſwer he had *Knowledge that the Plaintiff was married*, and would take no Advantage of the ſame Marriage in his Anſwer, then the Matter to proceed without Bill of Revivor. Cary's Rep. 73, 74. cites 6 Eliz. fol. 150. Fairefield v. Greenfield.

2. The Plaintiff exhibited his *Bill*, as well *in his own as in his Wife's Name, concerning a Promiſe* made by the Defndant to the Plaintiff and his Wife, *to make them a Leaſe* of the Manor of Appeſcourt, during their Lives; the Defendants demur, for that the Plaintiff ought to have a Bill of Revivor againſt them, for that his *Wife is dead ſince the Bill exhibited.* Demurrer was diſallowed, for that the Promiſe was made during the Coverture, and the Plaintiff *claims not the ſame in Right of his Wife*, therefore the Defendants are ordered to anſwer directly to the Bill. Cary's Rep. 88, 89. cites 19 Eliz. Thorne v. Brend, Wilkinſon, & al'.

3. A *Widow had a judicial Order*, and a *Commiſſion to make Proofs*, and after ſhe married; no Bill of Revivor needed. Toth. 228. cites Paſch. 37 Eliz.

4. *Feme ſole* takes a *Commiſſion to examine* Witneſſes, and marries before the Examination, and then they are examined. It was ordered, that the Depoſitions ſhould ſtand. Toth. 163. cites 10 Car. Winter v. Dancie.

Nelſ. Chan. Rep. 85. S. C. accordingly.

5. Feme ſole brings her Bill, and *marries*, and gets a *Decree, without bringing Bill of Revivor*, this will not impeach the Decree, for 'tis only Matter of Abatement, and the Defendant might have taken Advantage of it before the Hearing, but it is too late after. Ch. R. 231. 14 Car. 2. Cramburne v. Dalmahoy.

6. In a Bill of Revivor *a Defendant was omitted, but his Name was uſed thro'out the Cauſe* in Motions, and a Commiſſion, and held, that this ſupply'd the Omiſſion. Ch. R. 252. 16 Car. 2. Peachy v. Vintner.

7. Where *Husband and Wife, in Right of the Wife, exhibited a Bill*, and

and the *Husband died*, the Wife, if she pleaſe, may proceed without a Bill of Revivor. 3 Ch. R. 40. Hill. 21 & 22 Car. 2. Parry v. Juxon.

8. If *Jointenants*, or *Tenants in Common*, exhibit a Bill, and any of them *die*, pending the Suit, there needs no Revivor; Per Ld. Keeper Bridgman. 3 Ch. R. 66. Trin. 1671. Wright v. Dorſett. Abr Equ. Caſes 1. pl. 5. S C. adds a Quære as to Tenants in Common, becauſe a Right deſcends to their Repreſentatives.

9. It is not neceſſary to revive againſt a *Defendant that has not anſwer'd*; Per Cur. Vern. 308. pl. 301. Hill. 1684. Oxburgh v. Fincham.

10. A Cauſe having been heard on a *Bill of Interpleader*, and a Trial at Law directed to ſettle the Right between the Defendants, there is an end of the Suit as to the Plaintiff, ſo that if he afterwards dies, the Cauſe ſhall ſtill proceed, and there needs no Revivor, each Defendant being in the Nature of a Plaintiff; Per Cur. Vern. 351. pl. 347. Mich. 1685. Anon.

(O. a) Done on Bill of Revivor. What muſt, or may be.

1. A *Deviſee brings an original Bill in the Nature of a Bill of Revivor.* The Queſtion was, whether the Defendant ſhould be at Liberty to make a *new Defence?* Ld. Keeper held, that where the Bill, altho' original, is *only to ſupply the Want of Privity*, and in all other Matters but as a Bill of Revivor, I think the Decree ought to be carried on in the ſame Manner as it would have been upon a Bill of Revivor, if the Plaintiff had claimed in Privity. There is no Reaſon why the Deviſee ſhould not have the ſame Advantage of the Decree as an Heir or Executor, without entering again into the Merits of the Cauſe, and the Decree ought to be neither longer or ſhorter than the firſt Decree. 2 Vern. 548, 549. pl. 499. Paſch. 1706. Clare v. Wordell. On a *Bill in Nature of a Bill of* Revivor *againſt a Deviſee*, the Deviſee *cannot diſpute the Juſtice* or Validity *of the Decree*, for then a Deviſee would be in better Caſe than an Heir; Per Ld. Keeper Harcourt. 2 Vern. 672. pl. 599. Paſch. 1711. Minſhull v. Ld. Mohun.

2. *Defendant pleaded* to a Bill, but *before the Plea came on to be argued the Defendant died.* The Plaintiff revived, and upon the coming on of the Plea to be argued, Ld. C. Talbot was of Opinion, that it could not be argued, but that the *Defendant's Repreſentative muſt plead De Novo.* Caſes in Chan. in Ld. Talbot's Time, 3. Mich. 1735. Micklethwaite v. Calverly and Baker. In the End is a N. B. that the Reaſon ſeems to be, becauſe the Repreſentative may have a Plea to defend him without denying the Merits; for if an Executor or Adminiſtrator can truly plead Plene Adminiſtravit upon a Sci. Fa at Law, (which muſt always iſſue in ſuch Caſe) the Execution can only be *De Bonis Teſtatoris quando acciderint*; but the Anſwer of the Teſtator in a Court of Equity will bind the Executor who has Aſſets. Ibid.

(P. a) Pleas and Demurrers to Bills of Revivor.

1. THE Plaintiff has exhibited his Bill of *Revivor againſt* 2, *where the firſt Bill was againſt* 3, and the *Parſonage in Queſtion is named* Equ Abr. 4 pl. 8. cites S. C. and *by* adds a Quære.

by another Name than in the former Bill; therefore ordered, if Cauſe be not ſhewed by a Day, the Defendant ſhall be diſcharged. Cary's Rep. 78. cites 18 & 19 Eliz. Heines v. Day, Dean of Windſor, and Hatchines.

(Q. a) Coſts. In what Caſes on Bills of Revivor.

1. THE Plaintiff exhibits his Bill againſt L. and M. two of the Defendants, and after Commiſſion M marries J. B. the other Defendant; and the Plaintiff then exhibits a Bill of Revivor againſt the Defendants, which needs not, as it ſeems to this Court; therefore ordered, *if there be no Cauſe of Revivor*, that J. B. and his Wife, who are called up by Proceſs to anſwer the ſame Bill, are licenſed to depart without Anſwer to the Bill of Revivor, and the Plaintiff to pay him ſuch Coſts as this Court ſhall award. Cary's Rep. 81. cites 19 Eliz. Jackſon & Ux. v. Smith, Bourne & Ux.

N Ch R. 147. S. C. 2. A *Bill of Revivor* againſt one as Heir of his Father was diſmiſſed with Coſts; he cannot have Coſts of the original Suit; for they are dead with the Perſon. 3 Ch. R. 65. 19 June 1671, Loyd v. Powis.

3. A Decree was made, and before *Coſts taxed* the Plaintiff died, and a Bill of Revivor brought, and diſallowed by Lord Chancellor on Plea, that it does not lie for Coſts. 2 Chan. Caſes 7. Temple v. Rouſe.

4. No Revivor *for Coſts*, there being no *Decree inrolled*. 2 Chan. Rep. 195. 32 Car. 2. Glenham v. Staville.

2 Chan. Caſes 104. but S. P. does not appear. Vern. 160. pl. 149. S. C. but S. P. does not appear. 5. A Suit cannot be revived for *Coſts alone*, *where no Duty is decreed*; but when a Duty is decreed, and Coſts awarded by the ſame Decree, which is ſigned and enrolled in the Life of the Party, it is otherwiſe. 2 Chan. Rep. 245. 246. 34 Car. 2. Lady Dacres v. Chute.

6. Feme ſole exhibits her Bill and then *marries*. Baron and Feme bring Bill of Revivor, and obtain a Decree with *Coſts*; Per North K. this is not like a Bill of Revivor againſt an *Heir* or *Executor*, where the Suit is *abated by Death*; in that Caſe they ſhall anſwer only for their own Time, but here all Proceedings ſtand in Statu Quo, and it is unreaſonable there ſhould be ſuch an Abatement; and in Caſe the Defendant had been a Feme ſole and intermarried, that ſhould not have abated the Plaintiff's Suit, and in this Caſe the Abatement was by the Parties own Act. The Court ordered Coſts of the whole Suit, deducting only the Charge of the Bill of Revivor, which was thought hard, becauſe the Abatement was by the Parties own Act, and becauſe had the Defendant been in the Right and ſo intitled to Coſts, yet he could not have compelled the Plaintiff to Revive. Vern. R. 318. pl. 315. Paſch. 1685. Durbain v. Knight.

(R. a) Of Second and Supplimental Bills.

1. A Former Bill depending, was pleaded in Bar of a Second, but though *both Bills* were of the ſame Matter and Effect, the latter

latter had ſome new Matter. Ordered, that ſince the Plea was good, the Plaintiff ſhould pay the uſual Coſts of a Plea allowed, but Defendant to anſwer the ſecond Bill, and the *former Bill diſmiſſed* with 20 s. Coſts. Chan. Caſes, 241. Mich. 26 Car. 2. Croſts v. Wortley.

2. After Diſmiſſion on Hearing, a new Bill was exhibited on the ſame Equity, on Suggeſtion of Notice which was not in Iſſue in the former Cauſe; and per Ld. Keeper, the Defendant's Anſwer ſhall not conclude the Plaintiff, but though he denied Notice, yet the Plaintiff ſhall examine thereto, and that in caſe Examination ſhall be made as to the Notice, and no Proof of it, if the Notice had been denied in the former Suit, yet the Plaintiff's Bill *to have the Defendant's Oath* would lie, but then the Defendant's Oath ſhould not be concluſive. Chan. Caſes, 252. Hill. 26 & 27 Car. 2. Williams v. Williams.

3. A Supplemental Bill to have a *further Diſcovery* from the Defendant *by Way of Evidence*, for the better clearing the Matters depending on the *Account*, which the Defendant hath not anſwered in the former Cauſe; the Plaintiff pleaded the former Bill, to which the Defendant anſwered, and the Cauſe heard, and the Account directed; the Court ordered the Defendant to anſwer to all Matters in this Bill not anſwered to in the former Cauſe, but the Plaintiff not to reply nor to proceed further. 2 Chan. Rep. 142. 30 Car. 2. Boeve v. Skipwith.

Chan. Caſes, 201. 202. Paſch. 23 Car. 2. Bovey v. Skipwith, S. C. but S. P does not appear. — 3 Chan. Rep. 67.

S. C. but S. P. does not appear.

4. In a Bill of *Review*, you may add a new Supplemental Bill. Vern. R. 135. pl. 226. Hill. 1682. Price v. Keyte.

5. *One Bill* was preferred *to clear the Title* to Lands, and after a Decree for the Lands, *another Bill* was exhibited *for the Profits*, and a 2d Decree for them. 2 Chan. Caſes, 72. Mich. 33 Car. 2. Coventry v. Thinn.

2 Chan. Caſes, 134. Hill. 34 & 35 Car. 2. Coventry v. Hall, S. C. & S. P. And the Decree made by Ld. Nottingham, for the Meſne Profits was confirmed by Ld. Keeper North. —— 2 Chan. Rep. 259. S. C. & Ld. Keeper North confirmed the Decree of Ld. K. Finch.

6. New Bill *after Diſmiſſion*, was brought *on the ſame Equity by a 3d Perſon*, becauſe he could not have a Bill of Review. 2 Chan. Caſes, 119. Trin. 34 Car. 2. Doily v. Smith.

7. A *Diſmiſſion on Election to proceed at Law* is not peremptory, but Plaintiff may, after ſhe has filed at Law, bring a new Bill. 2 Vern. R. 32. pl. 24. Hill. 1618. Counteſs of Plymouth v. Bladen.

8. Where a Supplemental Bill is brought *after Publication*, it is irregular to *examine Witneſſes to a Matter* that was *in Iſſue, and not proved in the original Cauſe*; and ſuch Proofs not be read. MS. Tab. March 31, 1725. Bagnal v. Bagnal.

9. If there be *no Proof to the new Matter* in the Supplemental Bill, it muſt be diſmiſſed. MS. Tab. Mar. 31, 1725. Bagnal v. Bagnal.

(S. a) Anſwer. What is a full and perfect Anſwer. Where it muſt be Fully and Directly, or where To his Remembrance &c. is ſufficient.

1. A having 2 *Leaſes*, was *allowed to ſtand* by Anſwer *upon* them *both*, and not reſtrained to one at his Peril. Toth. 70. cites Hill. 35 Eliz. Kirkham v. Saunderſon.

2. The

2. The Defendant derived his *Title* by a Leaſe and Aſſignment which was *before his Knowledge*, and therefore pleaded that he *heard ſay, that ſuch a Leaſe and Aſſignment was made*; The Maſter of the Rolls was of Opinion, becauſe it was another's Act, the Oath is, that he thinks it to be true. The Defendant *might have pleaded directly, that they were made, as he thinketh.* Toth. 70. cites 37 Eliz. Burgony v. Machell.

3. The Defendant anſwered, that he *had no Evidences belonging to the Plaintiff*; that anſwer was diſallowed, becauſe the Defendant therein will be his own Judge, whether they belong to the Plaintiff or not and therefore he was *ordered to anſwer what he had, and* to *bring them to be viewed* to whom they belonged. Toth. 70. cites 37 Eliz. Rotheram v. Saunders.

4. A Man's *own Acts* muſt be *anſwered directly* upon Oath in the Affirmative or Negative, *without Traverſe*; as Mr. Juſtice Beamont held. Toth. 71. cites 38 Eliz. Williams v. Leighton.

5. Whether a *Licence to aſſign a Leaſe* were granted or not, being but 3 Years paſt, the Defendant was ordered by my Lord to anſwer *directly*, and not to his Remembrance. Toth. 71. cites 38 & 39 Eliz. Oſwald v. Pennant.

6. The Defendant was ordered to *ſet down his Term certain.* Toth. 72. cites 1597. Harbert v. Morgan.

7. It was held that if 2 *anſwer jointly and ſeverally*, if one of them anſwers firſt for himſelf, and the other ſays that he has peruſed all that the former has anſwer'd, and for himſelf anſwers that he believes it to be true, ſuppoſing this other Defendant not to be charged with any thing of his Knowledge, that ſuch a *relative* Anſwer is ſufficient in a joint and ſeveral Anſwer, but not where the Defendants anſwer ſeverally *each apart.* Hardr. 165. Hill. 1659. in the Exchequer. Walker v. Norton.

8. An Anſwer to a Matter *charged as the Defendant's own Fact*, muſt regularly be, without ſaying *to his Remembrance, or as he believes*, if it be *laid to be done within* 7 *Years* before, unleſs the Court, upon Exception taken, ſhall find Special Cauſe to diſpenſe with ſo poſitive an Anſwer. Clarendon's Ord. 18 Car. 2.

9. On Exceptions to an Anſwer, the Defendant having ſworn that he received no more than the Sum of .... to his Remembrance, it was allowed to be a *good Anſwer.* Vern. 470. pl. 456. Trin. 1687. Hall v. Bodily.

10. Defendants made *Affidavits that they had no Books, Evidences &c. to their Knowledge concerning the Matters in Queſtion, but what were produced before the Maſter, and annexed to a Schedule.* This Affidavit [is] evaſive, and they were put to ſwear that they had no Books or Evidences concerning the Matters in Queſtion, but what they had already produced. MS. Tab. June 10, 1713. Mayor &c. of Hartford v. the Poor of Hartford.

11. If a Man gives a General Anſwer, and a *particular Queſtion is ask'd which is included in the General*, yet he *muſt anſwer it particularly*, elſe it may be demurr'd to; for that may be a Matter of Judgment. Select Caſes in Chan. in Ld. King's Time, 53. Mich. 11 Geo. 1. Paxton's Caſe.

(T. a) Anſwer.

(T. a) Anſwer. Oath. By whom, and in what Caſes the Anſwer muſt be upon Oath.

1. LADY Wharton was appointed to anſwer upon Oath, and not upon her Honour; and ſo they ought to be ſworn as Witneſſes, (as my Lord held) or elſe no Attaint lies if the Jury do not go according to the Evidences. Toth. 72. cites 1497. Willoughby v. Lady Wharton.

2. A *Biſhop* to anſwer upon Oath. Toth. 74. cites 8 Car. The Mayor of Sarum v. the Biſhop of Sarum.

3. It was ruled by the Ld. Keeper, that a *Plea of Outlawry* ſhould be without Oath, becauſe of the Averment of Identity of Perſons; and it was ruled that a *Plea of the Privilege of Oxford* ſhould be put in without Oath. 2 Freem. Rep. 143. pl. 182. Trin. and Mich. 1674. Maſters v. Bruett.

4. Lord C. Macclesfield allowed a *Quaker*, who was committed for not anſwering to a Bill exhibited againſt him, to put in his Anſwer *without Oath or Affirmation, the Bill being groundleſs*, and diſcharged him out of Cuſtody. Wms's Rep. 781. Hill. 1721. Wood v. Story & Bell.

And in a Note there, Pag. 782. it is ſaid that the like Order was ſaid to be made by Lord Harcourt in Dr. Heathcote's Caſe.

(U. a) Anſwer. Where it ſhall conclude, or charge or diſcharge the Defendant.

1. THE Plaintiff having made *no Proof* of the Matter in Queſtion, the Defendant's Anſwer muſt *be taken as true*, and ſo the Court diſmiſs'd the Bill. Chan. Rep. 95. 11 Car, Feltham v. Davy.

2 Freem. Rep. 146. pl 189. (bis) Mich. 1677. Anon. S. P.

—Where there is no Proof *but what ariſes from the Anſwer* of the Defendant, the Anſwer muſt be taken intirely as it is, and no Part of it muſt be impeached by any other Evidence; per Parker C. 10 Mod. 405. Paſch 4 Geo. 1. in Canc. Nab v. Nabb.

2. Where there is *but one Witneſs againſt the Defendant's Anſwer*, the Plaintiff can have no Decree. Vern. 161. pl. 152. Paſch. 1683. Alam v. Jourdan.

3. Per Cur. The Caſe of **Howard v. Brown**, was the firſt in this Court where, becauſe a Man had charged himſelf by Anſwer, that this Anſwer ſhould be *allowed as a good Diſcharge*, and it ought to be the laſt. 2 Vern. 194. Mich. 1690.

4. *Plaintiff for* 80*l. conveys an Eſtate abſolutely* to the Defendant, *and brings a Bill to redeem. Defendant* inſiſts the Conveyance was abſolute, but *confeſſes, that after the* 80*l. paid, with Intereſt, it was to be in Truſt for the Plaintiff's Wife and Children.* Plaintiff replies to the Anſwer, but no Proof was made of the Truſt, yet decreed the Truſt for the Benefit of the Wife and Children. 2 Vern. 288. pl. 277. Paſch. 1693. Hampton v. Spencer, & e contra.

5. Where a *Bill had unadviſedly charged that Plaintiffs had agreed* to pay an equal Proportion of the Debts, they being Sureties in the Bond, yet *Defendants by Anſwer denying* they made any ſuch Agreement, that *ſet*

Plaintiffs at large, and left them at Liberty to demand the whole against Defendants; and per Cowper C. decreed accordingly. 2 Vern. 608. pl. 546. Paſch. 1708. Parſons and Cole v. Doctor Briddock & al'.

6. A *Legacy* being left *to an Executor, without any expreſs Diſpoſition of the Surplus*, but there was ſtrong *Proof that Teſtator intended him the Surplus*; but on a Bill brought by the next of Kin againſt him for a Diſtribution, he anſwers, and *waives the Benefit of the Surplus by Miſtake of the Law* in that Point, and admitted himſelf accountable for the Surplus; but being a Creditor upon an open Account, he inſiſted, that he ought to have his Legacy over and above his Debt. But upon better Information he prayed to amend his Anſwer as to the waiving the Surplus, which was denied by the Maſter of the Rolls, but he decreed the Legacy over and above the Debt; and on Appeal Ld. Cowper ſaid, that he would not, againſt the Defendant's own Conceſſion, decree the Surplus for him. But in Eaſter Term 1718, the Cauſe coming before Ld. C. Parker, his Lordſhip ſaid, that he could not but incline to help the Defendant, who by Miſtake, *or Miſ-advice* only of his Counſel, *was in a Way of loſing his Right*; and therefore, if the Plaintiffs would bind the Defendant by his Anſwer from taking the Surplus, they ought to *take it on the Terms in the Anſwer*, (viz.) He waives the Surplus, but inſiſts upon his Debt and Legacy, and decreed him Both in this Caſe, even *tho'* by the Maſters Report it appeared, that *the Legacy was much greater than the Debt*. Wms's Rep. 297. pl. 74. Mich. 1718. Rawlins v. Powell.

See Tit. Plea and Demurrer.

(W. a) Anſwer. Where there is a Plea or Demurrer.

1. IT is a Rule in Equity, that the Anſwer *over-rules the Plea where Defendant anſwers the ſame Things he inſiſts upon in his Plea that he ought not to anſwer to*. MS. Tab. Appeals, 20 Jan. 1717. E. of Clanrickard v. Burk.

2. Defendant had an *Order to plead, anſwer, and demur, but not demur alone*, but Defendant *anſwered only by denying, and demurred to every other Part of the Bill*; but held by Ld. C. that he *ought to anſwer ſome material Fact of the Bill*, and the Demurrer was diſcharged, with Coſts. MS. Rep. Mich. 12 Geo. 2. in Canc. Attorney-Gen. v. . . . . .

(X. a) Anſwer. In what Caſes the Anſwer of one ſhall affect another.

1. DEfendant by Anſwer *accuſes himſelf and Fellow Defendant*, and is believed againſt himſelf, but not againſt his Fellow. Toth. 72. cites 4 Eliz. Michell v. Webb.

2. *Two Defendants, one* having *anſwered, the other refuſed*, but ſhall be bound by the others Anſwer, if the Cauſe paſs againſt them. Toth. 74. cites 7 Jac. Matthew v. Matthew.

3. One Defendant's Anſwer ſhall *not prejudice the other Defendant*. Toth. 75. cites 3 Car. Eyre v. Wortley.

4. A *Bill* was brought *againſt* 3, viz. *A. B. and C. for a joint Demand. A.* by Anſwer *ſwears, that he believes, and hopes to prove, that the Plaintiff was ſatisfied his Demands.* The *Plaintiff replied to B. and C. only, and brought the Cauſe on by Bill and Anſwer as againſt A.* It was inſiſted, that the Plaintiff in this Caſe could have no Decree; for having brought on his Cauſe as againſt the third Defendant on Bill and Anſwer only, his Anſwer muſt be taken to be true, and tho' he does not directly ſwear the Money paid, yet he ſays, he believes and hopes to prove it paid, but the Plaintiff not replying to him, he is excluded of the Benefit of his Proof, and this was a cunning Practice of the Plaintiff to proceed againſt thoſe Defendants only who were ignorant of the Matter, and to exclude the Defendant who, perhaps, could have proved the Debt paid. The *Plaintiff was ordered to pay Coſts, and left at Liberty to reply to the other Defendant.* Vern. 140. pl. 132. Hill. 1682. Barker v. Wyld and 2 others.

5. Regularly the Anſwer of one Defendant ſhall not be *made uſe of as Evidence againſt another Defendant*; but one Defendant ſaying by his Anſwer, that he was much in Years, and could not remember the Matter charged in the Bill, but that J. S. was his Attorney and tranſacted this Matter, and J. S. the Attorney being made a Defendant, and giving an Account of this Matter, here, upon a Motion for an Injunction, Ld. Cowper ſaid, that theſe Words in the Defendant's Anſwer amounted to a *referring to the Co-Defendant's Anſwer, and for that Reaſon* the Attorney's Anſwer *ought to be read*, and accordingly was read againſt the firſt Defendant. Wms's Rep. 300 Mich. 1715, pl. 75. Anon.

6. One Defendant ſhall not be prejudiced by the *Admiſſion of another.* MS. Tab. March 6. 1720. Cheevers v. Geoghegan.

(Y. a) Anſwer. How to be made and ſworn where a Corporation is Defendant.

1. A *Bill againſt a Corporation* to diſcover Writings, Defendants anſwer under the Common Seal, and ſo being not ſworn, will anſwer Nothing in their own Prejudice. Ordered, that the Clerk of the Company, and ſuch principal Members, as the Plaintiff ſhall think fit, anſwer on Oath, and that a Maſter ſettle the Oath; Per North K. Vern. 117. pl. 104. Hill. 34 & 35 Car. 2. Anon.

(Z. a) Anſwer taken How. And at what Time.

1 *Commiſſioners, for taking* an Anſwer in the Country, had *omitted Executio iſtius Brevis &c.* The Anſwer was referred to the Six Clerks, but on Motion, the Commiſſioners having indorſed on the Anſwer, *Capt' & Jurat'* &c. ſecundum Effectum & Tenorem Commiſſion' huic annex', and had annexed the Commiſſion to the Anſwer, it was ordered the Anſwer ſhould be *allowed.* Vern. 41. pl. 41. Paſch. 1682. Pen v. Chetle.

2. *One* of the Defendants *is in Contempt*, and ſtands out to a Sequeſtra-

tration, and the *Cauſe is heard againſt the other Defendants*, yet he may come in and anſwer, and the Cauſe be heard again as to him. Vern. 228. pl. 225. Hill. 1683. Phillips v. the Duke of Bucks.

(A. b) Anſwer. Of putting in Anſwers where there is a Croſs Bill.

1. IF a Bill is filed, and then a Croſs-Bill, the *firſt Bill is to be anſwer'd before the other* Croſs-Bill; and where *A. files a Bill againſt B. & C. who put in inſufficient Anſwers, and prefer their Croſs-Bill againſt A.* and then *B. becomes Bankrupt*; and after B.'s *Aſſignees bring their Bill* in Nature of an Original Bill for Account, and A. pleads the Statute of Limitations, and his Plea was allowed; and afterwards the *Aſſignees bring their Bill in Nature of a Bill of Revivor*, grounding it upon the former Bill brought by B. and C. but Ld. Chancellor ordered, that C. ſhould anſwer A's Bill before A. ſhould be obliged to anſwer the Aſſignee's *Bill*. Wms's Rep. 266, 267. Mich. 1714. Child & al' Aſſignees of Sir Stephen Evans, v. Frederick.

2. The original Bill is firſt to be anſwered, but if the *Plaintiff in the original Bill will, after the Croſs-Bill* filed, *amend his Bill* in Things material, this amended Bill, as to the Amendments, is a new Bill; and the Plaintiff in the original Bill ſhall be bound to anſwer the Croſs-Bill, which was filed Prior to the Amendments made to the original Bill, before the Plaintiff in the original Bill ſhall have an Anſwer to his Amendments; and as the amended Bill muſt be anſwered all together, ſo the Priority ſeems in ſuch Caſe to be loſt as to the Whole. 2 Wms's Rep. 345. Hill. 1727. Steward v. Roe.

(B. b) Anſwer. Of the Traverſe.

1. IF the *Defendant denies the Fact*, he muſt traverſe or deny it (as the Cauſe requires) directly, and *not by Way of Negative Pregnant*, as if he be charged with the Receipt of a Sum of Money, he muſt deny or *Traverſe that he has not received that Sum or any Part thereof*, or elſe *ſet forth what Part he has received*; and if a Fact be laid to be done with *divers Circumſtances*, the Defendant muſt not deny or traverſe it literally as it is laid in the Bill, but *muſt anſwer the Point of Subſtance poſitively* and certainly. Clarend. Ord. 18 Car. 2.

2. An Anſwer *wanted the General Traverſe* at the End, and it was objected, that without this Traverſe no Iſſue was joined. But per Ld. Macclesfield, it does not appear but that the whole Bill and every Cauſe in it is fully anſwered, and then the adding the General Traverſe is rather Impartinent than otherwiſe; and if *Iſſue* is taken *upon this General Traverſe*, it *is only a Denial of every other Thing not anſwered before by the Anſwer*. Mich. 1722. 2 Wms's Rep. 87 Anon.

3. *And* his Lordſhip ſaid, that this General Traverſe ſeemed to him to have *obtained formerly*, and in ancient Times, *when Defendant uſed only to ſet forth his Caſe in the Anſwer*, without anſwering every clauſe in the

the Bill; and for that Reaſon it was the Practice for the Defendant to add, at the End of the Anſwer, this General Traverſe. Mich. 1722. 2 Wms's Rep. 87. Anon.

(C. b) Of Referring Bills or Anſwers for Scandal, Impertinence, Inſufficiency &c.

1. WHERE an *Anſwer* is excepted to be referred, and is *reported Inſufficient*, and the Defendants did not except againſt the firſt Report, but had put in *another Anſwer*; they are to anſwer all the Points excepted to, though the ſame exceed the Bill. Chan. Caſes, 60. Mich. 16 Car. 2. Criſp v. Nevill.

2. *Plea to part, and Demurrer to part*; *Plea over-ruled*; then Defendant anſwered, and that being inſufficient he put in another Anſwer, and that being reported inſufficient he put in a 4th Anſwer; if the firſt be accounted one. Finch C. did not commit him to be *examined on Interrogatories*. Chan. Caſes, 279. Trin. 28 Car. 2. Clotworthy v. Melliſh.

3. A Bill was brought againſt 2 *Defendants*, the Anſwer of one is reported *inſufficient*, and the Report on Exceptions confirmed; afterwards the other Defendant puts in juſt ſuch another Anſwer, and *inſiſted on the ſame Matter*. On Petition, the Court to avoid delay will judge on the Inſufficiency of the *ſecond Anſwer* without ſending it to a Maſter; Per Finch C. Vern. 74. pl. 69. Mich. 1682. Weſt v. Ld. Delaware & Cutler.

4. Where the Defendant *Anſwers to part*, and *pleads to all other Matters* not anſwered unto, the Plaintiff cannot put in Exceptions to the Anſwer till he has firſt argued the Plea, or obtained an Order that the Plea ſhall ſtand for an Anſwer, with Liberty to except to the Matters not pleaded unto. Vern. 344. pl. 336. Mich. 1685. Darnell v. Reyny.

5. If the Plaintiff *refers the Anſwer for Scandal and Impertinence*, and the Maſter *finds it neither*, the Plaintiff, *in Exceptions to the Maſter's Report, muſt ſhew wherein, in what Page and how far* the Anſwer is Scandalous or Impertinent; Per Ld. Macclesfield. 2 Wms's Rep. 181. Trin. 1723. Craven v. Wright.

6. *And* it ſeems ſtronger where Exceptions are taken for Inſufficiency, and the *Maſter Reports it ſufficient* that the Exceptions to the Report, ſhould ſhew wherein the Anſwer is inſufficient. Ibid.

7. *So* if the Bill or Anſwer be referred for ſcandal, and the Maſter *Reports it ſcandalous*; if the Maſter has once *expunged this Scandal*, the *Party cannot then except to the Report*, becauſe it cannot then be made appear by the Record what the Scandal was, and it was his own Fault that he did not except ſooner. Ibid. 182.

8. Ld. C. King made it a Rule, that a *Bill ſhall not be referred for Scandal after the Defendant hath anſwered it*; and by this Means an old Rule of Court was altered. Mich. 1725. 2 Wms's Rep. 311. Abergavenny (Lady) v. Abergavenny (Lady).

9. After an Order to refer an Anſwer *for Inſufficiency*, it cannot be referred for *Impertinence*, yet it may be for *Scandal*. 2 Wms's Rep. 312. In a Note added by the Editor at the Bottom, it is ſaid to have been ſo determined. Hill. Vac. 1729. in Caſe of Elliſon v. Burgeſs.

(D. b) In what Caſes a Bill ſhall be taken Pro Confeſſo, after a full Anſwer.

1. PLaintiff brought her *Bill* againſt Defendant *for an Account of Profits* &c. and after *Defendant had fully anſwered*, Plaintiff *amended her Bill 3 Times*, to which *Defendant put in 3 ſeveral Pleas and Demurrers*, which had been *all over-ruled*, and the Defendant ſtood in Contempt to a Sequeſtration for not anſwering the amended Bill. Plaintiff now moved for Liberty to ſet down the Cauſe on the Sequeſtration, in order that the Bill might be taken Pro Confeſſo &c. whereto it was objected that there being an Anſwer to part (viz.) the Original Bill, the Bill could not be taken Pro Confeſſo, becauſe Part was fully anſwered and denied &c. and the Caſe of * **Hawkins & Crook** was cited. But on the Part of the Plaintiff, it was urged that if Defendant by anſwering Part, and refuſing to anſwer the moſt material Point of all, ſhould prevent the Bills being taken Pro Confeſſo, that would put the Plaintiff in a much worſe Condition than not anſwering at all, and would encourage Defendants by this Method to elude the Juſtice of the Court &c. And as to **Hawkins v. Crook**, Defendant there was willing and deſirous to put in a full Anſwer, and that was at length the Liberty given him by the Court. Ld. Chancellor ſaid that this is an untrodden Path, and as there are no Precedents to direct, we muſt go upon the Reaſon of the Thing. At Law after the Party has appeared and is in Court, if he makes Default &c. Judgment is given for the whole Demand; and if in Treſpaſs &c. Defendant pleads &c. only to part, and ſays nothing to the Reſidue, Plaintiff may take his Judgment immediately for what is not anſwered, and Courts of Equity form their Proceſs upon the ſame Plan when the Party is in Court &c. and it is a Juriſdiction which ſeems abſolutely neceſſary and exerciſed by all Courts, that when they have the Parties once before them, they ſhould have it in their Power to determine upon the Right &c. and therefore ſeemed ſtrongly to incline that the Bill ſhould be taken Pro Confeſſo quoad the Particulars not anſwered. But the Defendant offering to anſwer by the next Term except as to Matter of Account, no Order was made upon the main Queſtion. MS. Rep. Mich. 4 Geo. 2. in Canc. Lady Abergavenny v. Lady Abergavenny.

*See tit. Pro Confeſſo. (A) pl. 9. S. C.

2 Wms's Rep. 311. S. C. but not S. P.

2. Nota, A Caſe was mentioned in the Exchequer, of the Corporation of **Helſton v. Robinſon**, where after an Anſwer reported inſufficient, and Defendant refuſing to put in any further Anſwer, the whole Bill was taken Pro Confeſſo, by the Opinion of the whole Court delivered Seriatim; and this was the Opinion of the Maſter of the Rolls in the Caſe of **Hawkins & Crook** before cited, for that an inſufficient Anſwer is no Anſwer &c. and it is the Party's own Obſtinacy to ſtand out and refuſe making a Diſcovery &c. and the Opinion of taking a Bill Pro Confeſſo quoad ſome Particulars, and joining Iſſue &c. as to the reſt, ſeems new and introductory of great Confuſion in the Proceedings; and Q. B. Ibid.

(E. b) Amend-

(E. b) Amendment. In what Cases in Proceedings in Equity.

1. *AFTER Replication* a better Answer ordered. Toth. 71. cites 38 & 39 Eliz. Wilcox & Yates v. Fisher.

2. In a Rejoinder and a *Commission*, the Defendant to *amend* her Answer; but my Lord said *not* to amend an Answer *after Issue join'd*. Toth. 75. cites Mich. 9 Car. Chettle v. Chettle.

3. The Defendant's Answer which she had sworn, containing some-thing which she afterwards found to be untrue, it was moved on her *Affidavit of* the said *Matter untruly set forth, being occasioned by its being added in the Margin of the Draught after her Perusal thereof, and her being thereby surprized*, that she might have Liberty to amend her said Answer in the Matters so mistaken; and upon Affidavit of *Notice of this Motion, and Certificate that no Replication was filed*, and the Plaintiff making no Defence, she had Liberty given her to amend. Chan. Cases 29. Mich. 15 Car. 2. Chute v. Lady Dacres.

Ibid. it was said the like Liberty was given before Replication filed, in a Case in Ld. Coventry's Time, of Chettle v. Chettle.—2 Freem. Rep. 173. pl. 227. S. C. cited in the principal Case.———Toth. 75. Mich. 9 Car. S.C. & S. P. but not to amend it after Issue joined.

But where the Defendant having by her *Answer consented that an Award made by her Father might be confirmed*, desired Leave to amend her Answer in that Particular, she having *made Oath that she had never read the Award, and that such Answer was prepared for her by her Father, who had wrong'd her in the Award*, the Court denied to give her Leave to amend. 2 Vern. 434. pl. 396. Pasch. 1702. Harcourt v. Sherrard and Dame Anderson Ux'.———Equ. Abr. 29, 30. pl. 5. has a Note that one Reason seems to be, because the *Father was an Arbitrator of her own chusing*.

4. Some Tenants of a Manor brought a Bill against the Lord to discover Ancient Customs. The Defendant demurr'd, because all the Tenants of the Manor are not made Parties; but the Court gave the Plaintiffs Leave to amend their Bill, and to make the other Tenants either Plaintiffs or Defendants as they would consent or not. Fin. Rep. 114. Hill. 25 Car. 2. Hudson v. Fletcher.

5. A *Conveyance by virtue of a Power* was *set forth* by the Plaintiff in his Bill, but *without Date, Day, Month, or Year*; whereupon the Defendant demurr'd; but the Court over-ruled the Demurrer, and gave the Plaintiff Leave to amend his Bill. Fin. Rep. 260. Trin. 28 Car. 2. Bushell v. Newby.

6. A *Decree* was made *against Baron and Feme*, and all the *Process of Contempt was right till the Serjeant at Arms*; but the *Order for that was only against the Baron, and so* likewise *was the Sequestration*. The *Husband died*, and after his Death a *Sequestration went against the Wife's Jointure*; and it was moved to be amended, but the Party could not prevail. Chan. Prec. 115. pl. 102. Arg. cites Trin. 1700. Northcott v. Northcott.

7. A *Recognizance* was enter'd into by F. as Surety, *that a Party in the Cause should abide such Order as should be made upon the Hearing*. Afterwards *an Order was made* for confirming of the Report, *but in the Title of the said Order the Words (et Ux') were omitted*. An Action being brought upon this Recognizance against F. the Surety, he took Advantage of this Omission, and pleaded that no such Order was made in the Cause; whereupon the Plaintiff, perceiving the Mistake, obtained an *Order* from the Master of the Rolls *to amend* the Order *by adding the Words*, and the same was afterwards confirmed by the Ld. Keeper. 2 Vern. 376. pl. 339. Trin. 1700. Spearing & Ux' v. Lynn.

Chan. Prec. 115 pl. 107. Speering v. Lynn & Ux' and Field & al'. S. C. and that the Title of the Order was to be amended Nisi &c. and afterwards it was insisted against the Amendment, for that the Defendant was only a Surety; but on the other Side it

it was ſaid that this was only the *Miſtake of the Clerk*, and ought to be amended to carry on the Juſtice of the Court; and cited the Caſe of Earl v. Earl this Term, where an Affidavit, made before a Sequeſtration, was not filed before the Sequeſtration made, but was ordered to be filed after to ſupport the Sequeſtration, and the Order of Amending was made abſolute in the principal Caſe.

8. Bill was brought for an Account of the Perſonal Eſtate of one T. E. The Defendant having anſwered, and Witneſſes being examin'd, it happened that *in the Title of the Interrogatories the Plaintiff was called Tho. White inſtead of John.* The Court ſaid they cannot read the Depoſitions, nor can the Title be amended, and this altho' moſt of the Witneſſes were, ſince their Examination, gone to Sea. Vern. 435. pl. 398. Paſch. 1702. White v. Taylor.

9. No Proceedings upon an amended Bill till the *Coſts* of the former Proceedings are *diſcharged*. MS. Tab. December 6, 1705. Gage v. Liſter.

10. Wherever there is new Matter in amended or ſupplemental Bills, there can be no Proceedings againſt the Defendant without a *new Service ad faciend' Attorn'*, and a Cauſe cannot be brought to a Hearing without it; for the Defendant ought to have an Opportunity to defend againſt the new Matter. MS. Tab. March 6th, 1720. Cheevers v. Geoghegan.

11. There does not appear to be any Precedent in Chancery of an Amendment *to a Bill in a Part, wherein it has been diſmiſs'd upon the Merits*; Per Ld. C. King, aſſiſted by the Maſter of the Rolls. 2 Wms's Rep. 402. Hill. 1726. Sir John Napier v. Lady Effingham.

S. P. admitted per Cur. 2 Vern. 224, 225. Paſch. 1691. in Caſe of Cecil v. the Earl of Salisbury.

12. If a *Decree* be made *againſt an Infant*, relating to his Inheritance, *with a Niſi Cauſa within 6 Months after Age*, he may amend his Anſwer; and all Decrees againſt Infants give them ſix Months after Age to ſhew Cauſe. 2 Wms's Rep. 403. Sir John Napier v. Lady Effingham.

——The Infant at his full Age may (as the right Way is) apply to the Court, and ſet forth How he is grieved by the Decree, and may have Leave to amend or alter his Anſwer, or any Part of it, or put in a new one; but if he does not do ſo, it ſhall be preſumed that he abides by it, and ſo it ſhall be read againſt him; and ſo it was done in the principal Caſe. Gilb. Equ. Rep. 3, 4. Hill. 6 Ann. The Lord Guernſey v. Rodbridges.

13. The Maſter of the Rolls refuſed to hear any Proof that the Record of an *Anſwer in Chancery* was miſtaken, in being made *contrary to the original Draught*. But afterwards upon very full *Affidavits by the Solicitor and his Clerk, that this was only a Miſtake in the Perſon that ingroſs'd* the Anſwer, and the foul Draught being produced, upon ſolemn Debate before the Ld. Chancellor, aſſiſted by the Maſter of the Rolls, the Court gave the Defendant Leave to amend the Anſwer, and to ſwear it over again, tho' *no Precedent* could be ſhewn *that Amendment was ever made after the Cauſe heard*, and this Matter had been before denied on a Petition and on a Motion. 2 Wms's Rep. 425. 427. Mich. 1727. Gainſborough (Counteſs) v. Gifford.

(F. b) Relief without a Bill, or not pray'd.

1. A Decree was made without a Bill. Toth. 125. cites Mich. 9 Jac. Bull v. Huddleton.

2. A Legacy was presumed, after a great Length of Time, to be paid; and a perpetual Injunction was decreed against a Bond given about 30 Years since relating thereto, and a former Decree was *discharged*, tho' inrolled, and tho' no Relief was particularly pray'd against that Decree. 2 Vern. 23. pl. 14. Pasch. 1687. Fotherby v. Hartridge.

3. The Defendant, in this Case, being advised he had *paid* one Nailor, who was his Solicitor in this Cause, *more Money than could be due to him*, obtained an Order to have his *Bills referred* and tax'd, which was done; and upon the Taxation he was reported to be *over-paid* 60 *l.* thereupon he moved the Court for a *Ne exeas Regnum* against Nailor, *on Affidavit* that he was going beyond Sea with my Lord Cornbury, the Governor of Jamaica, and the Writ was granted by the Master of the Rolls, in the Absence of my Ld. Keeper, tho' there was *no Bill* in Court *whereon to ground this Writ*. Ch. Prec. 171. Mich. 1701. Loyd v. Cardy.

For more of Chancery in General, See **Charge, Charitable Uses, Common, Conditions, Contribution, Copyhold, Devises,** and other Proper Titles throughout this Work.

Charge.

Fol. 388.

(A) In what Cases a Charge made *by one* shall *bind another*.

See Tit. Ren (D. 2) and Tit. Remitter (K)

1. IF a Man devises Lands to J. S. and his Heirs, upon Condition that he shall grant a Rent-Charge in Fee to J. D. the Remainder of the Land to W. N. in Tail, and J. S. grants the Rent accordingly, and dies without Issue, this Charge shall bind this Remainder, because it was not granted merely out of the Estate of the Tenant in Tail, but also partly by Force of an Authority of the Devisor, for it was the Will of the Devisor who had Power to charge it; and this was made in Preservation of the Estate of him in Remainder, for if he had not granted it the Condition had been broke; and some said, that here the Donee had a Fee by Force of the Devise until the Rent granted by Force of the first Words, and after a Tail. Mich. 15 Jac. B. R. between *Dutton and Ingham* adjudged, per totam Curiam, which Intratur P. 15 Jac. Rot. 204. Cro. J. 427. pl. 2. Dutton v. Engram, S. C. adjudged, but there it is, (that if J. S. die without Heirs of his Body, then the Lands should remain to the said J. D. and the Heirs of his Body.)—— Poph. 131. Gouldwell's Case, S. C. it was agreed per Cur. that the Grantee was in by the Devisor, and not by the Tenant in Tail.

2. So it had been in this Case, if the Remainder in Tail had been limited to him to whom the Rent ought to have been granted; for tho' the Devisor appoints that it should remain to the same Person to whom he appoints the Rent to be granted, yet it cannot appear that his Intent was, that the Rent should not longer than during the Cro. J. 427. 428. pl. 2. Dutton v. Engram, S. C. adjudged ac-

cordingly.— Poph. 131. Gouldwell's Caſe, S. C. ſays, as to the ſecond Point, that this Rent being to be granted to him in Remainder, the Intent of the Deviſor is thereby explained, that he ſhall have the Rent only till ſuch time as the Remainder comes into Poſſeſſion, for that now the Rent ſhall be drown'd in the Land by the Unity of Poſſeſſion.

Continuance of the firſt Eſtate Tail, becauſe the Rent is a Fee, and ſhall go to his collateral Heirs, when Heirs of his Body fail, and ſo more large than the Eſtate of the Land. Mich. 15 Jac. B. R. between *Dutton and Ingham* adjudged, per totam Curiam, præter Croke, who ſeemed e contra, becauſe of the Intent of the Deviſor aforeſaid, which Intratur P. 15 Jac. Rot 204.

3. So if a Man deviſes Lands to J. S. in Tail, upon Condition that he ſhall grant a Rent in Fee to W. S. the Remainder of the Land to a Stranger, and the Deviſee grants the Rent accordingly, and dies without Iſſue, this will bind the Remainder for the Cauſe aforeſaid. Mich. 15 Jac. B. R. between *Dutton and Ingham*, per Curiam.

Cro. J. 427, 428. S. C. adjudged a good Grant of the Rent in Fee iſſuing out of

4. So if the Rent ought to be granted to the ſame Perſon to whom the Remainder is limited, yet the Remainder [man] ought to hold it charged after the Death of Tenant in Tail. M. 15 Jac. B. R. between *Dutton and Ingham*, per Curiam, for the Cauſe aforeſaid.

all the Eſtate, and not out of the Eſtate Tail only, and being guided by the Directions of the Will, it ſhall take according to the Limitation thereof, and charge all the Inheritance. Poph. 131. Gouldwell's Caſe, S. C. Haughton J. ſaid, that the Intent of the Deviſor ſeemed to him to be, that inaſmuch as the Land is limited in Tail, and the Rent in Fee, that by this the Grantee ſhould have Power to grant or diſpoſe of the Rent in what Manner he would; but if the Land had been in Fee, he ſhould have conſtrued his Intent to have been, that the Grantee ſhould have the Rent only until the Remainder fall; to which Doderidge agreed, and ſaid, that this in the Caſe of a Will, and this Conſtruction ſtands with the Intent of the Deviſor, and likewiſe with the Statute, which ſays, Quod voluntas Donatoris eſt obſervanda.

* S. C. cited Arg. 4 Le. 90. in pl. 188.—Jenk. 238. pl. 17. S. C.

5. If a Man ſeiſed in Fee ſuffers a Recovery to the Uſe of the Recoverors, until they have made a Leaſe for certain Years, and after to the Uſe of himſelf, if the Recoverors leaſe for Years accordingly, he that hath the uſe after ſhall never avoid it; for he comes under the Leaſe. * Dyer, 12 Eliz. 290. 61. by all the Juſtices. Co. 2. Beckwith 57. b. Mich. 15 Jac. B. R. between *Dutton and Ingham* it was ſo agreed, per totam Curiam.

Cro. E. 216. pl. 14. Hill. 33 Eliz. B. R. Harvy v. Thomas, ſeems to be S. C. & S. P. adjudged accordingly.——Le. 247. pl. 332. S. C. & S. P. held clearly by the whole Court.——4 Le. 15. pl. 54. S. C. Wray Ch. J. held accordingly, and but Gawdy J. e contra. —— S. C. cited Arg. 3 Bulſt. 273.—— See Tit. Fine (S. 2) pl. 5. and the Notes there.

6. If the Baron be ſeiſed of Lands in Fee in right of his Feme, and thereof makes a Leaſe for Years, and after he and his Wife levy a Fine Come ceo &c. to J. S. in Fee, and after the Baron dies, the Conuſee ſhall hold the Land diſcharged of the Leaſe, for the Leaſe was * Fol. 389. void by the Death of the Baron, for the Baron joined (*) but for Conformity and Neceſſity, for all the Eſtate paſſed from the Feme. H. 33 Eliz. B. R. adjudged, quod vide cited Co. 1. Bredon 76. Co. 2. Cromwell 77. b. Mich. 32, 33 Eliz. B. R.

S. P. held accordingly, in the Caſe of Harvy v. Thomas. Cro. E. 216. pl. 14. Hill. 33 Eliz.

7. So if the Baron, ſeiſed in Fee in the Right of the Feme, acknowledges a Statute, or grants a Rent out of the Land, and after he and his Wife join in a Fine Come ceo &c. to J. S. in Fee, and after the Baron dies, J. S. ſhall hold the Land diſcharged of the Rent, and Statute for the Cauſe aforeſaid. Co. 2. Cromwell 77. b. ſaid to have been adjudged in B.

B. R. and they cited it as reſolved in the Lord Mountjoy's Caſe, 24 Eliz. that the Recognizance of the Baron ſhall not bind the Conuſee of a Fine, and the Conuſee is in by the Feme, and the Baron joins only for Conformity.— 3 Le. 254. Mich. 32 Eliz. C. B. cites Ld. Mountjoy's Caſe, thus, viz. Ld. M. took to Wife an Inheritrix, by whom he had Iſſue, and ſo was intitled to be Tenant by the Curteſy

teſy. He acknowledged a Statute, and afterwards he and his Wife levied a Fine and died; now the Conuſee ſhall hold the Land diſcharged of the Statute; for after the Death of the Husband the Conuſee is in by the Wife only, and ſo is in paramount the Charge.

8. But if the Baron and Feme are Jointenants in Fee, or in Tail, upon a Conveyance to them made during Coverture, and the Baron acknowledges a Statute, and after he and his Wife levy a Fine Come ceo &c. to J. S. and ſuffer a Recovery to him, and after the Baron dies, yet J. S. ſhall hold it charged with the Statute; for he comes in as well of the Eſtate of the Baron as of the Feme, for the whole, for there are no Moieties between them.

9. [But] if Baron and Feme are Jointenants in Fee, upon a Conveyance to them made before Marriage, and the Baron acknowledges a Statute, or grants a Rent out of the Lands, or leaſes the Land to another, and after he and his Wife levy a Fine Come ceo &c. to J. S. and after the Baron dies, it ſeems that J. S. ſhall hold one Moiety diſcharged, and the other Moiety charged with the ſaid Charges; for it ſeems the Moiety of the Feme is diſcharged by the Death of the Baron, for it ſeems the Baron had no Power to charge the Moiety of the Feme but during her Life.

10. In Aſſiſe the Caſe was, that *Tenant in Tail granted a Rent-charge, and died*; the *Iſſue entered, and infeoffed N. and re-took Eſtate*, and yet it was awarded that the Charge was determined; becauſe by the Entry of the Heir all was extinct. Br. Charge, pl. 20. cites 14 Aſſ. 3.

11. If *Tenant by Elegit takes Confirmation for* Term of *his Life of the making of the Tenant of the Franktenement*, by this *he is in by the Tenant* of the Franktenement, *and not in the Poſt by the Law*, as he was before; *and* then, *if the Tenant of the Franktenement had charged the Land Meſne between the Execution* made by the Exigent, *and the Confirmation* made, *he ſhall hold charged* where he was diſcharged before; Quod Nota. Br. Extinguiſhment, pl. 30. cites 31 Aſſ. 13.

12. If there are two Jointenants, and the one grants a Rent-charge, the Grantee may diſtrein the Beaſts of the Grantor upon the Land, but not the Beaſts of the other. Br. Charge, pl. 39. cites 11 H. 6. 35.

13. *A. Tenant in Tail.* Remainder *to B. in Fee. B. grants a Rent-charge* out of the Lands *to J. S.* and afterwards *A. makes a Feoffment in Fee to W. R. and dies without Iſſue*, yet the Poſſeſſion of the Feoffee, (ſo long as the Feoffment remains in Force) ſhall not be charged with the Rent, becauſe he is in of the Poſſeſſion given him by the Tenant in Tail, which was not ſubject to the Payment of the Rent. 1 Rep. 62. a. (d) Paſch. 23 Eliz. C. B. in Capel's Caſe, alias, Hunt v. Gately. 1 Rep 128. a. (b) cites S. P agreed, in S. C.

14. If Tenant for Life be, the Remainder over in Fee, and Tenant for Life grants a Rent-charge, and afterwards ceaſeth, whereupon the Lord recovers in a Ceſſavit, he ſhall hold the Land charged. Arg. 3 Le. 255. pl. 339. Mich. 32 Eliz. C. B. in the Serjeant's Caſe.

15. *A. Tenant in Tail.* Remainder *to B. in Tail. B. charges the Land* with a Rent or Leaſe, and then *A. ſuffers a Common Recovery and dies without Iſſue.* The Recoveror ſhall not be charged with this Leaſe or Rent; becauſe the Poſſeſſion and the new Eſtate of the Recoveror, which he has gained from A. the Tenant in Tail, is ſubject to the Charges and Leaſes of the Recoveror, and cannot be ſubject to the Leaſes and Charges of *B.* in Remainder alſo Simul & Semel. 1 127. b. 128. a. cites it as adjudged by all the Judges of England. Mich. 34 & 35 Eliz. in Caſe of Hunt v. Gately. 1 Rep. 61. b. Capel's Caſe, S. C. adjudg'd accordingly. ——Mo. 154 pl. 298. S. C. adjudged accordingly, after Conference with all the Judges of England. ——4 Le. 150. pl. 263. S C argued; ſed Adjornatur. ——And. 282. pl. 290. S. C. adjudged —— Goldsb. 5. pl. 11. S. C. adjudged. ——Jenk. 250. pl. 41. S. C. ——S. C. cited 2 Rep. 52. b. ——S, C. cited 2 Roll Rep. 221.

2 And 66. pl. 48. S. C. but S. P. does not appear.

16. *A. Tenant in Tail for Life.* Remainder *to B. in Tail.* Remainder *to C. in Tail. A. & B. join in a Fine Come ceo &c. to J. S. who renders a Rent of* 40 *l. a Year to A.* afterwards *B. dies without Iſſue*, whereupon C. enters. *A. diſtrains for the Rent*, and adjudged that he well may, for that the Rent remains after the Death of B. without Iſſue, ſo long as A. the Tenant for Life ſhall live. 1 Rep. 76. a. Mich. 39 & 40 Eliz. Gardiner v. Bredon.

17. Dr. Cary being ſeiſed in Fee, makes a *Settlement to the Uſe of himſelf for Life*, Remainder *to Sir Geo. Cary for Life*, Remainder *to the Truſtees to preſerve contingent Remainders*, Remainder *to the firſt and every other Son of Sir Geo. Cary in Tail Male*, Remainder *to Wm. Cary for Life*, with like Remainders *to his firſt and every other Son in Tail Male*, Remainder *to Nich. Cary for Life*, Remainder *to his firſt and every other Son in Tail Male*, Remainder *to Dr. Cary in Fee.* Dr. Cary dies, and on his Death, the Remainder to Sir Geo. Cary comes into Poſſeſſion, and the Remainder in Fee deſcended on Sir Geo. Cary. Sir Geo. Cary being ſeiſed of an Eſtate for Life, with Remainder to his firſt and other Sons in Tail Male, with the like Remainders to Wm. Cary, and Nich. Cary, and being alſo ſeiſed of the Reverſion in Fee which deſcended to him as Heir to Dr. Cary, *confeſſes a Judgment and afterwards dies*, and then *the Eſtate limited to Wm. Cary takes Effect, and the Reverſion in fee deſcends to him; He had two Sons; they die*; and ſo the Reverſion in Fee comes into Poſſeſſion. And now the Queſtion is, whether this Reverſion when it came into Poſſeſſion, was liable to the Judgment confeſſed by Sir Geo. Cary. And Ld. Chancellor ſaid, I am of Opinion that it was liable to ſuch Judgment, becauſe it was the Eſtate of Inheritance of Sir Geo. Cary, and as it was ſo ſubject to the intermediate Eſtates for Life, it was in him liable to be granted or charged, or incumbred by him as he thought fit; and as he might have granted or charged this Reverſion, ſo might he have granted a Leaſe for 1000 Years out of it if he had pleaſed, and which would have taken Effect out of the Reverſion in Fee; and if it had come to Wm. Cary, he could not have claimed ſuch Reverſion, but ſubſequent to that Leaſe; and as he might have done ſo, in like Manner might he have charged it by Judgment or Statute. The Point that was in the Caſe of **Kellow & Rowden**, in 3 Mod. does not ſeem applicable to this Caſe, for that was on an Action on a Bond by the Father againſt the 2d Son as Heir to the Father; for in that Action the 2d Son was charged as immediate Heir to the Father, and in this Caſe it appeared that the Father had ſettled Land on himſelf for Life, Remainder to his firſt Son in Tail, Remainder to himſelf in Fee. The Father dies, the Eſtate comes to the firſt Son, who dies leaving a Son, and then the Son dies, and on his Death the Land deſcended to the 2d Son as Heir to the Father. In this Caſe it was not doubted but that this Eſtate was the Eſtate of the Father, and liable to the Debt; but the Queſtion was, if the Plaintiff in that Action had well charged the Defendant as immediate Heir to his Father, and whether he ought not to have charged him as Heir to the Nephew, and have ſhewn his Pedigree for that Purpoſe. Mr. Juſtice Giles Eyre, held that he was not well charged, but the other 3 Juſtices held that he was. But Mr. Juſtice Giles Eyre in that Caſe ſaid, that it was not doubted but that the Reverſion in Fee, which took Place in the 2d Son, was veſted in the firſt Son, and that the firſt Son might have charged it with Statute, Judgment or Recognizance; which was not denied by the other Juſtices. So that it could not be doubted, but that if he had made a Leaſe for Years out of the Reverſion, and ſuch Reverſion had after come to the Brother, but that it muſt have been ſubject to that Leaſe. The Stating this proves the Difference, and that it would not be liable to the Bond of Sir Geo. Cary, as Aſſets by Deſcent, becauſe

cauſe that cannot be where there is an intermediate Eſtate, but muſt be where the Heir takes as immediate Heir to the Anceſtor that entered into the Bond. But on Judgment you charge the Tertenant of the Eſtate that was in the Perſon that was the Conuſor of the Judgment, but not ſo by his Bond, unleſs the Lands came as Aſſets by Deſcent to the very Heir of Sir Geo. Cary. This will not be liable to the Inconveniences as were by me at firſt apprehended; for if either of the Perſons that took an Eſtate Tail had ſuffered a Common Recovery, there would have ben an End of the Reverſion in Fee. Where there is a Tenant in Tail with Reverſion to him in Fee, and this Reverſion deſcends to the Deſendants, they muſt take it liable to the Judgment, or Statute, or Recognizance of any of their Anceſtors, in whom the Eſtate at any Time was; and therefore I am of Opinion that this Reverſion is liable to the Judgment. As to a Fine that was mentioned, as it is not produced before me, I cannot give any Determination upon it, but it ſeems to operate no otherwiſe than as a Grant of the Reverſion, which being ſubſequent to the Lien that was on it by this Judgment, and the Plaintiffs filing their Bill in 1726. which was but 2 Years after ſuch Fine, the ſame is no Bar to the Plaintiffs. MS. Rep. Dec. 1740. Giffard v. Barber.

(B) Charge. What is a Charge on Land; and on what Land.

1. IF a Man *charges his Manor* of R. and *after a Tenancy*, that is held of the Manor, *eſcheats*, now this is Parcel of the Manor, and yet ſhall not be charged, for it was not Parcel at the Time of the Grant, but then the Services thereof were Parcel of the Manor. Br. Charge, pl. 50. cites 22 Aſſ. 10.

2. A. deviſed Lands for Payment of Debts and Legacies, and gave Legacies to 3 younger Children, and *makes his Wife Executrix* without more Words, *but deviſed* that his 3 Children *ſhould releaſe to his Executrix all* ſuch Actions and *Demands of his perſonal Eſtate.* The perſonal Eſtate ſhall be firſt applied *in Aid of the Heir.* Chan. Caſes, 296. Hill. 28 & 29 Car. 2. Pain's Caſe.

3. A. having begun to build a Houſe, made his Will ſoon after the Statute of Frauds, and thereby *deviſed Lands for raiſing* younger Children's *Portions and Payment of his Debts, and appointed* 400 *l. to be laid out in finiſhing his Houſe.* The *Will was not atteſted as that Act required* for paſſing Lands, ſo that the younger Children could take no Benefit of the Deviſe, notwithſtanding which, the Son and Heir of A. inſiſted on having the 400 l. out of the perſonal Eſtate; but Ld. Chancellor decreed that the *perſonal Eſtate ſhall not be leſſened in* prejudice of younger Children, *to make good a Direction* in the Father's Will *for the Benefit of the eldeſt Son, when he* at the ſame Time *takes Advantage of a defective Execution of the Will*, and defeats the Father's Intentions in Favour of his younger Children. Vern. 95. pl. 83. Mich. 1682. Husbands v. Husbands. 2 Chan. Caſes, 127. S. C. but very imperfectly reported.

4. A. *covenanted* or gave *Bond to ſettle Land or Annuity out of Land of* 100 *l. a Year*, but *had no Land at the Time* of the Settlement; an *after Purchaſe* ſhall be liable, and that againſt a voluntary Deviſee. 2 Vern. 27. pl. 90. Paſch. 1689. Tooke v. Haſtings.

5. Bill to be relieved and indemnified againſt an Annuity of 100 l. per Ann. charged upon the Plaintiff's Jointure, and payable to the De-

fendant Oldfield for his Life &c. upon this Caſe. Mr. Ramſden (the Plaintiffs late Husband) treating with the Plaintiff's Friends and Relations about a Marriage with the Plaintiff, did propoſe to ſettle certain Lands in Jointure upon her; the Propoſals being laid before Counſel in Order to draw a Settlement, it was objected upon looking into the Title, that the *Lands propoſed to be ſettled in Jointure were ſubject to this Rent-charge of* 100 *l. per Ann. to the Defendant Oldfield for Life*, and the Plaintiff's Counſel did inſiſt that Mr. Ramſden ought to give Security to indemnify the Plaintiff's Jointure from this Charge, and thereupon Mr. Ramſden did give a Bond to indemnify, but that not being thought a ſufficient Security, he offered to get the Defendant Appleyard (a Man of a conſiderable Eſtate) to be bound with him for a Security; and upon his Application to Mr. *Appleyard* who was his Friend and Kinſman, Mr. Appleyard *by Letter directed to Mr. Ramſden, writes* thus (viz.) *That he is willing to be bound* with him, viz. Mr. Ramſden, *to indemnify the Lady's Jointure from the ſaid Annuity, and doth by this his Letter oblige himſelf ſo to do.* This Letter being produced to the Plaintiffs Counſel he was ſatisfied with it, and thereupon the Settlement was made, and the Marriage took Effect, and there was a *Bond drawn purſuant to this Agreement*, which *was executed by Mr. Ramſden, but never* executed *by Mr. Appleyard.* Mr. Ramſden died inſolvent in 1717. and Mr. Oldfield's Annuity being ſecured by Demiſe and Re-demiſe of Part of the Jointure Lands, brought an Ejectment againſt the Plaintiff to recover his Rent-charge, and thereupon the Plaintiff brings her *Bill* in this Court againſt the Executors of her Husband, and *againſt the Executors of Mr. Appleyard, and alſo againſt his Heir at Law, to whom he deviſed all his real Eſtate ſubject to the Payment of his Debts.* The principal Point in this Caſe was, if the Heir at Law and Deviſee ſubject to the Payment of Debts of Mr. Appleyard, ſhould be liable to indemnify the Plaintiff's Jointure from this Rent-charge, by Force and Virtue of this *Letter* to Mr. Ramſden, *without having executed the Bond to indemnify*, Mr. Ramſden the *Plaintiff's Husband dying Inſolvent, and the Executors of Mr. Appleyard having no Aſſets.* The Defendant's Counſel inſiſted that the Heir at Law of Mr. Ramſden, as well as his Executors, ought to have been made a Party to this Suit; for if he had Aſſets by Deſcent, he would be liable to ſatisfy the Whole, Mr. Appleyard being only a Surety, (ſuppoſing his Heir to be bound by this Letter) ought not to be charged. 2dly, That Mr. Appleyard had no Conſideration for indemnifying the Plaintiffs Jointure from Incumbrances, and therefore *Nudum Pactum*, and not binding. 3dly, That this *Promiſe* of Mr. Appleyard was in its Nature barely *Executory*, and Parties concerned in Intereſt ought to have come into this Court for a ſpecifick Performance of this Agreement in his Life-time, and during Mr. Ramſden's Life-time, and then Mr. Appleyard might have made himſelf ſafe by taking a collateral Security. 4thly, That this Letter cannot bind his Heir at Law and Deviſee. Per Parker C. it is not ſo much as ſuggeſted in all the Pleading in this Cauſe, that Mr. Ramſden left Aſſets real or perſonal to ſave the Defendant harmleſs from this Rent-charge, and the Exception of Want of proper Parties, ought to have been made before the Cauſe was at Hearing, if the Defendants would take Advantage of it, and therefore over-ruled the Exception.

2dly, That there was a ſufficient Conſideration for this Promiſe or Undertaking of Mr. Appleyard, viz. the Marriage, and ſuch a Conſideration is good at Law; for though no Profit accrues to the Promiſor, yet the other Party, without this Promiſe, would be ſubject and liable to a Loſs or Damage, and that is a ſufficient Conſideration to ſupport an Aſſumpſit at Common Law. 3dly, That this Promiſe of Mr. Appleyard is direct and poſitive in the preſent Tenſe (viz.) and I do by this

my

my Letter oblige myſelf ſo to do; and though this Letter was directed and ſent to Mr. Ramſden, yet it was writ with an Intent to be ſhewn to the Plaintiff's Counſel, to ſatisfy him that the Lady's Jointure ſhould be indemnified from the Rent-charge, and it ſeems it did ſo, for immediately thereupon the Jointure was accepted, and the Match was made, which very likely would not have gone on without it. 4thly, *Tho' this Letter* of Mr. Appleyards *would not bind his Heir at Law*, it not being in the Nature of a Debt by Specialty, but by ſimple Contract only, and the Heir not named in it, *yet it will* bind him *as Deviſee of the real Eſtate ſubject to the Payments of Debts*; for thereby the Lands are liable to the Payment of all Debts whatſoever. And decreed an Account to be taken of what is due to the Defendant Oldfield for the Arrears of his Annuity, to be paid by a Day to be appointed by the Maſter, otherwiſe the Injunction in this Cauſe to be diſſolved. That the Plaintiff be reimburſed, what ſhe ſhall ſo pay, by the Defendant, the Deviſee of Mr. Appleyard, who is to give ſuch Security as the Maſter ſhall approve to indemnify the Plaintiff from all future Payments; Per Parker C. MS. Rep. Mich. 7 Geo. Ramſden v. Oldfield & Appleyard & al'.

(C) Charge. Where on the Perſonal Eſtate.

1. THough *Debts and Legacies* are *charged on Lands*, yet the perſonal Eſtate muſt come in Aid, unleſs there is an *expreſs Clauſe of Exemption* in the Will. Fin. R. 342. Hill. 30 Car. 2. Ford Ld. Grey v. Lady Grey & al'. Chan. Caſes, 296. S. C.

2. Uncle on Marriage of his Niece, agrees by Deed-Poll to *permit his Eſtate to deſcend* to her, and that *he ſhould charge the ſame with 500 l. and no more*. The Uncle dies, and charges it with 2000 l. and deviſed away all his perſonal Eſtate to his Executors. Decreed the Agreement to be performed, and that the perſonal Eſtate ought to come in Aid of the ſaid Agreement. Fin. R. 405. Hill. 31 Car. 2. Otway v. Braithwaite & al'.

3. Where a *real and perſonal Eſtate are both ſubject to Payment of Debts*, if the perſonal Eſtate is ſufficient, there ought to be no further Account of the real Eſtate. But if the *real Eſtate be expreſsly charged* with the Payment of Debts, then ſo long as it remains Subject, it will draw both Eſtates to an Account at any Time, becauſe the perſonal Eſtate ought in the very Nature of the Thing, to go in Eſtate of the real Eſtate, and therefore the *Statute of Limitations* cannot interpoſe, or be any Bar to an Account thereof; decreed per Cur. Fin. R. 458. Trin. 32 Car. 2. Davis & al.' v. Dee & al'.

4. A. deviſes *Lands to B. for Payments of his Debts*, and deviſes *to C. other Lands which were in Mortgage, and all his perſonal Eſtate.* Decreed that B. muſt take the Mortgaged Lands Cum Onere, and that the perſonal Eſtate, though deviſed to him, muſt be ſubject to the Debts, notwithſtanding Lands were deviſed for Payment of Debts. 2 Vern. 183. pl. 165. Mich. 1690. Lovel v. Lancaſter.

5. When the *perſonal Eſtate is deviſed away*, it ſhall not be applied in Exoneration of the real Eſtate, and though the Heir and Mortgagee ſhould agree to charge the Debt on the perſonal Eſtate, yet the Legatees ſhould be reimburſed out of the Real; Arg. But whether in Caſe of a *Mortgagor* with Covenant to pay the Money, and a Recognizance as farther Security, *dying inteſtate* and leaving younger Children unprovided for, But where the *Deviſee is made Executor it is* Aſſets 2 Vern. 302. pl. 291. Mich. 1693. Cutler v.

Coxeter. — 2 Vern. 568. pl. 515. Hill. 1706. French v. Chicheſter. — for, the Mortgagee ſhall be let ſweep all the perſonal Eſtate, by Reaſon of his Covenant and Recognizance, and leave the *younger Children deſtitute*, Curia adviſare vult. 2 Vern. 309. pl. 300. Hill. 1693. Mill v. Darrell.

The ſame Difference is taken between a Gift of the perſonal Eſtate *to the Deviſee*, or to *a Stranger* who is not Executor. G. Equ. R. 72. Mich. 9 Ann. Hall v. Brooker.

It was by Ld. C. Macclesfield denied to be a Rule, that in all Caſes the perſonal Eſtate is applicable in Caſe of the Real; for he ſaid that it ſhall not be ſo applied, if thereby the Payment of any *Legacy* will be prevented, much leſs where it will deprive the Widow of her *Paraphernalia*. Mich. 1721, Wms's Rep. 730, 731. Tipping v. Tipping. ——— 2 Chan. Caſes, 4. Anon.

6. A. ſeiſed of Land in Fee, *covenants to pay* 1000 *l. to build a Houſe* thereon; after it was begun, and before it was finiſhed A. dies Inteſtate. The Adminiſter of A. may be compelled ſpecifically to perform this Agreement; and decreed accordingly. 2 Vern. 322. pl. 310. Mich. 1694. Holt v. Holt.

Abr. Equ. Caſes, 409, 410. pl. 3. S. C. printed as an Original Caſe, and held accordingly.

7. A Will is made of Lands and Legacies charged, and the Will duly executed; afterwards he makes a Scrivener take Directions to prepare a Draught of Inſtructions for another Will, which the Scrivener did, which Teſtator read, approved and ſet his Hand to; Per Cowper C. ſuch Legatees of the Perſonalties in the firſt Will, as are left out in the ſecond, muſt loſe their Legacies, but for thoſe that had *Legacies by the firſt Will chargeable on the real Eſtate*, if the ſame Legacies were deviſed to them by the 2*d Will*, they ſhall ſtill continue charged on the real Eſtate, and be raiſed out of it; and ſo whether their Legacies were increaſed or deminiſhed. But for *other new* abſolute perſonal Legacies deviſed by the 2d, they ſhould be charged only on the perſonal Eſtate, and ſhould have the *Preferance* to be firſt paid out of the perſonal Eſtate, before the other Legacies in the firſt Will upon the real Eſtate. 3 Chan. R. 159. Hill. 6 Ann. Hyde v. Hyde.

8. It was agreed by the Court and all the Bar, that the Caſes wherein the Perſonal Eſtate has ever been applied in Eaſe and Exoneration of the Real Eſtate, are only where there was *no expreſs Exemption of the Perſonal Eſtate*; for if a Deviſe be of ſuch Lands to be ſold for the Payment of Debts and Legacies, and then ſays, I will that my Perſonal Eſtate ſhall not ſtand charged or be liable thereunto; or if the Deviſe for Sale of Lands for the Payment of Debts is general, and he after deviſes all the Reſt and Reſidue of his Perſonal Eſtate, having already made Proviſion for the Payment of my Debts and Legacies out of my Real Eſtate, Or out of ſuch particular Lands &c. or ſuch like Clauſes; in ſuch Caſes the Real Eſtate ſo ſubjected ſhall not be exonerated by the Perſonal; and cited the Caſe of **Lady Gainsborough**, and of one **Lar-way**, and ſeveral others. Gilb. Equ. Rep. 73, 74. Mich. 9 Ann. in Caſe of Hall v. Brooker.

Chan. Prec. 423. S. C. reports it as 2 Vern. 701. that the Perſonal Eſtate deviſed is not liable. ——But Wms's Rep. 291. 294. S. C. reports that the Cauſe coming on again, on the Equity reſerved after the Trial of an Iſſue that had been directed by the Court, the Ld. Chancellor ſeemed ſtrongly of Opinion, that the Perſonal Eſtate ſhould be applied in Eaſe and Exoneration of the Real Eſtate; 1ſt, becauſe the *Father's Will ſaid that his Executors ſhould by his Perſonal Eſtate pay and levy his Debts*; and if (tho' the Will were ſilent) on the Teſtator's dying indebted, the Perſonal Eſtate ought to be applied to pay the Debts in Eaſe of the Real, a Fortiori it muſt be ſo, when the Will was expreſs that all the Debts ſhall be paid thereout. 2dly, this 300*l.* was a Debt; for ſo is all Money borrow'd. Indeed it was a Debt of a ſpecial Nature, and for which there was a particular Remedy, not by Mutuatus at Law, nor by

9. A *Mortgage* in Fee for 300*l.* redeemable at Michaelmas 1710, or *at any other Michaelmas* on ſix Months Notice, and *no Covenant to pay* the Money. The Mortgagor continued in Poſſeſſion, paid the Intereſt, and by Will deviſed his Perſonal Eſtate to his Wife and Daughter. Per Ld. Chancellor, the *Perſonal Eſtate deviſed* is not liable; here is no Covenant either expreſs'd or imply'd. 2 Vern. 701. Mich. 1715. Howell v. Price.

Bill

Bill in Equity, but by Ejectment to recover the Poſſeſſion on Default of Payment. 3dly, if the Mortgagee had been in Poſſeſſion it would not have made it leſs a Debt, ſince the Creditor would thereby have had his Remedy in his own Hands. 4thly, it was ſuch a Debt as the Mortgagor took great care that he, his Heirs or Aſſigns might at any Time have Liberty to pay off. 5thly, the running on of Intereſt, and its carrying Intereſt, proved its being a Debt; and the Proviſo ſaying that if the Mortgagor, his Heirs or Aſſigns ſhould pay the 300 l. and the Rent, or Arrear of Rent &c. in this Caſe by the Word (Rent) was to be underſtood the Intereſt or Profit of the Money, and what the Money yielded. Laſtly, he ſaid it plainly appeared from hence to be a Debt, viz. That in caſe a Mortgagee died, and the Mortgagor come to redeem, he ſhould pay the Money to the Executor, and not to the Heir of the Mortgagee, tho' it was a Mortgage in Fee, it being Money ſecured by and due on Land; wherefore, upon the Whole, his Lordſhip thought it a ſtrong Caſe in Favour of the Heir, and decreed accordingly.——Gilb. Equ. Rep. 106. S. C. in totidem Verbis with Chan. Prec.

10. A. by his Will directed that his *Debts, Legacies, and Funerals ſhould be paid out of the Rents of his Real Eſtate*, and his Executor to receive the Rents till B. came of the Age of 25, and then to pay the *Surplus to B.* and gives ſome Legacies, and then *gives the Reſidue of his Perſonal Eſtate to B.* B. dies an Infant. Per Cowper C. if in the Caſe the Reſidue of the Perſonal Eſtate unbequeath'd had been deviſed *to a Stranger*, or to a 3d Perſon, he ſhould have had it free and exempt from Payment of Debts; but the Deviſee of the Surplus of the Land and of the Perſonal Eſtate being *one and the ſame Perſon*, on Conſideration of the whole Will, he thought the Surplus of the Perſonal Eſtate was not intended to be deviſed to B. free and exempt from Payment of Debts. 2 Vern. 740. pl. 647. Hill. 1716. Doleman v. Smith.

There is * *no expreſs Clauſe to exempt the Perſonal Eſtate*, and that has always been the Diſtinction in this Court; per Ld. Cowper. Chan. Prec. 458. S. C.—— Chan. Prec. 456. S. C. reports that A. gave the *Reſidue of his Perſonal Eſtate* (*before unbequeath'd*) *to B.* ſo that if the Perſonal Eſtate had been deviſed *to a Stranger*, Ld. Cowper held it might have had another Conſideration from the Meaning of the Words (*before unbequeath'd*); but here he thought it could not.—— Gilb. Equ. Rep. 128. S. C. in totidem Verbis.

* Gilb. Equ. Rep. 72. Mich. 9 Ann. in Canc. Hall v. Brooker, S. P.

11. The *Real Eſtate is expreſsly charged with the Payment of Debts*, and the *Perſonal Eſtate is given to the Executor*. Adjudged that the *Executor takes* not the Perſonal Eſtate to his own Uſe, *but as Executor*; and then it ſhall be applied to diſcharge the Real Eſtate in Favour of the Heir at Law. Pengelly ſaid that *if theſe Words (to her own Uſe)* or the like *had been added*, it might give ſome Cauſe of Doubt, but little Streſs was laid on the Manner of creating her Executrix. The Decree was directed to be of the Surplus of the Perſonal Eſtate after the Legacies paid. Gibb. 41, 42. Hill. 2 Geo. 2. in the Exchequer. Lucey v. Bromley.

12. A. ſeiſed in Fee *makes a Mortgage*, and then *deviſes the Lands to B.* and *gives ſeveral Money-Legacies to C. D. &c. and wills that all his Debts ſhall be paid out of his Perſonal Eſtate*; *and if that be not ſufficient, then the Legatees to abate in Proportion.* The Queſtion was, whether the Mortgage ſhould be paid out of the Perſonal Eſtate, ſo as to diſappoint the Legatees, there not being ſufficient to pay both &c. Per Maſter of the Rolls, it is a Rule in this Court that a Hæres Factus, as well as Natus, ſhall have Aid of the Perſonal Eſtate, but not to diſappoint Legatees; and therefore if the Heir or Deviſee does exhauſt the Perſonal Eſtate, as they may at Law, this Court will turn the Legatees upon the Land &c. But this Caſe turns upon the particular Wording of the Will; and tho' the Teſtator, willing his Debts ſhould be paid out of his Perſonal Eſtate, and if that falls ſhort, then the Legatees ſhould abate in Proportion, ſeems prima facie to import no more than the Law ſays, and ſo are to be conſidered as Surpluſage, yet it holds upon Conſideration that theſe Words do really import more; for if the Perſonal Eſtate was exhauſted by the Deviſee to pay the Mortgage, as it might be at Law, then by the Law of this Court, which is as much the Law of the Land as the Common Law, the Legatees ſhould come upon the Land

without any Abatement; but here the Teſtator ſays they ſhould abate in Proportion, and conſequently to give them a Remedy upon the Land is to contradict the Will; wherefore *the Debt upon the Mortgage is to be computed amongſt the other Debts of the Teſtator, and the Surplus only to be divided amongſt the Legatees* &c. MS. Rep. Mich. 4 Geo. 2. in Canc. Reeves v. Herne.

(D) Charge. Where, on the Real Eſtate.

1. NO Man can charge his Heir but as a Part of himſelf, and therefore beginning with himſelf. Hob. 130. pl. 172. Trin. 12 Jac. Oates v. Frith.

2. *As to the Diſpoſal of my Eſtate, I deviſe the ſame* as follows; and then deviſes *White Acre to B.* his eldeſt Son *in Tail ſpecial*, Remainder *to his 3 other Sons in Tail Male* ſucceſſively, and deviſes *Copper-Mines &c. to B. to be ſold to pay Debts*, and then gives *to his Daughter* 30 l. per Ann. till 12 Years old, and afterwards 50 l. per Ann. till Marriage, and gives her 1500 *l. to be paid by B. within* 3 *Months after Marriage*, and *makes B. Executor*, and dies. The Perſonal Eſtate fell ſhort. Cowper C. ordered Precedents to be ſearched, but thought the Lands not charged. Chan. Prec. 449. pl. 287. Mich. 1617. The Ld. Pawlet v. Parry.

3. A. ſeiſed of Land in Fee *deviſed ſeveral Legacies*, and then *deviſed Lands to B. and C. his Wife for Life, upon Condition* that *B. his Executors, Adminiſtrators, and Aſſigns ſhould pay all his Debts and Legacies*; and after the Death of B. and C. he deviſed the Inheritance to D. and the Heirs of his Body. B. C. and D. joined in Sale of the Lands to J. S. 'Twas urged that by the *Limitation over to D. in Tail* the Condition was deſtroy'd, and ſo the Purchaſor's Eſtate not liable in Law or Equity to the Debts or Legacies, tho' he had Notice. But per Cur. the Lands are liable in Equity, and ſo decreed againſt the Purchaſor with Damages and Coſts, and he to take his Remedy over againſt C. (B. being dead) for the Profits received, and ſhe was decreed to pay the ſame to the *Purchaſor*, for which Purpoſe he was to have the Benefit of this Decree. Nelſ. Ch. Rep. 38. 12 Car. 1. Newell v. Ward & Brightmore.

4. If a Man *deviſes Lands for Payment of Debts, and makes an Executor*, and leaves a Perſonal Eſtate, no Part of the Perſonal Eſtate ſhall go to the Payment of Debts, becauſe, by making an Executor, the Teſtator's Intent appears that the Executor ſhall have the Goods, becauſe the Teſtator has made other Proviſion for the Payment of his Debts; but if a Man diſpoſes Land *for Payment of Debts, and dies inteſtate*, the Perſonal Eſtate is chargeable in the Adminiſtrator's Hands to the Payment of Debts; for ſo the more Land will remain for the Benefit of the Heir, or more Money for the Land ſold, and no *Intent* appears that the Adminiſtrator ſhall have any thing; per Fountain Serj. and admitted as reaſonable by the Maſter of the Rolls. Lev. 203. Hill. 18 & 19 Car. 2. in Canc. Feltham v. the Executors of Harliſton.

S. C. cited per Cowper C. 2 Vern. 718. in Caſe of Wainwright v. Bendlowes. —In ſuch Caſe the Perſonal Eſtate, tho' bequeath'd to his Executor, ſhall be firſt applied; for he takes it as Executor, and the Deviſe is ſuperfluous; but if the ſame had been deviſed *to a Stranger*, who was *not Executor*, ſuch Stranger ſhould take it diſcharged of Debts, or only to be in Aid of the Real Eſtate. Gilb. Equ. Rep. 72. 9 Ann. Hall v. Brooker.—But in ſuch Caſe if any *particular Legacy*, as a Horſe, or 500 l. in Money, or any *Part only of the Perſonal Eſtate*, be *bequeath'd to an Executor*, ſuch particular Legacy, not being caſt upon him by the Law only, ſhall not come in Aid in caſe of a Deficiency; but he ſhall be chargeable only in reſpect of the Surplus caſt upon him by the Law. Agreed. Gilb. Equ. Rep 73 in Caſe of Hall v. Brooker.

5. *My*

5. *My Debts and Legacies being first deducted, I devise all my Estate Real and Personal to J. S.* Per Finch C. This amounts to a Devise to sell for Payment of Debts. Vern. 45. pl. 45. Pasch. 1682. Newman v. Johnson. This amounts to a Charge on the Lands; for J. S. is not to have the Lands till after the Debts and Legacies are paid. Chan. Prec. 398. pl. 270. Pasch. 1715. Tomkins v. Tomkins.

6. A. devised *his Debts to be paid out of his Real and Personal Estate.* The Executors paid more than his Personal Estate. They shall be reimbursed out of the Real Estate. 2 Chan. Cases 109. Trin. 34 Car. 2. Anon. 2 Chan. Cases 117. Trin. 34 Car. 2. S. P. in Case of Culpepper v. Aston.

7. One devised all his Lands to A. and the Heirs of his Body; Remainder over; and in another Part of the Will devised to A. all his Personal Estate, and makes him Executor, *willing him to pay his Debts.* This is a Charge upon the *Lands* as well as upon the *Personal Estate* to pay the Debts. Vern. 411. pl. 386. Mich. 1686. Clowdsly v. Pelham, cited per Hutchins Commiss. N. Chan. Rep. 178. in the Case of Webb v. Sutton; and distinguishes between a Desiring in a Will to pay Debts, and desiring to pay *a Money-Legacy*; that in the last Case 'tis no Charge on the Land. The Court said that this Case was affirm'd in Dom. Proc. 2 Vern. 229. Pasch. 1691. in pl. 208.—Real Estate was decreed to be charg'd with an *Annuity* given by the Will, *tho' no express Words to charge the Land, the Executor being Devisee* of the Land. Per Lords Commissioners. 2 Vern. 143. pl. 140. Trin. 1690. Elliot v. Hancock.——But this Case was denied by the Master of the Rolls, 4 Nov. 1738. in Case of Miles v. Leigh.

8. *As for my worldly Estate I give my Daughter* 10*l. to be paid by my Executor*, and *I give her* 10*l. per Ann. during her Life*, to be paid by Quarterly Payments; *and all the rest of my Real and Personal Estate I give to my Son* &c. The Court doubted if this was a Charge on the Real Estate. Nelf. Chan. Rep. 155. Hill. 1689. at the Rolls. Joyce's Case. *As for my Temporal Estate, wherewith God hath blessed me, I give and dispose* thereof as follows; *First, I will that all my Debts be justly paid which I shall owe at my Death* to any Person or Persons whatsoever; *also I devise all my Estate in G. to J. S.* This was all the Real Estate the Testator had. Per Ld. Keeper Wright, This is a Charge on the Real Estate for Payment of Debts. Ch. Prec. 264. pl. 215. Mich. 1706. Bowdler v. Smith.

9. A. devised Lands to B. in Tail, Remainder over, and gives *Power to his Executor to raise* 500*l. out of his Estate for his next Heir*, if the Executor shall think it necessary, *and desires him to see his Debts paid*, and gives to his Executor all the *Rest and Residue* of his Estate unbequeath'd, to pay and distribute as he shall think fit. Per Commissioners, the Executor has Power to *sell* the Lands, and the Real Estate by the Will is subjected to the Payment of Debts. 2 Vern. 153. pl. 149. Trin. 1690. Wareham v. Brown.

10. Decreed by Somers, Ld. Chancellor, that *where a Real Estate is upon an equitable Title made subject* by this Court *to the Payment of Debts*, and it appears that there is a *sufficient* legal Estate, (i. e.) *Goods and Chattels to satisfy Debts upon Specialties*, for which the Creditors may have Remedy at Law against the Executor; in such Case the *Debts upon simple Contract, for which there is no Remedy at Law, shall be first satisfied out of the equitable Estate.* 3 Salk. 83. pl. 4. Hill. 1697. Feverstone v. Scetle.

11. A Man devises a *Legacy out of his Land*, and died, leaving *sufficient Assets* for the Payment of all his Debts and Legacies. Per Holt, that Legacy ought to be paid out of the Land; for it is a Charge on the

the Land, and not on Goods. Tho' Cowper, King's Counſel, ſaid, that in Chancery, if it be not expreſſed that Legacy ſhould be paid out of Land, and not out of Goods, if there be ſufficient Aſſets they will charge them in Eaſe of Inheritance; to which Holt anſwered, if Chancery be meddling with Wills, they ought to go according to Law. 12 Mod. 342. Mich. 11 W. 3. Anon.

12. B. in 1661, made his Will, and amongſt other Legacies, *deviſed an Annuity* of 20 l. per Ann. *to C.* to be paid quarterly, and gives other Legacies, and then has this Clauſe, *All the reſt of my real and perſonal Eſtate, not before bequeathed, (my Debts being paid) I give to my Brother* D. and makes him ſole Executor, and Ld. Keeper held the Lands were charged by B's Will. Abr. Equ. Caſes 74. Paſch. 1702. Quintine v. Yard.

Chan. Prec. 430. pl. 282. S. C. accordingly, and that ſince he does not deviſe his Real or Perſonal Eſtate to any particular Perſon for thoſe Purpoſes, the Perſons that come within that Deſcription muſt be ſuppoſed to be in his View, and it muſt be taken to be a Deviſe for the Benefit of Legatees and Creditors, preferable to any Diſpoſition whatſoever, either of his Real or Perſonal Eſtate, and conſequently both are made liable thereunto. —— Gilb. Equ. Rep. 111. S. C. in totidem Verbis with Chan. Prec.

13. A. deviſed to B. his Heir at Law, his Lands for Life, Remainder to her Iſſue, Remainder over, but in the Beginning of the Will he ſays, *I will and deviſe, that my Debts, Legacies, and Funerals, ſhall be paid in the firſt Place.* A. makes B. Executrix. Cowper C. decreed the Real Eſtate liable to the Payment of Debts, and ſaid, that the directing the Debts to be paid *in the firſt Place imports*, that before any Deviſe by his Will ſhould take Effect, his Debts &c. ſhould be paid, and ſeemed to lay ſome Streſs upon the Word *(Deviſe.)* 2 Vern. 708. pl. 630. Hill. 1715. Trott v. Vernon.

Chan. Prec. 451. pl. 288. S. C. Ld. Chancellor was clear of Opinion, that the Perſonal Eſtate was not liable in this Caſe, and decreed accordingly. — Gilb. Equ. Rep. 125. Mainwright v. Bendloe, S. C. but ſeems to be only copied from Chan. Prec. — S. C. cited by Ld. C. Talbot, Caſes in Equ. in Ld. Talbot's Time 208. Trin. 1736 in Caſe of Stapleton v. Colville.

14. A. *deviſed* his *Fee-Farm Rent to be ſold for the Payment of his Debts, and the Surplus* ariſing by Sale, after Debts paid, he deviſed *to his Brother B. his Heir at Law, and to* his Brother C. and to his Brother-in-law D. and willed his *Houſhold Goods ſhould go along with his Houſe*, and deviſed the reſt, and *Reſidue of his perſonal Eſtate, to his Siſter* E. and made her *Executrix.* The Queſtion was, whether the Perſonal Eſtate ſhould be applied to the Payment of Debts in Eaſe of the Fee-Farm Rent? Per Lord Chan. a *Difference* is to be taken *where* an *Eſtate is to be ſold out and out for Payment of Debts*, and *where only the Debts are charged on it*, and the Eſtate made liable to the Debts, and cited **Feltham's Caſe**, 1 Lev. 203. and the preſent Caſe is the ſtronger, becauſe the *Surplus* ariſing by Sale, after Debts paid, is *not to go to the Heir, but is deviſed away*; and beſides, here the Debts being great, the Deviſe of the Perſonal Eſtate would come to nothing, which at Law is deemed the worſt Conſtruction that can be made of a Will, and therefore decreed the Debts ſhould be paid in the firſt Place, out of the Money ariſing by Sale of the Fee-Farm Rents, and the Perſonal Eſtate only to come in Aid of the Fund, if deficient, and the Surplus of the Perſonal Eſtate to the Siſter, the Executrix. The Deviſe of the reſt and reſidue of the Perſonal Eſtate to her is to be underſtood what he had not otherwiſe deviſed by his Will, viz. the Houſhold Goods to go with the Houſe, and not the Reſidue after the Debts paid. 2 Vern. 718. pl. 637. Mich. 1716. Wainright v. Bendlowes.

MS. Rep. Mich. 3 Geo. in Canc. Awbrey v. Middleton.

15. Caſe upon a Will; it begins, *As to all my worldly Eſtate, I give and diſpoſe thereof* in Manner following, and *then gives ſeveral pecuniary Legacies*, and ſeveral *Annuities for Lives, to be paid by his Executor, and* then he *deviſes all the reſt and reſidue of his Goods and Chattles, and Eſtate, to his Nephew* Middleton, *(the Defendant and Heir at Law*

Law to the Teſtator) *and makes him ſole Executor.* The Will was executed in the Preſence of three Witneſſes, with other Circumſtances reqnired by the Statute 29 Car. 2. of Frauds to paſs or charge Lands. Note, there was an *expreſs Deviſe of ſome Lands in the Will to a Relation of the Teſtator.* The Queſtion was, if the Real Eſtate of the Teſtator be chargeable with the Legacies and Annuities in Default of the Perſonal Egate? It was inſiſted, that the Real Eſtate was not chargeable with the Annuities and Legacies, 1ſt. becauſe no expreſs Charge upon the Land; and 2dly, No implied Charge; becauſe expreſsly declared by the Teſtator, that the Annuities and pecuniary Legacies ſhonld be paid by his Executor, which ſtrongly implies the Intent of the Teſtator to be, that the Annuities and Legacies ſhould be paid out of the Perſonal Eſtate, being directed to be paid by one, viz. his Executor, who, as ſuch, has nothing to do with the Real Eſtate; and tho' in this Caſe it happened that the Executor was Heir of the Teſtator, yet that will not alter the Caſe, but it is the ſame as if they were two diſtinct Perſons, becauſe he *claims by two diſtinct Titles*, viz. the Land as Heir at Law, and not by the Will, and the Perſonal Eſtate by the Deviſe of all the reſt and reſidue of his Goods, Chattles, and Eſtate, and as Executor; they likewiſe inſiſted, that the Real Eſtate of the Teſtator did not paſs to the Executor by the Deviſe of all the reſt and reſidue of his Goods, Chattles, and Eſtate, becauſe the Word Eſtate follows and accompanies Goods and Chattles, and therefore ſhall be reſtrained and confined to that Sort of Eſtate which went before, viz Perſonal Eſtate, tho' they admitted the Word (Eſtate) itſelf, or accompanied with other Words which found in Realty, would paſs Land in a Will. Per Cowper C. the Real Eſtate of the Teſtator is chargeable with the pecuniary Legacies and Annuities by the Will. It was certainly the Intent of the Teſtator, that the Annuities and Legacies ſhould be paid, and I will endeavour to ſupport the plain and expreſs Intent. It is certain, from the whole Frame of the Will, that the Teſtator meant to diſpoſe of all his Eſtate, both Real and Perſonal; for in the Beginning of the Will he ſays, as to all his worldly Eſtate, he gives and diſpoſes thereof, and afterwards does expreſsly deviſe Part of his Real Eſtate, ſo that it is apparent he meant to diſpoſe of his Real, as well as Perſonal Eſtate, by his Will; then comes the laſt Clauſe, all the reſt and reſidue of his Goods, Chattles, and Eſtate, he gives to his Executor; now the Words (reſt and reſidue) in this Place, may have ſome Streſs laid upon them, and ſeem to refer to the introductive Clauſe in the Will, (as to all his worldiy Eſtate &c.) which certainly extend to Lands in a Will, and will bear a larger Conſtruction by Reference to the firſt Clauſe, by which he intimates, that he intended to diſpoſe of all his Eſtate both Real and Perſonal, by his Will, and therefore he was of Opinion, that by the Deviſe of all the reſt and reſidue of his Goods, Chattles, and Eſtate, all his Lands do paſs to his Executor, and that he takes by the Will, and not by Deſcent as Heir at Law, and that the Lands ſo deviſed to him are chargeable with the pecuniary Legacies and Annuities, if the Perſonal Eſtate falls ſhort to ſatisfy the ſame, and decreed accordingly.

16. Mr. Parry having 5 Sons and 2 Daughters makes his Will, which begins thus, viz. *As to my Eſtate I diſpoſe of it in manner following*; and then he *gives ſeveral ſpecifick Legacies to his Children*, and *deviſes his Lands to his eldeſt Son Charles (the Defendant) and to the Heirs Male of his Body*, Remainder *to his 2d Son in Tail Male*, and *ſo on* to his other 3 Sons in Tail Male ſucceſſively. He alſo *deviſes ſeveral Debts and Chattel-Intereſts to his eldeſt Son Charles, and then* he *gives* 1500*l. a-piece to his* 2 *Daughters at* 21 *Years of Age, or Day of Marriage, to be paid by his ſaid Son Charles, and makes him ſole Executor.* The Queſtion was, if

MS Rep. Mich. 3 Geo in Canc. Ld. Henry Pawlet & Ux. v. Parry.

the Real Eſtate expreſsly deviſed to his Son Charles in Tail, with Remainders over in Tail Male to his other Sons, is chargeable with this Portion of 1500 l. deviſed to the Plaintiff, being directed by the Will to be paid by his Son Charles the firſt Deviſee in Tail and Executor. For the Plaintiff was cited the Caſe of **Cloudeſley v. Pelham**, in Canc. 1686. The Deviſe there was to Truſtees in Tail, yet the Court held that the Lands were chargeable with Payment of Debts implicitly by that Will. Per Cowper C. This is a very doubtful Caſe; the Lands are ſettled by this Will upon the Teſtator's Sons ſucceſſively in Tail Male, which makes it very different from the Caſe of a Deviſe in Fee. Caſes of this Nature have been carried very far already in this Court, to charge Land by Implication, out of an Inclination in the Court to make every Part of the Will take Effect; and if there be Precedents ſufficient to warrant a Charge upon Lands, ſettled and intail'd by the Will, I ſhall be willing to do it now out of the ſame Inclination. The Lands are not directly and abſolutely given to the Defendant, who is directed by the Will to pay the 1500 l. to the Plaintiff, but only Sub Modo with Limitations over to the other Sons in Tail Male ſucceſſively. Suppoſe the Defendant, the firſt Deviſee in Tail, and who is directed by the Will to pay this 1500 l. to the Plaintiff at her Age of 21 Years, or Day of Marriage, had died without Iſſue before the 1500 l. had become payable, would this 1500 l. be a Charge upon the Eſtate Tail of the 2d Son who is next in Remainder? I will take Time to conſider of this Caſe, and in the mean while let the Maſter take an Account of the Perſonal Eſtate of the Teſtator, and make an Eſtimate of the Quantum thereof at the Time of making the Will; for that may give ſome Light to find out the Meaning of the Teſtator. It might then be ſufficient to ſatisfy all Debts and Legacies, tho' ſince it may be inſufficient by ſubſequent Loſſes or Accidents. Curia adviſare vult.

17. *Legacies by Will were charged on the Land* (viz.) *charged with the Payment of her Legacies abovementioned.* The Teſtatrix after *gave other Legacies by a Codicil.* It was objected, that theſe Words could not extend to the Legacies in the Codicil, but admitted, that if the Real Eſtate had been *charged with the Payment of the Teſtatrix's Legacies in general*, it would have taken in the Legacies in the Codicil, they being as much her Legacies as the Legacies in the Will. Decreed the Legacies by Codicil chargeable only on the Perſonal Eſtate. Wms's Rep. 421. 423. Paſch. 1718. in Caſe of Maſters v. Sir Harcourt Maſters.

At the End of this Caſe Ibid. 190. is added a Note, that if in this Caſe there had been a *Want of Aſſets for Payment of A's Debts*, it ſeems the Lands would have been charged therewith by the firſt Words. —— A. by his Will takes

18. A. made his Will, and begun it thus, viz. *As to my worldly Eſtate I diſpoſe the ſame* as follows; *After my Debts and Legacies paid* &c. and then gave ſeveral Legacies, and alſo Portions to his Daughters; and then added, *After all my Legacies paid, I give the Reſidue of my Perſonal Eſtate to my Son*; and then he *deviſed his Fee-ſimple Lands to his* (only) *Son and his Heirs, and if he dies without Iſſue in the Life of any of his Daughters, then to his Daughters*; and *ordered Intereſt to be paid by the Executors for the Daughters Portions*, and made his Son and J. S. Executors. The Perſonal Eſtate was near, but not fully, ſufficient to pay all the Portions. Ld. C. Macclesfield ſaid, that as plain Words are requiſite to charge the Eſtate of, as to diſinherit, an Heir. His Lordſhip took Notice of the Intereſt being directed to be paid by the Executors, and that the Deficiency of the Perſonal Aſſets was not ſuch as to leave the Daughters deſtitute, and decreed the Real Eſtate not liable. 2 Wms's Rep. 187. Trin. 1723. Davis v. Gardiner.

Notice, that he had limited Annuities to his eldeſt Son and his Wife for their Lives, and then charges all his Real Eſtate with Payment thereof; and afterwards he limits the Manor of H. to C. his 2d Son, in ſtrict Settlement, Remainder to D. in like Manner, and then *deviſes to C. all other his Eſtates, Real and Perſonal, whatſoever, and wherefoever, to him, his Heirs, Executors, Adminiſtrators, and Aſſigns, for ever. And farther, my Will is &c that my ſaid Son B. ſhall pay all my Debts &c. and all Legacies &c. bequeathed by this my Will.* And then *bequeathed to his younger Children* 2000 *l. apiece.* A. dy'd

ſeiſed

ſeiſed of no Real Eſtate but the Manor of H. only. The Queſtion was, whether the Eſtate deviſed in ſtrict Settlement was ſubject to the Pay of younger Children's Portion? And Mr J Parker, who heard the Cauſe for my Ld. Chancellor, was of Opinion, that this Real Eſtate was chargeable, theſe Portions being for younger Children, who are conſidered as Creditors in a Court of Equity; and in the Caſe of Creditors it has been held, that where a *Teſtator in the Beginning of his Will declares, that he* is diſpoſing of all his *worldly Eſtate, and then gives a Direction that his Debts ſhall be paid*, the Debts thereby become chargeable on the Real Eſtate as well as the Perſonal; and as to an Objection that A had uſed proper Words to charge his Real Eſtate with Payment of the Annuities, but had not in relation to theſe Portions, and that therefore his Intent was not the ſame, he ſaid it was not concluſive; for a Teſtator *may uſe expreſs Words of charging in one Part of his Will, and may create a Charge by Implication in another Part of it*; and as to the Objection that A. had made a *different Fund for Payment of the Legacies out of the Reſidue of his Real Eſtate which he gave to C.* he ſaid, that if the Fact was ſo, that there was any ſuch Reſidue, the Argument would be good; but that there was no ſuch Reſidue in Fact; and decreed accordingly. Barn. Chan. Rep. 86. Paſch. 1740. Webb v. Webb.

19. *As touching all ſuch worldly Eſtate which God has bleſs'd me with, I diſpoſe of the ſame* as follows: *Imprimis, I will that all my juſt Debts be paid and ſatisfied.* It was argued that it is a general Preface to make a general Diſpoſition of his Real and Perſonal Eſtate as is mention'd after in the Will; that it is an independant Clauſe, and means only an Intention of a general Diſpoſition. He after deviſes his Freehold and Copyhold Eſtate to his Son and his Heirs, when he comes to 21, paying his Wife 100 l. a Year for her Dower in the mean time. After 100 l. per Ann. to his Wife for Dower, the reſt of the Profits to be put out for Benefit of all his Children, but made no Proviſion for Debts. It was inſiſted that if a Man deviſes Lands after Debts paid, that is a Charge; but it was decreed that this is not a Charge of Debts upon the Real Eſtate. MS. Rep. Trin. 9 Geo. 1723. Barton v. Wilcocks.

20. The Defendant was Executor and Deviſee of the Real Eſtate of one Moore. The *Bill was to be paid 30 l. which the Plaintiff had lent to Moore*, either out of the Perſonal Eſtate, if ſufficient, or if not, then out of the Real Eſtate, for this Reaſon, becauſe *upon lending of the Money the Title Deeds of the Real Eſtate were put into the Hands of the Plaintiff, and it was indorſed upon them, that it was agreed that the Deeds were ſo depoſited, as a Security for the Payment of ſo much Money*, and the Court declared the Real Eſtate in this Caſe charged with the ſaid Debt. MS. Rep. Hill. 10 Geo. 1. 1723. Atkinſon v. Swift.

21. Teſtator, *ſeiſed in Fee* of a Farm, called *Hills Tenement*, in the County of Somerſet, *and of* another called *Bowry-Hays in Tail*, by Will devis'd as follows, viz. As to all my worldly Goods, I give all that Tenement, called *Hill's-Tenement*, *to my Wife* Joan *for her Life*, and after her Deceaſe, then *to my Son Robert, and his Heirs, for ever.* Item, I give to my ſecond Son *Henry* 150 *l. to be paid when Robert ſhall come into Poſſeſſion.* Item, I give to my *Daughter Mary Leigh* 150 *l. to be paid in* 12 *Months*, at, and upon the Time that my Son *Robert ſhall* come to, and *enjoy the Premiſſes* abovementioned; and *in Caſe* my Son *Robert die before my Wife* Joan, my Son *Henry coming into Poſſeſſion*, and ſurviving his ſaid Mother, *ſhall pay to my Daughter* Mary Leigh the Sum of 200 *l.* Item, All the Reſt and Reſidue of my Goods and Chattles I give to my Wife Joan, whom I appoint ſole Executrix of this my laſt Will and Teſtament. *Robert and Henry both died in the Life-time of Joan.* Upon Joan's Death Henry, the Son of Henry, the younger Brother, enters on the Premiſſes. Mary brings her Bill againſt him, to have her Legacy of 150 l. or 200 l. out of the Land, according to the Directions of the Will; but, upon Conſideration, the Counſel for the Plaintiff thought proper to waive their Demand of the laſt Legacy, and to inſiſt rather upon the firſt. Mr. Greene for the Plaintiff inſiſted, that this Legacy was not *contingent*, but abſolute, given to her immediately, tho' the Time of Payment was future, (viz.) when Robert ſhould come into Poſſeſſion of the Eſtate; that therefore the Circumſtance of Robert's

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and

and Henry's dying in the Life-time of the Mother, which the Teſtator could not foreſee, did not alter the Caſe, or take away that which was already veſted in her. 2dly, That this was a Charge on the Land, and if it was ſo in the Hands of Robert, it muſt remain charged into whoſe-ſoever Hands it ſhould afterwards come; nor is it in the Power of the Defendant (tho' he be Heir at Law, as Grandſon of the Teſtator) to take Advantage of his Title by Deſcent, and thereby avoid this Incumbrance, but he is bound to take in this reſpect as a Purchaſor, i. e. *Terram cum onere* in Support of the Intent of the Teſtator. Indeed, the common Rule is, that where a Legacy is given generally, it is a Charge on the Perſonal Eſtate, and there is no Neceſſity of expreſs Words to ſubject that to the Payment thereof; but here the Perſonal Eſtate is expreſsly diſcharged, becauſe the Teſtator has deviſed all that away to his Wife, ſo that nothing remains here, whereout the Legacy can be ſatisfied, but the Land, and for this relied on 2 Vern. 228. **Alcock v. Sparhawk**, where Land in the Hands of an Executor, Deviſee, and Heir at Law, tho' not expreſsly charged, was yet made liable in Aid of the Perſonal Eſtate; and on 2 Vern. 143. **Elliot v. Pancock**, where the Land was charged with the Payment of an Annuity, tho' the Executor, Deviſee thereof, was not Heir at Law; (but Note, the Maſter of the Rolls ſaid, that was a moſt abſurd Caſe.) Mr. Brown for the Defendant ſaid, that this was but a contingent Legacy, to be paid upon Robert's coming into Poſſeſſion of the Eſtate, which Contingency never happening, conſequently it is a *lapſed Legacy*, and ſo with reſpect to the 200 l. which depended on the like Contingency of Henry's coming into Poſſeſſion; for it does not appear, but that Teſtator might foreſee that his Wife might ſurvive both his Sons, and then his not providing for his Daughter in ſuch Caſe, can be attributed to nothing elſe but his want of Intention ſo to do. 2dly, Admitting any Legacy due, yet the Plaintiff is not intitled to come upon the Real Eſtate, but muſt ſeek it out of the Perſonal; and that ſuch was the Teſtator's Intention, appears by his deviſing all the Reſt and Reſidue of his Eſtate to his Wife, which Words, *Reſt and Reſidue*, neceſſarily imply, that ſomething was before diſpoſed out of it, which muſt be the 150 l. Legacy, for there is nothing beſides mentioned, and it does not appear that there were any Debts owing to make any Deduction; this is likewiſe the Caſe of an Heir at Law, who is never to be prejudiced without expreſs Words; now here are no expreſs Words to charge him or the Land, for it is not ſaid by whom, or out of what the Legacy is to be paid, but only, I charge ſo much to be paid when ſuch a one ſhall come into Poſſeſſion, which is, indeed, a very general Bequeſt of a Legacy, and ſo falls entirely within the Rule, that in ſuch Caſe the Perſonal Eſtate is to become liable; ſo upon the whole, this Legacy was but a Perſonal Charge upon Robert, which, at leaſt, could affect his Eſtate only while in his Hands, and was lapſed by the Death of him who was to pay it. The Maſter of the Rolls ſaid, I take this to be a *Charge on the Real Eſtate* in the Hands of the Heir. I ſay a Charge; for if it were a Condition, then the Defendant, who is the Heir at Law, might ſafely commit a Breach of it, there being No-body but himſelf to take Advantage of it; that the Real Eſtate is charged I make no doubt, becauſe it could never be the Meaning of the Teſtator, that the Daughter ſhould have 150 l. in Caſe the Eſtate went to his Son, and, at the ſame Time, that ſhe ſhould have nothing in Caſe it went to his Grandſon; this would be a moſt *Un-natural Conſtruction*, and yet ſuch muſt be the Conſequence, if the Legacy be conſidered merely as a Perſonal Legacy, and ſo lapſed by the Death of Robert; and in this Caſe the Heir muſt take under the Will; for tho' Robert and Henry were Heirs to the Teſtator, yet the

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Deviſe to them, being with a Charge, broke the Deſcent, and tho' they never took in Poſſeſſion, yet it was a Remainder, tranſmiſſable to the next Perſon, who muſt take thro' them, and not as Heir to the Teſtator; and if the Eſtate limited to Robert does not ceaſe by his dying before he could take, ſo neither does the Charge ceaſe; and for the ſame Reaſon, I think, the Conſideration, that the Defendant is an Heir at Law, ought to be laid quite out of the Caſe, becauſe this is a *Proviſion for a Child*, and who otherwiſe will be left quite deſtitute, which will be another unnatural Conſtruction. As to the Words *Reſt and Reſidue of my Goods and Chattles*, I lay no great Streſs upon that Argument, nor can it be concluded from thence, that any Thing was before thereout diſpoſed of, becauſe theſe are Words merely of Courſe, and always inſerted by the Penner of the Will, whether there be any precedent Bequeſt or not, and indeed, *are never improper*, becauſe no Executor can be ſaid to take more than the Reſidue, *it being impoſſible for a Man to die without leaving ſome ſmall Debts* behind him; *or, if it could be ſo, the Funeral Expences muſt always be born by the Executor.* Decreed for the Plaintiff, that the Land ſhould be ſold, and the 150 l. paid to her with Intereſt. At the Rolls, 4 Nov. 1738, Miles v. Leigh. From this Order the Defendant appealed to the Ld. Chancellor, and for the Appellant it was inſiſted, that the Will being ſilent as to what Fund the Legacy ſhould ariſe out of, and the Land not being expreſsly charged, the *Perſonal Eſtate is the proper and natural Fund.* That the Time of Payment, viz. *when Robert &c* could not denote an Intention to charge the Land with it, but merely the Time of Payment, and may reaſonably be accounted for, viz. that as the Mother, who was Tenant for Life of Hill's-Tenement, and Deviſee of the Perſonal Eſtate, might maintain her Children out of the Profits, during her Life, ſo after her Death, (when the eldeſt Son ſhould come to the Land) a Proviſion might be made for the younger Children out of the Money; and that laſtly, that by the other Conſtruction, this Legacy of 150 l. (together with the other Legacy of 150 l. to Henry, had he liv'd to take it, and which would equally be a Charge) would *exhauſt the whole Deviſe* of Hill's-Tenement; and as to Bowry-Hays, Teſtator had no Power over it; and for a Teſtator to mean, that a Deviſee ſhould get nothing by the Deviſe, is a ſtrange Preſumption, and it is a neceſſary Circumſtance in the ſupplying the want of a Copyhold Surrender, that the Heir at Law be not diſinherited. In 2 Vern. 568. **French v. Chicester**, tho' the Real Eſtate was expreſsly charged with the Payment of Debts, yet the Reſiduum being given to the Wife, who was likewiſe made Executrix, as here, the Court held ſhe muſt take it as Executrix, and the Perſonal Eſtate, not being particularly exempted, was decreed to be applied in Eaſe of the Real. For the Defendant in the Appeal it was urg'd, that there is no need to ſay in expreſs Terms, that the Legacy ſhall be paid out of the Real Eſtate, or by the Heir, and that the Smallneſs of the Eſtate could be no Argument to ſuppoſe the Teſtator's Intention was otherwiſe; for it would, at leaſt, be as hard upon Henry, (who was to have the Eſtate upon the Death of Robert) to pay 200 l. to the Plaintiff, which by the expreſs Words of the Will he was to have done, out of this ſmall Eſtate, as for Robert, (or the Defendant, his Heir) to pay only 150 l. out of the very ſame Eſtate. Ld. Chancellor; The firſt Queſtion is, Whether this Demand of the Plaintiff is a Charge upon the Perſonal or Real Eſtate? The Will itſelf is very ill penn'd, but upon the Conſtruction of it, (which muſt ariſe from the whole taken together) I am of Opinion, that it was originally, and ſolely to ariſe out of the Real Eſtate. It is introduced, indeed, with the Phraſe *(All my wordly Goods)* as if Teſtator intended to ſay nothing of his Land, either by way of Diſpo-

ſition or Charge ; but it is plain he meant by this, All his *Eſtate, of what Kind ſoever*, for he preſently after diſpoſes of his Real Eſtate, and therefore uſed that Expreſſion with the ſame Latitude that the Civilians uſe the Word *(Bona.)* Now the Clauſe upon which the Queſtion ariſes, (Item, *I give to my Daughter* Mary Leigh 150 *l. to be paid in* 12 *Months, at, and upon the Time that my Son Robert ſhall come to*, and enjoy *the Premiſſes abovementioned)* amounts to, and muſt be conſtrued, the ſame as if the Teſtator had ſaid *(He paying ;)* for the Court often conſtrues a Clauſe as conditional, tho' there be no expreſs Words of Condition, particularly Adverbs of Time, as the Word *(When)* have been often conſidered as making a *Condition or Charge*, tho' there be no Direction *out of what* Eſtate, nor *by whom* the Bequeſt ſhall be paid ; and this Conſtruction will appear the better warranted, upon conſidering the Clauſe relating to Henry's paying 200 l. for as upon his coming to the Eſtate, one of the Legacies before charged, viz. that devis'd to himſelf, would be ſunk, and, conſequently, the Eſtate become larger than it would have been in the Hands of Robert, who was to have paid two Legacies out of it ; ſo the Teſtator, probably, upon this Conſideration, thought fit to make the Plaintiff's Legacy 200 l. inſtead of 150 l. (for that muſt be conſidered *not* as *a diſtinct*, *but* an *additional Legacy)* which manifeſts his Intention, that whoever had the Land, ſhould pay the Legacy, by his increaſing the latter in Proportion as the Eſtate in the former was increaſed. As to the Smallneſs of the Eſtate, and that it will hardly pay the Legacy, it will be no Objection; for tho' the Teſtator does not take upon him directly to charge the intail'd Land, yet I am of Opinion his Intent was to charge both, (for the Words are, *when Robert ſhall come to the Premiſſes abovementioned*, which include, as well Bowry-Hays, as Hill's-Tenement;) that is, theſe Bequeſts were *not* made *in reſpect of what Eſtate he* himſelf *had a Power to charge*, (which poſſibly might not be more than ſufficient to ſatisfy them) *but* in reſpect *of what Eſtate would come*, whether *by Will or Settlement to his eldeſt Son.* As to the Deviſe of the Reſiduum, there can be nothing drawn from thence, for there might have been Debts, nor can any thing particular be inferr'd as to the Propriety of the Expreſſion, it being as general and looſe a Phraſe, as that of *All my worldly Goods*, with which he begins his Will, the firſt Article of which is a Deviſe of Land. The 2d Queſtion is, whether this was a contingent Legacy? and whether, if contingent, the Contingency has happened? Now, I am of Opinion, that the Legacy was to take Place not when Robert ſhould *Perſonally* take the Eſtate, but *when the Deviſe to Robert* (which was to him *and his Heirs)* ſhould take Effect ; and if it be a Charge upon the Real Eſtate, it is immaterial whether Robert took or not ; for by the Deviſe the Deſcent is broke, and the *Charge binds his Heir* as well as him, *tho' he himſelf never took in Poſſeſſion* ; in the ſame Manner as in the Caſe of **Marks v. Marks**, where the Condition was to have been performed by the Anceſtor, yet he dying before the Time of Performance, it was decreed to be done by the Heir. Whereupon the Decree pronounced by the Maſter of the Rolls was affirmed.

(E) Where

(E) Where on the Perſonal Eſtate, and where on the Real, and on which firſt.

1. A *Legacy was deviſed to pay Debts* and Legacies. The *Perſonal Eſtate bequeath'd to A.* ſhall not be ſubject or liable to the ſaid Debts or Legacies. Ch. Rep. 45. in 6 Car. 1. Peacock v. Glaſcock.

2. A. indebted by *Judgment*, and ſeiſed of Lands liable, died *inteſtate*, leaving B. his Wife and C. a Son, Infant, his Heir. B. takes Adminiſtration, and enters as *Guardian* on the Lands, and received the Profits, and made D. Executor, and charged it, and dies. D. enter'd as Guardian, and poſſeſs'd the Perſonal Eſtate of A. and B.—C. died. D. adminiſter'd to C.—E. the Heir of C. paid 200 l. on the Judgment. Per Ld. Keeper, the *Profits taken by the Guardians* ſhould be liable to make Satisfaction to C. but the *Perſonal Eſtate in B.'s Hand* was liable firſt, in Eaſe of E. to which the *Adminiſtrator de Bonis non* is liable; tho' not being made a Party he held the Bill ill, but gave Leave to amend in that Point. 2 Ch. Caſes 197. Trin. 26 Car. 2. Breſſenden v. Decreets.

3. *Deviſe* of Leaſes, and other conſiderable *Perſonal Eſtate in Truſt*, to pay his Wife 100 *l. per Ann.* during her Life, *in Lieu and Diſcharge of her Dower.* Decreed to iſſue out of the Perſonal Eſtate only, if that be ſufficient free from *Taxes*; but if that be not ſufficient, then to be made good out of the Real. Fin. Rep. 134. Mich. 26 Car. 2. Leſquire v. Leſquire.

4. *Lands* were *ſettled for Payment of Legacies* and Debts, and after for Performance of his Will, and made his Will at the ſame time, and in it he *directed his Truſtees to pay certain Legacies* to his younger Children, the *Surplus to his Heir*, and made his *Wife Executrix*, but did not give her thereby, in Terms, the Perſonal Eſtate, and deviſed that the Children *Legatees ſhould releaſe to his Executrix all ſuch Actions and Demands of his Perſonal Eſtate.* Decreed per Finch C. that the Perſonal Eſtate be accounted for, in Aid of the Heir, for what he ſhould be charged withal, not only as to the Creditors, but as to the Legacies. Chan. Caſes 296. Hill. 28 & 29 Car. 2. Lord Grey v. Lady Grey & al'. Fin. Rep. 338. Hill. 30 Car. 2. S. C. — S. C. cited Chan. Prec. 417. in Caſe of Howell v. Price. — S. C. cited Arg. Caſes in Equ. in Ld. C. Talbot's Time, 204. in Caſe of Stapleton v. Colvile.

5. An *Annuity* was deviſed, and charged *on that Part of his Eſtate that ſhould remain unſold after his Debts and Legacies ſhould be paid.* Part was ſold, and there was a *Surplus* on that Part. Decreed that the Surplus of what was ſold, as well as the Rents of the other Part unſold, ſhould be both applied to the Payment of this Annuity; and what that falls ſhort, to be ſupplied out of the other Part of the Eſtate unſold, with Coſts. Fin. Rep. 459. Trin. 32 Car. 2. Coleman v. Coleman.

6. If *Lands* are *deviſed for Payment of Debts and Legacies*, and the *Reſidue of the Perſonal Eſtate is given to the Executors* after Debts and Legacies paid, the Perſonal Eſtate ſhall notwithſtanding, as far as it will go, be *applied to the Payment of the Debts &c.* and the Land be charged no further than is neceſſary to make up the Reſidue. 2 Vent. 349. Paſch. 32 Car. 2. Anon.

7. *Deviſee* of Land ſhall be unburthened of a Debt lying on the Land by the Perſonal Eſtate in the Hands of the Executor or Adminiſtrator, and ſo ſhall a Deviſee of a *Mortgage*. 2 Chan. Caſes 84. Hill. 33 & 34 Car. 2. Popley v. Popley. Vern. 36. pl. 35. Pockley v. Pockley, S. C. accordingly. — S. P. where 500 l. was due on a Mortgage of the Land deviſed. Fin. Rep. 401. Mich. 30 Car. 2. Starling v. the Draper's Company.

8. A. *by his Will ſubjects both his Real and Perſonal Eſtate to the Payment of his Debts.* Decreed that the Heir ſhould pay the Debts, or in Default thereof the *Real Eſtate to be ſold*, and Liberty given to the *Heir to proſecute for the Perſonal Eſtate.* MS. Tab. Appeals 23 Feb. 1705. Slydolph v. Langhorn.

9. An *Eſtate* being conſiderably *mortgaged, was deviſed to A.* and ſeveral *ſpecifick Legacies were left to others.* The *Surplus is not ſufficient to diſcharge the Debt.* All the ſpecifick Legacies ſhall contribute towards the diſcharging the Mortgage, before the mortgaged Premiſſes ſhall be affected; for the Covenant to pay the Money makes it a Perſonal Debt, and the Real Eſtate ſhall never be put in Average with the Perſonal. MS. Tab. Appeals 1706. Warner v. Hayes.

S. C. cited by Ld. C. Talbot, Caſes in Equ. in Ld. Talbot's Time, 209.

10. A. *convey'd all his Lands in Truſt for Payment of his Debts and Legacies*, and by his Will *deviſed all his Perſonal Eſtate to his Wife*, yet the Perſonal Eſtate ſhall come in Aid of the Real. MS. Tab. cites Feb. 1707. French v. Chicheſter.

Trin. 1736. in Caſe of Stapleton v. Colvile; but ſaid that unleſs he was acquainted with the particular Circumſtances of the Caſe of French v. Chicheſter, wherein the Book ſeems deficient, he could never form any Judgment from it; ſince if the Reaſon given in the Book [viz. 2 Vern. 568.] for it be the Only one, he could not ſay that it gave him intire Satisfaction, nor could he lay any great Streſs upon it, and the rather becauſe there is a plain Difference at Law between the bare making an Executor and the making him likewiſe Legatee of the Perſonal Eſtate; for in the firſt Inſtance, if the Executor dies inteſtate before Probate, the firſt Repreſentative of the Teſtator is intitled to the Adminiſtration; whereas in the latter, there being an expreſs Gift to him, he takes as Legatee, and conſequently upon his Death his Repreſentative would be intitled to it, an Intereſt being veſted in him in his own Right in the one Caſe, but nothing at all in the other, until he hath converted it.

11. Bill to have a ſpecifick Performance of an Agreement of a Purchaſe of Lands againſt the Heir and Executor of Croſts, to whom the Lands were deviſed for Payment of Debts &c. Croſs Bill by the Heir againſt the Executor to account for the Perſonal Eſtate of the Teſtator, to come in Aid of the Real Eſtate deviſed to be ſold for Payments of Debts &c. Croſts the *Teſtator deviſed particular Lands to his Executors, to be ſold for Payment of all his proper Debts*, and makes A. and B. his Executors. For the Heir at Law were cited ſeveral Caſes, that where there are *no Negative Words in the Will*, an expreſs Deviſe of all the Perſonal Eſtate to the Executors doth not exempt the Perſonal Eſtate from Payment of Debts of the Teſtator, tho' there be a Deviſe of Lands to be ſold for Payment of Debts; as **Lady Gainsborough's Caſe** in Dom. Proc. **Hungerford's Caſe** in Dom. Proc. **Cook v. Moor** in Dom. Proc. **Chriſt's Hoſpital v. Garroway** in Canc. **Hale v. Hale** in Canc. Tempore Cowper C. Decreed that the Executors account for the Perſonal Eſtate of the Teſtator, for that is liable to Payment of Debts in Aid of the Real Eſtate; and ſince the Perſonal Eſtate is not ſufficient to pay off the Debts and Mortgage, the Lands muſt be ſold, and the Money raiſed by Sale to pay the Reſidue of the Debts; and the Surplus of the Money raiſed by the Sale, after the Debts paid, to go to the Heir; per Harcourt C. MS. Rep. Mich. 12 Ann. in Canc. Gale v. Crofts & al'.

12. Tho. Davies being ſeiſed of Lands in Fee, *in Conſideration of* 300 *l. by Leaſe and Releaſe convey'd the ſaid Land to R. in Fee, with a Covenant for quiet Poſſeſſion*, and alſo that the ſaid Land was free from all Incumbrances; and in the ſaid Releaſe there was a *Proviſo, that if the ſaid D.* his Heirs or Aſſigns, *ſhould* upon Michaelmas-Day, which ſhould be in the Year of our Lord 1702, or at *any* other *Michaelmas-Day, pay the ſaid* 300 l. *with the Rents and Arrears which ſhould grow due for the ſame, it ſhould be lawful for the ſaid D. his Heirs and Aſſigns to enter; but the ſaid Releaſe was without any Covenant for Payment of the* 300 *l.* The ſaid D. continued in Poſſeſſion, and paid the Intereſt to R. as it became due. Afterwards D. upon his Marriage *ſettled the ſaid Land on his Wife and the Iſſue*

Iſſue of that Marriage, and covenanted that it was free from all Incumbrances, except the ſaid Mortgage to R. Afterwards D. *made his Will*, and thereby *gave ſeveral Legacies to the Value of about 26 l. and all the reſt of his Goods and Chattels he gave to his Wife and Daughter, whom he made his Executrixes, and appointed them to pay his Debts.* D. died, leaving his ſaid Daughter, who was his only Child. The *Daughter died within Age*, whereby the Plaintiff became Heir at Law to D. and brought his Bill againſt the Defendant, formerly the Wife of the ſaid D. to have his Perſonal Eſtate (which amounted to 600 l. beſides the Legacy) applied in Exoneration of the ſaid Land. The Defendant's Counſel inſiſted that it ought not to be applied in Diſcharge of the Land; 1ſt, becauſe the 300 l. was neither a Debt in Law nor Equity; for where there is a Debt, there is a Method for the Recovery of it; but in this Caſe there was none, there being no Covenant for the Payment of it. 2dly, becauſe D. had charged his Real Eſtate alone with the Payment of 300 l. and had diſpoſed of his Perſonal Eſtate otherwiſe. 3dly, becauſe the *Perſonal Eſtate was given to the Daughter who was Heir at Law*, whereby the Demand of the Aid of the Perſonal Eſtate was extinguiſh'd. But Cowper Ld. C. was clearly of Opinion that the Land was convey'd by D. to R. as a Mortgage, becauſe D. had by the Proviſo reſerved to himſelf, his Heirs or Aſſigns a Power of Redeeming, and had upon his Marriage ſettled the Land as his own, and in the Covenant of that Deed of Settlement called the Land convey'd to R. a Mortgage; and he was of Opinion, that *the Rent and Arrears expreſs'd in the Proviſo ſignified the Intereſt of the 300 l.* and ſaid that the Word *(Rent)* taken in its largeſt Senſe, was not improperly uſed to denote Intereſt. He was alſo of Opinion that the 300 l. was a Debt, wherewith the Perſonal Eſtate of D. was chargeable, tho' the Mortgagee was reſtrained as to the Recovery of it, for want of a Covenant for Payment of it; but that the Mortgagor being in Poſſeſſion might have been ejected by the Mortgagee, and if the Mortgagee had been in Poſſeſſion the 300 l. would have been no leſs a Debt upon his having a Pledge in Hand; and that D. appointing his Executrixes to pay his Debts, is a Proof that he deſigned them to pay his Debts in Exoneration of the Inheritance, for the Redemption whereof he had reſerved ſo large a Power by the Proviſo; and as to *the Perſonal Eſtate* being diſcharged by its being *given to the Heir at Law*, he was of Opinion it was not, becauſe it *was given to her jointly with the Wife*; for which Reaſon he decreed that the Perſonal Eſtate ſhould be applied to the Exoneration of the Real. Several Precedents were cited, where only Real Eſtates were charged, and yet the Perſonal Eſtates given to others had been applied to the Diſcharge of the Real. MS. Rep. Mich. 4 Geo. Powel v. Price.

13. Where-ever *Aſſets are brought in Exoneration*, there the Debt originally charges the Perſonalty. Arg. 9. Mod. 20. Mich. 9 Geo. 1. in Lady Coventry's Caſe.

14. By the conſtant Courſe of this Court where Debts by *Specialty*, which are a *Lien* at Law on the Real Eſtate, are *diſcharged out of the Perſonal Aſſets* in Eaſe of the Lands, then the *Creditors by ſimple Contract* ſhall ſtand in the Place of the Creditors by Specialty, to have their Debts ſatisfied out of the Lands; and decreed accordingly, and that the Lands be ſold for that Purpoſe, and the Heir, an Infant, to join in a Conveyance within ſix Months after he comes of Age. 9 Mod. 151. Trin. 11 Geo. 1. Charles v. Andrews.

15. A. *deviſed to his Wife certain Houſes in Bar of Dower*; *and, ſubject to his Legacies, deviſed to B. his eldeſt Daughter and her Heirs one Moiety of his Real Eſtate, as alſo* one Moiety *of his Perſonal Eſtate*; *and* in the ſame Words *to C. his youngeſt Deaughter*; and after *bequeath'd to J. N.* his God-ſon 500 *l. Part of* 1000 *l. owing to him by J. S. and the Reſidue of*

the 1000 *l.* he gave *among the Brothers and Sisters of J. N. &c.* Afterwards *A. mortgaged the said Estate for* 3000 *l.* It was contended that this Mortgage, being a Debt, must be paid out of the Personal Estate prior to the specifick Legacies, or at least before the pecuniary Legacies; and it was admitted by Counsel on both Sides, that the Land being made by the Testator himself a Fund for Payment of the Mortgage-Money, tho' the same should be eased against an Administrator or Residuary Legatee, yet it should be eased so as not to disappoint any of the Debts or even Legacies given by the Will, either specifick or pecuniary. 2 Wms's Rep. 328, 329. 335. Hill. 1725. Rider v. Wager.

16. A Mortgage shall be paid out of the personal Estate *in Preference to the Customary or Orphanage Part, by the Custom of London*; Arg. said to have been determined, and the same was admitted by Ld. C. King, because the Custom of London cannot take Place till after the Debts paid. 2 Wms's Rep. 335. Hill. 1725. in Case of Rider v. Wager.

17. By Marriage Articles, A. *covenanted to settle all his Lands in B. within 6 Months after Request*, to the Use of himself for Life, Remainder to Trustees to preserve &c Remainder to his Wife for Life, Remainder to the 1st &c. Son in Tail Male, *Remainder to Trustees for 500 Years, to raise 5000 l. for Daughter's Portions payable at 18 or Marriage.* A. covenanted that the Lands (which were but 366 l. a Year) were 500 l. a Year, and *gave a Bond of* 8000 *l. for Performance of Articles.* The Marriage took Effect. The Wife died, leaving only one Child M. a Daughter, no Settlement being made. Afterwards A. married again, and settled the greatest Part of the Lands in B. without giving Notice of the Articles, and had Issue B. a Son, and E. a Daughter. A. died Intestate, leaving M. B. and E. living, and a personal Estate of 20000 l. The Master of the Rolls held that this 5000 l. was not a Debt due from the Intestate, or to be paid out of his personal Estate; for notwithstanding the Bond, there is *no Covenant for Payment of the 5000 l.* but the Covenant was to settle Lands, and to raise a Term of 500 Years for securing the 5000 l. And that the Want of making Request, shall not prejudice the Cesty que Trust, and the rather, because she was an Infant. And though the Covenant had been absolute to settle within 6 Months, and likewise a Covenant to pay the 5000 l. yet Resort should be to the Land first, and afterwards in Case of Deficiency to the personal Estate; for the Articles to settle particular Lands, are in Equity a Settlement, and A. from that Time became a Trustee for the Trusts in the Articles, and is not like a Mortgage, where the Land is only a Pledge for the Money borrowed. But the Land actually settled by A. on his 2d Marriage without Notice, (though it was a Breach of Trust in A.) shall not be liable to the Articles. 2 Wms's Rep. 437. Hill. 1727. Edwards v. Freeman.

18. *A. Tenant for Life*, Remainder *to B. his Son in Tail* expectant on Death of A.'s Wife as to part, and as to other Part, expectant on the Death of A. *charges by Will the Reversion in Fee of all the Estate, with Payment of his Debts.* The personal Estate was very Deficient. A. dies, living the Wife. B. attainted his Age of 21 and levied a Fine to the Use of himself and his Heirs, and *after B. had received the Rents of the Surplus of Estate, not in Jointure, for 2 Years, he died Intestate and unmarried.* The *Estate descended to W. R. and his Mother administred* to B. It was insisted that by the Fine levied by B. the Estate Tail was extinguished and consolidated with the Reversion or Remainder in Fee in W. R. and that the Plaintiffs the Creditor's Title to demand their Debts their Debts then attached upon the Estate, and cited 1 Salk. 333. **Simmonds v. Cudmore**, and therefore that the Rents and Profits received by B. should be applied towards Satisfaction of the Creditors, and by Consequence that the Wife being Plaintiff and Administratrix to B. had

had Aſſets in her own Hands. But the Court held clearly that the *Rents and Profits received by B. of his own Eſtate*, whereof he was then Owner, *ſhould not be applicable to ſatisfy Creditors till a Demand made*, becauſe till then he did no wrong in receiving the Rents and Profits of his own Eſtate. Equ. Abr. 140. 141. Mich. 1728. Counteſs of Warwick v. Edwards. ——— And cites as lately decreed in Caſe of Mountague v. Bord.

19. The Teſtator deviſes *as to all his worldly Eſtate, that his Debts be paid within a Year* after his Deceaſe; and then Deviſes his *real Eſtate to Truſtees for a Term in Truſt for his Wife for Life, Remainder to his Sons ſucceſſively in Tail Male*, and gives ſeveral Legacies; Per Ld. Chancellor, the real Eſtate Eſtate is chargeable with the Debts, in Caſe the perſonal Eſtate be Deficient. Caſes in Equ. in Ld. Talbot's Time, 110. Trin. 1735. Hatton v. Nichol.

(F) Apportioned. In what Caſes.

1. B. Had Iſſue C. a Son by the 1ſt Venter, and D. and E. 2 Sons and 6 Daughters by his 2d Wife, and ſettles Land on D. in Tail Male, Remainder to E. Remainder to C. his eldeſt Son by his firſt Wife, Provided that *if the Land come to his eldeſt Son, that he or his Heirs ſhould pay* 1000 *l.* to Teſtator's Daughters within 4 Months after the Eſtate ſhould come to them; and in Default, the Truſtees to enter and raiſe the Money. C. dies, leaving F. a Son. D. and E. died without Iſſue, but one of them ſuffered a *Recovery of the Moiety* of the Lands, ſo that a *Moiety only comes to B.* the Mother having a Moiety in Jointure to her, and made no ſurrender thereof; Per Cur. the 1000 l. is a legal ſubſiſting Charge, and the Daughters claim not under, but Paramount, the Son that ſuffered the Common Recovery; and though the Eſtate never came to C. the eldeſt Son, and only a Moiety came to F. his Son, yet there muſt be no Apportionment, but the Daughters are intitled to the whole 1000 l. 2 Vern. 359. pl. 324. Mich. 1698. Hooley v. Booth.

See tit. Apportionment. (A)

(G) Charge. When Diſcharged.

1. LANDS *deviſed to be ſold for Payment of Legacies* of 200 l. and 300 l. Deviſee ſold for 500 l. and he having enjoyed the Lands 6 Years, and his Vendee 22 Years, in all 28 *Years without any Demand*, it was decreed againſt the Legatees and their Bill diſmiſſed. Fin. R. 316. Mich. 29 Car. 2. Cuſſe v. Aſh.

2. A. deviſed Lands to &c. and ſays, *If C. or his Heirs ſhall enjoy the Lands*, then he or they ſhall, in Reſpect thereof, *pay* 200 *l. to a Charity &c.* and the 200 l. *to be paid within* 21 *Years after they come into Poſſeſſion.* The Lands came to the Poſſeſſion of C. who enjoyed them ſeveral Years, and then ſold them to D. who had *quiet Poſſeſſion* 40 *Years before the Demand, but had Notice* of the Charge; Per Ld. Chan. Had this been a Rent-charge, it would have been always chargeable on the Land, but this is of a *Sum in Groſs*, to be paid together and at one Time; but directed to amend the Bill, if Plaintiff would, and make the Executors

&c.

&c. Parties, who perhaps may have paid the Money. Fin. R. 336. Hill. 30 Car. 2. Attorney General for Aſhford Pariſh in Kent v. Twiſden.

3. The Father on Marriage charges Lands with Payment of Daughter's Portions, has a Daughter and deviſed the Land to a Nephew. The Daughter marries J. S. They *releaſe* the Portion to the Nephew, and the Nephew *covenants that it is in Truſt* for the Husband and Wife, and to continue the Money in his Hands at Intereſt, or place it out on Security. The Nephew *ſells the Lands with Notice* of the Original Charge. Decreed that the Lands are ſtill liable to the Portion. 2 Ch. R. 173. 31 Car. 2. Tucker v. Searle.

4. A. by Will gives 3000 *l. to his younger Children, ſecured by Mortgage from B.* and declares that if his eldeſt Son does not pay this 3000 l. then *his Lands ſhall go to* his younger Children. B. brings a Bill to redeem and to pay in his Mortgage Money; there is a Decree, and B. pays it in purſuant, the *Maſter puts it out on a bad Security*, the eldeſt Son ſhall not be compelled to pay it over again to the younger Children. Vern. 336. pl. 331. Mich. 1685. Oldfield v. Oldfield.

So where a Deviſe of Lands is *to Truſtees and their Heirs* for Payment of Debts and Legacies, there is a reſulting Truſt for the Heir, and he may properly come into Court and offer to pay the Debts and Legacies, and pray a Conveyance of the whole Eſtate to him; for the Deviſees are only Truſtees for Teſtator to pay his Debts and Legacies. 9 Mod. 171. Roper v. Radcliff, in Dom. Proc. ——So of a Refiduary Legatee. Ibid.

5. If a *Leaſe* be made in Truſt *to pay Debts*, and after the Leſſor dies, the Heir paying the Debts ſhall be relieved againſt the Leaſe and ſet it aſide; Per Ld. Chan. 2 Chan. Caſes, 172. Hill. 1 Jac. 2. in Caſe of Bodmin v. Vandebenden.

6. When the Lands of the Heir are charged for Payment of Portions to Infants *at 21 or Marriage*, they ſhall not be diſcharged before that Time, nor ſhall a real Security for Infant's Portions be *turned into a perſonal Security* where the Lands are originally charged; but where the Lands are *only ſupplementally* charged, it is otherwiſe; Per Jefferies C. Vern. 338. pl. 331. Mich 1685. Oldfield v. Oldfield.

But where the Deed expreſsly provided that the *Term was to ceaſe on the Money being raiſed*; it was held that the Land was diſcharged. Ibid. cites Goddard v. Bowman.

7. Land was convey'd to J. S. *in Truſt to raiſe and pay 500 l.* to B. the Truſtee enters and raiſed the 500 l. and afterwards becomes inſolvent, but before he became ſo, B. *took a Judgment from him to pay* the 500 l. when raiſed. The Words being to raiſe and pay, the Maſter of the Rolls doubted, and took Time to conſider, and would look into the Truſt-Deed and Deſeaſance of the Judgment. 2 Vern. 85. pl. 82. Mich. 1688. Harriſon v. Cage.

8. Grand-father Tenant for Life, Remainder to his firſt Son in Tail, Remainder over with Power to charge the Eſtate with Annuity of 250 l. per Ann. for 4 Years. He charged the Premiſſes with 250 *l. per Ann. for 4 Years* to begin after the Deceaſe in *Truſt to raiſe* 1000 *l.* Part to be paid to A. and the other Part to the Plaintiff B. and dies. The Son pays A. his Part. A. delivers up the Deeds and they are ſuppreſſed. The Son takes the Profits for 4 Years and more, and leaves a Daughter his Heir at Law, but no perſonal Aſſets; Per Lds. Commiſſioners, the Lands ſhall be *liable in the Hands of the Daughter though the 4 Years are expired*, and though the Perſon is dead that received thoſe Profits and ſhould have paid the Money in Queſtion. 2 Vern. R. 178. pl. 162. Mich. 1690. Smith v. Smith & Holt & al'.

9. Even at Law, if the *Heir took the Profits* which ſhould be applied for Payments of Debts, the Lands ſhall ſtill remain charged therewith; Per Lds. Commiſſioners. 2 Vern. 181. in pl. 162. Mich. 1690. cites Corbert's Caſe, 4 Rep. 81. b. 82.

10. A.

10. A. deviſed to M. his Daughter 500 l. and then deviſed to B. his Son and his Heirs an Advowſon, *on Condition that B. give Bond to pay M. this Legacy of 500 l. according to his Will.* B. died in the Life of A. Per Cur. this is a good equitable Charge ſubſiſting, notwithſtanding the Death of B. For if he had been living, and had refuſed to give Bond for the Payment of the 500 l. as directed by Will, the Advowſon ſhould be chargeable. N. Ch. R. 175. Mich. 1691. Webb v. Sutton.

11. A. deviſed the *Rents and Profits of his Lands till B. attain* 21, or marry, *towards Payment of his Debts; and if B. die* before 21, or without Iſſue, *my Debts being paid*, then he deviſed the ſame *to J. S. in Tail*, he paying 100 l. to C.—B. dies before 21, without Iſſue. The Profits to the Time that B. would have been 21, would not be ſufficient to pay the Debts. 'Twas decreed per 2 Lords Commiſſioners, Rawlinſon and Hutchins, that the Profits ſhould be liable to Payment of the Debts beyond the Age of 21, till the Debts ſhould be paid. But Ld. Rawlinſon held that was only by reaſon of the laſt Words; but Ld. Hutchins held that it would be the ſame without them. Chan. Prec. 34. pl. 36. Mich. 1691. Martin v. Woodgate.

12. By *Deſcent of the Inheritance* of Lands, out of which a *Term for 500 Years* was created for raiſing a Portion of 5000 l. for A. on whom the Inheritance deſcended, who died under 21 unmarried, the Land is not diſcharged; but the 5000 l. remains ſtill a ſubſiſting Charge on the Eſtate; per Somers C. and affirmed in Dom. Proc. 2 Vern. 348. pl. 320. Hill. 1697. Thomas v. Keymith. 2 Freem. Rep. 205. pl. 282. S. C.

13. A. deviſed an *Annuity of 100 l. per Ann. to B. for Life*, to be iſſuing *out of the Rents and Profits of Bl. Acre*, with Clauſe of Diſtreſs; and *deviſed Wh. Acre, and alſo Bl. Acre, charged with* the ſaid Annuity, to C. and his Heirs. The *Lands charged were but 50 l. per Ann.* and B. had enter'd and taken the Profits during his Life, and deviſed the *Arrears* to M. And 'twas decreed for M. For the Intent was that B. ſhould have 100 l. per Ann. And a Deviſe of the Rents, or of the Profits of Lands is a Deviſe of the Lands themſelves, and the Court will decree a Sale where Lands are charged to raiſe Portions, and the Profits will not do it; and the Deviſe of Bl. Acre, *charged with the Annuity*, charges it in his Hands by the ſaid Words; for it could not be charged before. Chan. Prec. 122. pl. 106. Mich. 1700. Foſter v. Foſter.

14. *Intereſt-Money of a Mortgage ſecured by Bond*, is only a further Security, and does not diſcharge the Land; per Maſter of the Rolls. Chan. Prec. 132. pl. 116. Mich. 1700. Barret v. Wells.

15. Where *Lands are deviſed to Truſtees to raiſe Money* for ſeveral Purpoſes, and *they raiſe it out of the Profits*, the Land is thereby diſcharged, and the Perſons concerned muſt reſort to the Truſtees; per Ld. Keeper Wright. Chan. Prec. 143. pl. 124. Hill. 1700. Juxon v. Brian.

A. deviſed that his Executors ſhould receive the Profit of his whole Real Eſtate for Payment of Debts and Legacies, and after thoſe paid he deviſed his Eſtate to B. The Executors miſapplied the Profits. Ld. C. Parker held that this uncertain Intereſt ſhould determine at ſuch Time as they might have paid the Debts &c. if they had duly applied the Rents &c. and only the Executors are liable. Wms's Rep. 505. 518. Mich. 1718. Carter v. Barnardiſton.

16. Lands *deviſed to Truſtees and their Heirs to ſell, and pay Legacies*, and among the reſt a *Legacy to the Heir* of 100 l. but no Diſpoſition is made of the Surplus. Per Cur. No more ſhall be ſold than is neceſſary for Payment of the Legacies, and the Heir ſhall have the Surplus. 2 Vern. 425. pl. 386. Paſch. 1701. Randall v. Bookey. Chan. Prec. 162. pl. 134. S. C. decreed accordingly.

17. 3000 l. to be raiſed out of Land by virtue of a Power to A. and a Leaſe raiſed to Truſtees for that Purpoſe was *aſſign'd to new Truſtees for a Collateral Security of a Leaſe for 99 Years made by A. and that the ſaid Truſt ſhould remain during the Term.* A. bequeath'd the 3000 l. to M. his Daughter, ſubject to the ſaid Collateral Truſt. And per Ld. Wright,

if the 3000 l. had been made a *Collateral Security generally*, the Court would *diſcharge in reaſonable Time*, as here in 7 *Years* Time, if the Party did not ſhew probable Cauſe of *Fear of Eviction*, and ſhew by whom; but this being expreſsly ordered to continue, they could not do it; and decreed 3000 l. to the Truſtee of the Leſſee to ſtand his Security, to be laid out at Intereſt on ſuch Security as the Maſter ſhould approve of, liable to the Lady's Claim, in caſe there ſhould be no Eviction. 12 Mod. 614. cited per Holt Ch. J. Hill. 13 W. 3. as Lord Cornwallis's Caſe.

18. In a Marriage-Settlement the *Term raiſed for Daughters Portions at their Ages of* 17, *provided* that *if the ſaid A. ſhould have Iſſue Male upon the Body of the ſaid M. that ſhould attain the Age of* 21, *or ſhould marry, or if the ſaid A. ſhall have no Daughters*, or if the Perſon inheritable ſhall pay off the Portions intended to be raiſed, the Term ſhall ceaſe. It happened that *A. had a Son that attained the Age of* 21. Decreed that the Term ceaſe, and the Daughters loſt their Portions, tho' it was urged that the Meaning muſt be, that if he had a Son he ſhould not pay till he arrived at 21 Years, which was enough in Favour of the Heir. MS. Tab. Feb. 12, 1706. Colt v. Arnold.

19. A. made a *Leaſe for* 21 *Years to B. for Payment of his Debts* and Legacies; and by a Will made at the ſame Time, reciting that he had made ſuch Leaſe, *deviſed the Lands after the Expiration of the ſaid Leaſe to C.* who was *his Heir*, and made B. Executor. A. lived 12 Years after, and paid the Debts himſelf, and the Perſonal Eſtate was ſufficient for the Legacies. C. brought a Bill for an Account of the Profits, and the Leaſe to be delivered up, *the Truſt being performed*; but Ld. Keeper Wright thought he had no Equity, and that the *Reverſion only was deviſed* after the Expiration of the ſaid Leaſe. Chan. Prec. 218. pl. 178. Paſch. 1703. Buſhnell v. Parſons.

Chan. Prec. 583. S. C. —This Decree was afterwards affirmed in the Houſe of Lords, tho' (the Reporter ſays it was) thought a very hard Caſe. 2 Wms's Rep. 21. at the End of S. C.

20. A. purſuant to Marriage-Articles, ſettled Lands on himſelf for Life, Remainder to his Wife for Life, Remainder to the firſt &c. Son &c. *Remainder to Truſtees for* 120 *Years to raiſe* 1500 *l. for Daughters on Failure of Iſſue Male*, Remainder *to himſelf in Fee.* The Truſt of the Term was declared to be *to raiſe the* 1500 *l. out of the Rents and Profits, as well by Leaſing for* 1, 2, *or* 3 *Lives*, or *any Number of Years determinable thereon*, or *for* 21 *Years abſolutely at the Old Rent.* There was only one Child, viz. a Daughter named M. [and it ſeems that the Wife was dead, tho' not mentioned.] Afterwards A. *ſettled the Reverſion* expectant on his own Death without Iſſue Male, ſubject to the 120 Years Term, in Truſtees for 10 Years, *Remainder to B.* his Nephew *for Life*, Remainder *to his firſt &c. Son in Tail Male*, Remainder *to C.* Grandſon of A. and Son of M. *in Tail Male*, Remainder *to himſelf in Fee.* The 10 Years Term was, that if M. and her Husband would releaſe the 1500 l. then the Truſtees ſhould raiſe 1900 l. viz. 1500 l. to be veſted in Land for the Benefit of M. and her Husband, and the other 400 l. to be paid to the Husband himſelf. *A. died without Iſſue*, leaving C. his Executor, *M.'s* 1500 *l. not being paid. B. enter'd and enjoy'd for* 4 *Years*, the *Portion not yet paid.* The *ſurviving Truſtee died, to whom M. adminiſter'd*, and then *M. and her Husband and B. aſſigned the* 120 *Years Term to J. S.* who advanced the 1500 l. *B. enjoyed the Land* 7 *Years, and died without Iſſue Male*, leaving no Aſſets. The Queſtion was, whether the Money could be raiſed by Mortgage, or any other Way by the Words of the Truſt, than by Leaſing or by the Annual Profits? Ld. C. Macclesfield ſaid that Here was *no Time appointed for raiſing this Portion*, and therefore is due when the Profits can raiſe it, and it *carries no Intereſt*; *but when the Sum of* 1500 *l. is, or might have been, raiſed by the Profits*, then it becomes due, and the Land is diſcharged as having born its Burthen; that the *Profits received by B. are as received by J. S. the Mortgagee, becauſe it is ſaid*

ſaid in the laſt Clauſe in the Mortgage-Deed that *it ſhould be lawful for B. to take the Profits without Account until Default of Payment*; ſo that by this Clauſe *B. was Tenant at Will to the Mortgagee*, which makes it all one as if J. S. had let it to any other Perſon, and ſo not purſuant to the Truſt, and ſo much as has been received of the Profits muſt go towards the Payment and ſinking of the Portion only, here having been a Power of Leaſing, and the Intention having been to charge the Land as far as may be. 2 Wms's Rep. 13 to 21. Paſch. 1722. Ivy v. Gilbert.

(H) Sunk by Perception of Profits.

1. EDward Loyd, on his Marriage, ſettled ſeveral Lands to the Uſe of himſelf for Life, as to Part to his Wife for Jointure, Remainder to firſt and other Sons of that Marriage, and *in Default of Iſſue Male to the Daughter and Daughters of that Marriage, and their Heirs, until the Remainder-man, to whom the Eſtate was to go, according to the Limitations of that Settlement, ſhould pay and ſatisfy unto the Daughter* 3000 *l.* Remainder to the Heirs of his Body &c. *He had Iſſue a Son* by that Marriage, *and* 4 *Daughters.* The *Son died in the Life-time of Edward Loyd, leaving a Daughter.* E. L. afterwards *ſuffered a common Recovery*, and made a Settlement upon that Marriage, and thereby charged the Premiſſes with other Lands with the raiſing 3000 l. more. The Daughters entered. The Plaintiffs were Creditors by Judgment, and their Bill was to be let into a Satisfaction, ſubject to thoſe Charges of 3000 l. and 3000 l. and in Exoneration thereof, to have an Account of the Rents and Profits. Decreed at the Rolls, that they ſhould account for the Profits, and that the Rents ſhould be applied firſt to pay the Intereſt, and then to ſink the Principal, as in Caſe of a Common Mortgage; and this Decree was affirmed by the Ld. Chancellor, with this Variation, that the Principal ſhould not be ſunk till a 3d Part was raiſed, above the Intereſt, and ſo again not to ſink the Principal till another 1000 l. be raiſed. 2 Vern. 523. pl. 473. Mich. 1705. and ibid. 576. pl. 521. Hill. 1706. Blagrave v. Clunn.

(I) Good or not. In reſpect of the Poſſeſſion &c. or want of Poſſeſſion &c. in the Perſon charging it.

1. IT was agreed that he in *Reverſion* may charge it, and *ſhall take Effect after the Death of Tenant for Life*; contrary of a Patron. Br. Charge, pl. 11. cites 38 E. 3. 4.

2. A Man *leaſed* Land *for* Term of *Years*, and *after granted a Rent-charge extra Terram illam* of 20 s. per Ann. The Termor ſhall hold it diſcharged; but if the *Termor ſurrender'd to him in Reverſion who charged*, there he ſhall hold charged, tho' 20 Years of the Term be to come; for the *Surrender made the Leſſor in, as if no Term had been*; by the beſt Opinion. Br. Charge, pl. 10. cites 5 H. 5. 8.

3. If *Land is leaſed* to one *for Life*, the Remainder *in Tail*, Remainder *to the Heirs of the Tenant for Life*, and the *Tenant for Life grants a Rent-*

Rent-charge in Fee, and dies, and the *Tenant in Tail dies without Iſſue*, the Heir of the Tenant for Life ſhall hold the Land charged. Br. Charge, pl. 36. cites 5 E. 4. 2.

4. A Man *leaſed for Life*, and granted the Reverſion or *Remainder over to J. N. who charged the Land and died*, and the *Tenant for Life is Heir to him to the Fee*, he ſhall hold diſcharged; for *he hath the Poſſeſſion by Purchaſe, tho' he hath the Fee by Deſcent*, and yet the Franktenement is extinct in the Fee. Quære. Br. Charge, pl. 16. cites 9 E. 4. 18.

5. A Man *cannot* grant or *charge that which he hath not*. Perk. S. 65.

6. *And therefore* if a Man grants a *Rent-charge out of the Manor of Dale*, and in Truth he hath not any Thing in the Manor of Dale, and *after he purchaſes the Manor* of Dale, yet he ſhall hold it diſcharged. Perk. S. 65.

7. Alſo a Man cannot *charge a Right*, for it ſhall be a good Plea for him to ſay againſt ſuch Grant by Matter in Fait, that he had not any Thing in the Land at the Time of the Grant; *but* in ſuch Caſe if the Grants had been *by Fine* Executory, the Law is contrary. Perk. S. 65.

For more of Charge in General, ſee **Contribution, Deviſe, Executors, Grants, Jointenant, Mortgage, Rent**, and other Proper Titles.

Charitable Uſes.

(A) By the Statute of 43 Eliz.

1. 43 *Eliz. cap.* 4. *S.* 1. WHereas *Lands, Tenements, Rents, Annuities, Profits, Hereditaments, Goods and Stocks of Money have been given*, † limited, appointed, and aſſigned *for Relief of aged, impotent and poor People, for Maintenance of ſick maimed Soldiers and Mariners*, * *Schools of Learning, Free Schools, and Scholars in Univerſities, for Repair of Bridges, Ports, Havens, Cauſeways, Churches, Sea-banks and Highways, for Education and Preferment of Orphans, for Stock or Maintenance of Houſes of Correction, for Marriages of poor Maids, for help of young Tradeſmen, Handycraftſmen, and Perſons decay'd, and for Relief or Redemption of Priſoners, and for Aid of poor Inhabitants, concerning Payments of Fifteenths, ſetting out of Soldiers, and other Taxes, which Lands, Hereditaments, Goods and Stocks have not been employed according to the Charitable Intent of the Givers*;

* A School unleſs it be *a Free-School*, is not a Charity within the Proviſion of the Statute of 43 Eliz. and conſequently the Inhabitants have not a Right to ſue in the Attorney-General's Name. 2 Vern. 387. pl. 355. Mich. 1700. Attorney-General, at the Relation of the Inhabitants of Clapham v. Hewer.

† Theſe Words (limited, appointed, and aſſigned) are very material Words, tho' omitted in the Abridgments of the Statutes; and as to Conſtructions upon them, ſee Letter (B).

For

*For Remedy whereof it ſhall be Lawfull for the Ld. Chancellor, and for the Chancellor of the Dutchy for Lands within the County Palatine of Lancaſter, to award * Commiſſions to the Biſhop of every ſeveral Dioceſe and his Chancellor, and to other Perſons, authorizing them, or any four of them, to enquire as well by the Oaths of 12 Men of the † County, as by all other lawful Ways of all ſuch Gifts aforeſaid, and of the Abuſes, Breaches of Truſt, Negligences, Miſ-imployments, not imploying, concealing, defrauding, miſ-converting, or Miſ-government of any Lands, Goods or Stock given for any the Charitable Uſes before rehearſed; and the Commiſſioners upon calling the Parties intereſted, ſhall make enquiry by the Oaths of 12 of the County (whereunto the Parties intereſted may take their Challenges) and upon ſuch enquiry ſet down ſuch Orders, Judgments and Dercees as the ſaid Lands, Goods and Stocks may be duly imploy'd for ſuch Charitable Uſes for which they were given; which Orders &c. not being Repugnant to the Orders, Statutes or Decrees of the Donors, ſhall ſtand good, and ſhall be executed until the ſame be altered by the Ld. Chancellor, or the Chancellor of the County Palatine of Lancaſter reſpectively, upon Complaint by any Party grieved.*

* Concerning theſe Commiſſions, theſe 6 *Things are to be obſerved.* Firſt, The *Number muſt be 4 or more.* 2dly, The Commiſſioners to be the *Biſhop and Chancellor* of that Dioceſs, (if there be a Biſhop) and other Perſons of good and ſound Behaviour.

3dly, In that Commiſſion *any* 4 of them *do ſuffice to make Orders and Decrees*, for therein none is of the Quorum. 4thly, None ſhall be Commiſſioners that *have any Part of the Lands* &c or Goods, or Chattles, Money or Stocks in Queſtion. 5thly, The Commiſſion is to *limit a certain Time*, within which the Commiſſioners are to order, decree and certify. 6thly, Their Authority is to *inquire as well by the Oath of 12 lawful Men or more, as by all other good Ways and Means.* 2 Inſt. 710.

And the Commiſſioners have Power alſo to enquire of theſe 9 Things. 1ſt, *Of Abuſes.* 2dly, *Breaches of Truſt.* 3dly, *Negligences.* 4thly, *Miſ-imployments.* 5thly, *Not imploying* 6thly, *Concealing.* 7thly, *Defrauding.* 8thly, *Miſ-converting.* 9thly, *Miſ-government* of any Lands, Tenements &c. Goods, Money &c. given to any of the Charitable Uſes aforeſaid. 2 Inſt. 711.

† *Lands in Gray's-Inn Lane* were *given to build a School at Rugby in Warwickſhire.* The *Commiſſioners ſat at Rugby* to inquire, and held not good. Toth 92. 2 Jac. Rugby School's Caſe.——Duke's Char. Uſes. 80. pl. 24. S. C. upon Breach of the Truſt, a Commiſſion was taken out in Warwickſhire, to inquire of this Gift; and by a Jury there, the Gift and Breach of Truſt was found, and a Decree made by the Commiſſioners in that County, to ſettle the Lands according to the Donor's Will; and upon an Appeal the Decree was reverſed; for the *Inquiſition and Decree was not made, nor found by Jurors, and Commiſſioners of the County where the Lands given* to ſuch Uſes *do lie.* The Words of the Statute are, To enquire by the Oaths of 12 Men, or more of the County, of ſuch Gifts, Limitations, and Appointments, and of the Breaches of Truſt of ſuch Lands or Goods &c. which is intended to be by Jury and Commiſſioners of that County where the Lands do lie.——Ibid. 118. pl. 2. S. P.——See Ibid. 126. pl. 36. S. P.

2. S. 2. This Act ſhall not extend to any Lands, Goods or Stocks given to any College, Hall, or Houſe of Learning within the Univerſities, and to the Colleges of Weſtminſter, Eaton or Wincheſter, or to any Cathedral or Colleg iate Church.

This Act does not extend to all Lands &c. nor to all Goods and Chattles, Money or Stocks given to any of the Charitable Uſes aforeſaid; but certain are excepted in theſe 8 ſeveral Caſes, viz. 1ſt, Of the Colleges, Halls or Houſes of Learning in either of the Univerſities. 2dly, Of the College of Weſtmiſter. 3dly, Of the College of Eaton. 4thly, Of the College of Wincheſter. 5thly, Of any City or Town Corporate, where there is a ſpecial Governor or Governors of ſuch Lands &c. 6thly, Of any College, Hoſpital, or Free-School, which have ſpecial Viſitors or Governors, or Overſeers appointed to them by their Founders. 2 Inſt. 211.

*3. S. 3. This Act ſhall not extend to any City or Town Corporate, or to any Lands or Tenements given to the Uſe aforeſaid, within any ſuch City or Town Corporate, where there are Governors appointed, neither to any College, Hoſpital or Free-School, which have * ſpecial Viſitors, Governors, or Overſeers appointed by their Founders.*

* If *Land is given to* a Corporation, or other *particular Perſons* to perform a Charitable Uſe, *and the Donor appoints them Viſitors alſo* of the Uſe according to his Intent; if *the ſaid Viſitors do break the Truſt*, either in detaining Part of the Revenue, miſ-imploying, or any other Ways defrauding the Charitable Uſe; this may be reſtored by Decree of the Commiſſioners, notwithſtanding the Statute of 43 Eliz. which diſables Commiſſioners to meddle with Lands given to the Charitable Uſes, where ſpecial Viſitors are appointed; For the Intent of *the Statute is to diſable Commiſſioners to meddle with ſuch a Caſe, where the Land is given to Perſons in Truſt to perform a Charitable Uſe, and the Donor appoints ſpecial Viſitors to ſee thoſe Truſtees to perform the Uſe* according to his Intent; if the Truſtees defraud the Truſt, the Commiſſioners cannot meddle, but the Viſitors are to perform it; but *where the*

Viſitors are Truſtees alſo, there *the Commiſſioners may* by their Decree, *reform the Abuſe* of the Charitable Uſe; reſolved by Ld. Coventry. Duke's Char. Uſes, 68, 69. pl. 6. Hill. 11 Car. Sutton Colefield's Caſe.——Ibid. 124. pl. 26. S. C. in totidem Verbis.

4. *S.* 4. *This Act ſhall not be prejudicial to the Juriſdiction of the Ordinary.*

5. *S.* 5. *No Perſons that ſhall have any of the ſaid Lands, Goods or Stocks, or ſhall pretend Title thereunto, ſhall be named a Commiſſioner or a Juror, or ſhall ſerve in the ſame.*

This Act does not extend to Lands of Purchaſors having theſe 3 Qualities; 1ſt, for valuable Conſideration of Money or Land.

6. *S.* 6. *Perſons which ſhall purchaſe upon valuable Conſideration of Money or Land, any Eſtate or Intereſt in any Lands, or Chattles that ſhall be given to any the Charitable Uſes above mentioned without Fraud, having no Notice of the ſame Charitable Uſe, ſhall not be impeached by Decrees of the Commiſſioners, and yet the Commiſſioners may make Decrees and Orders for Recompence to be made by any Perſons who being put in Truſt, or having Notice of the Charitable Uſes above mentioned, ſhall break the ſame Truſt, or defraud the ſame Uſes againſt the Heirs, Executors or Adminiſtrators of them having Equity.*

2dly, Without Fraud or Covin. 3dly, Having no Notice of the ſame Charitable Uſe. But albeit the Commiſſioners cannot make any Decree againſt any ſuch Purchaſors, yet may they make Decrees for *recompence* to be made by any Perſon or Perſons, who being put in Truſt, or having Notice of the Charitable Uſes aboveſaid, have or ſhall break the ſaid Truſt, or defraud the ſame Uſes by any Conveyance, Gift, Grant, Leaſe, Releaſe or Converſion againſt his or their Heirs, Executors and Adminiſtrators, having Aſſets in Law or Equity, ſo far as the ſaid Aſſets will extend. 2 Inſt. 711.

If *Lands* be *given to a Charitable Uſe, and to diſpoſe of an Overplus*; if the Purchaſor had *no Notice*, it cannot bind, but if *Rent Iſſue out* of Land, the Purchaſor muſt pay it, but will not charge him to pay *Arrearages* before Purchaſe, nor lay it upon one, nor excuſe the other. Toth. 95, 96. cites Mich. 14 Car. Peacock v. Tewer.——Duke of Char. Uſes, 82. pl. 33. S. C.

Lands were charged by Will with 200 l. to be paid within 2 Years to a Charity. T. after the Deviſor's Death, *purchaſed the Land with Notice of the Charge*, and after 40 *Years quiet Enjoyment and a Settlement made* by the Purchaſor on his Son's Marriage, a Demand was made of this 200 l. But becauſe the Executors or Adminiſtrators of the Deviſor were not made Parties, the Ld. Chancellor would not direct a Trial at Law upon the Point of Notice, nor make any Decree; beſides the Demand was not in Nature of a Rent-charge, which will always be chargeable on the Land into whoſe Hands ſoever the ſame ſhall come, but it was of a Sum in Groſs to be paid together and at one Time, and this Land having been enjoyed by ſeveral Perſons ſince his Will, it does not appear but that the Money may be paid; and ordered that Plaintiff be at Liberty to amend his Bill, and make proper Parties, and to bring the Cauſe to a Hearing again as he ſhould be adviſed. Fin. Rep. 336. Hill. 30 Car. 2. Attorney-General v. Twiſden.

This Act does not extend to Lands of Purchaſors of Lands, Tenements and Hereditaments, aſſured, conveyed, or come to Queen Eliz. H. 8. Ed. 6. or Queen Mary by Act of Parliament, Surrender, Exchange, Relinquiſhment, Eſcheat, Attornment, Conveyance, or otherwiſe. But if ſuch Manors, Lands &c. have ſince the Beginning of Queen Elizabeth's Reign been given &c. to any of the Charitable Uſes before expreſſed, then this Act doth extend to the ſame. 2 Inſt. 711.

7. *S.* 7. *This Act ſhall not give Power to any Commiſſioners to make Orders concerning any Manors or Hereditaments granted unto the Queen, to King Henry the Eighth, King Edward the Sixth, or Queen Mary. And yet if any ſuch Manors, or Hereditaments, or any Profits out of the ſame have been given for any of the Charitable Uſes before expreſſed, ſince the beginning of Her Majeſty's Reign, the Commiſſioners may proceed to enquire and make Orders and Decrees according to this Act, the laſt mentioned Proviſo notwithſtanding.*

Concerning the Certificate of the Commiſſioners, theſe 4 Things are to be obſerved. 1ſt, That they certify their Order and Decree reſpectively, either *into the Court of Chancery of England*, or into the Chancery *of the County Palatine* of Lancaſter, as the Caſe ſhall require. 2dly, That it ought to be *in Parchment, under the Hands and Seals of the Commiſſioners.* 3dly, It muſt be *with in the Time limited* in the Commiſſion. 4thly, That the *Lord Chancellor* or Ld Keeper, and the ſaid Chancellor of the Dutchy ſhall, and may within their ſeveral Juriſdictions, *take* ſuch Order for the

8. *S.* 8. *All Orders and Decrees of the Commiſſioners ſhall be certified under the Seals of the ſaid Commiſſioners, either into the Chancery of England, or into the Chancery within the County Palatine of Lancaſter, within ſuch Time as ſhall be limited in the Commiſſions.*

the *due Execution* of all or any of the ſaid Judgments, Decrees and Orders ſo certified, *as to* either of them *ſhall ſeem fit* and convenient. 2 Inſt. 711.

9. *S.* 9. *The Lord Chancellor, and the Chancellor of the Dutchy, may take Order for the due Execution of the ſaid Decrees and Orders.*

10. *S.* 10. *If after any ſuch Certificate made, any Perſons ſhall find themſelves grieved with any of the ſaid Orders or Decrees, it ſhall be lawful for them to complain to the Lord Chancellor, or the Chancellor of the Dutchy according to their ſeveral Juriſdiction; and the ſaid Lord Chancellor, or Chancellor of the Dutchy, may proceed to the Examination, Hearing and Determining thereof, and annul, alter or enlarge the ſaid Orders and Decrees of the Commiſſioners according to the Intent of the Donors, and ſhall tax Coſts againſt ſuch Perſons as ſhall complain without Cauſe.*

In the Remedy for the *Party griev'd with ſuch Decrees* ſo certified, theſe 5 Things are to be conſidered 1ſt, That he *complain to the Lord Chancellor*, or Lord Keeper, or to the Chancellor of the Dutchy according to their ſeveral Juriſdictions, for Redreſs thereof; and this Complaint is to be *by Bill.* 2dly, Upon ſuch Complaint, firſt they ſhall reſpectively by ſuch Courſe, as to their Wiſdoms ſhall ſeem meeteſt, the Circumſtance of the Caſe conſidered, *proceed to the Examination, Hearing, and Determining* thereof, 2. Upon Hearing thereof, ſhall or may *adnul the Whole*, (which rarely is done) *diminiſh* (in Part) *or enlarge*, (that is to confirm the Former, and to enlarge the ſame by adding ſomething thereunto) *the Judgment* and Decrees ſo certified. 3dly, As ſhall be thought to ſtand with Equity and good Conſcience. 4thly, According to the true Intent and Meaning of the Donors and Founders thereof. 5thly, And ſhall, and may tax and *award good Coſts* of Suit by their Diſcretion, (reſpectively) *againſt ſuch* Perſons *as ſhall complain* to them reſpectively *without juſt and ſufficient Cauſe* of the Orders, Judgments and Decrees before mentioned. But this Order being given and limited by Act of Parliament, no Coſts (if the Order, Judgment or Decree be adnuled, diminiſhed or enlarged) ought to be given to the Party complaining. 2 Inſt. 711. 712.

(B) Eſtabliſhed, though the Conveyance was defective.

1. DEVISE *Eccleſiæ Sancti Andreæ* de Holbourn. The Parſon ſhall take, and yet the Church is not Perſona Capax, but the Intent appears. Pl. C. 523. b. Hill. 20 Eliz. in Caſe of Welkden v. Elkington.

2. A *Copyhold* may be charged with a Charitable Uſe. Toth. 92. 41 Eliz. Kenſham's Caſe. Duke's Char. Uſes 80. pl. 25. cites S. C.

3. Deviſe to a Charity *by a Feme Covert Adminiſtratrix*, was held good. 2 Vern. 454. cites Mo. 822. Damus's Caſe. Mo. 822, 823. pl. 1111. 12 Jac. in Canc. S. C.

4. A Deviſe of Lands held in Capite was made *to the Principal, Fellows, and Scholars of Jeſus College in Oxford, to find a Scholar of the Blood of the Teſtator* from Time to Time. Upon a Reference to Hobart Ch. J. and the Ch. Baron, they agreed that the Deviſe was void in Law, becauſe the Statute of Wills did not allow Deviſes to Corporations in Mortmain, yet they held it clearly within the Relief of 43 Eliz. under the Words *(limited and appointed;)* and ſo it was decreed, that the College ſhould enjoy it againſt the Ward and his Heirs; and they held alſo, that the Proviſo in the Statute exempting Colleges, is only intended to exempt them from being reformed by Commiſſion. but not to reſtrain Gifts made to them. Hob. 183. Hill. 13 Jac. Flood's, alias, Lloyd's Caſe. A Deviſe to the Company of Leatherſellers, London, for a Charitable Uſe, was held a good Deviſe. Toth. 92. Trin. 5 Car. Hellam's Caſe. —— Duke's Char. Uſes 80. pl. 23. cites S. C. upon a Decree by Commiſſioners to ſettle the Lands upon the Company. An Appeal was, and Exception taken, for that the Company of Leatherſellers was a Corporation, and the Statutes of Wills does except Deviſes of Land to a Corporation. But the Decree was confirmed, there being many Precedents in it.

5. A

S. C. cited 2 Vern. 454. Mich. 1703. pl. 416 —— See S. C. in Duke 74, 75, 76.—— It has been generally held that

5. A Will of *Copyhold Lands of Inheritance* to A. and his Heirs, *without any Surrender* before or after the Will, was decreed good by the Stat. 43 El. 4. but per Ld. Chancellor, the Lord of the Copyhold ſhall have his Duties always of *Fines*, *Heriots*, *&c.* of the Heir or Purchaſor, in whoſe Name the Intereſt of the Copyhold reſts in Law, and that *Allowance* ſhall be made of it out of the Charitable Uſe. Mo. 890. pl. 1253. Rivet's Caſe.

the *Statute* 43 *Eliz. ſupplies all Defects of Aſſurances, where the Donor is of Capacity* to diſpoſe, *and has ſuch an Eſtate as is any ways deviſable by him*; and upon this Ground it hath been held, that if a Copyholder doth diſpoſe of *Copyhold Lands* to a Charitable Uſe *without a Surrender*, or if *Tenants in Tail* do *convey* Land to a Charitable Uſe *without a Fine*, or if a *Reverſion* be *granted without Attornment or Inrollment*, and divers other the like Caſes, yet theſe Defects are ſupplied by the Statute of 43 Eliz. becauſe the Donor had a Diſpoſing Power of the Eſtate, and this is a good Limitation and Appointment within this Statute. Duke's Char. Uſes 84. pl. 40. Chriſt-Hoſpital v. Hawes.

Duke's Char. Uſes 78. in pl 17. cites S. C.—— Ibid. 110. cites S. C. & S. P. and adds Feme Covert.——Hob. 136. pl. 184. S. C.

6. If an Infant, *Lunatick, or other Perſon who has not Capacity* to diſpoſe of an Eſtate, ſhall grant to a Charitable Uſe, this Defect is not ſupplied by the Statute. Duke's Char. Uſes 85. pl. 40. in Caſe of Chriſt's-Hoſpital v. Hawes, cites it as reſolved Hob. 136. 15 Jac. in Collinſon's Caſe.

Mo. 888 pl. 1251. Rolt's Caſe, S. C. The Queſtion was, becauſe this Will was made before the Stat. 32 H. 8. and the Land not in Uſe, whether it were a Limitation, Appointment, or

7. C. 15 H. 8. *deviſed a Houſe in Eltham*, in Kent, *to L. his Wife for Life, and after* her Death *to* J. B. and others, *Feoffees, (as he called them) in the ſaid Houſe, to keep it in Reparations, and to beſtow the reſt of the Profits upon the Reparations of certain Highways* there. *C. and his Wife are dead, and the Houſe deſcended to O. R. an Infant.* This Caſe being in Chancery, between the Pariſhioners and R. was referred by the Court to the Ld. Hobbard, and the Ld. Ch. B. Tanfield, who reſolved it clearly, that though the Deviſe was utterly void, yet it was within the Words *(limited and appointed* to Charitable Uſes;) otherwiſe if he were *one who had appointed what was not his own* to Charitable Uſes. Hob. 136. pl. 184. Paſch. 15 Jac. Colliſon's Caſe.

Aſſignment within the Stat. 43 Eliz. and that it was referr'd to Mountague Ch. J. and Hobart, who certifying that it was a Limitation or Appointment to a Charitable Uſe, to be relieved by the Stat. 43 Eliz. cap 4 the Ld. Chancellor confirmed the Decree.

The Charity of Judges have carried ſeveral Caſes on the 43 Eliz. great Lengths, and this *occaſioned the Diſtinction between operating by Will* and *by Appointment*, which ſurely the Makers of the Statute never thought of; per Ld. C. Cowper. Chan. Prec. 272. Mich. 1708. The Attorney-General for Sidney College v. Baines. ——G. Equ. Rep. 5. S. C.

8. If a Man *conveys* 2 *Parts of his Lands* which he *held in Capite*, for a valuable Conſideration, and then *deviſes the remaining* 3*d Part to a Charity*, this is void, and not helped by the Statute; becauſe, in the Inſtant of his Death, this 3d Part deſcends to the Heir, and he having diſpoſed the other 2 Parts has no Power by the Common Law, and is diſabled by the Statute of Wills to deviſe the other Part. Duke's Char. Uſes 78. pl. 18. in 17 Jac. Ld. Mountague's Caſe.

Deviſe by *Tenant in Tail* to Charitable Uſes was decreed

9. If *Tenant in Tail* gives Land to Charitable Uſes, the Iſſue is barr'd; for the Saving in the Stat. 39 Eliz. cap. 5. excludes him. Arg. Godb. 309. Paſch. 21 Jac.

to be a good Appointment, tho' no Fine was levied or Recovery ſuffered. 2 Vern. 453. pl 416. Mich. 1703. The Attorney-General and Pettifer v. Rye, Warwick, & al'.——And the Remainder-man ſhall be bound by a Settlement to Charitable Uſes as well as the Iſſue in Tail, and a Decree made by the Commiſſioners was confirmed with Coſts. Chan. Prec. 16. Tay v. Slaughter ——The Statute of 43 Eliz. herein *reſtored the Common Law*, and at Common Law was no Fine or Recovery. G. Equ. Rep. 45. Jenner v. Harper.——Chan. Prec. 391. Trin. 1714. S. C. & S. P.

10. The

10. The Teſtator being ſeiſed in Fee of a *Manor held in Capite, deviſed* it *to be ſold* by his Executors, and that *Part of the Money* ariſing by ſuch Sale *ſhould be paid to his Wife*, and *Part in ſeveral other Legacies, and the Reſidue to be beſtowed in Charitable Uſes.* Upon a Reference to the Juſtices of B. R. from the Court of Wards, the Queſtion was whether this was a good Conveyance within the Stat. 43 Eliz. becauſe there was *no Diſpoſition of the Land to Charitable Uſes, but only an Appointment that the Land ſhould be ſold, and the Money divided* as aforeſaid; and reſolved that it was not. Cro. C. 525. pl. 4. Hill. 14 Car. Aſcough's Caſe. Jo. 428. pl. 12. Aſcough v. Phillips, S. C. but S. P. does not appear; but reſolved that the Deviſe of the 3d Part is void in Law againſt the Heir, notwithſtanding the Statute of Charitable Uſes.——Cro. C. 525. S. P.

11. A *Feme Covert makes a Will of* 30 *s. per Ann.* to a Charitable Uſe, *out of ſome of her own Lands*; and tho' an Award was made that it ſhall be paid, and Bonds given to perform the ſame, yet the *Heir is not bound* to perform the ſame. Toth. 96. cites Trin. 15 Car. Bramble v. the Poor of Havering.

12. *Money given to a Pariſh* generally, and not ſaid to what Uſe, decreed to the Poor of the Pariſh. Chan. Caſes 134, 135. Mich. 21 Car. 2. Weſt and the Churchwardens and Overſeers of the Poor &c. of Great Creaton v. Knight.

13. Where a Deviſe was of Lands *to Trinity-College* in Cambridge, for the Maintenance of a Fellow there, and that *if any by Cavil ſhould hinder this Deviſe, or that the ſame cannot go to the College by reaſon of the Statute of Mortmain, then he deviſed the ſame to R. N. and his Heirs*; and upon an Information exhibited againſt R. N. by the Attorney-General to have this Land eſtabliſhed in the College, it was decreed accordingly, notwithſtanding the ſaid Statute of Mortmain, and the ſaid Clauſe in the Will. Lev. 284. Hill. 21 & 22 Car. 2. in Canc. The King v. Newman.

14. M. deviſed 37 l. per Ann. to Charitable Uſes, out of the Manor of W. which was held in Capite. Exception was taken that the *Manor being held in Capite* the Teſtator could charge only 2 Parts in 3 by his Will, which would not amount to 37 l. a Year. But the Court held the Whole chargeable by the Will by the Stat. 43 Eliz. which was an enabling Statute, and that the Teſtator had only miſtaken the Manner of the Conveyance; for had he done it by Grant it had been good for the Whole, and being by Will the Statute made it a good Appointment for the Whole in like Manner. Neſl. Ch. Rep. 146. in 22 Car. 2. Higgins v. the Poor of Southampton. 3 Chan. Rep. 68 S. C. accordingly. ——2 Vern. 454 S. C. cited as decreed good.

15. Tho' a Charity was *precedent to the Stat.* 43 *Eliz. cap.* 4. yet the Statute ſubſequent had a Retroſpect, and would make it a good Appointment, tho' it was not ſo before (but void). Chan. Caſes 195. Hill. 22 & 23 Car. 2. Smith v. Stowell.

16. A *Deviſe, void by Miſnoſmer* of a Corporation, was ſupply'd in *Equity* as a good Appointment of a Charitable Uſe. Chan. Caſes 267. Mich. 27 Car. 2. Anon. Fin. Rep. 221. Platt v. St. John's College, Cambridge,

S. C accordingly.——Duke 77, 78. S. P. in S. C. pl. 16. ——2 Vern. 454. cited as the Caſe of Platt v. St. John's College.——Duke Char. Uſes 83. pl. 38. The Mayor of London's Caſe, S. P. held accordingly, where Lands were deviſed to the Mayor and Chamberlain of London, inſtead of the Mayor and Commonalty; for it appears that he intended to give it to the Corporation of London, and his Intent ſhall be obſerved.

17. A. built an Alms-houſe in L. and, during his Life, gave 4 l. per Ann. to 7 poor Women of L. of 60 Years of Age, and after by his Will gave 28 l. per Ann. to be diſtributed equally *between 7 poor Women.* Decreed, that this Charity be *eſtabliſhed for ever*, tho' the Words do not fully direct it in Succeſſion, and the 7 poor Women *to be choſen out of L.*

only. Fin. R. 353. Paſch. 30 Car. 2. Attorney General for Lambeth Pariſh v. Whitchcott.

18. A deviſed a Charity to the Poor of B. in the County of C. which was a *Miſtake of the County* of C. for D. The Court was of Opinion, that ſince there was ſuch a Pariſh in the County of D.—A. muſt mean that Pariſh, becauſe it appears he was born there, and that both he and his Parents lived and died in that Pariſh. Fin. R. 395. Mich. 30 Car. 2. Langenew Pariſh in Denbighſhire, alias, Owen, v. Bean & al'.

19. A *Rectory* deviſed *for the Maintenance of a Miniſter* there, was deviſed *to no certain Perſon*, and therefore void at Common Law, and nothing was mentioned concerning the Nomination to it. Thoſe to whom the Eſtate came appointed O. to be Miniſter, and ſerve the Cure. P. ſuppoſing a Lapſe to the Crown, was preſented, inſtituted, and inducted, as if the Church had been void. (Note, the Church was formerly appropriate to an Abbey, and no Vicar endowed, but, probably, was ſerved by one of the Monks, and this coming to the Crown, by Grant came to the Teſtator.) It was urged, that here was *a pious Uſe* wholly ſubject to this Court, and that P. coming in by the Ordinary, tho' he was not Parſon or Vicar, was allowed by the Biſhop; and decreed accordingly that P. ſhould have the Tithes. 2 Chan. Caſes 31. Trin. 32 Car. 2. Perne v. Oldfield.

20. An *Impropriator deviſed to one that ſerved the Cure, and to all that ſhould ſerve the Cure* after him, *all the Tithes, and other Profits* &c. Tho' the Curate was incapable to take by this Deviſe in ſuch Manner, for want of being incorporate, and having Succeſſion, yet Ld. Chancellor Finch decreed, that the Heir of the Deviſee ſhould be ſeiſed in Truſt for the Curate for the Time being. 2 Vent. 349. Paſch. 32 Car. 2. Anon.

21. In Caſe of *Copyhold Land* where there is a *Surrender to the Uſe of the Will*, ſuch a Will will operate as an Appointment; for the Copyhold paſſes not by the Will, but by the Surrender. 2 Vern. 598. pl. 536. Mich. 1707. Att. Gen. v. Barnes & Ux. (the Caſe of Sidney College in Cambridge.)

3 Chan. Rep. 150 S. C. alias, Dr. Johnſon's Caſe, but Ld. Chancellor ſaid, that it being a favourable Caſe on the one Side, and a Charity on the other, he would conſider further of it, and confer with the Judges.

22. A *Will not executed in Preſence of three Witneſſes*, being void as a Will, cannot operate as an Appointment within the 43 Eliz. 2 Vern. 597. Mich. 1707. Att. Gen. v. Barnes & Ux. (the Caſe of Sidney College in Cambridge.)

Deviſe of Lands, not in Writing, to Charitable Uſes, or *without* 3 *Witneſſes*, is void; and the Statute 43 El. 4. which favoured Appointments to Charities, is now repealed pro Tanto, i. e. as to the Want of 4 Witneſſes, by the *Statute of Frauds*, which requires 3 Witneſſes. 1 Salk. 163. pl. 3. Trin. 1714. in Canc. Genner v. Harper.——Gilb. Equ. Rep. 44. S. C. in totidem Verbis, only miſtakes a Citation out of Swinb. for Comb. and concludes, that Ld Chancellor ſeemed to be of the ſame Opinion, but ſaid, he would conſider of it till the firſt Day of Cauſes after the Term, and in the mean Time recommended it to the Plaintiffs to make good the Charity.

A Nuncupative Will of 20l. per Ann. out of Lands to a Charity, tho' *before the Statute of Frauds*, is not good as an Appointment by the 43 *Eliz.* Ch. Prec. 389. Trin. 1714 Jenner v. Harper.——For at Common Law Lands or a Real Eſtate were not deviſable, and the Statute of 32 H. 8. as much requires that a Will of Land ſhould be in Writing as by the Statute of Frauds it is required that ſuch a Will ſhould have 3 Witneſſes, and this being a Deviſe *of Rent, which cannot paſs without Deed*, is not good by Nuncupative Will. Wms's Rep. 248. Trin. 1714. S. C.——Wms's Rep. 248. the Reporter makes a Quære, and cites Duke's Charitable Uſes, 81. Stoddard's Caſe, where one, before the Statute of Frauds, deviſed a Rent of 10l a Year out of Lands to Charitable Uſes, and will'd the Scrivener to put it in Writing, which he did, and decreed that this Nuncupative Will was good; for tho' a Rent cannot be created without Deed, yet *Rent* may be *appointed without Deed* by the Words of 43 Eliz. and tho' the Nuncupative Will be void as a Will, yet it is good as an Appointment; and the Reporter ſays it ſeems, that 43 Eliz which makes theſe Appointments to Charities good, being ſubſequent to 32 H. 8. of Wills, ſuperſedes and repeals that Statute, but that it is true, that the Statute of Frauds being ſubſequent to 43 Eliz. repeals that, and therefore ſince the Statute of Frauds an Appointment of Lands to a Charity by Will not atteſted by 3 Witneſſes is void.

23. A *Wife* having *Power to diſpoſe of her Perſonal Eſtate*, (which only comprehended the Perſonal Eſtate ſhe had before Marriage) *and getting into Poſſeſſion*, in a ſecret Manner, after Marriage, *of a great Perſonal Eſtate at her Father's Death, conceals it from her Husband*, and afterwards by Will diſpoſes of it to Charities; yet decreed, that what was ſo concealed ſhall not be made good to the Husband, ſo as to diſappoint the Charities. MS. Tab. March 11. 1711. Pilkington v. Cuthbertſon.

24. A. ſettled Lands, with *Power of Revocation* by Writing executed under Hand and Seal in the Preſence of 3 Witneſſes, not being menial Servants, and in her Illneſs, by a Letter, directed a Deed of Revocation to be prepared, but died before it was done, having by Will left Part to Charitable Uſes, and decreed good as an Appointment, tho' there was *no Revocation*; Per Maſter of the Rolls. Ch. Prec. 473. pl. 296. Paſch. 1717. Piggot v. Penrice. Gilb. Equ. Rep. 137. S. C. in totidem Verbis,

25. The Statute ſupplies all Defects of Aſſurance where the *Donor is of Capacity* to diſpoſe, and hath ſuch an Eſtate as is any way diſpoſable by him, whether by Fine or Common Recovery. 2 Vern. 755. pl. 660. Mich. 1717. in Caſe of Att. Gen. v. Burdet. Ibid. cites Duke's Char. Uſes 84. pl. 40. in Caſe of Chriſt's Hoſpital v. Hawes, S. P. where it is ſaid, that upon this Ground it has been held.

26. J. S. by Will deviſed an *Annuity of 50l. a Year, and alſo 100 l. in Money*, to A. and his Heirs, and *if A. dies without Heirs, then to a Charity. A. died without Iſſue in the Life-time of J. S. the Teſtator, and then* J. S. died. It was argued, that the Deviſe of the Remainder ought to be ſupported, as given to a Charity; but Ld. Chancellor ſaid, that ſuppoſing it to be void if given to a common Perſon, it ſhall be the ſame when given to a Charity; that in this Caſe *the Deviſe over is void*, and the Word (Heirs) ſhall not be conſtrued to ſignify Heirs of the Body where the Deviſee over is not inheritable; and the Death of the firſt Deviſee in the Life-time of the Teſtator can make no Alteration, if the Will was void at the making. 2 Wms's Rep. 369. pl. 109. Trin. 1726. Att. Gen. v. Gill.

(C) Grant or Deviſe to Charitable Uſes. Good in reſpect of the Words of the Gift, and the Perſons to whom.

1. IF one deviſes Land *to J. S. for Life, the Remainder to the Church of St. Andrews in Holborn*, the Parſon of the Church ſhall have this Remainder. Duke's Char. Uſes 113. cites 21 R. 2. Deviſe 17. [But it is not at Deviſe 17.]

2. A Deviſe *to the poor People maintained in the Hoſpital in the Pariſh of St. Lawrence in Reading for ever.* Exception was taken, that the Poor were not capable by that Name, for no Corporation, yet, becauſe the Plaintiff was capable to take Lands in Mortmain, and did govern the Hoſpital, it was *decreed* the Defendant ſhould aſſure the Lands *to the Mayor and Burgeſſes* for the Maintenance of the ſaid Hoſpital. Toth. 94. cites 43 Eliz. Mayor and Burgeſſes of Reading v. Lane. Duke's Char. Uſes 81. pl. 30. cites S. C.

3. Upon the Will of one Hunt, of the Leaſe of the Rectory of H. in the County of W. it was reſolved by Egerton and Popham, that a Deviſe of *Money to be diſtributed to 20 of the pooreſt of his Kindred*, ſhall be a good Deviſe accordingly. Duke's Char. Uſes 80. pl. 27. cites S. C. —Ibid 212. S. P.

a good Deviſe, notwithſtanding it does not appear that he had any poor Kindred. Toth 92. cites 44 Eliz. Goſſ v. Webb.

Duke's Char. Uſes 81. pl. 28. cites S. C. 4. A being ſeiſed of *Copyhold* Lands in B. in Eſſex, did deviſe, *that the Parſon and Churchwardens in Thames-ſtreet, London, and 4 honeſt Men of that Pariſh, ſhould ſell* the Land, and employ the Money for the Poor, and Charitable Uſes in that Pariſh; and it was objected that the Deviſe was void, becauſe the Parſon and Churchwardens were *not a Corporation to take Land out of London*, nor to ſell it for ſuch Uſes; but it was decreed, that the Deviſe was good, and that they had a good Authority to ſell the ſame. Toth. 92, 93. cites 3 Jac. Champion v. Smith.

Duke's Char. Uſes 82. pl. 32. cites S. C. 5. When *no Uſe* is *mentioned* or directed *in a Deed*, it ſhall be decreed to the Uſe of the Poor. Toth. 95. cites 10 Jac. Fiſher v. Hill.

Sir Thomas was then Treaſurer of the Navy. Toth. 94, 95. S. C. and *tho' no certain particular Men could claim it*, yet he was adjudg'd to account for it by this Law. 6. The *Captain, Mariners, and Soldiers at Sea made a voluntary Conſtitution, that every Mariner and Sea-ſoldier ſhould abate ſo much a Month out of their Pay, to be employed for the Relief of the Mariners and Soldiers maimed or hurt in the Service*, of which Abatement there was 3001. and which had been in the Hands of Sir Tho. Middleton above 20 Years. The Mariners procured a Commiſſion upon the Statute of 43 Eliz. whereupon the Commiſſioners finding the Conſtitution and the Retainer, Sir Thomas was decreed to pay the Money to the ſaid Uſe; and upon Exceptions exhibited by Sir Thomas, the Ld. Chancellor confirmed the Decree. Mo. 889. pl. 1252. 15 Jac. Middleton's Caſe.

——Duke's Char. Uſes 74. pl. 13. cites S. C.

Duke's Char. Uſes 81. pl. 28. cites S. C. 7. A deviſed by Parol *a yearly Rent of 10l. for ever out of his Houſe called the Swan* with 2 Necks in the Old Jewry, London, *for the Maintenance of 2 Scholars in Oxford and Cambridge*; and will'd that Hugh the Scrivener ſhould put it in Writing, which he did accordingly; and this was found by Inquiſition, and decreed. And it was objected that the Deviſe was not good, for that a Rent could not be deviſed by a Nuncupative Will; but the Decree was confirmed to be good; for a Rent may be created and granted without Deed in Caſe of a Penſion, much more for a Charitable Uſe. Toth. 93. cites 20 Jac. Stoddard's Caſe.

S. C. ſays it was decreed good in Chancery by the Words (limited and appointed) within the Statute. 8. *Lands* given *to Church-wardens* void in Law. Decreed about 2 Car. Toth. 96. Penniman v. Jennings.—And cites Mich. 14 Car. Manſel v. Middleton. Duke's Char. Uſes 82. pl. 34.

Duke's Char. Uſes 80. pl. 26. cites S. C. accordingly.—Ibid. 113. cites S. C. and ſays that ſo by reaſon it will be in all ſuch uncertain Gifts——Ibid. 112. S. P. 9. Money was given *for the Good of the Church of Dale*, and this was ruled good upon theſe general Words. Toth. 92. cites 4 Car. Wingfield's Caſe.

Duke's Char. Uſes 81. pl. 31. cites S. C. 10. A. deviſed by his Will *Moneys* to a Charitable Uſe, *to be beſtow'd for poor People*, and the Reſidue of his Goods to be employ'd to ſuch Uſes as his Feoffees ſhall think meet. The Deviſe is good. Toth. 95. cites 9 Car. The Mayor of Briſtol v. Whitton.

Duke's Char. Uſes 82. pl. 35. cites S. C. 11. Whether Money given *to maintain a Preaching Miniſter* be a Charitable Uſe? The Ld. Keeper and the Judges did decree (notwithſtanding it is not warranted by the Statute to be a Charitable Uſe) that the ſame ſhall be paid by the Executor to ſuch Maintenance. Toth. 96. cites Trin. 15 Car. Pember v. the Inhabitants of Kingſton.

12. A.

12. A. deviſes 20 *l. per Ann. to a Preaching Miniſter*, and dies, leaving Lands and Aſſets, and the Defendant will not pay it accordingly. The Court with the Judges charges her, out of the Aſſets, to *buy Lands to perpetuate it.* Toth. 96. cites Trin. 15 Car. Penſterd v. Pavier. Duke's Char. Uſes 82. pl. 36. cites S. C.

13. Deviſe of a Charity *to the Poor indefinitely.* In ſuch Caſe Equity gives the *Diſpoſal* thereof *to the King.* Fin. Rep. 245. Hill. 28 Car. 2. The Attorney-General v. Peacock. By the *Civil Law* this Deviſe would be to the Poor of the Hoſpital of that Pariſh where the Teſtator lived; and if no Hoſpital there, then to the Poor of that Pariſh. Fin. Rep. 245. in S. C.

14. A Giſt to raiſe *Money to proſecute Offenders* will not be good as a Charitable Uſe; per Curiam Obiter. 2 Salk. 605. pl. 3. Paſch. 2 Ann. B. R. in Caſe of the Queen v. Savin.

15. *In Saffron-Walden* in Eſſex *was a Free-School, and P. and others ſubſcribed to a Charity-School there of* 12 *Boys* and 12 Girls, which Subſcription was only *during the Pleaſure of the Benefactors.* P. being delighted with theſe Charity-Children, declared he would leave them ſomething at his Death. *P. by Will gave* 500 *l. to the Charity-School.* The Ld. Chancellor ſaid that tho' the Free-School be a Charity-School, yet that for Boys and Girls went more commonly by that Name; and as the Teſtator was fond of the latter, and declared he would leave them a Legacy, therefore That, and not the Free-School, is intitled thereto; and becauſe it was objected that on the Failing of this Charity-School the Charity ought to revert to the Founder, he gave Liberty to the Parties in ſuch Caſe to apply again to the Court. Wms's Rep. 674. pl. 193. Mich. 1720. The Attorney-General v. Hudſon.

16. One Timothy Wilſon being ſeiſed of Lands in Fee, and alſo poſſeſs'd of a conſiderable Perſonal Eſtate, by Will dated 22d of March 1714, *gave all his Real and Perſonal Eſtate to two Truſtees, their Heirs* &c. in Truſt, *to pay the Produce thereof to* his Niece *Elizabeth Wilſon for her Life, and after her Death* he gave the ſaid Real and Perſonal Eſtate *to the Son and Sons, which his Niece ſhould leave behind her, ſeverally and ſucceſſively according to Seniority, and the Heirs of the Body of ſuch Son and Sons* iſſuing, the Elder to be preferr'd &c. *and* for want of ſuch Iſſue, that is, *in caſe all ſuch Sons died without Iſſue before any of them attain'd* 21, *then* he gave the ſame *to the Daughter and Daughters which his Niece ſhould leave* behind her at her Death, *and the Heirs of their reſpective Bodies* iſſuing; *and* for want of ſuch Iſſue, that is (as he expreſs'd himſelf) *in caſe all ſuch Daughters died without Iſſue before any of them attained* 21, then the ſaid Truſtees and the Survivor of them, and the Heirs and Executors &c. of the Survivor, were *to diſpoſe of* his Real and Perſonal Eſtate *to ſuch of his Relations of his Mother's Side who were moſt deſerving, and in ſuch Manner as they thought fit, and for ſuch Charitable Uſes and Purpoſes as they ſhould alſo think moſt proper and convenient.* One of the Truſtees declining to act in the Truſt, Elizabeth brought her Bill in Michaelmas 1715, to compel him to act in the Truſt, or to transfer the ſame as the Court ſhould direct; and he refuſing to act, the Court decreed him to aſſign the Truſt as the Maſter ſhould direct, and accordingly he by Leaſe and Releaſe aſſign'd and convey'd the Premiſſes, with the Approbation of the Maſter, to another Perſon in Truſt for the Uſes of the ſaid Will. *Elizabeth died without Iſſue* in 1732, and on a Bill brought by the Teſtator's Relations on the Mother's Side, to have their Share of the ſaid Eſtate, and on a Croſs Bill brought by the Attorney-General to have the ſame applied to Charitable Uſes as the Court ſhould direct, the *Maſter of the Rolls* held clearly that the Limitation over of the Perſonal Eſtate was good, and that the Power given by the Will to the

Truſtees of diſtributing the Teſtator's Eſtate as they thought fit was at an End, and could not be aſſigned over, and that therefore the Power of diſtributing the ſame devolved on the Court; and ſhe *directed that one Half of the ſaid Eſtate ſhould go to the Teſtator's Relations on the Mother's Side, and the other Half to Charitable Uſes*, the known Rule that Equity is Equity being (as he ſaid) the beſt Meaſure to go by. He ſaid that he had no Rule of judging of the Merits of the Teſtator's Relations, and could not enter into Spirits, and therefore could not prefer one to the other; but that all ſhould come in without Diſtinction, excluding only thoſe that were beyond the 3d Degree. He held that as to the Perſonal Eſtate, there ſhould be *no Repreſentation of thoſe Relations who died in the Life-time of Eliz.* For before her Death no Part thereof veſted in any of the Relations, and it was contingent whether they would be intitled thereto or not, and decreed ſo accordingly. His Honour cited a Caſe determined by Ld. Cowper, which was where one *gave his Perſonal Eſtate to his Relations, fearing God and walking humbly before him*, and decreed by him that it ſhould *go equally among his Relations*. MS. Rep. Nov. 30. 1735. Doyley & al' v. the Att. Gen. & al'. & e contra.

(D) Altered.

But it was obſerved to the Court, that the Practice had always been to apply them *In eodem genere.*

1. WHEN a Thing is diſpoſed to maintain Contempt and *Diſobedience* in any, this ought to be ordered and diſpoſed by the Court to a contrary Uſe and End. Lane 44. Paſch. 7 Jac. Arg. cites Venable's Caſe.

Vern. 251. in Caſe of the Attorney-General v. Baxter.

2. The Donor of a Houſe to a Vicarage for the Vicar to live in, and a Leaſe to be made by the Truſtees to the Vicar for the Time being, *on Condition* of his having no other Living, and of his being Reſident, being *miſtaken in his Title*, as thinking the Vicarage was Donative where it was Preſentative, made no Preſentation of a Vicar, in Default whereof the King preſented by Lapſe. Decreed that the Truſtees leaſe this Houſe to the King's Preſentee, but under the Conditions abovementioned. Nelſ. Ch. Rep. 40. 15 Car. Joyce v. Osborne.

3. A Submiſſion was to Arbitrators touching Lands, and they were *awarded to B.* and Poſſeſſion delivered accordingly, and no Claim was made during B.'s Life. B. by his Will deviſed theſe Lands to a Charity. J. S. purchaſed theſe Lands, with Notice of the Award and Deviſe; and 'twas decreed that the Teſtator being *intitled in Equity* to the Land by the Award, and the Purchaſor having Notice, his Purchaſe is not good, and the Charity ſhall be eſtabliſhed. Fin. Rep. 75. Hill. 25 Car. 2. Chard Pariſh &c. v. Opie.

4. A Deviſe was of a Charity *to the Poor*, without ſaying what Poor; Equity gives the Diſpoſal of this Charity to the *King*, and in this Caſe the King gave it to the Governors of Bridewell, Chriſt-church, and St. Thomas's Hoſpital, for the 40 poor Boys in Chriſt's Hoſpital, educated there to learn the Art of Navigation. Fin. R. 245. Hill. 28 Car. 2. Att. Gen. alias, Chriſt's Hoſpital v. Peacock.

5. *General Charities* are under the Direction and Diſpoſal of the King, and not of the Commiſſioners, and to be ſettled by Information in Chancery

cery for the King; but where the Charities are deviſed to the Poor for ever, the King cannot diſpoſe to the poor Kindred of the Teſtator, becauſe they cannot live poor for ever; ſo that ſuch Diſpoſal by the King is to be to the Poor who may take it for ever, by which the King directed it to Chriſt's Hoſpital. 2 Lev. 167. Trin. 28 Car. 2. B. R. Att. Gen. v. Matthews.

6. C. deviſed a *Salary for Maintenance of Independent Lectures in Market Towns*, and deviſed the Eſtate thus charged to his Nephew, who afterwards deviſed it for Payment of his Debts. Bill was brought to have the Lands ſold for Payment of the Debts. Afterwards, upon an Information for the Charity, the growing Payments and Arrears were decreed, and the independent Lectures *changed into Catechiſtical Lectures*, in the ſame 3 Market Towns, and this, tho' there were not ſufficient to pay the Debts. 2 Vern. 267. in pl. 252. cites it as decreed in 1679. Combes's Caſe. 3 2 Chan Caſes 18 Hill. 31 & 32 Car. 2. the Att. Gen. v. Combe, S.C. decreed accordingly.

7. No *Agreement of Pariſhioners*, where ſeveral Charities are given for ſeveral Purpoſes, can *alter* or divert them to other Uſes, but they muſt be *applied* for the Purpoſes for which they were given. Vern. 42. pl. 43. Paſch. 1682. Man v. Ballet. As if Money *given*, or Lands ſettled *for Repairs of a Church are beſtowed in Maintenance of a Lecturer by Agreement of the Pariſhioners*, the Money ſo paid to the Parſon ſhall not be allowed on Account. Vern. 42. pl 43. Paſch. 1682. Man v. Ballet. ——— It muſt be accepted on the ſame Terms as given upon, or leave it to the right Heir. Fin. R. 222. St John's Coll. Cambridge v. Platt.

8. A Man having deviſed 50 l. per Ann. *for a Lecturer in Polemical or Caſuiſtical Divinity, ſo as he was a Batchelor or Doctor in Divinity, and 50 Years of Age*, and would read 5 Lectures every Term, and at the End of every Term would deliver fair Copies of the ſame, to be kept in the Univerſity, and in Default of ſuch a Lecturer, he gave that 50 l. per Ann. to College in Oxon. Now, upon this Information, the Univerſity of Cambridge, with the Conſent of the Heir at Law, would have had the Rigour of the Qualifications mitigated, viz. That a Man of 40 Years of Age might be made capable of this Salary, and that 3 Lectures every Term might ſerve Turn, and that if he delivered ſuch fair Copies of his Lectures once a Year, it ſhould be ſufficient; but the Ld. Chancellor, tho' no one made Oppoſition to it, refuſed to intermeddle in it, and ſaid, they ſhould be held to the Letter of the Charity, and that the Heir had no Power to alter the Diſpoſition made by his Anceſtor. Vern. 55, 56. pl. 52. Paſch. 1682. the Att. Gen. v. Marg. & Reg. Profeſſors in Cambridge &c.

9. Deviſe of 1000 l. for ſuch Charity as Teſtator had by Writing appointed, and *no ſuch Note being to be found*, the King appointed the Charity, and the ſame was decreed accordingly. Vern. 224. pl. 223. Hill. 1683. Att. Gen. v. Syderfin.

10. A. deviſed ſeveral particular Charities, and the Surplus *for the good of poor People for ever*. The Surplus, being indefinitely deviſed, it was decreed, that the *King may apply the Charity*. Vern. 225. cited Hill. 1683. in the Caſe of Att. Gen. v. Siderfin, as the Caſe of Frier v. Peacock.

11. Money deviſed to *ejected Miniſters*; the King has the Diſpoſal of it. 2 Chan. Caſes 178. Mich. 2 Jac. 2. Att. Gen. v. Rider. So *to 60 pious* ejected Miniſters decreed, per Ld Keeper North, for the Maintenance of a Chaplain for Chelſea College. Vern. 248. pl. 243. Trin. 2684. Att. Gen. v. Baxter. ——— But this Decree was diſcharged, and the Information diſmiſſed, and the Money then remaining in Court ordered to be paid out to Mr. Baxter, to be by him diſtributed according to the Will; Per Lds. Commiſſioners. 2 Vern. 105. Trin. 1689. Att. Gen. v. Hughes.

12. John

12. John Snell, by his Will, charged his Real and Perſonal Eſtate with an annual Sum, or Exhibition, *for the Maintenance of Scotchmen in the Univerſity of Oxon. to be ſent into Scotland, to propagate the Doctrine and Diſcipline of the Church of England there.* Now, by the late Act of Parliament, Presbyters are ſettled in Scotland; and it was inſiſted, that altho' the Charity cannot now take Place according to the Letter and expreſs Direction of the Will, yet it ought to be performed *Cypres*, and the Subſtance of it may be purſued, that is, to propagate the Doctrine and Diſcipline of the Church of England, tho' not in the Form and Method intended by the Teſtator, and ſhall not be void, ſo as to fall into the Eſtate, and go to the Heir; No Decree appears. 2 Vern. 266. pl. 252. Paſch. 1692. Att. Gen. v. Guiſe.

13. A Charity given *to maintain Popiſh Prieſts* was *applied* by the King *to the other Uſes*, and not to turn to the Benefit of the Heir. 2 Vern. 266. pl. 252. Paſch. 1692. Arg. cites it as adjudged in the Exchequer, and affirmed on Appeal to the Houſe of Lords. Gates v. Jones.

14. An *Information* was exhibited in the Exchequer, *to diſcover whether an abſolute Deviſe of Lands was not really in Truſt for Superſtitious Uſes, and if ſo, then to have an Application thereof to an Uſe truly Charitable*; And it was held firſt, that the King, as Head of the Commonwealth, is obliged by the Common Law, and for that Purpoſe intruſted and impowered to ſee that nothing be done to the Diſheriſon of the Crown, or the Propagation of a falſe Religion, and to that End intitled to pray a Diſcovery of a Truſt to a Superſtitious Uſe, and this Uſe, being ſuperſtitious, is merely void, and for that reaſon the King cannot have it; yet, however, it is not ſo far void as that it ſhall reſult to the Heir, and therefore the King ſhall order it to be applied to a proper Uſe. 1 Salk. 162, 163. pl. 1. 26 May, 1693. the King v. Portington.

(E) Favoured and Conſtrued. How.

S. C. cited 2 Vern. 398. Mich. 1700. in the Caſe of the Att. Gen. v. the Mayor of Coventry, which Caſe was, that the Reverſion in Fee of divers Lands let on Leaſes, on which in all 70 l. per Ann was reſerved, was granted by King H. 8. to the Corporation of Coventry; 400 l. of the Purchaſe Money was paid by the Corporation, and 1000 l by Sir Tho. White, but in the Grant *the Corporation was ſaid to be the Purchaſors, and it was by the Deed declared that the whole 70 l. per Ann ſhould be applied to ſeveral Charities therein mentioned.* The Leaſes expiring, the Value of the Lands were greatly increaſed, but the Surplus had been all along received by the Corporation of Coventry, the Lands themſelves not being given to the Charities, but particular Rents out of the Lands. It was decreed, that the Corporation ſhould have the Surplus of the Profits. The Ld. Keeper, and 5 Judges, Aſſiſtants, were all of Opinion, that this Caſe was not within the Reaſon of Thetford School's Caſe, but that there was a plain and ſubſtantial Difference between them; for in that Caſe the Lands were given to the Charity, and tho' in directing the Application of it a Sum certain is given to maintain a Schoolmaſter, and Sums uncertain to other Charities, amounting to what was the Value of the Eſtate, it was reaſonable, that as the Eſtate increaſed, the Charity ſhould do ſo too, becauſe no one elſe was to

A Deviſed Lands to Truſtees in Fee for Maintenance of a Preacher, and Schoolmaſter, and ſo many poor People, ſo much to each, and which amounted to the annual Profits of the Land at the Time. The *Land was then of the Value of 35 l. a Year, but afterwards came to be worth 100 l. a Year.* Reſolved, that the Revenue ſhould be employed to increaſe the Stipends of each, and if there be any Surplus, it ſhall be employ'd for a greater Number of Poor, and the *Deviſees ſhall take nothing to their own Uſe*; for it appears that the whole ſhall be employ'd in Works of Piety and Charity, and as a Decreaſe of the Value would be a Loſs to the Preacher, Schoolmaſter, and Poor, ſo when it increaſes it ſhall be to their Profit; by all the Judges. 8 Rep. 130. b. Paſch. 7 Jac. Thetford School's Caſe.

to take any Benefit thereof; but that in the preſent Caſe *not the Lands themſelves, but* 70 *l a Year iſſuing out of the Lands is allotted to Charities, and the Town* of Coventry *is expreſsly mentioned to be the Purchaſors*, and it appears that they raiſed 400 l. Part of the Conſideration Money, and that with ſome Difficulty by Sale of their Goods, Gold Rings, Box-Money, &c. and when they were in that low and decayed Condition, as mentioned in the Articles, the Plaintiffs would have it preſumed, that they were ſuch good Chriſtians as to ſell all they had to give it to the Poor; and the Information was unanimouſly diſmiſs'd; but upon an Appeal to the Houſe of Lords the Diſmiſſion was reverſed, and the Defendants ordered to Account for the improved Value of the Land, and the Charities to be augmented in Proportion.

2. By *Deviſe of the Rent of his Land* to a Charitable Uſe, the Land itſelf paſſes, and it ſhall be taken largely for a Deviſe of the Rent then reſerved, or afterwards to be reſerved upon an improved Value; reſolved by the Judges on a Reference by the Ld. Keeper, and his Lordſhip decreed accordingly. Duke's Char. Uſes 71. pl. 7. 9 Jac. Kennington Haſting's Caſe. Ibid. 112. S. 2. pl. 1. S. P. and refers to S. C. —In the County of Warwick, a *Rent* deviſed [deviſed] to Charitable Uſes, *carries the Land.* Toth. 269 cites 8 Car. Lenner v. Linnington,

3. A *Debt* which is a * *Choſe en Action* was given for the Erection of a School, and held a good Appointment within the 43 Eliz. Toth. 91. 3 Car Hungate ex Parte Inhabitants of Sherbone. Duke's Char. Uſes 79. pl. 21. cites S. C. & S. P. decreed, whether the Debt be owing by Statute, Bond, Judgment, or Recognizance —— Ibid. 112. cites S. C. & S. P. accordingly. * In the Original it is (Charitable Uſe in Action.)

4. If one deviſes Money to a Charitable Uſe for Relief of the Poor, and makes 2 *Executors*, and dies, and they prove the Will, *and jointly intermeddle with the Receipt of the Money, and the one truſts the other with the Money, and to pay it accordingly, and he waſtes it, and dies inſolvent*, the Survivor ſhall be charged with the whole, if the Teſtator left Aſſets to pay it, becauſe they jointly meddled in the Execution of the Will; but if he that died had only proved the Will in the Name of Both, and the Survivor had never meddled, he ſhould not be charged; becauſe the other had no joint Authority with him from the Teſtator, and he could not hinder the other's intermeddling. Duke's Char. Uſes 66, 67. pl. 4. 16 Mar. 4 Car. the Poor of Walthamſtow in Eſſex's Caſe.

5. If a *Rent* be *granted out of Land to a Charitable Uſe*, this it ſeems *is a Charge that ſhall go with the Land* in whoſe Hands ſoever it comes, albeit it be not ſo by the ſtrict Rules of Law, and *a Diſtreſs may be taken for it upon the Terre-tenant for all Arrears in whoſe Time ſoever it was*; and the Party muſt have his Remedy againſt them them that had the Land for the Arrears in their Time in Chancery. Duke's Char. Uſes, 125. Ibid 64. 3. Trin. 9 Car. 1. Eaſt-Grinſtead's Caſe, S. P. and Ibid. 70. pl. 8. Hill 14 Car. Woodford Inhabitants in Eſſex, S. P.

6. In Caſe of Charitable Uſes, the Charity is not to be *ſet aſide* for Want of every Circumſtance appointed by the Donor. N. Ch. R. 40. 12 Car. 1. Joice v. Osborne.

7. Deviſe of a *Portion of Tythes*, to the Intent that the Profits ſhould be employed *to build a Grammer-School, and for the Maintenance of the Maſter*; the Tithes were then *in Leaſe for a Term of Years, at the yearly Rent of* 7 *l.* the Deviſees received the Rent, and built the School, and in Conſideration of the Surrender of the Term, they *granted a longer Term* to the firſt Leſſee, (viz.) *for* 50 *Years at the ſame Rent*; the Leſſee died about 24 Years after the Commencement of his Leaſe, and his Executors enjoyed it about 14 Years afterwards, during all which Time the *yearly Value was worth* 43 *l. per Ann. more than the reſerved Rent*; but *before the Leaſe of* 50 *Years expired, the ſurviving Deviſee made a Leaſe of thoſe Tithes for* 21 *Years, at the yearly Rent of* 10 *l. to commence after the* Duke's Char. Uſes, 46, 47. Paſch. 16 Car. 2. Wright v. the School of Newport-Pond in Eſſex.

Expiration of the Leaſe for 50 Years; adjudged that this *concurrent Leaſe was void*, being made to defraud the Charity of the Increaſe of the Tithes, which was then worth 60 l. per Ann. more than the reſerved Rent, and that the Truſtees ought to let it at that Value, and not exceeding 21 Years. Nelſ. Abr. 434, 435. pl. 8. cites 16 Car. 2. Wright v. the School of Newport.

A Charity was deviſed *to the Poor of the Pariſh of L.* in the County of M. *whereas there is no ſuch Pariſh in that County, but in the County of D.* Per Cur. there being ſuch a Pariſh in the County of D. The *Teſtator* muſt mean that Pariſh, becauſe it appeared that he *was born there*, and that both he and his Parents *lived and died in that Pariſh*. Fin. Rep. 395. Mich. 30 Car. 2. Owens v. Bean.

8. M. C. *bequeathed* 100 *l. to the Church-Wardens and Overſeers of the Poor of the Pariſh of St. Giles's without Cripplegate London*, part whereof lies in London, and part in Middleſex, to be paid to them to encreaſe the Pariſh Stock, which was paid to them accordingly, and they placed the ſame out at Intereſt, and received 3 l. Intereſt, and *paid it to the Poor of that Part of the ſaid Pariſh which lies within London, but no Part thereof to the Poor of the other Part* of the Pariſh *which lies in Middleſex*. It was decreed by the Commiſſioners, that the Payment ſhould have been to both Parts of the Pariſh, as well that in Middleſex, as in London; but upon Exceptions taken, that Decree was reverſed. Duke's Char. Uſes, 52. 19 Car. 2. in Canc. Rooks v. D.

Duke's Char. Uſes, 47. Trin. 21 Car. 2. S. C.

9. Where a Will or Money given to a Charity have been concealed, the ſame has been decreed to ſupport a Charity, as for Inſtance, the *Will* of James Meek was *concealed*, *by which he gave* 100 *l. per Ann.* in Eaſt-Smithfield, St. Katherine's and Aldgate, *to learn poor Scholars, to be choſen out of the Free-School in Worceſter, to be educated in Magdalen-Hall in Oxford*; it was proved he made ſuch a Will, and that a little before his Death he declared that he would not alter it; and the Heir at Law refuſing to convey theſe Houſes out of which the Rent iſſued, according to the Will of the Teſtator; the Commiſſioners decreed that the Chancellor, Maſter and Scholars of the Univerſity ſhould ſtand ſeiſed &c. and pay the Rents as directed by the Will, which Decree was affirmed in Chancery. Nelſ. Abr. 436. pl. 10. cites Moor Ch. Uſes, 79. Meek v. Magdalen-Hall.

10. Tertenants Leſſees of a Charity which was *greatly improved*, as from 20 to 150 l. per Ann. were ordered to *augment the Rent* 50 l. per Ann. but the Commiſſioners had before made a Decree for avoiding the Leaſes, they being not good in Strictneſs of Law. Chan. Caſes, 195. Hill. 22 & 23 Car. 2. Smith v. Stowell.

11. One Coleman deviſed an *Annuity of* 20 *l. a Year to any of the Name of Coleman, who ſhould be fit to be a Student and reſide in Bennet-College in Cambridge, with a Power* to the Maſter and Fellows *to diſtrain* for this Annuity. On a Bill brought for this Annuity by the Plaintiff Coleman, a Student of the ſaid College, it was decreed accordingly. Fin. Rep. 30. Mich. 25. Car. 2. Coleman v. Coleman and the Maſter &c. of Bennet College.

12. *Lands were charged* with Payment of a Charity of 1000 l. and the Money was paid to the Executor of the Executor of the Teſtatrix, after which the Lands *were ſold*; Decreed that the Payment was made to a wrong Hand; for that by 7 *Jac.* 1. 3. *it ſhould have been paid to the Parſon of the Pariſh or Vicar* &c. that the Lands are ſtill chargeable with it. Fin. R. 187. Mich. 26 Car. 2. Attorney-General for the King and Rector of Chiddleſton cum Farley in Hampſhire, and the Church-Wardens and Overſeers of the Poor of that Pariſh v. Lord Newport & Worſley.

13. Lands were *given to the Poor of the City* of Rocheſter; It was decreed that *the Poor of the Liberties and Precincts* of the ſaid City, *ſhall have a Share* of the Charity. Fin. Rep. 193. Hill. 27 Car. 2. Attorney-General v. the Mayor of Rocheſter.

14. A.

14. A. *lived in Lambeth, and built an Alms-Houſe there, wherein he placed 7 poor Women of Lambeth* of 60 Years old and more, and charged Caroon Houſe there with Payment of 4 l. a Year to each, and *directed that the Places of ſuch as died, ſhould be ſupplied by others, but did not mention whether of Lambeth, or any other Pariſh.* The Court decreed the Poor Women to be choſen out of Lambeth only, and not out of any other Pariſh; becauſe otherwiſe the Charity would rather be a Prejudice than a Kindneſs to Lambeth; for if taken out of other Pariſhes, Lambeth muſt maintain them, the 4 l. a Year not being ſufficient to maintain a Poor Woman of 60 Years old. Fin. Rep. 353. Paſch. 30 Car. 2. Attorney-General v. Whitchcott, alias, Bodwyn & al'. v. Whitchcott.

15. Lands *pur Auter Vie* deviſed to Charity were decreed, though the Charity is not within the Statute of 43 Eliz. 4. 2 Chan. Caſes, 18. Hill. 31 & 32 Car. 2. Attorney-General v. Combe.

16. The Poor People of a Hoſpital were appointed to have 8 *d. a Day, and the Guardian 8 l. per Ann.* A Prebend Reſidentiary for the Time being was to be the Guardian. The *Revenue was improved* to 60 l. per Ann. All above 8 l. per Ann. was decreed to the Poor. Some of the Counſel made a Difference between this Caſe and where the only Imployment was to be a Guardian. 2 Chan. Caſes, 55. Trin. 33 Car. 2. Anon.

17. Charitable Legacies by the Civil Law, are to be *preferred to other Legacies*; and if the Spiritual Court gives ſuch Preference in Caſe of Deficiency of Aſſets, Chancery will not grant an Injunction. Vern. 230. pl. 226. Hill. 1683. Fielding v. Bond.

18. A *Houſe burnt down in the Fire of London* was *charged with 25 s. a Year* ancient Rent *to a Charitable Uſe*, of which there was an *Arrear for 20 Years.* The Court of Judicature for rebuilding ſettled the Rent of the Tenant at 5 l. a Year. The Queſtion was who ſhould pay the 25 s. Rent and Arrears, the Tenant or the Landlord. *Ld. Keeper ordered the growing Payments and Arrears of the 25 s. to be deducted out of the Rent, and the Tenant to pay no more Rent in the mean Time.* Vern. 309. pl. 304. Hill. 1684. Grice v. Banks.

19. Charity though given to an *Illegal or Superſtitious* Uſe, ſhall not be void for the Benefit of the Executor or Heir, but ought to be performed *cy-pres*; Arg. 2 Vern. 266. pl. 252. Paſch 1692. Attorney-General v. Guiſe.

20. A. by Will bequeathed to his Heir at Law (his Nephew) 40 s. Then adds, *Being determined to ſettle for the future, after the Death of me and my Wife, the Manor of S. with all the Lands, Woods, and Appurtenances to Charitable Uſes, I deviſe my Manor of S. with the Appurtenances, to F. G. and H. and their Heirs and Aſſigns* on Truſt &c. to pay and deliver yearly, for every ſeveral particular Sums therein mention'd. The *Particulars in the Will of the Sums to be paid in Charity amounted but to half the Rent of the Manor*, as it was at the Time of making the Will; yet 'twas decreed that the *Surplus* ſhould be diſpoſed in Charity, and not go to the Heir; and the Decree was affirmed in Dom. Proc. Parliament Caſes 22. Arnold v. Johnſon & al'.

21. On the Foundation of an Hoſpital one Rule is, that *no Leaſe be made for above 21 Years.* A Leaſe for 21, with a *Covenant to make it* 60 Years by Renewal, is as prejudicial as a Leaſe for 60 Years, and the Covenant of no Force in Equity. 2 Vern. 410. pl. 376. Hill. 1700. Lydiatt & al' on Behalf of Felſtead Hoſpital in Eſſex v. Sir John Foach.

22. A Corporation for a Charity are but Truſtees for the Charity, and may *improve*, but not do any thing in Prejudice of the Charity, or in Breach of the Founder's Rules; per Wright Keeper. 2 Vern. 412. pl. 376. Hill. 1700. Lydiatt & al' v. Sir J. Foach.

Note, that in this Caſe the Founder's Rule was further, that on ſuch Leaſe for 21 Years *ſhould be reſerved the old Rent, and no more*; and yet by Deed of Covenants they reſerved

ſerved an additional Rent almoſt double the old Rent, as 32 l. per Ann. for 18 l. per Ann. and yet 'twas decreed to be paid, tho' this is contrary to the expreſs Rule.

2 Vern. 596. pl. 535. Mich. 1707. Watſon v. Hinſworth Hoſpital, which had the ſame Rule; and Ld. Eleſmer and Ld. Clarendon kept them down to the Rule; but per Cowper C. the Rule is alterable as Prices of Things alter, and the Rent may be increaſed, but the Tenant is intitled to a beneficial Leaſe, and referr'd it to the Archbiſhop of York, to certify what Fine and Rent he thought reaſonable.

23. Charity-*Lands were leaſed at a great Under-value.* The Commiſſioners decreed the Leaſe to be ſet aſide, and the Leſſee to pay the Arrears of Rent according to the full Value, (the Odds being from 24 l. per Ann. to 133 l. per Ann.) and to deliver up the Poſſeſſion. The Court, on Exceptions, confirmed the Decree as to the making the Leaſe void, and delivering Poſſeſſion, and to ſet out the Charity-Lands from the Leſſee's other Lands which lay intermix'd. 2 Vern. 414. pl. 378. Hill. 1700. Sir W. Reresby, Exceptant, Farrer and Dun, Schoolmaſter and Uſher of Pocklington-School, Reſpondents.

24. Charities are *not barr'd by Length of Time*, or any *Statute of Limitations*; per Ld. Wright and 3 Judges. 2 Vern. 399. pl. 369. Mich. 1700. in Caſe of the Attorney-General v. the Mayor &c. of Coventry.

25. Lord Coventry having decreed a Leaſe of Charity-Lands to J. S. (who had been at great Expence in recovering thoſe Lands) for 99 Years, if 3 Lives lived ſo long, *at the Rent of one Third of the then improved Value, and to be perpetually renewable without Fine.* It was now decreed that the Leaſe ſhould be renew'd Toties quoties without Fine, but the Rent not to be computed according to the Value of the Land when the Decree was made, but at the *improved Value* at the Time it ſhall be renewed; per Cowper C. 2 Vern. 746. pl. 653. Hill. 1716. The Attorney-General at the Relation of Wotton Under-Edge v. Smith.

26. Appointment by *Tenant in Tail* ſhall bind the Reverſioner in Fee, the Statute of Charitable Uſes ſupplying all Defects of Aſſurance which the Donor was capable of making. 2 Vern. 755. pl. 660. Mich. 1717. The Attorney-General v. Burdett, Smith, & al'.

27. One by Will gives 5 l. per Ann. to all and every the Hoſpitals; and it was proved the Teſtatrix lived in a Place where there were 2 Hoſpitals. It ſhall be taken to be theſe Hoſpitals, and not to extend to another Hoſpital about a Mile from thence, tho' founded by the ſame Perſon. Wms's Rep. 425. pl. 118. Paſch. 1718. Maſters v. Maſters.

28. The *Reverſion* in Fee *of diverſe Lands, on which* 70 *l. per Ann. Rent was reſerved*, was given to the Corporation of Coventry, and *the whole* 70 *l. appointed to particular Charities.* Afterwards the Leaſe expired, and the *Rents were greatly increaſed.* The Overplus ſhall be applied to the Augmentation of the Charities, and not for the Benefit of the Corporation. MS. Tab. March 8, 1720. The Mayor of Coventry v. the Attorney General.

29. *Information* to eſtabliſh a Charity of Lands given by Will, *againſt the Heir at Law* of the Deviſor. The Defendant by his Anſwer *did not inſiſt upon his Title, nor did he expreſsly diſclaim; but his Counſel, at the Hearing, had no Inſtructions to inſiſt on the Defendant's Title, or to pray a Trial at Law*, and thereupon the *Court decreed the Lands to the Charity.* Upon a Petition of *Re-hearing, the Defendant* by his Counſel *inſiſted upon his Title* as Heir at Law, *and that the Deviſe was void*; but the Court would not now, at the Re-hearing, allow the Defendant to inſiſt upon his Title, ſince he had waived it before by his Counſel at the Hearing, but ſaid he was concluded by it; and tho' it was admitted to be a *doubtful Caſe*, the Court would not ſuffer Counſel to argue it, but affirmed the Decree; per Ld. Macclesfield. MS. Rep. Mich. 9 Geo. in Canc. The Attorney General v. Ardern.

(F) Truſtees.

(F) Truſtees &c. Favour'd; or puniſh'd for Misbehaviour &c. In what Caſes.

1. *Executors* having Goods of their Teſtator to diſpoſe to pious Uſes, cannot *forfeit* them; for they have them not for their own Uſe; but their Power is ſubject to the *Controulment of the Ordinary*, and the Ordinary may make Diſtribution of them to pious Uſes. And it was ſaid at Bar, that the Ordinary might make the Executors to *account* before him, and to puniſh them according to the Law of the Church if they ſpoil the Goods; but cannot compel them to employ them to pious Uſes. Owen 33, 34. Hill. 40 Eliz. Per Cardell, Maſter of the Rolls, in the Caſe of Stinkley v. Chamberlain.

2. If *Land is given to find a Prieſt in D.* and *one is maintained in S.* this is a Miſemployment; Per Altham, Baron. Lane 115. Paſch. 9 Jac. Duke's Char. Uſes 116. cites S. C. & S. P. and ſays that the Converting it to other Uſes than according to the Intent of the Donor, is a Miſemployment; As if it was to find a Preacher, and the Truſtees employ it to the Poor, or ſome other kind of Uſe.

3. Moneys given for Relief of the Poor were *laid out on building a Conduit*; and adjudged a Miſemployment. Duke of Charitable Uſes 94. 5 Car. 1. Wivelſcomb in Com. Somerſet.

4. *Keeping the Profits of Lands, or Money given to a Charitable Uſe* in their Hands, *whether it be concealed or not*, and not to pay it when it is due, or to convert it to other Uſes, is a Miſemployment within the Statute. Duke's Char. Uſes 116. S. P. and the Commiſſioners may decree the Money with Damages for the Detaining it, to be employ'd in the Charitable Uſe according to their Diſcretion, not exceeding legal Intereſt by the Year, for the Detaining it. Duke's Char. Uſes 67. pl. 3. Trin. 9 Car. 1. in Walthamſtow in Eſſex's Caſe.

5. *Leaſing the Land at an Under-value* is a Miſemployment, without having Regard to what the Rent was before. Duke's Char. Uſes 116. The Commiſſioners may make void the Leaſe, and order the Surrender thereof, and order the Land to be ſettled on other Truſtees. Ibid. 123. S. 20.——Ibid. 67. pl. 5. Mich. 10 Car. S. P. as to the Avoiding and Surrendring the Leaſe. Reſolved. Eltham's Inhabitants v. Warner.——Ibid. 124. S. P.

6. It ſhall be accounted and called a Miſ-employment of a Gift or Diſpoſition to Charitable Uſes, in all Caſes where there is found *any Breach of Truſt*, *Falſity*, *Non-employment*, *Concealment*, *Miſ-government*, *or Converſion in and about the Lands*, Rents, Goods, Money &c. given to the Uſe, againſt the Intent and Meaning of the Giver or Founder. Duke's Char. Uſes 115.

7. If Leſſee of Land given to ſuch a Uſe, *does Waſte* and Deſtruction upon the Land, by cutting down and Sale of Trees of Timber, eſpecially if it be where he has the Land at an Under-value, or the like, this is a Miſ-employment; in this Caſe the Commiſſioners may decree the Leaſe to be void and ſurrendered, and that the Leſſee ſhall make a Recompence. Duke's Char. Uſes 115.

8. If Truſtees *leaſe the Land at an Under-value*, the Commiſſioners may order the Truſtees, or the Tenant, as they ſhall ſee Cauſe, to make it up. Duke's Char. Uſes 116.

9. *Truſtees* of a Charity *refuſed to undertake* the Truſt. The Court ordered other Truſtees to perform the ſame, with proper Powers; Per Ld. K. Littleton. N. Ch. R. 42. 17 Car. 1. Maggeridge v. Gray.

10. The *Inhabitants of Cofield were incorporated* by H. 8. and the *Manor and Park granted to them in Fee*, by the Name of the Warden and Aſſiſtants, and the Grant was made to them; and it appeared by the Grant, that the ſame was *for the Benefit of the Inhabitants for Eaſe of Taxes, and Relief of the Poor*. A Suit was in the Star-Chamber touching Miſ-employment and incloſing the Lands, whereby the Inhabitants were prejudiced, and there decreed, that no farther Incloſure ſhould be made without Conſent of the major Part of the Inhabitants. In King Charles the firſt's Time, ſome of the principal of the Inhabitants, Mr. *Pudſey, and others, took a new Charter, leaving out the Inhabitants*, and now the *Warden and 23 more made Leaſes* and Incloſures, *without Conſent of the major Part*; and the *Plaintiff, an Inhabitant, on Behalf of himſelf and the reſt* of the Inhabitants, *brought his Bill*; and the Ld. Keeper decreed againſt the new Leaſes and Incloſures, and that no ſuch ſhould be without Conſent of the major Part; and on Re-hearing confirmed this Decree; for *tho' the Adminiſtration was in the 24, yet the Benefit was for the Inhabitants in general*; but it was preſſed much that the 24 were the Corporation, and the Intereſt in them, and they might alien the Eſtate, and a fortiori leaſe and incloſe, and it would breed a Confuſion if that the Multitude muſt intermeddle. Chan. Caſes 269, 270. Mich. 27 Car. 2. Anon.

Money given for the Repair of a Bridge and a Church-way, and certain Houſes, were *employed to repair the Church*; the Truſtees were decreed to Account for what they had, or might have received without their wilful Default, without Reſpect to other Diſburſements than the Bridge, the Way, and the Houſes; and the Truſtees, the Defendants, to pay Coſts. Fin. R. 259. Trin. 28 Car 2. Att. Gen. and Churchwardens of Somerſham in Huntingtonſhire v. Hobert and Johnſon, alias, Hammond v. Hobart.

11. Feoffees of a Charity having *miſ-employed the Rents* &c. were *decreed to Account, and the Truſt to be tranferr'd to ſuch Perſons as the Judge of Aſſiſe ſhall nominate*, and that the Account of the Rents and Profits be for 6 Years paſt, and that all the Deeds and Writings ſhall be delivered to ſuch Perſons whom the Judge of Aſſiſe ſhall appoint to be Feoffees, and the Executors of ſuch of them who are dead ſhall come into the Account, and the Arrears ſhall be paid to the new Truſtees, and Conveyances executed to them accordingly. Fin. Rep. 269. Mich. 28 Car. 2. Love v. Eade.

12. *Truſtees* for Charitable Uſes are no otherwiſe or further *chargeable* than any other Truſtee is, who is only to be charged for ſo much as he receives, and ſhall not ſtand charged for the Receipts of others; Per Finch C. Vern. 44. pl. 42. Paſch. 1682. Mann v. Ballet.

13. By the Appointment of a Charity there were 6 Truſtees, and when they ſhould be reduced to 3, they ſhould *chuſe others*. All the 6 were dead except one. Cowper C. held, that *filling up the Number by the only ſurviving Truſtee* was good, for it was only Directory, and the Neglect did not extinguiſh the Right, and he only did what he ought to do. 2 Vern. 748. pl. 655. Hill. 1716. Att. Gen. at the Relation of Tracy & al' v. Floyer, and relating to Waltham Holy Croſs.

MS Rep. Paſch. 6 Geo. Phillips v. Sir John Walters

14. Bill to have an Account of the Profits and Salary of Lecturer of Church-Hill in Com Oxon, upon this Caſe; Sir John Walters, Ch. B. founded a *Lectureſhip* at Church-Hill Oxon. *with a Salary of 50 l. per Ann.* charged upon his Lands to the Lecturer, ſo long as he ſhould attend the Charge of diligent Preaching there once every Sunday, unleſs hindered by Neceſſity, *and when the ſaid Lectureſhip ſhould be void by Death, Removal, Departure, or otherwiſe*, then the *Truſtees were to appoint a new Lecturer &c.* The *Plaintiff, in* 1701, *was appointed Lecturer* by the Truſtees *expreſsly for the Term of his natural Life, but* being much in Debt about a Year and a half after the Appointment, the Plaintiff *went away, and was Chaplain to a Regiment in Spain, and continued* many Years abroad in that Employment. In 1710 the Truſtees appoint Griffin Lecturer, and in the Deed of Appointment they recite, that the Lec-

Lecturesſhip was vacant by the Departure of the Plaintiff Phillips, and thereupon they appoint Griffin Lecturer. 1ſt. Point was, If the Truſtees could remove the Plaintiff Phillips from the Lecturesſhip for going abroad, and not Perſonally preaching there every Sunday, and appoint a new Lecturer in his room? 2d. Point, Admitting they had a Power to remove him for Abſence, if Sir John Walters in this Caſe ought to account to the Plaintiff for the Profits of Lecturer to the Time that the new Lecturer was appointed? Counſel for the Plaintiff argued, that the Appointment of the new Lecturer by the Truſtees was void, the Plaintiff Phillips being expreſsly appointed Lecturer for Life he had a Freehold, and that the Truſtees could not turn him out of his Freehold, without ſome *legal Proceſs or Sentence in the Spiritual Court*, or at leaſt they ought to have *ſummoned him to appear before themſelves*, and to hear what Excuſe he could make for his Abſence, before they had removed him, and compared it to the Caſe of a Removal of an Officer in a Corporation for Non-attendance or Non-reſidence in the Corporation &c. and there ought to be a Summons before a Removal &c. As to the 2d Point, they ſaid it was a clear Caſe that Sir John Walters was accountable to the Plaintiff for the Profits of the Lecturesſhip till the new Lecturer was appointed, deducting what Sir John Walters paid for ſupplying a Sermon every Sunday in his Abſence, which appears by the Anſwer not to amount to half the Value of the Salary, otherwiſe Sir John would ſave the Money in his own Pocket, there being no Perſon that can any ways claim it but the Plaintiff. Counſel for the Defendant inſiſted, that the Plaintiff was not intitled to any Account at all againſt the Defendant, for that it was proved in the Cauſe, that the Plaintiff did not read the Common Prayer the firſt Time he preached, according to the Act of Uniformity 13 & 14 Car. 2. cap. 4. S. 19. and thereby the Lecturesſhip was void. As to the other Point they inſiſted, that the Plaintiff had forfeited the Lecturesſhip by going abroad, and not preaching Perſonally at the Church by the expreſs Words of the Founder, and the ſame was *ipſo facto vacant*; and therefore the Truſtees might appoint a new Lecturer, and ſuch Appointment was good. Parker C. was of Opinion, that Sir John Walters employing another Perſon to preach in the Abſence of the Plaintiff, acted therein as the Plaintiff's Agent, and not as a Truſtee of the Charity, and conſequently ought to account to the Plaintiff for the Profits of the Lecturesſhip, deducting what was paid by him for ſupplying the Plaintiff's Place in his Abſence, but whether the Appointment of the new Lecturer was good or not, yet Sir John Walters having paid the whole Salary to Griffin, will diſcharge him againſt the Plaintiff as his Agent in procuring a proper Perſon to preach, and to do the Duty for the Plaintiff, but he doubted if the Appointment of the new Lecturer by the Truſtees was good, and took Time to conſider of that Point. Afterwards, 27 May, he delivered his Opinion, that the Appointment of the new Lecturer was good; and he ſaid the Lecturesſhip was not void by the 13 & 14 Car. 2. cap. 4. for not reading the Common Prayer, for that Act inflicts a Penalty, but does not make the Lecturesſhip void, but the Lecturesſhip was *void by the Plaintiff's Abſence, and the Neceſſity of abſenting himſelf by reaſon of his Debts was not the Neceſſity intended by the Founder* to be an Excuſe for his Abſence; and tho' he was declared Lecturer expreſsly for Life, yet he is ſubject to the Terms impoſed by the Founder; for the Truſtees cannot alter the Terms and Nature of the Truſt, and the firſt Appointment is ſuperſeded by the 2d. without any other Act.

15. A College ſeiſed in Fee, was *reſtrained by its Conſtitution from making other Leaſes than for 21 Years and at the Rack Rent.* They made a Leaſe accordingly to J. S. who having *much improved the Premiſes by Building*, an Entry was made thereof in the Audit-Book, and a Recommen-

mendation ſigned by the Maſter, Warden and moſt of the Fellows, to grant him a new Leaſe at the End of the Term at the ſame Rent, and when the Leaſe was near expiring, an Order was made at the Audit for ſuch new Leaſe. But Ld. C. Parker diſapproved of the Recommendation, it being to wrong the College and break the Statutes; and that the Signing of a Contract for leaſing by the Maſter and Fellows, was not binding to the College, it not being under the College Seal. But in Caſe the Tenant after this Order had laid out Money in Improvements in Confidence and Reliance on ſuch Order, there would have been ſome Equity in it. But even in that Caſe he ſhould only have his Reparation from the private Perſons ſigning ſuch Order, and not from the College; and as to Repairs done by the Leſſee ſince the Order for the new Leaſe, they are no more than what by his old Leaſe he was obliged to do; and therefore diſmiſſed the Tenant's Bill for compelling a new Leaſe, and with Coſts. Wms's Rep. 655. Mich. 1720. Taylor v. Dullidge Hoſpital in Surry.

16. In Caſe of Misbehaviour of Truſtees, or Miſapplication of Charity, Chancery will *oblige them to aſſign*. MS. Tab. March 8. 1720. Mayor of Coventry v. Attorney-General.

17. The Governors of a Free-School *joined in a long Leaſe of Houſes at 5 l. a Year, though worth 50 l. a Year.* The Lords Commiſſioners decreed the Aſſignee of this Leaſe to ſurrender it back, and ordered the Leſſee and the Governors to pay 70 l. Coſts. And Ld. C. King affirm'd the Decree as to the Surrendring, but reduced the Coſts to 50 l. and thought there was no Reaſon that the Charity ſhould pay the Coſts, but that the Leſſee who was to have the Benefit ſhould; and that the Governors though not Guilty of Corruption, nor were to gain any Thing, yet ought to pay ſome *Coſts for their extreme Negligence.* 2 Wms's Rep. 284. Trin. 1725. Eaſt v. Ryall.

(G) Commiſſioners. Their Power. And Decrees made by them confirmed, or ſet aſide.

Duke's Char. Uſes, 79, pl. 22. cites S. C. and ſays that the Decree was affirmed

1. WHEN a *Donor appoints Lands or Goods to be ſold* for to maintain a Charitable Uſe, and doth *not appoint by whom* the Sale ſhall be made; it ſhall be made by ſuch as the *Commiſſioners ſhall appoint.* Toth. 92. cites 41 Eliz. Steward v. Jermin.

by the Ld. Keeper upon an Appeal to him.

Mo 890. pl. 1253. 14 Jac. Rivet's Caſe.

2. A *Commiſſion* of Charitable Uſes was *ſued out by Fraud to avoid a Charitable Uſe*, and the Commiſſioners made a Decree for Exemption from the Charity, and that *Decree confirmed* by the Chancellor. Yet a *new Commiſſion* was ſued out on the Statute of Charitable Uſes, and the Lands charged with the Charity, though the Words of 43 Eliz. 4. are, The ſaid Commiſſioners to make Order &c. Arg. Show. 206. cites Mo. pl. 1153.

Jo. 147. pl. 5. S. C. reſolved upon Reference to Crew Ch. J. Walter Ch. B and Jones and Crooke J.

3. A *Decree in Chancery* upon the 43 Eliz. 4. *is concluſive*, and not to be further examined, becauſe it takes its Authority by the Act of Parliament, and the Act mentions but one Examination, and it is not like to where the Chancellor makes a Decree by his Ordinary Authority. Cro. C. 40. pl. 2. Mich. 2 Car. Windſor v. Inhabitants of Farnham.

that no Bill of Review lies, becauſe the Statute is introductory of a new Law, and gives an

an Appeal on a Decree made by Commiſſioners to the Ld. Keeper, and when he has affirmed it, his Affirmation is peremptory, and no Review thereof can be made by himſelf or his Succeſſor.——S. C. cited Cro. C. 351. Hill. 9 Car. B. R. per Curiam.——But in ſuch Caſe the Party grieved may petition the King in Parliament, and have his Complaint examined, and ſo the Decree may be affirmed, altered, or annulled. Duke's Char. Uſes 62. Eaſtham in Eſſex's Caſe.——When the Ld. Keeper has altered or confirmed a Decree made upon the Statute 43 Eliz. 4. The Decree *is to be perpetual*, and then to remain in the Petty-Bag. Toth. 91. cites 8 Car. Poor of Eaſt-Grinſtead v. Howard.

4. If Money be given to a Charitable Uſe by Will, and the Executors detain it in their Hands many Years without employing it according to the Will, having Aſſets, the Commiſſioners may *decree the Money with Damages for detaining of it*, to be employed in the Charitable Uſe, according to their Diſcretion, not exceeding 8 l. per Cent. for a Year for the Damages. Duke's Char. Uſes 67. pl. 4. 16 Mar. 4 Car. Walthamſtow in Eſſex's Caſe.

5. My Lord Keeper declared that when he had altered or confirmed the Decree made upon the Statute of 43 Eliz. *the Decree is to be perpetual*, and then to remain in the Petty Bag; and it is in his Power to make a Decree good which is defective. Toth. 91. cites 8 Car. The Poor of Eaſt-Greenſted v. Howard. Duke's Char. Uſes 79. pl. 20. S. C. ſays the Decree is * not perpetuated, and not to be altered but by Act of Parliament. [* The firſt (not) ſeems to be put in by Miſtake of the Printers.]

6. If a *Rent-charge* be *granted* to a Charitable Uſe *out of Lands in ſeveral Counties*, the Commiſſioners are to charge this Rent by their Decree upon all the Lands in every County, according to an *equal Diſtribution, having Regard to the yearly Value of all the Lands chargeable* with the Rent, and cannot by their Decree charge one or 2 Manors with all the Rent, and diſcharge the Reſidue in other Counties or Places; for that their Decree will then be contrary to the Will of the Founders or Donors. Reſolved by Ld. K. Coventry. Duke's Char. Uſes 65. pl. 3. Trin. 9 Car. Eaſt-Greenſted's Caſe.

7. If a *Rent* be *granted out of Lands in ſeveral Counties for Maintenance of Charitable Uſes in one County*, the Commiſſioners in that County where the Charitable Uſe is to be performed, may make a Decree to charge the Lands in other Counties to pay an equal Contribution of Charge in Payment of the ſaid Rent; and there *needs not ſeveral Inquiſitions in each County*, for that the Rent is an intire Grant by the Deed or Will. Reſolved by Lord Coventry. Duke's Char. Uſes 64. pl. 3. Trin. 9 Car. Eaſt-Greenſted's Caſe.

8. A Charitable Exhibition was deviſed *diſpoſable by* 4 Parſons of ſuch Pariſhes for the Time being. They *diſagree* in their Election; 2 chooſe A. and 2 chooſe B. Thereupon a *Commiſſion iſſues*. The Commiſſioners direct another Meeting of the 4, and *award that if the* 4 *diſagree, the Biſhop of W. ſhould chooſe* one, and in caſe of a Vacancy the Guardian of the Spiritualties; and decreed 10 l. of the Arrears that ſhould incur between the Vacancy and the Election, to go towards the Charges of ſuing out the Commiſſion. The 4 diſagreed, and the Biſhop of W. elected one. *Exceptions* were taken to the Decree, but over-ruled, and the Decree confirmed. Fin. Rep. 78. Hill. 25 Car. 2. Steers v. Burt & Holland.

9. *Decree of Commiſſioners* againſt a Purchaſor of Lands charged with a Charity, but without Notice of the Charity, for Payment of *Coſts*, and *Arrears of the Annuity* due before he had the actual Poſſeſſion of the ſaid Cloſe, was, as to ſo much thereof, reverſed. Fin. Rep. 81. Hill. 25 Car. 2. Wharton v. Charles & al' in Behalf of the Poor of Warcup and Blebarn in Com. Weſtmoreland.

10. A *new Commiſſion to prove the yearly Value* of Lands charged with a Charity, tho' the former Commiſſion was executed and returned, was

granted on a Pretence of Surprize, and that the *Exceptant* had other Witneſſes to examine; but if the Reſpondent examine no Witneſſes, but only croſs-examine thoſe produced by the Exceptant, then the Exceptant to be at the Charge of the Commiſſioners on both Sides, otherwiſe each to bear the Charge of his own Commiſſioners. Fin. Rep. 251. Trin. 28 Car. 2. Harding v. Edy.

11. *Decree* made by Commiſſioners was *reverſed*, and the Exceptants quieted, on Payment of ſuch Rent as had been paid *for a long Time* before. Fin. Rep. 293. Paſch. 29 Car. 2. Leas and Goldſmith v. the Feoffees of Brerewood-School in Staffordſhire.

12. The Commiſſioners cannot decree *Coſts* on the Stat. 43 Eliz. but if there be an Appeal from their Decree, the Ld. Chancellor may decree the Coſts not only of the Appeal, but of the Commiſſion alſo, and tho' they decree Coſts that ſhall not upon an *Appeal* be ſufficient to *reverſe* the Decree; for the Ld. Chancellor may either ſurceaſe or leſſen the Coſts, or exempt the Party from them intirely. Abr. Equ. Caſes 126. Paſch. 1700. Rockley v. Keyly.

Chan. Prec. 111. pl. 98. S. C. that a Decree was made by the Commiſſioners of Charitable Uſes, and Exceptions were taken to it, and they now came on before the Maſter; and he and moſt of the Bar were of Opinion, that by the Statute of Eliz. the Maſter of the Rolls may hear an Appeal as the Chancellor may, and may affirm the Decree, and give Coſts, notwithſtanding the Statute mentions only the Chancellor; but Mr. Edwards the Regiſter ſaid it had always been an Exception, and therefore the Maſter of the Rolls would do nothing in it.

13. *Iſſue at Law* was directed on a Re-hearſing of Exceptions taken to a Decree made by Commiſſioners of Charitable Uſes, after that *Decree* was *twice confirmed*. 2 Vern. 507. pl. 456. Trin. 1705. Corpus Chriſti College v. Naunton Pariſh in Glouceſterſhire.

14. Where *Commiſſioners* for Charitable Uſes *intend to oppreſs*, the Court will puniſh them. 9 Mod. 65. Mich. 10 Geo. Wright v. Hobert.

(H) Proceedings. And Exceptions to Decrees.

1. CHancery may *relieve upon an Original Bill* within the Statute of Charitable Uſes. Chan. Caſes 135. ſays a Decree was produced where, upon the Advice of 4 Judges, it was ſo reſolved 30 June 1657. in Caſe of St. John's College v. Platt.

It was doubted that the Court could not relieve upon a Bill, but that the Courſe preſcribed by the Statute, by a Commiſſion of Charitable Uſes, muſt be obſerved in Caſes relievable by that Statute; but no poſitive Opinion was delivered, the Defendant conſenting to a Decree. Chan. Caſes 158. Hill. 21 & 22 Car. 2. The Attorney-General v. Newman, alias, Trinity-College v. Newman.——But ibid. 267. Mich. 27 Car. 2. Relief was given by an Original Bill.—— Chan. Caſes 267. Mich. 27 Car. 2. Prat v. St. John's College, it was objected that the Proceſs and Method appointed by Statute ought to be held, viz. a Commiſſion and Inquiſition, and Decree by Commiſſioners, and ſo to come at laſt to a final Decree by the Ld. Chancellor or Ld. Keeper, and not to ſue by Original Bill, as was done in the principal Caſe; but the Ld. Keeper decreed the Charity, tho' before the Statute no ſuch Decree could have been made.

2. A Decree made on Behalf of a Town about Charitable Uſes. The Town may *lay the whole Money upon any one* they ſhall find *liable* to the Payment thereof, which when done a *Commiſſion* ſhall iſſue to examine in whoſe Poſſeſſion any of the Lands liable to the Money decreed are, and the Commiſſioners to *apportion* each Party's Payment with ſuch proportionable Part of *the Charges* as the Defendant hath been put unto. Chan. Rep. 91. 11 Car. 1. The Town of Market-Riſing v. Brownlow.

3. The

3. The Report of myſelf and all other the Judges made to my Ld. Keeper, upon a Reference to us of Exceptions taken in the Chancery to a Decree made by the Commiſſioners of Charitable Uſes in Mich. Term 1668, as follows. According to an Order made in the High Court of Chancery on Tueſday the 11th of June laſt paſt, in a Cauſe here depending between Ralph Tattle, John Lee, Grace Harding, Tho. Rock, and Nath. Humphreys, Exceptants, and John Bradſhaw, Rector of the Pariſh-Church of St. Michael Crooked-Lane, London, and others, Reſpondents. We have called all Parties, viz. their Counſel, before us, and upon Conſideration of the Decree mentioned in the ſaid Order, and hearing what was alleged on the other Side, we find that by *Inquiſition* taken before ſome of the Commiſſioners for Charitable Uſes, *in the Abſence of the Exceptants*, it was *found that ſeveral Houſes and Lands therein* mentioned *were given by ſeveral Perſons, ſome in the Time of E.* 3. *ſome* in the Time *of Queen Eliz. and ſince, to ſeveral Uſes within the ſaid Pariſh*, viz. *ſome to the Poor, ſome to the Repair of the Church, and ſome for preaching Sermons*; and that ſince the Year 1646, the Rents *and Profits had been received by* 13 *ſeveral Perſons, and not employed to the aforeſaid Uſes*; and the *Commiſſioners thereupon cauſed a Charge to be drawn up of thoſe Rents and Profits, amounting to* 3847 *l.* 10*s. and becauſe the Exceptants did not diſcharge themſelves of* that Sum, *they have decreed the Exceptants and every of them, being* 5 *of the aforeſaid* 13 Perſons, *to pay the ſaid* 3847 *l.* 10*l. and to alter the Feoffees*; which Decree we do conceive to be all together erroneous, and ought to be reverſed; 1ſt, becauſe the *Exceptants* were by Order of ſome of the Commiſſioners *debarr'd from being heard before the Jury, until after the Inquiſition was found.* 2dly, For that it does *not appear* to us *but that as much, or more, has been yearly paid to and for ſeveral Charitable Uſes directed by the Donors, as is required by their reſpective Wills and Gifts, tho'* the ſame has *not* been *mentioned to be paid out of the Rents of the reſpective Houſes and Lands by them given.* 3dly, Becauſe we find that all the Pariſh-Rents and Moneys, within the Time mentioned in the ſaid Decree have been by the Exceptants, and the preceding and ſucceeding Church-wardens, paid and accounted for, and thoſe Accounts audited and allowed according to the ancient Uſage of that Pariſh; and we conceive that the Way uſed by the Exceptants, and other Church-wardens of that Pariſh, touching leaſing out the Premiſſes, receiving the Rents, and accounting for the ſame, is fit to be continued. And for an Expedient to prevent the Fruſtrations of Commiſſions upon the Statute for Charitable Uſes by the Wilfulneſs of any Perſon, we conceive that it is requiſite *that the Perſons who are complained of for diverting the Charity, be heard before the Jury, and have Liberty to anſwer for themſelves before the Inquiſition be found*, and thereby they will have leſs (if any Cauſe at all) to put in Exceptions to Decrees made againſt them; all which we humbly certify, and refer to your Lordſhip.

From a Copy of a MS. Rep. of Ld. Ch. J. Keeling, Mich. 1668 Tattle v. Bradſhaw.

4. Sir Tho. Smith deviſed his Lands in Fee *to ſuch Charitable Uſes as the Lord Lumley and Sir Henry Henn ſhould appoint* &c. They *appointed* 5 *l. to the Poor of St. Mary in Cheſter*; and the *Commiſſioners decreed that the Church-wardens and Overſeers* of that Pariſh *might diſtrain for this* 5 *l.* The Queſtions were, whether the Commiſſioners could add a Power of Diſtreſs where there was none by the Original Gift; and whether the *Commiſſioners in Cheſhire can bind the Lands in Eſſex with ſuch an additional Clauſe*; and adjudged in both Points that they might. Raym. 209. Hill. 22 & 23 Car. 2. B. R. Harriſon v. Groſvenor.

5. A *Decree* by Commiſſioners for Charitable Uſes, was confirmed by *Original Bill.* Chan. Cases, 193. Hill. 22 & 23 Car. 2. the Poor of St. Dunſtans v. Beauchamp.

But the Reporter ſays Quære? What need of ſuch a Bill? For when a Decree is made by Commiſſioners, the Court is to *return it into the Petty Bag*, and then to *ſerve the Defendant with a Writ of Execution*, upon which Service the Defendant may file *Exceptions*,

ceptions, and pray to ſtay Proceedings till they are heard but if the Defendants do not then except, but ſubmit to the Decree, it ſeems reaſonable they ſhould be concluded thereby, and not be admitted to Exceptions after. Ibid. 193, 194.

6. A Decree being made by the Commiſſioners of Charitable Uſes, Exception was taken thereto, viz. That *in the ſeveral Purchaſes made of the Premiſes from the Time of Queen Elizabeth, to the Time, the ſeveral Lands of the 2 Exceptants have been quietly enjoyed, without any Thing demanded for the Uſe of the ſaid School, ſave only* 20 *s. Rent reſerved out of the Lands of one of them, payable Yearly to John Gifford and his Heirs; and* 30 *s. Rent payable Yearly out of the Lands of the other to the ſaid Gifford and his Heirs, who granted the ſaid Lands to the Anceſtors of the Exceptants Annò* 10 *Jac. and which hath been paid from Time to Time, for the Uſe of the ſaid School, and never at any Time demanded or paid to the ſaid Gifford, or his Heirs*, which the Exceptants do believe might proceed from ſuch *Agreement* made *between the Giffords, and the Feoffees of the ſaid School.* Thereupon the Court declared there was no Cauſe to charge the Exceptant's Lands with the Decree made by the ſaid Commiſſioners, or with any Exactions or Impoſitions of Rent, or Sums of Money whatſoever, and reverſed the Decree of the Commiſſioners for Charitable Uſes; and decreed that the Lands of the Exceptants ſhall be from henceforth diſcharged of the ſame, and of all Sums whatſoever by the Feoffees, other than the 20 s. and the 30 s. aforeſaid. Fin. R. 293, 294. Paſch. 29 Car. 2. Leas v. Morton.

S. C. cited Arg. Mich. 13 Geo. 2. Comyns's Rep. pl. 277. in the Caſe of Cook v. Cook, in the Exchequer.

7. A *Decree by Commiſſioners for Charitable Uſes* was excepted to in Chancery, which after confirmed the other Decree, but in the Interim A. the Perſon decreed againſt, conveyed his Lands to raiſe Portions for his Daughters, with Power of Revocation; this ſhall not hinder Execution for the Money decreed, but the *Lands alien'd ſhall be ſequeſtred* for the Money, and a Scire Facias againſt A.'s Heir, A. dying after the Decree confirm'd. 2 Chan. Caſes, 94. Paſch. 34 Car. 2. Harding v. Edge.

8. There lies *no Appeal to the Houſe of Lords* from a Decree on the Statute for Charitable Uſes; and Lords Commiſſioners ſeemed to be of Opinion, that a *Decree on Exceptions* to a Decree of Commiſſioners for Charitable Uſes is final by the Act of Parliament, and that there could be *no Re-hearing*. 2 Vern. 118. pl. 116. Mich. 1889. Saul v. Wilſon.

9. If the Lord of a Manor ſhould erect *a Mill*, and convey it *to Truſtees, to the Intent that the Inhabitants might have the Convenience of Grinding there*; the Inhabitants ſhall not be admitted to ſue here in the Attorney-General's Name; Per Ld. Keeper. 2 Vern. 287. in pl. 355. Mich. 1700.

Wms's Rep. 599. Hill. 1719. Attorney-General v. Wiburgh & al'. S. P.

10. The Teſtator deviſed an Annuity out of his Lands for the Maintenance of Watford-School. Upon a Bill in Equity exhibited by the Attorney-General in Behalf of the Charity, it was inſiſted, that *all the Tertenants* of the Lands charged, ſhould be *made Parties*, but decred that they ſhould not, becauſe every Part of the Land is chargeable, and the Charity ought not to be put to this Difficulty; but if the Tertenants ſeek a Contribution, they may make them Parties to the Information, or help themſelves by ſuch Courſe as they think fit. 1 Salk. 163. pl. 2. in Canc. 1712. Attorney-General v. Shelly.

Ibid. The Reporter ſays, viz. Note, Parker C. ſeemed to take a *Difference where Truſtees* of the Charity *are appointed by the Donor*,

11. Bill to eſtabliſh a Will, and to perform ſeveral Truſts, ſome of them relating to Charities; the Bill was brought by ſome of the Truſtees againſt other Truſtees, and ſeveral Ceſty que Truſts. An Objection was made for *Want of Parties*, for that there being ſeveral *Charities given by the Will to Perſons uncertain*, not capable of ſuing or being ſued, and conſequently cannot be brought before the Court, therefore the Attorney-General on their Behalf ought to have been made a Defendant to take care of theſe Charities; and if a Decree ſhould be made in this Cauſe, it would not be final, but the Attorney-General might afterwards

wards bring an Information on Behalf of thoſe Charities, and ſet aſide this Decree, and therefore he ought to be made a Party. Per Parker C. I think in this Caſe the Attorney-General need not be made a Defendant. It is true, where a Bill is brought on Behalf of ſuch a Charity to eſtabliſh it, it muſt be in the Name of the Attorney-General ex Neceſſitate rei, becauſe there are no certain Perſons intitled to it who can ſue in their own Names, but in this Caſe there is no ſuch Neceſſity; for ſome of the Truſtees of the Charity are made Defendants, and there may be a Decree to compel an Execution of the Truſts in the Will relating to thoſe Charities, and if there ſhould be any Colluſion between the Parties in Relation to the Charity, it is true, the Attorney-General notwithſtanding a Decree, may bring an Information to eſtabliſh the Charity and ſet aſide the Decree, and I think he might do the ſame Thing though he were made a Defendant in Caſe of Colluſion between the Parties, but he ſeemed to admit, that *where an Eſtate is deviſed to Truſtees for Charities to Perſons certain*, who are capable to ſue or be ſued, *ſuch Perſons ought to be made Defendants as well as other Ceſty's que Truſt.* A 2d Objection for want of Parties was, that *one of the Truſtees was not brought to Hearing.* But it was anſwer'd, that the Truſtee who is not brought to Hearing *is named a Defendant* in the Bill, *but being beyond Sea is not amenable by the Proceſs of the Court, and therefore the Plaintiff may proceed without him*, otherwiſe there would be a Failure of Juſtice; beſides, that very Truſtee is one of the Plaintiffs in the Croſs Cauſe, and ſo is before the Court, Quod fuit conceſſum; Per Parker C. MS. Rep. Trin. 5 Geo. in Canc. Monill v. Lawſon.

and *where no Truſtees are appointed, but the Lands deviſed immediately to Charitable Uſes.* In the latter Caſe there can be no Decree unleſs the Attorney-General be made a Party but otherwiſe where Truſtees are appointed by the Donor. This proceeded to Hearing, and Objections over-ruled Per Parker C.

12. Urged, that in Caſe of a Charity, where the *moſt ſpeedy and leaſt expenſive Method* ought to be purſued, Iſſue ought not to be directed, but the Court ought to decree upon the Proofs. MS. Tab. March. 25. 1721. Biſhop of Rocheſter v. Attorney-General.

For more of Charitable Uſes in General, See Mortmain (A. 2) pl. 11. the Stat. of 9 Geo. 2. cap. 36. and other proper Titles.

Chauntery.

(A) *By whom* it may be *made.*

Fol. 387.

1. A Man may make a Chauntery by Licence of the King, without the Ordinary, for the Ordinary hath nothing to do with the making thereof. 9 H. 6. 16.

Chauntries were diſſolved by Statutes of H. 8. & E. 6.

(B) In what *Place*.

As to Chauntries, See Godolp. Repert' 329. S. 6. 331. S. 8. &c. cap. 29.

1. IT may be founded in a Cathedral Church; and also in any other Church. 9 H. 6. 17.

Chimin Common.

Fol. 390. (A) Chimin Common. *What* shall be said a Common Highway.

Cro. C. 366. pl. 3. S. C.

1. IF there be a Common Highway for all the King's Subjects, and it hath been used time out of mind, when the Way has been foundrous, for the King's Subjects to go by Outlets upon the Lands next adjoining, the Way lying in the open Field not inclosed. These Outlets are Part of the Way; for the King's Subjects ought to have a good Passage, and the good Passage is the Way, and not only the beaten Track; for if the Lands adjoining be sowed with Corn, the King's Subjects (the Way being foundrous) may go upon the Corn. Trin. 10 Car. B. R. per Curiam, upon a Trial at Bar upon an Information against *Sir Edward Duncomb*.

Fitzh. Barre, pl. 302. S. C.

2. If there be a Water, which is a Highway, which Water by the Increase or Force thereof changes its Course upon the Ground of another, yet he hath a Highway also over there where the Water is, as he had before in the ancient Course; so that the Lord of the Soil cannot disturb this Course made De Novo. 22 Ass. 93. said to be adjudged in the Eire of Nottingham.

3. A Way *leading to any Market Town, and common for all Travellers, and communicating with any great Road*, is an Highway; *but if* it lead *only to a Church*, *or* to an *House or Village*, or to *Fields*, it is a private Way; Per Hale Ch. J. but it is a Matter of Fact, and depends much on common *Reputation*. Vent. 189. Hill. 23 & 24 Car. 2. B. R. Austin's Case.

1 Salk. 359. pl. 8. the Queen v. Sainthill S. C. but not S. P.

4. Highway is the *Genus of all Publick Ways*, as well *Cart*, *Horse*, *and Foot*-way, and yet Indictment lies for any one of these Ways, if they are *common to all the Queen's Subjects* if they have Occasion to pass there, viz. if it be a Foot-way common to all, or Horse and Prime-way; but these *are not Altæ Viæ Regiæ*; for that it is the *Great Highway*, *common to Cart*, *Horse*, *and Foot*, that please to use it; Per Holt Ch. J. 6 Mod. 255. Mich. 3 Ann. B. R. the Queen v. Saintiff.

5. If a Vill be erected, and a Way laid out to it, if there be no other Way but *that* to the Vill, not material *Quo animo* it was laid out, it shall

ſhall be deem'd a *publick Way*. No one living in a Hundred ſhall be allowed an Evidence for any Matter in Favour of that Hundred, tho' ſo poor as upon that Account to be excuſed from the Payment of Taxes, becauſe, tho' poor at preſent, he may become rich; Per Parker Ch. J. 10 Mod. 150. Hill. 11 Ann. B. R. the Queen and Inhabitants of Hornſey.

6. *Communis Strata* and *Via Regia* are *ſynonimous* Expreſſions, and ſignify the ſame Thing, as the Word (Strata) is now uſed; per Parker Ch. J. 10 Mod. 382. Hill. 3 Geo. 1. B. R. The King v. Hammond.

7. A *Navigable River* is eſteemed an Highway; per Parker Ch. J. in delivering the Opinion of the Court. 10 Mod. 382. Hill. 3 Geo. 1. B. R. in Caſe of the King v. Hammond, cites Fitzh. 279. Tit. Challenge.

(B) Who ought to *repair* it.

1. IF there be a common Highway, which Time out of Mind hath been uſed to be repaired by the Country, and after J. S. that hath Lands not incloſed, next adjoining to the Highway of both Sides of the Way for his ſingular Profit, incloſes his Lands of both Sides the Way by Hedge and Ditch, he by this thenceforth hath taken upon himſelf the Reparation of the Highway, and hath freed the Country from the Reparation thereof; ſo that he himſelf at all times after, where there ſhall be need, ought to repair it. Trin. 10 Car. B. R. in an Information againſt *Sir Edward Duncombe*, reſolved per Curiam upon Evidence at the Bar upon ſuch an Information; and it is not ſufficient for him to make the Way as good as it was at the Time of the Incloſure, but he ought to make it a perfect good Way, without having any reſpect to the Way as it was at the Time of the Incloſure; and then it was ſaid that it was ſo reſolved by all the Judges 6 Jac. and 19 Jac. For when the Way lay in the open Fields not incloſed, the King's Subjects, when the Way was bad or foundrous, uſed to go for their better Paſſage over the Fields adjoining, out of the common Track of the Way, which Liberty is taken away by the Incloſure. Cro. C. 366. pl 3. S. C. it was proved that tho' he had made a Cauſey reaſonably good at his own Charge for Horſemen, yet Carts and Coaches might not paſs, nor could meet for the Straitneſs thereof, nor could go beſides the Way; and as to his being chargeable to the Repairs now, by reaſon of this Incloſure, whereas the Pariſh was chargeable before for the Reparations, Noy ſaid it was ſo reſolved in the 6 & 19 Jac. upon Conference with all the Juſtices of England, which Richardſon Ch. J. affirmed.——Sid. 464. pl. 8. Trin. 22 Car. 2. B. R. cites S. C. in the Caſe of the King v. Sir Nich. Staughton; and there the Chief Juſtice ſaid, and it was not denied, that if a Man incloſes Land of one Side which was anciently incloſed of the other Side, he that makes ſuch new Incloſure ſhall repair all the Way; but if there had been no ancient Incloſure of the other Side, then he ſhould repair but one Half of the Way; but if he makes a new Incloſure on both Sides of the Way, there he ſhall repair the whole Way.——And if one incroaches upon the Highway, he is chargeable to repair the ſaid Way ſo long as the Incroachment continues; but as ſoon as he leaves the Incroachment open to the Way again, ſo that the Incroachment ceaſes, he ſhall be diſcharged from repairing the ſaid Way for the future. But if one is bound to repair a Highway Ratione Tenuræ of any Lands, tho' he leaves them open to the Way, yet he is always bound to repair the Way; per Kelynge Ch. J. 2 Saund. 160, 161. in S. C.——By Roll Ch. J. Sty. 364. Hill. 1652. all Highways of common Right are to be repaired by the Inhabitants of that Pariſh in which the Way lies; but if any particular Perſon will incloſe any Part of a Way or Waſte adjoining, he thereby takes upon himſelf to repair that which he has ſo incloſed.——Mar. 26. pl. 62. Trin. 15 Car. B. R. S. P. accordingly per Cur. in Caſe of the King v. the Inhabitants of Shoreditch.——13 Rep. 33. Paſch. 7 Jac. Anon. ſays that of common Right all the Country ought to repair it, becauſe they have their Eaſe and Paſſage by it; but yet ſome may be particularly bound to repair it.——The Inhabitants of every Pariſh of common Right ought to repair the Highways, and therefore if particular Perſons are made chargeable to repair the ſaid Ways by a Statute lately made, and they become inſolvent, the Juſtices of Peace may put that Charge upon the reſt of the Inhabitants; per Holt Ch. J. Ld Raym. Rep. 725. Mich 10 W. 3 B. R. Anon. ——2 Ld. Raym. Rep. 1170. Trin. 4 Ann. Holt Ch. J. cited Duncomb's Caſe ſupra.——Keb. 894 pl. 60.

6c. S. C. cited per Cur. as reſolved that it is not ſufficient that ſuch new Way is better than ever the former was, but he muſt keep it in ſufficient Repair for the King's People to paſs.

2. An Owner of Land, who is no Occupier thereof, cannot be charged to repair a common Way, but only the Occupier. Hill. 11 Car. B. R. in one *Foſter's Caſe*, per Curiam, upon a Motion for a Prohibition to the Marches of Wales, upon an Information there preferr'd in ſuch Caſe againſt the Owner.

3. It was held in B. R. that he who has *Land next adjoining to the King's Highway*, is bound to *cleanſe the Dykes without any Preſcription.* Br. Nuſance, pl. 28. cites 8 H. 7. 5.

4. *Contra* of him who has *Land which is not adjoining*, but other Land is between him and the Way, he is not ſo bound, *unleſs* it be *by Preſcription.* Ibid.

5. *And* per Keble, a Man is not bound to *lopp his Trees which incumber the Way*, therefore it ſeems that another may do it, and the Soil and *Franktenement of the Way is to thoſe to whom it adjoins*; but he who has *Land adjoining to a Bridge* is not bound to do it, unleſs it be by Preſcription. Ibid.

6. A *Hamlet within a Pariſh* cannot be charged of common Right to repair a Highway, except it be by Preſcription, or ſome other ſpecial Reaſon, but a Vill may be; per Roll Ch. J. Sti. 163. Mich. 1649. B. R. The Inhabitants of Mile-End in the Pariſh of Stepney.

7. If a Man has 8 Plough-Lands, he ought to find 8 Carts for 6 Days, altho' his Land be Paſture. Raym. 186. Paſch. 22 Car. 2. B. R. Frere's Caſe.——He had 1700 Acres of Meadow.

8. Every * *Pariſh* of common Right ought to repair the Highways, and *no Agreement* with any Perſon whatſoever *can take off this Charge* which the Law lays upon them. Nota. Vent. 90. Trin. 22 Car. 2. B. R. Anon.

* *Unleſs* there be ſome *ſpecial Matter* to fix it upon others; per Hale Ch. J. Vent. 183. Hill. 23 & 24 Car. 2. B. R. in Auſtin's Caſe.—(But the Reporter adds a Quære, Why not the County? as in the Caſe of common Bridges, and cites 2 Inſt. 701.)

Unleſs a † particular Perſon be obliged by *Preſcription or Cuſtom*; but private Ways are to be repair'd by the Village or Hamlet, or ſometimes by a particular Perſon. 1 Vent. 189. per Hale Ch. J. in Auſtin's Caſe.

† Mar. 26 pl. 62. Trin. 15 Car. B. R. The King v. the Inhabitants of Shoreditch.

9. An Information was brought againſt the Defendant for not repairing of a Highway, Ratione Tenuræ, between Stratford and Bow. It was tried at the Bar by an Eſſex Jury. The Evidence for the King was that *Mawd the Empreſs gave* certain *Lands to the Abbeſs of Barking* to repair this Way, that *the Abbeſs &c. ſold thoſe Lands to the Abbot of Stratford, who, by the Conſent of his Convent, charged all his Lands for the Repair of the Way*; and thus it ſtood till the Diſſolution &c. Then *all the Lands of the Abbot* of Stratford *being veſted in the Crown, were granted to Sir Peter Mewtis*, who held them charged for repairing the Way, *and* from him *by ſeveral meſne Conveyances they came to the Defendants.* This was proved by ſeveral Witneſſes living in other Pariſhes, none being admitted to give Evidence who lived in either of the ſaid Pariſhes of Stratford or Bow. But it was ſaid for the Defendants, that no Lands ſhall be chargeable for the Repairing this Highway, ratione Tenuræ, but ſuch which were originally given for that Purpoſe, and ſo the Defendants could not be guilty, unleſs it was proved that they had ſome of thoſe Lands in Poſſeſſion which were given by the Empreſs to the Abbeſs of Barking, and that no other Lands formerly belonging to the Abbot of Stratford were liable, but ſuch which he bought of the ſaid Abbeſs. The Court was of Opinion, that upon this Evidence *all the Lands of the Abbot were liable to repair* this Way, and directed the Jury accordingly,

accordingly, who found for the Plaintiffs. 4 Mod. 48. Mich. 3 W. & M. B. R. The King and Queen v. Buckeridge & al'.

10. Per Holt Ch. J. The Inhabitants of every Parish, of common Right, ought to repair the Highways; and therefore if *particular Persons* are *made chargeable* to repair the said Ways by a Statute lately made, and they *become insolvent*, the Justices of Peace may put that Charge upon the rest of the Inhabitants. Ld. Raym. Rep. 725. Mich. 10 W. 3. B. R. Anon.

11. Every Parish of common Right ought to repair their Highway; but *by Prescription one Parish may be bound to repair the Way in another Parish*; per Holt Ch. J. 12 Mod. 409. Trin. 12 W. 3.

12. Tho' the *Lord* of a Manor who is bound to repair a Bridge or Highway *ratione Tenuræ*, may, *upon several Alienations* of several Parcels, *agree to discharge those that purchase* of him of such Repairs, yet *that will not alter the Remedy for the Publick*, but will only bind the Lord and those that claim under him; and no Act of the Proprietor will apportion the Charge, whereby the Remedy for the Publick Benefit should be made more difficult. 1 Salk. 358. Pasch. 3 Ann. The Queen v. the Dutchess of Buccleugh & al'.

13. *And* tho' a Manor subject to such Charge *comes into the Hands of the Crown*, yet the *Duty continues* upon it; and any Person claiming afterwards under the Crown the whole Manor, or any Part of it, shall be liable to an Indictment or Information for want of due Repairs. 1 Salk. 358. S. C.

(C) Privileg'd from Duty. Who.

1. *Clergymen* are liable to the Repairs of the Highways, and Judgment accordingly. Vent. 273. Trin. 26 Car. 2. B. R. Dr. Webb v. Batchillor. 2 Lev. 139. Trin. 27 Car. 2. S. C. adjudged. — Freem. Rep. 396. pl. 514. S. C. the Court held that they are chargeable to all publick Charges. —— Ibid. 488 pl. 667. S. C. adjudged; and Hale Ch. J. said they would not allow the Dispute of so long a settled Point; for in Sir Nicholas Hide's Time, it was resolved that the Clergy are liable thereto.

2. An *Exemption by the King's Letters Patents* made *before the* 2 & 3 *Ph. & M. cap.* 8. are not sufficient to exempt Lands chargeable to send Men for the Repairing Highways, from the Charge of Repairing them, which Lands by the said Statute of Ph. & M. and other subsequent Statutes are chargeable to send Men for that Purpose; and Judgment was given accordingly. 3 Mod. 96. Hill. 1 Jac. 2. B. R. Bret v. Whitchcot. The *King's Moneyers of the Mint*, are not exempted from doing Duty to the Highways; adjudged. Cumb. 10. Hill. 1 & 2 Jac. B. R. Brent v. Whitchcock S. C.

(D) Offences *in* Highways punished. How.

1. NO Lord can punish *Purpresture* upon a Highway, unless he be *Lord of both Sides*. Kelw. 141. a. pl. 11. says it was so said in that Plea, and affirmed by Shard. Cases in Itin. in Time of E. 3.

Per Vaugh Ch. J. Vaugh. 341. —S. P. Per Fitzh. J. Br. Actions ſur le Caſe, pl. 6. cites S. C.

2. If any particular Perſon after the Nuſance made, has more *particular Damage* than any other; in ſuch Caſe, and becauſe of this particular Injury, he ſhall have particular Action upon the Caſe. 7 Rep. 73. cites 27 H. 8. 27. a.

———*As* if *he and his Horſe fall into it*, whereby he receives Hurt and Loſs. Co. Litt. 56. a. ſays that it was ſo reſolved in B. R. and in the Margin cites 27 H. 8. 27. ——And in the Caſe of Fineux v. Hovenden Cro. E. 664. Paſch 41 Eliz. Coke Attorney-General cited the S. P. adjudged in the ſame Year of 27 H. 8. Bendlows v, Kemp.

Br. Action ſur le Caſe, pl 93. cites 5 E. 4. 3. that he ſhall not have Action againſt him who ought to repair it; for that is the People, but it ſhall be reformed by Preſentment. ———So by Baldwin Ch. J. if a Man ſtops the King's Highway, ſo that a *Man cannot paſs from his Houſe to his Cloſe*, he ſhall not have Action on the Caſe, but he ſhall be puniſhed by the Leet. Ibid. pl. 6. cites 27 H. 8. 26, 27.

3 Mod. 289. Pain v. Patrick, S. C. adjudged for the Defendant. ———

3. Caſes lies not for *hindring a Man's Paſſage* in a Common Highway, becauſe he has no more Damage than others of the King's Subjects; but it muſt be by Indictment. Comb. 180. Trin. 3 & 4 W. & M. in B. R. Pain v. Partridge.

1 Salk. 12. pl. 1. S. C. held accordingly. ———Show. 243. S. C. Mich. 2 W. & M. adjornatur. Ibid. 255. S. C. adjudged for the Defendant.

4. *Indictment* againſt 2 Defendants who were *Overſeers* of the Highway, *for not repairing*, or cauſing to be repaired the Highways, and quaſhed; becauſe an Indictment for not repairing, *muſt always be againſt the Pariſh*, the Overſeers not being bound to repair the Ways, but only to give Notice to the Pariſh to come and repair them. 12 Mod. 198. Trin. 10 W. 3. The King v. Dixon & Hollis.

(E) Proceedings, Pleadings and Judgment.

This Exception was diſallowed, and it was ſaid that the Precedents are generally ſo.

1. INdictment was for not Repairing a Way which he ought to do in Blackacre in D. *Ratione tenuræ*, without ſaying tenuræ *ſuæ*. And by the Opinion of the Court it was naught; for another may have the Land. Noy 93. Anon. cites 5 H. 7. 3.

Vent. 331. Trin. 30. Car. 2. B. R. The K v. Sir Tho. Fanſhaw.

But where a Man is bound to repair ſuch Way *Ratione Reſidentiæ*, there he muſt of neceſſity allege a Preſcription. And this Diverſity was admitted good; Per tot. Cur. Kelw. 52. ut ſup.

2. If a Man is bound to repair a Way *Ratione Tenuræ* talis terræ, in a Preſentment or in a Plea, he need not *allege Title of Preſcription*, becauſe a Preſcription is *implied* in the Eſtate of Inheritance in the Land. Kelw. 52. pl. 4. Trin. 19 H. 7. Anon.

3. G. was indicted for *ſtopping the Highway*, and the Indictment was *not laid to be contra pacem*. And Cook ſaid, That for a Miſ-feaſance it ought to be contra pacem; but for a Non-feaſance of a Thing, it was otherwiſe; and the Indictment was for *ſetting up a Gate in Oſterly Park*; and Exception alſo was taken to the Indictment for Want of Addition; for *Vidua was no Addition of the Lady Greſham*; and alſo *Vi et Armis was left out* of the Indictment; and for theſe cauſes ſhe was diſcharged, and the Indictment quaſhed. Godb. 59. pl. 71. Mich. 28 & 29 Eliz. B. R. Lady Greſham's Caſe.

4. An

4. An Indictment was of a Nuſance to a *Horſe-way*, whereas it ought to be to the Queen's or King's Highway, or to the Highway, and therefore it was quaſhed. Cro. E. 63. pl. 8. Mich. 29 & 30 Eliz. B. R. Madox's Caſe.

5. The Defendant was preſented in a Leet, for that he had *diverted the Queen's Highway* within the Leet, to the Nuſance of the Queen's Subjects. The Court agreed that the Preſentment is void, becauſe a Highway cannot be diverted as a Courſe of Water may be, but may be *obſtructed or ſtopped*; but a Way is not diverted when it is ſtopt, and another Way made in another Place. And. 234. pl. 251. Paſch. 32 Eliz. Agmondeſham v. Cornwallis.

6. K. was indicted for *ſtopping quandam Viam valde neceſſariam for all the King's Subjects there paſſing*; Exception was taken becauſe it wanted the Word *Regiam*, and ſaid that the Word (Neceſſariam) does not imply any [ſuch] Matter; for a Foot-way is Neceſſary. Beſides the *Party had no Addition*; and for theſe Reaſons he was diſcharged. 4 Le. 121. pl. 243. Trin. 32 Eliz. B. R. Keene's Caſe.

7. Two were indicted for *incroaching upon the Highway*, and the Indictment was *et unum Tenementum ibidem erectaverunt*, where it ſhould be *erexerunt*; for there is no ſuch Latin Word as Erectaverunt; and it was not *Anglice*, did erect, which had been good, and for this Cauſe it was diſcharged. Cro. E. 231. Paſch. 33 Eliz. B. R. Chambers & Johns. ———Alias, the Queen v. Chambers & Johns.

8. Indictment for not repairing a *Bridge*, was *debent & ſolent Reparare pontem* &c. It was moved that the Indictment was inſufficient, becauſe it is *not alleged that the Bridge was over a Water, and not needful that it be amended.* 2dly, It did not appear in the Indictment *that the ſaid Bridge was ruinous and decayed.* 3dly, The Indictment is, that the Defendants debent & ſolent Reparare pontem, and it is not ſhewed that their Charge of reparing of the ſame is Ratione Tenuræ, and cites 21 E. 4. 38. where it is ſaid that a Preſcription cannot be, that a Common Perſon ought to repair a Bridge, unleſs it be ſaid to be Ratione Tenuræ, but it is otherwiſe in Caſe of a Corporation; and the Indictment was quaſhed. Godb. 346, 347. pl. 441. Trin. 21 Jac. B. R. Bridges and Nichols's Caſe.

9. Exceptions were taken to an Indictment for not repairing an Highway. 1ſt. Becauſe he did *not ſhew who were Surveyors*; ſed non Allocatur. 2dly, Becauſe it did not ſhew *the Day nor Year of the Offence*, and held not Material; becauſe it appears that it was before the Indictment, that he did not attend with a Cart *ſuch a Day appointed by the Surveyors.* 3dly, The Statute * 1 & 2 *M. cap.* 3. is *Highway leading to a Market Town*; & non Allocatur; becauſe every Highway leads from Town to Town, and cites 6 E. 3. 33. 4thly, It is alleged that T. B. *habens tantum terræ* committed the Offence, and the Words of the Statute are *Occupy &c.* ſo that a Man is not chargeable if he does not occupy his Land, tho' it be his Frank-tenement. But it was agreed that if a Man *ſuffers his Land to lie freſh*, it ſhall not excuſe him. But the Judges doubted of the 4th Exception, and commanded the Defendant to procure a *Certificate of his Conformity*, before they would quaſh the Indictment. Palm. 389. Mich. 21 Jac. B. R. Tho. Boſe's Caſe.

2 Roll. Rep. S. C. by Name of Nottingham's Caſe, alias, Tho. Bale's Caſe. * It ſeems it ſhould be the 2 & 3 *P. & M. cap.* 8.

10. H. was indicted for *ſtopping the King's Highway in Kenſington*, but does *not allege any Buttalls* of the King, viz. leading from ſuch a Village to ſuch a Village &c. And by Jones J. it needs not, becauſe the Nuſance is in the King's Highway, which is intended to go thro' all the Realm, but otherwiſe it ſhould have been of another common Way, to which Dodderidge and Whitlock agreed. Noy. 90. Mich. 2 Car. B. R. Halſell's Caſe.

So in an Indictment for not repairing a Highway, the Court conceived, that the *omitting the Terminus a quo* is not material, but the *omitting the Word* (*Communis*) is ill; but the Court left them to a Writ of Error, and Judg-

Judgment pro Rege 2 Keb. 728 pl. 8. Hill. 22 & 23 Car. 2. B. R. the King v. Glaſton Inhabitants. The Indictment did not ſet forth, *from what Place to what Place* the Highway led in which the Nuſance was ſaid to be committed. It was anſwered, that a Highway has no Terminus a quo, nor Terminus ad quem, and the Indictment held good 10 Mod 383 Hill. 3 Geo. 1. B R. the King v. Hammond ——Ibid. Arg. ſays, that a Highway is infinite, and cites 10 W. 3. the King v. Thompſon.

11. L. was indicted for *not repairing of an Highway*; the Indictment above was quaſhed, becauſe it is *not ſhewed of what Place the Defendant was an Inhabitant.* Noy 87. Mich. 2 Car. B. R. Lucye's Caſe.

12. H. was indicted for *not paving the King's Highways* in the County of M. in St. John's Street, *ante Tenementa ſua*, but becauſe the Indictment did *not ſet forth how he became chargeable* to the ſame, nor that he *dwelt there*, nor that he had any Tenement there, beſides, if he had, yet it might be that his Leſſee dwelt in the Houſe, and ſo the Leſſee ought to have amended the Highway; and for theſe Uncertainties the Indictment was quaſhed. Godb. 400. pl. 481. Paſch. 3 Car. B. R. Serjeant Hoskins's Caſe.

Noy 93. S P. accordingly, and ſeems to be S. C and cites 5 H. 7. 3. accordingly.——Vent. 331. Trin. 30 Car 2. B R. the King v. Fanſhaw, S. P & S. C. cited, ſed non allocatur; for the Precedents generally are Ratione Tenuræ, without ſaying (ſuæ.)

13. In an Indictment for not repairing a Way which he ought *Ratione Tenuræ of certain Lands* in Athton, and *does not ſay Ratione Tenuræ ſuæ*, and if another has the Land, it is no Reaſon to indict him; and of this Opinion was the Court. Lat. 206. Trin. 3 Car. Anon.

14. Upon a Preſentment againſt T. B. for *erecting a Brick Wall, and thereby ſtraitening the Highway*, Mr. Attorney ſaid, that it could not be arrented, unleſs there was an Inquiry per Miniſtros Forreſtæ, ſi ſit competens Paſſagium; for if it be not, it is a Nuſance in which the Subject is ſo far intereſted, that the King cannot diſpenſe with it. Jo. 277. 8 Car. in Itinere Windſor. Browne's Caſe.

15. Information for *ſtopping* a Highway; it was ſaid there was a common Highway for Horſe, Foot, and Carriages, in ſuch a Lane, leading to divers Market Towns, and the Defendant *with Hedges and Ditches* ſtopp'd it. The Defendants confeſs the Highway, but *ſay it was ſo foul and drowned with Water and Dirt, that Paſſengers could not paſs, and that for Eaſe of the Paſſengers J. S. ſeized of a Cloſe adjoining to it, laid out another Way more commodious* for the People, *and before the laying out of it a Writ of Ad quod Damnum iſſued, to inquire* whether it were to the Damage of &c. if the King ſhould grant ſuch Licence to the Defendants; *and an Inquiſition was taken, that it was not to the Damage* &c. It was moved that this Plea was ill, both for Matter and Form, becauſe it did not appear by what Authority J. S. did it; for it is but at his Pleaſure, and he may ſtop it when he will, and by that laying out the Subjects have not ſuch Intereſt therein as they may juſtify their going there; nor is it ſuch a Way as Inhabitants are bound to watch, or to make amends if a Robbery be done there; nor is any one bound to repair it; and the pleading of the Ad quod Damnum, and the Inquiſition upon it, are to no Purpoſe when he does *not plead, that he obtained the King's Licence*; and Judgment accordingly. Cro. C. 266. pl. 16. Trin. 8 Car. B. R. the King v. Ward.

16. In an *Information againſt the Inhabitants of S.* for not repairing the Highway, and the Iſſue was, whether they ought to repair it or no? *Some of the Inhabitants would have been Witneſſes to prove that ſome particular Perſons, Inhabitants, lying upon the Highway, had uſed, Time out of Mind, to repair it*, but were not permitted by the Court, becauſe they were Defendants in the Information, wherefore the Jury found that the Inhabitants ought to repair the Way. Mar. 26, 27. pl. 62. Trin. 15 Car. B. R. the King v. the Inhabitants of Shoreditch.

17. In-

17. Indictment for not repairing a Highway was quashed, for that it *set forth, that the Defendant ought to repair it, by reason of his Tenements*, when it *should have been*, that *he, and all those whose Estate he has in the Tenements, used to repair*; or, that *by reason of the Tenure* of his Tenements he ought to repair. Sty. 400. Hill. 1652. B. R. Anon.

18. The Defendants were indicted for not repairing a Highway, and a *Verdict found* against them. The Court was moved that a good Fine may be set upon them, because the *Way is not yet amended, and a Traveller that passed that Way has lost his Horse since the Trial, the Way being so bad that the Horse broke his Leg.* The other Side moved to respite the Fine, because there was a Contest between this Parish and another, which of them ought of Right to repair the Way, and in regard this Parish is very poor; besides, the Way cannot be amended until the Summer, and then it shall be done; but Roll Ch. J. ordered a Distringas to levy a Fine of 20 l. of the Parishioners for not repairing it. Sty. 366. Hill. 1652. B. R. Stoneham's Inhabitants Case.

19. In an Information for not repairing a *Way in B. from A. to D. in the Parish of C.* The Defendant *pleaded, that the said Way in the Parish of C. is in the Parish of B. and that the Inhabitants of B. ought to repair it*; whereupon it was demurred, and the Court conceived the *Plea repugnant*, and ordered the Defendants to repair by Consent, and that if the others ought to repair Part, they shall refund so much as shall be after found due on the Trial, otherwise the Court would have given Judgment. 1 Keb. 277. Pasch. 14 Car. 2. B. R. the King v. Yarenton Inhabitants (in Oxfordshire.)

Sid. 140. pl. 14. Pasch. 15 Car. 2. B. R. the S. C. the Information ought not to be quashed till it be found who ought to repair it; and then Judgment shall be given, tho' upon an ill Issue. It was insisted, that no Judgment could be given, it not being found who ought to repair; but per Cur. the Judgment shall be, that the Defendants go quit, and that the other Vills, between whom the Issue was, should repair. —— 3 Salk. 392. pl. 1. S. C.

20. Upon an Information for not repairing a Highway, the Issue was, *Quod non reparare debent*; but tho' it was an *ill Issue*, yet the Court would *not quash it till tried, to the Intent to know who ought to repair it.* And afterwards it was *found non debent* reparare, *but find not certainly who ought* to repair it. In this Case no Judgment shall be given, otherwise if they had found who ought to repair; for then Judgment should be given, tho' the Issue be ill, as the Court held clearly; and they were of Opinion, that the *Defendants should go quit*, and that the other Vill, who directed this Issue, and who of Right ought to repair, should repair. 1 Sid. 140. Pasch. 15 Car. 2. B. R. the King v. Yarnton Inhabitants in Oxfordshire.

The Issue being *by a special Agreement*, the Court conceived the Verdict well enough, tho' it be not found who ought to repair, and Judgment for the Defendant. 1 Keb. 514. S. C. —— Sid 140. ibid. reports, that Twisden J. said, that he was Counsel in a like Case for the Vill of Camberwell.

21. The Inhabitants of S. were indicted for *digging in the Highway*, but did *not say in what Town, Parish, or Village* the Place was, and therefore they mov'd to quash it; but the Court denied, unless there was a *Certificate of Amendment*. 2 Keb. 221. pl. 68. Pasch. 19 Car. 2. B. R. the King v. Shelderton Inhabitants.

22. Information against one for stopping of the Highway, the Word was *Obstupabat*; it was proved in Evidence, that he *plowed it up*, and resolved it did well maintain the Information. Vent. 4. Hill. 20 & 21 Car. 2. B. R. Griesley's Case.

23. S. was convicted for *not repairing* a Highway, viz. *that he, and all those whose Estate he has ought to repair* the said Way *Ratione Tenuræ*; and it was adjudged ill, because it is *by way of Prescription*, where it *ought to be by way of Custom*. 1 Sid. 464. Trin. 22 Car. 2. B. R. the King v. Sir Nich. Staughton.

This Case was upon a Presentment by a Justice of Peace on his own View, and that S ought to repair *Ratione Tenuræ* of certain Lands, Parcel of the said Piece of Land (mentioned before) *called Stoke Common, by the said S. out of the said common Highway, inclosed and increached*, and which,

which, Time out of Mind, had been Part of the ſaid Highway. The Defendant pleaded, that the Inhabitants ought to repair the ſaid Highway and *traverſed*, abſque hoc that he ought to repair the ſaid Way *Ratione Tenuræ* &c. and upon Demurrer it was held, that the Ratione Tenuræ was ill, and that it ought to have been *Ratione Coarctationis* of the ſaid Way, and that Defendant did well in traverſing the Ratione Tenuræ, and could not do otherwiſe; and adjudged for the Defendant. 2 Saund. 160. the King v. Stoughton.

But ſee Tit. Indictment, (M) pl. 18. contra.

24. In an Indictment for not repairing *Quandam altam Viam*, the Word *(Communem) was omitted*, and therefore held ill; but the omitting the Terminus a quo was conceived not material. 2 Keb. 728. pl. 8. Hill. 22 & 23 Car. 2. B. R. the King v. the Inhabitants of Glaſton.

25. In an Indictment for *erecting Poſts and Rails* in a Highway, it was held neceſſary to *prove that the Party indicted ſet them up*; for a Continuance of them, or *not ſuffering them to be removed*, would not ſerve. 1 Vent. 183. Hill. 23 & 24 Car. 2. B. R. Auſtin's Caſe.

3 Keb. 28. pl. 50. The King v. Thrower, S. C. and it being not ſaid pro Inhabitantibus Parochiæ, but pro omnibus Subditis Domini Regis, the Court would not quaſh it without Pleading.—Indictment for ſtopping a Way to the Church, did *not lay it to be Communis Via*, yet per Cur. it is good enough; and per Jones J. it is good enough, tho' there *wants Vi & Armis*, becauſe he who is ſuppoſed to ſtop the Way is *Owner of the Land*. Poph. 206. Mich. 2 Car. B. R. Hebborn's Caſe.

26. An Indictment was for *ſtopping a common Way to the Church of Whitby*. It was objected that an Indictment would not lie for a Nuſance in a Church-Path; but Suit might be in the Eccleſiaſtical Court; beſides the Damage is private, and *concerns only the Pariſhioners*; and where there is a Foot-way to a Common, every Commoner may bring his Action if it be ſtopp'd; but in ſuch Caſe there can be no Indictment. Hale Ch. J. ſaid that if this were alleged to be a *common Foot-way to the Church for the Pariſhioners*, the Indictment would not be good; for then the Nuſance would extend no further than the Pariſhioners, for which they have their particular Suits; but for aught appears this is a *common Foot-way, and the Church is only the Terminus ad quem, and it may lead further*, the Church being expreſs'd only to aſcertain it, and it *is ſaid Ad Commune Nocumentum*, wherefore the Rule was that he ſhould plead to it. 1 Vent. 208. Paſch. 24 Car. 2. Thrower's Caſe.

Cro. C. 584. Leyton's Caſe —2 Show. 60. pl. 46. Paſch. 31 Car. 2. B. R. Anon. S. P.

27. The Courſe of B. R. upon an Indictment for ſtopping a Way, is that the Offender is admitted to a Fine upon his Submiſſion before Verdict, if there be a *Certificate* that the Way is repaired; but if the Party be convicted by Verdict, ſuch Certificate will not ſerve, but the Party ought to cauſe a *Conſtat* to iſſue out *to the Sheriff*, who ought to return that the Way is repaired, becauſe the Verdict, which is a Record, ought to be anſwered with Matter of Record. Raym. 215. Paſch. 24 Car. 2. B. R. Houghton's Caſe.

12 Mod. 112. pl. 10. Anon. S. P. and ſeems to be S. C.—3 Keb. 301. pl. 36. The King v. St. Andrew's Holbourn, S. C. & S. P. by Hale Ch. J. accordingly.—3 Salk. 183. pl. 3. S. C. & S. P. accordingly; but that where a private *Perſon* is indicted for not repairing, he may give in Evidence that another is to repair, becauſe he is not bound of common Right as the Pariſh is.

28. If a *Pariſh &c.* be indicted for not repairing a Highway within their Precinct, they *cannot plead Not guilty, and give in Evidence that another ought to repair it*; for they are chargeable De Communi Jure, and if they would diſcharge themſelves by laying it elſewhere, they muſt plead it. 1 Vent. 256. Paſch. 26 Car. 2. B. R. Anon.

If you plead *Not guilty*, it *goes to the Repair* or not Repair; but if you will diſcharge yourſelf, you muſt do it by *Preſcription* or Ratione Tenuræ, and *ſay that ſuch an one Ratione Tenuræ*, or ſuch a Part of the Pariſh, *hath always uſed Time out of Mind &c.* 1 Mod. 112. Paſch. 26 Car. 2. B. R. Leather-Lane's Caſe.

29. An Indictment in a Leet was for *ſtopping a common Highway leading from a Place called Up-End*. Exception was taken, for that every Highway muſt be from ſome publick Place; but per Cur. this may be well enough; but becauſe it was *not ſet forth where the Stopping was*, the Indictment was quaſh'd. 3 Keb. 644. pl. 88. Paſch. 28 Car. 2. B. R. Ayerell's Caſe.

30. Re-

30. Replevin of taking of 5 Oxen. The Defendant makes Cognizance as Bailiff to the Lord of the Leet, becauſe the Plaintiff was amerced there for *not ſcouring a Ditch in an Highway*; and the Plaintiff demurr'd, becauſe the Statute of 18 Eliz. cap. 9. gives the Forfeitures for Highways to the Surveyors of the Highways; but adjudged by all the Juſtices for the Defendant, becauſe the *Party may be puniſhed in the Leet, and alſo by this Statute for divers Cauſes*. Raym. 250. Trin. 30 Car. 2. Stephens v. Hayns.

31. Indictment for *not repairing a Way to a Church*, and ſays the Defendants ought to repair the ſame, but does *not ſay* how, *whether by reaſon of Tenure, or otherwiſe*. It was held naught, becauſe prima facie, and regularly the Pariſh or County ought to do it of common Right. 2 Show. 201. pl. 206. Paſch. 34 Car. 2. B. R. The King v. Warwick (Mayor &c.)

32. A Preſentment was at a Court-Leet for *not repairing a certain Pair of Stairs leading to the Thames*. Several Exceptions were taken to the Form and Manner of the Preſentment; but the Court would not quaſh it, becauſe it was for not repairing the Highway. 2 Show. 455. pl. 420. Mich. 1 Jac. 2. B. R. The King v. the Inhabitants of Limehouſe.

33. A *Juſtice of P. on his View preſented* a Highway to be out of Repair, and the Preſentment being removed by Certiorari into B. R. the Defendants pleaded *Not guilty*. The Jury *found* a ſpecial Verdict *that the Way was out of Repair*, but that it was *not a Highway*, but a private Way. Holt Ch. J. held that the Verdict was againſt the Defendants, becauſe upon their Plea of Not guilty they give in *Evidence that it is no Highway*, but that Matter ought to be *pleaded ſpecially*; and he held that where a Juſtice of Peace preſents a Highway upon his View to be out of Repair, there the Parties are *eſtopp'd to plead that it is in Repair*. But the other Judges were againſt him in both Points, and held that this might be given in Evidence upon the General Iſſue, and that the Parties might *traverſe the Non-repairing*, tho' the Preſentment was upon View; for that cannot be a greater Eſtopple than the Finding of a Grand Jury who are upon Oath. Carth. 212, 213. Hill. 3 W. & M. B. R. The King v. Hornſey Inhabitants. S. C. 1 Show. 270. Trin. 3 W. & M. ordered to ſtay.——4 Mod. 38. S. C.——12 Mod. 13. S. C. & S. P.

34. If a *Preſentment* be made *by a Juſtice of Peace, upon his own View*, that a Highway is out of Repair, and the Defendants *plead ſpecially to* ſuch a Preſentment, viz. *that they ought not to repair*, they likewiſe *muſt ſhew who ought* to repair, or elſe the Plea is ill. Agreed per tot. Cur. and ſaid to have been ſo adjudged by Hale Ch. J. Carth. 213. Hill. 3 W. & M. B. R. in Caſe of the King v. Hornſey Inhabitants. 4 Mod. 38. S. C. held accordingly. —12 Mod. 13 S. C accordingly.

35. The *Being of* a Highway is Matter of Suppoſal, and muſt be denied in Pleading; and ſo held in the Caſe of Leather-Lane, per Holt Ch. J. And per Eyres J. you may give it in Evidence; for 'tis the ſame as No Park or No Warren. In Treſpaſs 'tis Not guilty. The Preſentment is but in Nature of an Indictment. Per Cur. ordered to ſtay. Show. 291. Trin. 3 W. & M. The King v. Hornſey.

36. By 3 & 4 *W. & M. cap.* 12. *the Proſecution is to be in the proper County, and not removed.*

37. *Indictment* upon the Statute of P. & M. for *not working* at the Highways upon Notice. Holt ſaid the better Opinions had been, that you can give nothing in *Evidence* upon Not guilty, but that the Ways are in Repair. Cumb. 312. Hill. 6 W. 3. B. R. The King v. Terrell & al'. Comb. 396. The King v. the Inhabitants of Ireton in Cumberland, S. P. accordingly.——But if it be againſt a particular Perſon, he may give in Evidence that others ought to repair it.

38. *Error*

38. *Error* of a Judgment upon an Indictment at the Quarter-Seſſions, for Non-repairing a Highway between A. and B. in the Pariſh of R. and the *Judgment was, that ſuch a Sum extrahatur & levetur to repair the ſaid Way, Niſi it were repaired by ſuch a Time.* It was objected that the Judgment was *prepoſterous*, extrahatur & levetur, inſtead of the Natural Way of *levetur & extrahatur*; and for this Exception the Judgment was reverſed, and compared to Debt upon Bond for 10l. if Judgment were Ideo Conſideratum eſt, quod habeat Executionem de præd. 10l. & recuperet; per Cur. it would be Error. 12 Mod. 409. 12 W. 3. The King v. Ragley Pariſh.

2 Ld. Raym. Rep 858. S. C. and Judgment was arreſted.

39. A Man was indicted for *not working towards the Repair of* the Highways *according to the Statute*, and *ſhew'd that 6 Days between ſuch and ſuch a Time were appointed by the Juſtices*, and that the Defendant did not come within any of the ſix Days. This Indictment was held naught; for the *particular Days ought to be ſet forth.* 1 Salk 357. Paſch. 2 Ann. B. R. The Queen v. Kime.

40. The Juſtices muſt not *appoint 6 Days generally between ſuch and ſuch a Time*, but muſt be particular, and if the Appointment was naught in ſuch Caſe, the Party is not bound to come at all. 1 Salk. 357. Paſch. 2 Annæ B. R. the Queen v. Kime.

41. Indictment was for *not repairing a Houſe ſtanding upon the Highway ruinous*, and like to fall down, *which the Defendant occupied, and ought to repair Ratione Tenuræ ſuæ.* Upon Not Guilty, the Jury *found* a ſpecial Verdict, viz. *that the Defendant occupied, but was only Tenant at Will.* The Court held, that the *Ratione Tenuræ* was only an idle Allegation; for it was not only charged, but found that the Defendant was *Occupier*, and in that reſpect he is anſwerable to the Publick; for the Houſe was a Nuſance as it ſtood, and the continuing it in that Condition is continuing the Nuſance; and as the Danger is the Matter that concerns the Publick, the Publick is to look to the Occupier, and not to the Eſtate, which is not material in ſuch Caſe as to the Publick. And Powell J. held, that there might be ſuch a Tenure, and that Tenures being chargeable upon the Land by the Statute of Avowries, it is not material, even in an Avowry, what Eſtate the Occupier has in the Premiſſes. 1 Salk. 357. Trin. 2 Ann. B. R. the Queen v. Watts.

6 Mod. 163. cites S. C. —But the Defendants are *not bound to put it in better Condition than it has been*

42. The Defendants were indicted for not repairing a common Footway, and *confeſſed, and ſubmitted to a Fine*; Et per Cur. the Matter is not at an End by the Defendants being fined, but Writs of *Diſtringas* ſhall be awarded *in infinitum, till we are certified that the Way is repaired.* Salk. 358. pl. 6. Paſch. 3 Ann. B. R. the Queen v. Cluworth Inhabitants. Time out of Mind, but as it has uſually been at the beſt. 1 Salk. 158. in S. C.

11 Mod. 56. the Queen v. the Inhabitants of Stratford, S. C. the Court thought it inſufficient, becauſe not ſhewn that the Way was ſtraightened.

43. An Indictment was, that *ſuch a Day* Alta Via Regia *fuit & adhuc eſt valde lutoſa & tam Anguſta, ſo that the Queen's People cannot paſs without Danger of their Lives* &c. Holt Ch. J. and Powell J. held the Indictment naught for want of *ſaying, that the Way was out of Repair*; and Powell ſaid, that the ſaying it was tam Anguſta that People could not paſs, was repugnant to its being Alta Via Regia; for had it been ſo narrow, People could never have paſſed there Time out of Mind. 2 Ld. Raym. Rep. 1169. Trin. 4 Ann. the Queen v. the Inhabitants of Stretford.

For more of Chimin Common in General, See **Indictment, Nuſance,** and other Proper Titles.

Chimin Private.

(A) Chimin Private. [And how Perſons may be intitled to a Way.] Fol. 391.

1. A Man by Preſcription may have a Way from his Meadow to the High Street. 20 Aſſ. 18. Br. Chimin, pl. 7. cites S. C. ſays, that a Man ſhall not have Aſſiſe of Nuſance of a Way ſtopp'd, unleſs it be to ſome Franktenement, but if it be from a Meadow to a High Street, it is as well as from his Houſe to the High Street.——— Fitzh. Aſſiſe pl. 218. cites S. C. & S. P. accordingly.———Br. Aſſiſe, pl. 229. cites S. C.

2. A Man may have a Way from his Houſe to the Church. 20 Aſſ. 18. Br. Chimin, pl. 7. ſays, Herle awarded Aſſiſe of a Way which was claimed to a Church; and Brooke ſays, Quod Nota, & Quære inde; for of a Way in Groſs an Aſſiſe does not lie.———Fitzh. Aſſiſe, pl. 218. cites S. C. & S. P.——— Br. Aſſiſe, pl. 229. cites S. C. but Brooke ſays Quære inde, for it is not claimed properly to his Franktenement.

3. A Man may *preſcribe* to have a Way *to go out of a Church, or over a Church-yard*, notwithſtanding that it is a Sanctuary; Per all the Juſtices and Apprentices in Chancery. Trin. 18 E. 4. 8. a. pl. 10. And it was ſaid there, that the Church-yard of the Charter-houſe is a common Way for the Inhabitants of London to St. J. and that they preſcribe in it. Br. Preſcription, pl. 91. cites S. C. and ſays, that it ſeems that the Words (out of a Church) ſignifies (*thro' the Church* &c.)——Jenk. 142. pl. 94. S. C.

4. Chimin *appendant cannot be made in Groſs by Grant*, for none can have the Commodity thereof but he who has the Land to which this Way is appendant. Br. Chimin, pl. 14. cites 5 H. 7. 7.

5. A. had an *Acre of Land* which was in the Middle, and *incompaſſed with other of his Lands*, and *infeoffs B. of that Acre*, and reſolved by the 4 Juſtices that B. ſhall have a convenient Way over the Lands of the Feoffor, and he is not bound to uſe the ſame Way that the Feoffor uſes. Noy 123. Oldfield's Caſe.

6. A *Stranger may have* a Way over another Man's Soil 3 manner of Ways, viz. for *Neceſſity*, by *Grant*, and by *Preſcription*. 1. For Neceſſity, As if A. has an Acre of Ground ſurrounded by Ground of B. —A. for Neceſſity has a Way over a convenient Part of B's Ground to his own Soil, as a Neceſſary Incident to his Ground. So if A. grants a Piece of Land which is ſurrounded by Land of Vendor, he grants a Way as a Neceſſary Incident therewith. 2. If A. be ſeiſed of Blackacre and Whiteacre, and uſes a Way from Blackacre over Whiteacre to a Mill, River &c. and he grants Blackacre to B. with all Ways, Eaſements &c. the Grantee ſhall have the ſame Conveniency that A. had when he had Blackacre. So if A. has 2 Acres, and has a Way from them over B's Land, and grants one of them with all Ways, B. ſhall have the ſame Way that A. had. But there *in making Title B. muſt allege* ſuch an Eſtate in A. as is traverſable, and not only ſay that A. was poſſeſſed of the Land to which &c. for a Term of Years; for there the Poſſeſſion would be 1 Salk. 173; pl. 2. 216. pl. 1. 579. pl. 1. S. C. but S. P. does not appear. ——— 3 Salk. 121. S. C. but S. P. does not appear.

be traverſable materially. 3. If a Way of Neceſſity be claimed, it is a good *Plea* to ſay that the Party has another Way; but otherwiſe where a Way is claimed by Grant or Preſcription. 6 Mod. 3. Mich. 2 Ann. B. R. Staple v. Heydon.

(A. 2) A Way. *How* it may be *uſed.*

1. IF A. be ſeiſed in Fee of a Backſide in a Town, and the high Street is next adjoining thereto on the Eaſt, and there is a Gate in the Backſide which incloſes it from the Street, the Gate being in the Eaſt next to the Street; and A. is alſo ſeiſed in Fee of a Meſſuage and Piece of Land next adjoining to the Backſide on the North of the Backſide, and by Deed infeoffs B. of the Meſſuage and Piece of Land which are on the North of the Backſide, and by the ſame Deed further grants to him and his Heirs liberos ingreſſum, egreſſum & regreſſum in, ad & extra eadem conceſſa Præmiſſa, in, per & trans prædictas Januam & Backſide; by Force of this Grant B. may go from the Street thro' the Gate, and over the Backſide to the Meſſuage or Piece of Land of which he is infeoffed; but he cannot go thro' the ſaid Gate and Backſide to other Places, or from other Places to the Street, without coming to the ſaid Meſſuage or Piece of Land, for the Liberty is granted to him of ingreſs and egreſs in, ad & extra eadem conceſſa Præmiſſa, ſo that this is made appurtenant to the Premiſſes before granted. Car. B. between *Hodder and Holman*, adjudged upon a Demurrer, where in Treſpaſs pedibus ambulando in the Backſide, the Defendant juſtified by Force of the ſaid Grant, ſhewing all this Matter in the Grant, and that he went from the ſaid Piece of Land over the Backſide, and thro' the Gate to the Street, & ſic retrorſum; and the Plaintiff replied, that he did the Treſpaſs of his own Wrong, abſque hoc that he went from the ſaid Piece of Land over the Backſide thro' the Gate to the Street, & ſic retrorſum; and adjudged a good Traverſe, for the Cauſe aforeſaid. Intratur Hill. 9 Car. Rotulo Dorſet.

S. P. and ſame Objection made, but it was anſwered, that by this Means the Defendant might purchaſe 100 or 1000 Acres adjoining to Blackacre, to which he preſcribes to have a Way, by which Means the Plaintiff would loſe the Benefit of his Land, and that a Preſcription preſuppoſed a Grant, and ought to be conſtrued according to the Intent of its original Creation, and to this the whole Court agreed, and Judgment for the Plaintiff. Mod. 190 pl. 22. Mich. 26 Car. 2. C. B. Howell v. King ——— S. P. reſolved accordingly, per tot. Cur. and Judgment was pronounced accordingly, tho' it is not entered on the Roll. Lutw. 111. 114 Trin 7 W. 3. Laughton v. Ward ——— Ld Raym Rep. 75. Paſch. 8 W. 3. S. C. adjudg'd accordingly, per tot Cur. and Powell J. junior ſaid, that the Difference is, where he goes ſtrait to a Mill,

2. In Treſpaſs for breaking his Cloſe, if the Defendant juſtifies going over his Cloſe, becauſe he has uſed, Time out of Mind, to have a Way over it from D. to Blackacre, and the Plaintiff replies, that at the Time of the Treſpaſs the Defendant went with his Carriages from D. to Blackacre, & dehinc to a Mill, this will not maintain his Action; For when the Defendant was at Blackacre, he might go whither he would. Paſch. 16 Jac. B. R. between *Sanders and Moſe*, adjudged upon Demurrer.

3. But it ſeems, that if a Man hath a Way for Carriage from D. to Blackacre over my Cloſe, and after he purchaſes Land adjoining to Blackacre, he cannot uſe the ſaid Way with Carriages to the Land adjoining, tho' he comes firſt to Blackacre, and thence to the Land adjoining, for then it may be very prejudicial to my Cloſe; but it ſeems, if I will help myſelf, I muſt ſhew the ſpecial Matter, and that he uſed it for the Land adjoining; Vide the ſaid Caſe of P. 16 Jac. Banco.

Mill or a Bridge there it may be good, but when he goes to his own Close it is not good; for, by the same Reason, if he purchases 1000 Closes he may go to them all.

4. If a Man *lets a House, reserving a Way thro' it to a Back-house*, he cannot come thro' the House without *Requeſt*, and that too at seasonable Times. Vent. 48. Mich. 21 Car. 2. B. R. in Case of Tomlin v. Fuller. Mod. 27. pl. 71. in S. C. that Lessee is not bound to leave his Doors open for the Lessor's coming in at 1 or 2 o'Clock in the Night, but he must keep good Hours.

(B) To whom the *Soil* and the Things thereupon do *belong*.

Fol. 392.

1. IN an Highway the King hath nothing but the Passage for himself and his People. * 8 E. 4. 9. † 2 E. 4. 9. * Br. Chimin, pl. 10. cites S. C. by all the Justices. ——Fitzh. Chimin, pl. 1. cites S. C ——Br. Chimin, pl. 9. cites S. C. —— Fitzh. Trespass, pl. 95. cites S. C.

2. But the Freehold and all the Profits, As Trees &c. belong to the Lord of the Soil. * 8 E. 4. 9. † 2 E. 4 9. ‡ 8 H. 7. 5. b. * Br. Chimin, pl. 10. cites S. C. — Fitzh. Chimin, pl. 1. cites S. C. † Br. Chimin, pl. 9. cites S. C. by all the Justices except Moyle —— Fitzh. Trespass, pl. 95. cites S. C. ‡ He who has the Trees in the Highway, there the Frank-tenement is to him; Per Keble, for if he has Land adjoining the Frank tenement of the Way is to him. Br. Chimin, pl. 15. cites 8 H. 7. 5.

3. The Lord of the Soil shall have an Action for digging the Ground. 8 E. 4 9. Fitzh. Chimin, pl. 1. cites S. C. & S. P.

4. If Trees grow in the Highway, he to whom the Seigniory of the Leet of the same Place doth belong, shall have the Trees. 27 H. 6. 8. per Curiam. Br. Leet, pl. 3. cites S. C. but Brooke makes a Quære how this Word (Seigniory of the Leet) is to be taken; for it seems that it is the Seigniory of the Fee, viz. the Seigniory of the Soile; for Leet is not Seigniory; because if it be not so taken, it cannot be Law but Leet in some Country is taken for the Soile.

5. Generally the Owner of the Soil of both sides the Way shall have the Trees growing upon the Way. 13 Eliz. B. R. per Curiam, cited D. 11 Jac. B. R. See tit. Trees (B) per totam.

6. The Lord of the Rape, within which there are 10 Hundreds, may prescribe to have all the Trees growing within any Highway within this Rape, though the Manor or Soil adjoining be to another; for usage to take the Trees is a good Badge of Ownership. D. 11 Jac. B. R. *between Sir Thomas Pelham* Plaintiff, and *Wiatt and Black* Defendants, per Curiam.

7. The Soil and *Frank-tenement of the Way, is to those whom it adjoins.* Br. Nusans, pl. 28. cites 8. H. 7. 5. per Keble.

(C) Inter-

(C) Interruption. What is. And Remedy for the ſame.

1. IF one grants me a Way, and afterwards *interrupts me in it*, I may *reſiſt him*; Arg. Godb. 53. pl. 65. cites 32 E. 3.

S. P. But Contra where he has the Land, where &c.

2. If a Man diſturbs me in my Way *with Weapons*, *Treſpaſs Vi & Armis* lies. Br. Action ſur le Caſe, pl. 29. cites 2 H. 4. 11. per Skrene and Thirning.

Br. Treſpaſs, pl. 72. cites S. C.

So where the Way was *totaliter ſtopt*,

3. For *ſtopping* a Way to his Freehold, either *Caſe or Aſſiſe* lies. Cro. E. 466. (bis) pl. 22. Paſch. 38 Eliz. B. R. Alſton v. Pamphyn.

ſo that he could not get to his Common. Cro. E. 845. pl. 32. Trin. 43 Eliz. in Cam. Scac. Cantrel v. Church.——Noy 37. Cautwell v. Church. S. C. and Judgment affirmed for the Plaintiff.

4. He that has *Ingreſs into a Houſe*, ought to have it at the *uſual Door*; and if they leave ſuch Door open, but *dig a Ditch* that he cannot enter without leaping, it is a Breach; Per Doderidge. Lat. 47. Trin. 2 Car. Climſon v. Pool.

5. A. has a Way over my Land, and coming to paſs over it I take him by the Sleeve and ſay, *Come not there, for if you do I will pull you by the Ears*; it is a Breach of Condition. The ſame it is *if I lock my Gates*. Lat. 47, 48. Trin. 2 Car. Per Doderidge in the Caſe of Climſon v. Pool.

Or I may cut it down. Jo. 221. pl. 1. Paſch 6 Car. B. R. James v. Haywood.

6. If I have a Way without a Gate, and a *Gate is hung up*, Action on the Caſe lies; for I have not my Way as I had before; Per Cur. Litt. R. 267. Paſch. 5 Car. C. B. in Caſe of Paſton v. Utbert.

——Cro. C. 184, 185. pl. 3. S. C. and S. P. by Hide, Jones, and Whitlock.

7. Cognizance of Ways *to carry Tithes* belongs to Court Chriſtian, as appears by Stat. 2 & 3 E. 6. 13. F. N. B. Conſultation, 51. (A) and Linwood in his Treatiſe of Tythes; and therefore a Conſultation was awarded. Jo. 230. pl. 1. Hill. 6 Car. B. R. Halſey v. Halſey.

Mod. 27. pl. 71. S. C. the Action was for ſtopping a Paſſage ſo that the

8. A Man has a Meſuage, and a *Way to the Meſuage through another's Freehold*, and the *Way is ſtopped*, and then the *Houſe is alien'd*. The Alienee can bring no Action for this Nuſance before *Requeſt*. Vent. 48. Mich. 21 Car. B. R. Tomlin v. Fuller.

Plaintiff was hindred from cleanſing his Gutter. It was moved in Arreſt, that there was no Requeſt; but it was anſwered that the Wrong began in the Defendant's own Time, whereas had the Nuſance been done by a Stranger, Notice muſt have been given before the Action brought. Twiſden held it was not good at the Common Law, and that Defendant might have demurred; but the Court held it aided by the Verdict; and Judgment for the Plaintiff.

9. Upon Evidence given in an Action of Treſpaſs between W. & C. at the Bar, it was ſaid by Glyn Ch. J. that if one make a Ditch, or *raiſes up a Bank to hinder my Way to my Common*, I may *juſtify the throwing it down, and the filling it up*. Sty. 470. Mich. 1655. Williamſon v. Coleman.

10. Every Man of common Right may *juſtify the going of his Servants or* of his *Horſes upon the Banks of Navigable Rivers, for towing Barges* &c. to whomſoever the Right of the Soil belongs; and if the Water of the River impairs and decreaſes the Banks &c. then they ſhall have reaſonable Way for that Purpoſe in the neareſt Part of the Field next adjoining to the River; and he compared it to the Caſe where there is a *Way through*

through a great open Field, which Way *becomes founderous*, the Travellers may juſtify the going over the Outlets of the Land, not incloſed, next adjoining. Ruled at Niſi Prius at Weſtminſter, *the firſt Sitting after Michaelmas-Term*, 10 *W.* 3. Ld. Raym. Rep. 725. Young v. ....

(D) Made unpaſſable &c. Remedy. And of ſetting out new Ways.

1. IF one grants me a Way, and after *digs Trenches* in it to my Hindrance, I may *fill them up* again. Arg. Godb. 53. pl. 65. cites 32 E. 3.

2. If a Way, which a Man has, becomes not paſſable, or becomes very bad by the Owner of the Land tearing it up with his Carts, and ſo the ſame be fill'd with Water, yet he which has the Way cannot *dig the Ground to let out the Water*; for he has no Intereſt in the Soil. Godb. 52. pl. 65. Mich. 28 & 29 Eliz. B. R. Dike v. Dunſton.

3. In Treſpaſs &c. the Defendant preſcribed *for a Foot-way*, and that the *Plaintiff* ſuch a Day *plow'd it up, and ſow'd it with Corn, and laid Thorns on the Sides, and that before the Treſpaſs done he left a new Foot-way near the old Way*, which had *ſince* been *uſed by all Foot-Paſſengers, and that the Defendant went in the ſaid new Way* to ſuch a Place &c. *quæ eſt eadem tranſgreſſio*; and adjudged a good Juſtification. Brownl. 212. Mich. 6 Jac. Horn v. Widelake. Yelv 141. S. C.— —— Noy 128. cites S. C. as adjudged accordingly; and S. P. was there adjudged in the Caſe of Horne v. Taylor accordingly, and likewiſe held that the Defendant may well juſtify going in the Place where the ancient Way was, and is not bound to go in the Way that is unplow'd.

Where a Way is ſtopp'd, and another Way made in another Place, the Way which is ſtopp'd cannot be ſaid to be diverted. And 234. pl. 251. Paſch. 32 Eliz. in Caſe of Aſhburnham v. Cornwallis.—The Aſſigning the new Way will not juſtify the Stopping the old Way. Carth. 393 Trin. 3 W. & M. in B. R. Per Cur. obiter.——Cro. C. 266. pl. 16. Mich. 8 Car. B. R. the S. P. in Caſe of the King v. Ward & Lyme.

4. If a Highway be ſo bad as it is * *not paſſable*, I may then juſtify going over another Man's Cloſe next adjoining. 2 Show. 28. pl. 19. Mich. 30 Car. 2. Abſor v. French. 2 Lev. 234. Aſſer v. Finch, S. C. but D. P.

* He may go in a Way good and paſſable as near the Path as he can. Noy, Attorney-General, ſaid it was ſo reſolved. Jo. 297. in Itin. Windſor in Henn's Caſe.

(E) Extinguiſh'd by Unity.

1. A Way extinguiſhed by *Unity of Poſſeſſion*, is revivable after on *Deſcent to 2 Daughters*, where the Land over which is allotted to one, and the other Land, in which the Way was, is allotted to the other Siſter; and this Allotment without Specialty to have the Land anciently uſed, is good to revive it. Jenk. 20. pl. 37. cites 21 E. 3. Godb. 4. pl. 5. cites 21 E. 3. 2. S. P.

2. In Treſpaſs the Defendant juſtify'd for a Way *appurtenant to his Houſe in D.* by Preſcription, *to go to* 8 *Acres of Wood in C.* The Plaintiff ſaid that J. N. after Time of Memory, that is to ſay, in the Time of King R. was *ſeiſed of the Land where* the Defendant claimed the Way,

and of the Wood to which he claimed it. Quære if Unity of Poſſeſſion in the Land in which he claims, and in the Wood to which he claims it, ſhall be an Extinguiſhment, as Unity of Poſſeſſion of Land in which &c. and of the Houſe to which &c. ſhall be? Brooke ſays, it ſeems that it ſhall clearly. Br. Chimin, pl. 13. cites 3 H 6. 31.

3. A. had a *Cloſe and a Wood adjoining* to it, and Time out of Mind a Way had been uſed over the Cloſe to the Wood, to carry and re-carry. He *granted the Cloſe to B. and the Wood to C.* The Grantee of the Wood ſhall not have the Way; for A. by the Grant of the Cloſe, had excluded himſelf of the Way, becauſe it was not ſaved to him. Cro. E. 300. pl. 13. Paſch. 34 Eliz. B. R. Dell v. Babthorp.

4. In an Action of Treſpaſs the Caſe was thus. A. had a *Croſs-Way by Preſcription to go to Wh. Acre over Bl. Acre*, and after he purchaſes *Bl. Acre, and of that infeoffs J. S.* and adjudged that the Croſs-Way is extinct, becauſe by the Unity the Preſcription fails. Noy 119. Mich. 3 Jac. C. B. Heigate v. Williams.

Palm. 446. S. P. by Doderidge.

5. A Way of *Eaſe* ſhall be *extinguiſhed* by Unity of Poſſeſſion, but not a *Way of Neceſſity*; per Doderidge. Lat. 154. Hill. 1 Car.

(F) Paſs. By what Words or Conveyance.

1. A Way *is an Eaſement* only, and will not *paſs* by the Words omnia Tenementa & *Hæreditamenta ſua.* Br. Left. Stat. Limit. 42.

2. When *Land is granted with a Way thereto*, it is Quaſi appendant unto it, and a Thing of Neceſſity; and therefore *by a Leaſe of the Land, tho' the Way be not mentioned, it well paſſes* without being expreſs'd in the Deed; for the Land cannot be uſed without a Way, and therefore it ſhall enſue it, and paſs of Neceſſity, and Unity of Poſſeſſion does not extinguiſh it; per tot. Cur. Cro. J. 190. pl. 13. Mich. 5 Jac. B. R. in Caſe of Beaudley v. Brook.

3. A. ſeiſed of Bl. Acre and Wh. Acre in Fee, by *Indenture of Bargain and Sale inroll'd convey'd Bl. Acre to J. S. in Fee, with a Way over Wh. Acre.* This is not good; for here is no Grant of the Way in the Deed, but only a Bargain and Sale of Bl. Acre, and a Way over Wh. Acre; for nothing but the Uſe paſs'd by the Deed, and there cannot be a *Uſe of a Thing not in Eſſe, as a Way, Common &c.* which are newly created, and until they be created no Uſe can ariſe by Bargain and Sale, and ſo nothing paſs'd by the Deed. Cro. J. 189. pl. 13. Mich. 5 Jac. B. R. Beaudly v. Brook.

(G) Actions.

1. AN Aſſiſe does not lie of a Way; for it is not Profit Apprender nor Franktenement, but an Eaſement. Thel. Dig. 68. lib. 8. cap. 6. S. 2. cites 34 Aſſ. 13. Trin. 31 E. 1. Aſſiſe 440.

* There are not ſo many Fol. in that Year.

2. Scire Facias was maintained of a Way out of a Fine levied, in permittat. Thel. Dig. 68. lib. 8. cap. 6. S. 2. cites Hill. 2 E. 3. * 46.

3. A

3. A Way was *extinct*, and yet *a new one was reserved upon Partition of a Mill, and Land over which the Way went*, and the Aſſiſe of Nuſance awarded to lie. Quære, if this was inaſmuch as the Way is appendant to the Mill by the Reſervation, or becauſe it is Aſſiſe of Nuſance; for it ſeems, that Aſſiſe of Novel Diſſeiſin does not lie of a Way, but Quod Permittat; and of a Way in Groſs Aſſiſe of Nuſance does not lie. Contra of a Way appendant to Franktenement. Br. Chimin, pl. 5. cites 21 E. 3. 2. but ſays, that this Caſe is better abridg'd, Tit. Nuſance, in Fitzh. 2. with a good Diverſity where the Aſſiſe lies, and where not.

4. Quod Permittat of a Way; Finch ſaid for Law, that a Man ſhall not have *Quod Permittat* of a Way, unleſs he *claims it to ſome Franktenement, or from ſome Franktenement to the high Street, or to the Church*, and ruled over; Belk. preciſe in this Caſe. Quod Nota. Br. Chimin, pl. 3. cites 45 E. 3. 8.

5. If a Man *ſtops the King's Highway, ſo that I cannot go to my Houſe, or to my Cloſe*, I ſhall not have Action upon the Caſe; for the ſtopping of a common Highway Royal ſhall be puniſhed by the Leet, and every Man grieved ſhall not have Action thereof; Per Baldwin Ch. J. Contra Fitzherbert J. and that *where one has greater Damage than another* he ſhall have Action upon the Caſe. Br. Action ſur le Caſe, pl. 6. cites 27 H. 8. 26, 27.

6. *So* where a Man makes a *Ditch over the Highway*, and *I and my Horſe fall therein* in the Night, I ſhall have Action upon the Caſe; Per Fitzherbert J. Br. Action ſur le Caſe, pl. 6. cites 27 H. 8. 26, 27.

7. The Plaintiff declared, that he *had the Tithes* of the Pariſh of B. for a Year, *and was poſſeſſed of a Barn*, in which he intended to lay them, and *that the King's Highway in B. was the direct Way for carrying the Tithes to the Barn, but* that *the Defendant had obſtructed it with a Ditch, and* with a *Gate erected croſs the Way, ſo that he* could not carry the Tithes by the ſaid Way, but *was forced to carry them round about, and in a more difficult Way*. After Verdict it was objected, that this being alleged to be a Stoppage in the Highway, was a common Nuſance, and no Damages ſhall be given in ſuch a Caſe, for then every one who had Occaſion to paſs that Way might bring the like Action, which the Law will not ſuffer by reaſon of the Multiplicity. Sed per Curiam, the *Plaintiff had particular Damage by the Labour of his Servants and Cattle*, occaſioned by obſtructing the Paſſage in the right Way, *which may be of greater Value than the Loſs of a Horſe*, and ſuch like Damage which is allowed to maintain an Action. 2 Jo. 157. Trin. 33 Car. 2. B. R. Hart v. Baſſet.

S. C. cited per Gould J. as a ſtrong Caſe for his Opinion for the Plaintiff, in the Caſe of Iveſon v. Moore. Ld. Raym. Rep. 491. Trin. 11 W. 3. ——— Ibid. 492. S. C. cited by Rokeby J. who was of Opinion for the Defendant, and ſaid, that admitting this Caſe to be Law, yet there ſome ſpecial Damage is laid. ——And ibid. 494. S. C. cited by Holt Ch. J. who held for the Defendant, and ſaid he had no Need to deny the Caſe of Hart v. Baſſet, becauſe the Plaintiff declared that he was Farmer of the Tithes, and that the Way was near to the Plaintiff's Land, and convenient for the carrying away the Tithes to his Barn, and that the Defendant had ſtopp'd the Way, by which the Plaintiff was compelled to go round about &c. And that if it was as Mr. Juſtice Gould cited it, that he was driven to a greater Expence, that makes it better than it is in the Report of 2 Jo. 156. Beſides, Holt ſaid, that there was another Ingredient, viz. that he was liable to an Action if he permitted the Tithes to lie on the Ground beyond a convenient Time, and that all this Matter was ſhewn ſpecially; but that if there was no more than the Plaintiff's going round about, it is a hard Caſe.

(H) Pleadings.

1. WAY ought to be claimed *certainly, to go or* to *carry*, and *re-carry* &c. et *quibus Temporibus*, and *to what Franktenement it is appendant*. Br. Chimin, pl. 7. cites 20 Aſſ. 18.

2. He

2. He who juſtifies to go in a Highway *ought to ſhew that it is the Highway of the King, and has been Time out of Mind* &c. and the *Plaintiff may ſay, that Men have gone this Way ſometimes by Licence of the Plaintiff, and ſometimes for their Money* &c. abſque hoc that it has been the Highway of the King Time out of Mind &c. Br. Chimin, pl. 7. cites 20 Aſſ. 18.

The Year-Book is, that the Writ was to have a Way over the Land of the Tenant, againſt him who was Tenant of the Soil &c.

3. Quod permittat *habere Cheminum ultra Terram* was brought *by the Tenant againſt the Tenant of the Soil*, who demanded the View. Belknap ſaid, the View you ought not to have; for you yourſelves are Tenants of the Soil where I have the Way. Per Finchden, you ſhall not have the *Way*, unleſs you claim it *to ſome Frankstenement*, or *from your Frankstenement to the High Street*, *or* to the *Church*, or otherwiſe the Writ is not good, clearly; Quod Nota. Br. View, pl. 21. cites 45 E. 3. 8.

4. *Treſpaſs* upon the Caſe was brought *by* 3 *againſt* 2, who counted that the *Plaintiffs were ſeiſed* of 14 Acres of Land *in B.* and *of* 3 *Acres of Meadow* there, and that the Plaintiffs and thoſe whoſe Eſtate they have &c. have had, and *ought to have a Way over* 3 *Acres of the Defendant's* to the ſaid Meadow, there have the Defendants diſturbed them to the Damage of 40 s. and the Defendants took the Treſpaſs ſeverally, and *traverſed the Preſcription*, and ſo to Iſſue; and found for the Plaintiff to the Damage of a Mark. Thirwit pleaded in Arreſt of Judgment, that the Treſpaſs of the one is not the Treſpaſs of the other, where the Defendants took the Treſpaſs ſeverally, and the Damages are aſſeſſed intire where they ought to be ſevered. Per Thirne, this is not much to the Purpoſe. Br. Action ſur le Caſe, pl. 29. cites 2 H. 4. 11.

S. C. cited 2 Roll Rep. 134. Mich. 17 Jac. B. R. where the Preſcription was, that

5. In Treſpaſs upon the Caſe, the Defendant preſcribed in *a Way over the Bridge of D. to his Manor of B. to carry Victuals and other Neceſſaries over the Bridge*, and *did not ſay to what Place he ſhould carry*, and yet well; by Hank. And ſo ſee that he preſcribed in a Foot-way and Horſe-way, that is to ſay, to paſs and carry. Br. Chimin, pl. 16. cites 11 H. 4. 82.

all thoſe whoſe Eſtate he has in ſuch a Houſe had a Way per & trans the Pound-Garden, but did not ſay from the Houſe to ſuch a Place, nor to ſuch a Houſe; Exception was taken, becauſe it was not ſaid from the Place to ſuch a Houſe; ſed non allocatur; for Doderidge J. ſaid, that it is not material whether he had the Way from or to the Houſe or not, and to prove this cites 28 H. 6. 9. and 11 H. 4 32.

Br. Chimin, pl. 2. cites S. C. Brooke ſays Quære; for no Exception is thereof taken.

6. The *Defendant juſtified* in Treſpaſs, *that he and his Anceſtors, Tenants of ſuch a Houſe, and* 30 *Acres of Land in D. have had a Way over the Place where* &c. *to the Market, and to the Church of D. Time out of Mind*, by which he uſed the Way &c. and the *other ſaid, that De ſon Tort Demeſne, abſque hoc that he and his Anceſtors have had ſuch Way Time out of Mind* in the Manner *as the Defendant ſuppoſed*, and ſo to Iſſue, and by the Reporter it is a Negative Pregnant; for *it may be found that he had a Way to the Market, and not to the Church*, or e contra; Quære. Br. Negativa &c. pl. 4. cites 28 H. 6. 9.

Br. De ſon Tort &c pl. 1. cites 28 H. 6. 9.

Br. Pleadings, pl. 152. cites S. C.

7. In a Quod Permittat the Plaintiff made his Title to the Way in his Count by Coertion of the Court, whereupon he *preſcribed and claimed from ſuch a Place to ſuch a Place*, as he ought, and *ſhewed by reaſon of what Land*, and *for what he uſed the Way*, *as to carry and re-carry* &c. which ſee in the Book there at large, and ſhewed that he was ſeiſed of Fee and of Right, and alleged Eſplees. Br. Chimin, pl. 12. cites 30 H. 6. 7, 8.

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

9. In

9. In Treſpaſs, where a Man *juſtifies* for a Way, the Defendant ought to *ſhew, that he has a Way from ſuch a Place to ſuch a Place*, and *not to ſay generally that he has a Way over ſuch Land with his Beaſts to carry and re-carry* Time out of Mind; as to ſay from his Houſe, or ſuch a Cloſe, over the Land of the Plaintiff to ſuch a Cloſe or Land, or to the Church, Market, or Highway in ſuch a Place, or the like; Quod Nota, per. Cur. And per tot. Cur. he *need not to ſhew the Quantity of the Cloſe* of the Plaintiff in which he claims the Way; otherwiſe it is elſewhere where he intitles himſelf to the Soil, as his Franktenement, Leaſe for Years, or the like; *but* he ſhall ſhew *the Quantity* of the Way which he claims, viz. of *ſo many Feet*, or the like; Quod Nota bene; by which the Defendant took longer Time thereof. Br. Chimin, pl. 6. cites 39 H. 6. 6.

10. In Caſe the Plaintiff *preſcribed habere Viam tam Pedeſtrem quam Equeſtrem pro omnibus & omnimodis Carriagiis*, Leonard Prothonotary ſaid, that by ſuch Preſcription he could not have a Cart-way; for every Preſcription is Stricti Juris; and Dyer ſaid, that it is well obſerved, and he conceived the Law to be ſo, and therefore it is good to preſcribe habere Viam pro omnibus Carriagiis generally without ſpeaking of Horſe-way, or Cart-way, or other Way &c. 3 Le. 13. pl. 31. 8 Eliz. C. B. Anon.

4 Le 167. 168. pl. 273. in Time of Queen Eliz. S. C. in totidem Verbis. — Ibid. 224. pl 360. Mich. 10 Eliz. C. B. Anon. S C. in totidem Verbis.

11. In Caſe for *ſtopping his Way*, the Plaintiff declares that he and all thoſe &c. have had a Way from his Houſe in *D. over Green-Acre in S. and over Black-Acre to ſuch a Place in P.* and that the Defendant had ſtopped his Way in S. and upon Not Guilty found for the Plaintiff it was moved in Arreſt, becauſe he did *not allege in what Vill Black-Acre was*, for he ought to allege all the Lands through which he was to have his Way, and Vills where they lie; and by Gawdy, this is a Fault for which the Defendant might have demurred, but that not being done it was adjudged for the Plaintiff. Cro. E. 427. pl. 27. Mich. 37 & 38 Eliz. B. R. Brag v. Banning.

Noy, 9. Banning's Caſe, S. C.

12. Per Curiam, the Plaintiff in his Declaration ſhall never lay *that the Way is Appendant or Appertenant*, becauſe it is *only an Eaſement and not an Intereſt*; And all the Precedents in the Book of Entries are accordingly, and that though the Jury found it to be Appurtenant to the Meſuage. And Man, Secondary, informed the Judges that a Judgment in B. R. was reverſed in the Exchequer, becauſe the Plaintiff had alleg'd a Way appurtenant to the Houſe, and ſo claim'd it in other Manner and Nature than he ought to do by Law; and adjudged in the Principal Caſe for the Plaintiff. Yelv. 159. Mich. 7 Jac. B. R. Godley v. Frith.

13. In Treſpaſs the Defendant *preſcribed for a Paſſage over the Land where* &c. but it was held not good, and adjudged for the Plaintiff; for Paſſagium is properly a Paſſage over the Water, and not over Land, and the Defendant ought to have preſcribed in the Way, and not in the Paſſage. Yelv. 163. Mich. 7 Jac. B. R. Alban v. Brownſall.

Brownl. 215. 216. S. C. & S. P. but ſeems only a Tranſlation of Yelv.— S. C. cited Arg 2 Lutw. 1518.

14. In preſcribing for a Way, the Defendant ought to ſhew *a quo loco ad quem locum* the Way is, and though a Way may be in Groſs, yet it ought to be bounded and circumſcribed to a certain Place eſpecially when it appears to lie in Uſage time out of Mind; for this ought to be in Certo Loco, and not in one Place to Day, and another Place To-morrow, but conſtantly and perpetually in the ſame Place; adjudged. Yelv. 163. 164. Mich. 7 Jac. B. R. Alban v. Brownſall.

Brownl. 215. 215, 216. S. C. & S. P. but is only a Tranſlation of Yelv. — Admitted per Cur. that a Way muſt be pleaded a quo Termino ad quem, becauſe a Man muſt not go over my Grounds but to the right Place. Hob.

Hob. 190. pl. 234. Trin. 15 Jac. in Gogle's Caſe.———Hutt. 10. Cobb v. Allen, S. C. and held that though the proper Uſe of a Way is to ſome End, and that ought to be ſhewn, yet if it be only that he had a Way over the Cloſes in the new Aſſignment, and no Place or End thereof is pleaded from what Cloſe, or to what other Place; and Iſſue is taken upon the Preſcription and found, the Preſcription is good——But in an Indictment for an Incroachment on the King's Highway, that Objection, that it was not laid a Quo or ad Quem the Way leads, was diſallowed. 2 Keb. 715. pl. 99. Mich. 22 Car. 2. B. R. The King v Rawlins.———Ibid. 728. pl. 8. Hill. 22 & 23 Car. 2. B. R. The King v. the Inhabitants of Glaſton, the Court conceived the Terminus a Quo not material.

Brownl. 215. 216. S. C. & S. P. but is only a Tranſlation of Yelv.——

15. In Treſpaſs the Defendant *preſcribed for a Way*, but did *not ſhew what Manner of Way it was*, whether a Foot-way, or Horſe-way, or Cart-way, and ſo uncertain; and therefore the Bar adjudged ill. Yelv. 163. 164. Mich. 7 Jac. B. R. Alban v. Brownſall.

In Caſe for ſtopping a Way, the Plaintiff declared that he was *ſeiſed of* 18 *Meſſuages* in St. Botholphs Aldgate, and *preſcribed for a Way from every one of thoſe Meſſuages over a certain Vacant Piece of Ground* &c. *to ſuch Place*; and after a Verdict for the Plaintiff, it was objected that it was *not ſhewn what Sort of a Way he had*, whether a Foot-way, Horſe-way, or Horſe-way; ſed non Allocatur; for it is *ſaid that he had a Way ire & redire* &c. and *after a Verdict it ſhall be intended a general Way for all Purpoſes*. Comyns's Rep 114. pl. 76. Paſch. 13 W. 3. B. R. Warner v. Green.—— 12 Mod 580. S. C. but S. P. does not appear.———Ld. Raym. Rep 701. S. C. but S. P. does not appear.

16. In a Declaration in Caſe for ſtopping the Plaintiff's Way, it was *not ſhewn to what Village the Way led*. After Verdict for the Plaintiff, this was moved in Arreſt of Judgment, and held a good Exception and Judgment arreſted; but if it had been *unto a Common Way there, or in ſuch a Village* it had been good. Brownl. 6. Trin. 8 Jac. Allyns v. Sparks.

17. In *Treſpaſs*, the Plaintiff declared of a Way *from his Houſe to a Mill and ſo back again*. Exception was taken that every Way is either Appendant or in Groſs and ought to be ſo laid, but that here the Plaintiff had *not alleged that this Way was appertaining to his Houſe*, and the Court were clear of that Opinion; becauſe in this Action the Plaintiff is only to recover Damages, whereas *in Aſſiſe of Nuſance* the Thing itſelf is to be recovered. But in this Principal Caſe he ought not to allege that this Way was appendant to the Houſe, it being laid to be from the Houſe to the Mill, and from the Mill back again to the Houſe; and ſo the Declaration is good, and Judgment for the Plaintiff. Bulſt. 47. Mich. 8 Jac. Pollard v. Caſy.

18. In Sci. Fa. upon a Recognizance for the *good Behaviour*; for that the *Defendant with others, riotouſly and unlawfully entered into ſuch a Cloſe, and cut up a Quick-ſet Hedge* &c. The *Defendant as to all but the Entring the Cloſe and cutting the Hedge, pleaded Not Guilty; and as to that* he *juſtified by a Preſcription for a Highway* in the ſaid Cloſe, *and becauſe it was ſtopped with a Quick-ſet Hedge, he cut it up*; the Plaintiff *replied De injuria ſua Propria & ex malitia præcogitata, the Defendant with others cut the Hedge* &c. upon which *Iſſue* was *joined and found for the Plaintiff*. It was objected, that he was not any Iſſue joined, for De injuria ſua Propria, where one juſtifies for a Way, or for any particular Thing, is no Iſſue, but the *Plaintiff ought particularly to traverſe the Preſcription alleged, and conclude abſque tali cauſa*, becauſe the whole Caſe is in Iſſue; and ſo it was adjudged. Cro. J. 598. pl. 22. Mich. 18 Jac. B. R. The King v. Hopper.

Palm. 387. S. C. and according to the Alterations.

19. If a Man has a Way *from his Houſe to the Church, and the next Cloſe of Land to his Houſe is his own*; it was ſaid by Doderidge J. that he cannot in this Caſe preſcribe that he has a Way from his Houſe to the Church; for he cannot *preſcribe to have a Way in his own Land*. But Ley Ch. J. contra, becauſe then all Ways in the Corn [Common] Fields ſhall be diſtant [deſtroy'd] but the Preſcription though *General, ſhall be applied to the other Lands*, to which Chamberlain J. agreed. But Doderidge

ridge ſaid that Infruiteneſs [Infiniteneſs] alters the Caſe. 2 Roll. Rep. 397, 398. Mich. 21 Jac. B. R. in Caſe of Slowman v. Weſt.

20. In Action on the Caſe for diſturbing the Plaintiff in his Way. Exception was taken becauſe it was *not ſhewn from what Vill to what Vill the Way led*; and per Jones and Doderidge J. there is a *Difference* when it is *alleged as an Abuttal* and when by Way of *Juſtification in Treſpaſs*; and Judgment accordingly for the Plaintiff. Palm. 420, 421. Paſch. 1 Ca. B. R. Harriſon v. Rook.

21. Caſe was brought for *ſtopping a Way* which the Plaintiff had *from ſuch a Place over Black-Acre* where the Nuſance is, *unto ſuch a Field (by Name)* and it was ruled to be good, *without ſhewing what Intereſt he had in that Field*; for it ſhall be *intended to be a common Field*. But if it had been *uſque ad tale clauſum*, he ought to ſhew what Intereſt he hath in the Cloſe. Noy. 86. Park v. Strewſam. Lat. 160. Hill. 2 Car. Parker v. Newſham, S. C. in totidem Verbis.

22. In Treſpaſs Quare Clauſum fregit, the Defendant *juſtified for a Way*; the Plaintiff *replied, That He went out of the Way*; this is a good Replication, per Harvey and Hutton J. to which Richardſon and Crook agreed; for there it was confeſſed and avoided by the Replication. Het. 28, 29. Trin. 3 Car. C. B. in Caſe of Johnſon v. Morris.

23. In Treſpaſs &c. the Defendant *juſtified that he had a Way not only to go, ride, and drive his Beaſts, but likewiſe to carry with his Carts*; the *Plaintiff traverſed*, abſque hoc *that the Defendant had a Way, not only to go and ride* &c. in the very Words of the Plea, *and ſo to Iſſue*, and found for the Plaintiff. It was *objected that the Iſſue was ill*, becauſe it *was no direct Affirmation, but by an Inducement only*; but the whole Court held e contra. Mar. 55 pl. 83. Mich. 15 Car. Hicks v. Webb.

24. In Caſe for ſtopping a Way, the *Plaintiff ſet forth a Title as Leſſee of the Company of Haberdaſhers* in London, *and claimed a Way for them*; whereas they having let the ſame cannot have the Way, and ſo the Preſcription is not rightly applied; it *ſhould have been* for them to have the Way *pro tenitibus & occupatoribus ſuis*; but as the Declaration is laid, the Company ought to have brought the Action. Sty. 300. Mich. 1651. B. R. Cantrell v. Stephens.

25. In *Treſpaſs* the Defendant *juſtified for a Way from his Houſe thro' the Place where uſque altam viam Regiam in Parochia D. vocat' London-Road* Iſſue was joined upon the Way, and found for the Plaintiff; and per Cur. it being *found that he had a Way over the Place where*, it is *not material to the Juſtification whither it leads, it being after Verdict*, when the Right of the Caſe is tried; and it is added at laſt [aided at leaſt] by the Statute of Oxford 16 Car. and ſo Twiſden ſaid was the Opinion of all the Judges in Serjeants-Inn, he putting the Caſe to them at Dinner. Vent. 13, 14. Paſch. 21 Car. 2. B. R. Clarke v. Cheyney.

26. Treſpaſs, *Quare Clauſum fregit & diverſa onera equina* of Gravel had carried away, *per quod viam ſuam amiſit.* After Verdict it was moved that the *Diverſa onera equina* was *uncertain*, and had *ſet forth no Title to the Way, nor any Certainty of it.* It was ſaid on the other Side, that the Uncertainty was aided by the Verdict, and the other Matter about the Way was only laid in Aggravation of Damages. But the Court held the Exceptions material, and thought it would be very inconvenient to permit ſuch a Form of putting a Title to a Way into a Declaration in Treſpaſs. 2 Vent. 73. Mich. 1 W. & M. in C. B. Blake v. Clattie.

27. In Caſe the Plaintiff *declared that he*, for 4 Years laſt paſt, *was ſeiſed in Fee of Lands adjoining to the Defendant's Meadow called B.* and that during that Time *habere debuit a certain Way* thro' a Gate of the Defendant's in B. to a Cloſe &c. of the Plaintiff's; but the Defendant, to hinder the Plaintiff of the Way, *locked up the Gate* &c. After Judgment for the Plaintiff by Default, and a Writ of Enquiry &c. it was moved So where the Plaintiff *declared that he was poſſeſs'd &c. of an ancient Meſſuage, and had a*

Lost way over the Defendant's Ground, as belonging to the said Messuage, & de jure habet,

moved that the Plaintiff had not shewn any Title by Prescription or otherwise; but the whole Court held it only Matter of Form, and well upon *Judgment by Default* and a *general Demurrer*, without any special Cause shewn; and some of them held it good in all Cases, tho' it had been shewn for Cause of Demurrer. 3 Lev. 266. Pasch. 2 W. & M. in C. B. Windford v. Woolaston.

and that the Defendant stopp'd it &c. The Defendant pleaded a frivolous Plea; and upon Demurrer it was objected that the Declaration was ill, because the Plaintiff did *not prescribe, or otherwise intitle himself* to this Way *than by a bare Possession of the Messuage* The Court held the Declaration sufficient, it being but a Possessory Action. 2 Vent. 186. Trin. 2 W. & M. in C. B. Warren v. Sainthill.——S. C. cited Arg. 6 Mod. 312. and that it was held it would be good on Demurrer.

28. Case for *disturbing the Plaintiff in his Way*, setting forth *that* 10 Maii &c. & diu antea & adhuc &c. *he was possess'd of an antient Messuage called C. and that he ought to have a Way from thence in, by, and thro' a Close of the Defendant's called G. to the Highway*, and that the Defendant had made a *Hedge cross* his said Close, so that the Plaintiff could not pass. Upon a Demurrer to this Declaration it was objected that the Plaintiff had set forth he was possess'd of the Messuage, but did *not say that he was possess'd for Years*; and that it appears by the Declaration that the Lands in which the Way is claim'd are the Lands of the Defendant, and therefore the Plaintiff ought to *set forth his Title to the Way either by Grant or Prescription*; tho' otherwise it had been if the Action had been brought against a meer Tort-Feasor, according to **St. John and Moody's Case**, 3 Keb. 528. 531. but notwithstanding the Plaintiff had Judgment. Lutw. 119, 120. Hill. 4 & 5 W. & M. Blockley v. Slater.

29. Defendant having made his *Prescription for a Way to Bl. Acre*, cannot *justify going over* the Plaintiff's Close called *Wh. Acre*. Lutw. 114. Trin. 7 W. 3. Laughton v. Ward.

1 Salk. 173. pl. 2. 216. pl. 1. 579. pl. 1. S. C. but S. P. does not appear.——5 Salk. 121. S. C. but S. P. does not appear.

30. A Man cannot *claim a Way over my Ground from one Part thereof to another*; but *from one Part of his own Ground to another*, he may claim a Way over my Ground. 6 Mod. 3. Mich. 2 Ann. B. R. Staple v. Heydon.

1 Salk. 173. pl. 2. 216. pl. 1. 579. pl. 1. S. C. but S. P. does not appear.——3 Salk. 121. S. C. but S. P. does not appear.

31. The Way of *Pleading by a particular Tenant*, is to shew *that such a one was seised in Fee of the Place to which* &c. and *being so seised, was intitled to a Way, and shew How, and that he granted to Lessor* &c. *who also granted to him* &c. For when one shews a particular Estate, he *must shew the Fee* in Somebody. 6 Mod. 4. Mich. 2 Ann. B. R. Staple v. Heydon.

For more of Chimin Private in General, See **Actions** (N. b) **Nuisance, Trespass,** and other proper Titles.

Church-

Church-wardens.

(A) Church-wardens. [Their Capacity.]

Fol. 393.

1. THE Church-wardens cannot preſcribe to have Lands to them and their Succeſſors; for they are not any Corporation to have Lands; but for Goods for the Church. Paſch. 37 Eliz. B. between *Langley and Meredine.* In London the Parſon and Church-wardens are a Corporation to purchaſe Lands, and demiſe their Lands. Cro J. 532. pl. 15. Paſch. 17 Jac. B. R. obiter.——In London the Church-wardens are a Corporation, and may take Land for the Benefit of the Church. So throughout England they are a Corporation, and capable to take and purchaſe Goods for the Benefit of the Church; per tot Cur. (abſente Crooke) Mar. 67. pl. 104. Mich. 15 Car. Anon.——They are a Corporation by Cuſtom, and this is by the Common Law. Jo. 439. pl. 4 Trin. 15 Car. B. R. per Cur. in Evelin's Caſe.——Cro. C 552. pl. 4. S. P. in S. C.——Noy 139. Mich. 4 Jac. Anon. S P.——A Remainder of a Term for 40 Years was limited by Deviſe to Church-wardens. Hutton and Harvey J. held the Remainder not good to them, becauſe they are not corporate, ſo as they may take by that Grant. Het. 74 Hill. 3 Car. Fawkner's Caſe.

Church-warden is a Corporation, and the Property of the Bells is in him, and he may bring *Trover* at Common Law. 2 Salk. 547. pl. 2. Trin. 4 W. & M. in B. R. Starkey v. the Church-wardens of Watlington.

It is ſaid in the Books that the Church-wardens are a Corporation, but very improperly; for all the Pariſhioners are the Body, and the Church-wardens are only a Name to ſue by in Perſonal Actions; but the Property is in the Pariſhioners; and in all Actions brought by Church-wardens it muſt be laid Ad Damnum Parochianorum; Per Macclesfield C. MS. Rep. Hill. 9 Geo. in Canc. Whitmore v. Bridges.——The Church-wardens are not a Corporation without the Parſon; per Cur. 5 Mod. 396. Paſch. 10 W. 3. in Caſe of Cox v. Copping.

2. If a Feoffment be made to the Uſe of the Church-wardens of D. this is a void Uſe; for they have not any Capacity of ſuch a Purchaſe, 17 H. 7. 27. b.

3. *Gift of the Goods of the Pariſh* made by the Church-wardens is not good *without the Aſſent* of the Side-men and the *Veſtry*; and if by the Veſtry, the ſame is good. Arg. 3 Bulſt. 264. Mich. 14 Jac. in Caſe of Mottram v. Mottram. For the Law gives them Power to take Things for the Advantage, but not to the *Diſadvantage of the Church.* Yelv. 173. in Caſe of Starkey v. Barton, cites 13 H. 7. 10.

4. Church-warden *is a Temporal* * *Officer.* He has the Property and Cuſtody of the Pariſh Goods; and as it is at the Peril of the Pariſhioners, ſo they may chooſe and truſt whom they think fit, and the Archdeacon has no Power to elect or controul their Election. 1 Salk. 166. Hill. 8 W. 3 B. R. Morgan v. the Archdeacon of Cardigan. * S. P. accordingly per Cur. Vent. 267. Hill. 26 & 27 Car. 2. B. R. and ſays that his Power is enlarged by ſundry Acts of Parliament.——They are Temporal Officers by Law, and intruſted with the Goods of the Pariſh. Comb. 417. Hill. 9 W. 3. The King v. Rice.——12 Mod. 116. S. C. & S.P. by Holt Ch J.——He is a Temporal Officer, and to be ordered by the Temporal Laws. 3 Mod. 335 Hill. 2 W & M. in B. R. in Leigh's Caſe——2 Roll Rep. 71, 72. Hill. 16 Jac. B. R. Mountague Ch. J. ſaid that a Churchwarden is not an Eccleſiaſtical but a Temporal Officer, employed in Eccleſiaſtical Buſineſs.——A Church-warden is not an Officer, but a Miniſter to the Spiritual Court; per tot. Cur. Godb. 279. pl. 395. in Caſe of Biſhop v. Turner, S. C.

5. As on the one Hand the *Parſon* of the Church *is a Corporation for the taking of Land* for the Uſe and Benefit of the Church, and *not* capable of taking *Goods* or any Perſonalty on that Behalf; *ſo the Church-wardens*

are a Corporation *to take Money or Goods*, or other Perſonal Eſtate for the Uſe of the Church, but are *not* enabled to take *Lands*; Per the Maſter of the Rolls. 2 Wms's Rep. 126. Hill. 1722. in Caſe of the Attorney-General v. Ruper.

(A. 2) The *Power* of them, and of the Pariſh.

S. C. cited by Coventry as reſolved. Roll Rep. 426. in pl. 19.

1. A Gift by them of Goods **in their Cuſtody**, without the Conſent of the **Sidemen or** Veſtry, **is void.** 38 Eliz. *Method and Winn's Caſe*, **cited per Coventry.** **My Rep.** 14 **Jac. B.**

Roll Rep. 57. pl. 33. Trin. 12 Jac. B. R. Buckſale's Caſe, S. C. and the Parſon having libell'd for this Matter in the Spiritual Court, a Prohibition was granted.——If a Pariſh-Bible be taken out of the Church, the Church-wardens may have an Action at Common Law. Ibid.

2. **If a** Man takes the Organs **out of the Church, the** Church-wardens may have **an Action of** Treſpaſs **for it; for the Organs belong to the Pariſhioners, and not to the Parſon, and therefore the Parſon cannot ſue in the Eccleſiaſtical Court againſt him who took them.** **Tr.** 12 **Jac. B. R. per Curiam adjudged.**

3. **The Church-wardens** by the Conſent **and Agreement** of the Pariſhioners, may take a ruinous Bell and deliver it to a Bell-Founder, and that he **by their Agreement** ſhall have for the Caſting thereof 4 l. and ſhall retain it till the 4 l. be paid; **and this Agreement of the Pariſhioners ſhall excuſe the Church-wardens in a Writ of Account brought againſt them by the Succeſſors of the Church-wardens; for the Pariſhioners are a Corporation for the Diſpoſal of ſuch Perſonal Things as belong to their Church.** **Mich.** 37, 38 **Eliz. B. R. between** *Method and Winn*, **adjudged.**

4. So **the Church-wardens by the Aſſent and Agreement of the Pariſhioners, may** take the Stones belonging to the Church, and with Part thereof repair a ruinous Window **of the Church**, and retain the reſt **to themſelves** in Satisfaction of their Expences **employed in the Repairs of the ſaid Window.** **Mich.** 37, 38 **Eliz. B. R. between** *Method and Winne*, **adjudged.**

5. *Treſpaſs* was brought *by the Church-wardens againſt the Parſon* of their Pariſh, *for breaking of their Field* in their Ward being, and good, and ſo ſee that they are *incorporated at Common Law as to Things Perſonal*, and they may have *Appeal and Action of Account De bonis Eccleſiæ* &c. *Contra of Things Real.* Br. Corporations, pl. 84. cites 11 H. 4. 12. and 12 H. 7. 27.

6. A *Feoffment* was made *to the Uſe of the Pariſhioners of D.* and the *Church-wardens made a Leaſe for Years*, and ill. Br. Treſpaſs, pl. 289. cites 12 H. 7. 27.

7. Admitting that Church-wardens may remove *Seats* in the Church at their Pleaſure, yet they cannot cut the Timber of the Pew. Noy 108. Trin. 2 Jac. C. B. Gilſon v. Wright & al'.

8. Church-wardens may take Notice of *Incroachments on the Church-yard*, but not of *ſowing of Diſcord among the Neighbours.* Vent. 127. Paſch. 23 Car. 2. B. R. Anon.

9. A Church-warden may *execute his Office before he is ſworn*, tho' it is convenient that he ſhould be ſworn; Per Cur. ſaid to have been reſolved. Vent. 267. Hill. 26 & 27 Car. 2. B. R.

10. If

10. If the Parish was Summoned, and refused to meet, or make a Rate for the *Repairs of the Church*, the Church-wardens might *make a Rate alone*, (if needful,) because, if the Repairs were neglected, the Church-wardens were to be cited, and not the Parishioners. Vent. 367. Trin. 35 Car. 2. B. R. Thurffield v. Jones. Skinn. 27. pl. 3. S. C. but S. P. does not appear. S. P. by Holt Ch. J. Obiter. Comb. 344. Mich. 7 W. 3. B. R.

11. Ecclesiastical Court may punish Church-wardens if they will *not open the Church to the Parson*, or to any one acting under him, but not if they refuse to open it to any other. 3 Salk. 87. Mich. 12 W. 3. B. R. Church-wardens of St. Bartholomew's Case. S. P. and if the *Ordinary* had *appointed me to* come and *Preach* in such a Church, yet he could not justify doing it without *Consent* of the Parson; and if a Person give a Charity to a certain Clerk *for Preaching in such a Parish*, he must do it by the Consent of the Parson; Per Holt Ch. J. 12 Mod 433. in Case of Turton v. Reignolds.

12. If he that is a Church-warden *de Facto makes a Rate for repairing the Church*, this will bind the Parishioners; Per Holt. MS. Cases.

13. If there be a *Church-warden de Jure, and a Church-warden de Facto*, in the same Parish, this latter cannot justify the laying out of, or receiving Money, but he is accountable to the Church-warden de Jure; he is no more than another Man, per Powel and Powis, and he that is de Jure may bring an Indebitatus Assumpsit against the other &c. MS. Cases, Pasch. 9 Ann. B. R. Andrews v. Eagle.

14. Goods given or bought for the Use of the Church are all *Bona Ecclesiæ*, for the taking whereof the Churchwardens may bring *Trespass*; Per the Master of the Rolls. 2 Wms's Rep. 126. Hill. 1722. in Case of the Att. Gen. v. Ruper, cites F. N. B. 91. (K) and that he may bring Trespass *for the taking* these Goods, *as well in the Time of their Predecessors as in their own Time.*

(B) Election.

1. THE *Canon about electing a* Church-warden is to be intended where the Parson had the Nomination of a Church-warden before the making of the Canon. Noy 139. Mich. 4 Jac. C. B. Anon.

2. *Prohibition* was moved for, because where the Custom of the Village was, that the Parishioners have used to elect two Church-wardens, and at the End of the Year to discharge one, and elect another in his room, & *alternis Vicibus &c.* by the new Canon now the Parson has the Election of one, and the Parish of the other, and that he that was elected by the Parishioners was discharged by the Ordinary at his Visitation, and for that he prayed a Prohibition, & allocatur as a Thing usual, and of Course, for otherwise (by Hubbard) the Parson might have all the Authority of his Church and Parish. Noy 31. Butt's Case.

3. Of Common Right the *chusing* Church-wardens belongs to the Parishioners. It is true, in some Places the Incumbent chooses one, but that is only by Usage, and the *Canon* concerning chusing Church-wardens is *not regarded by the Common Law*; Per Holt Ch. J. who said this was the Opinion of Hale Ch. J. Carth. 118. Pasch. 2 W. & M. in B. R. The Church-warden of St. Giles in Northampton's Case. And Church-wardens chosen by the Parish by Virtue of a Custom *cannot be refused* by the Archdeacon on Pretence of *Poverty or Unfitness*, and in such Case the Parish, having appointed him, must be answerable for him. 12 Mod. 116. Hill. 8 W. 3 King v. Rees.

4. *Arch-*

4. *Archdeacon* has nothing to do to *refuſe*, but admit. Comb. 417. Hill. 9 W. 3. B. R. the King v. Rice.

Cuſtom will prevail againſt the Canon. Vent. 267. Hill. 26 & 27 Car. 2. B. R. Anon.

5. Where the Church-wardens are to be elected by the Pariſhioners *by Preſcription*, it ſhall not be in the Power of the Parſon to hinder them. Per Cur. 8 Mod. 325. Mich. 11 Geo. in Caſe of the King v. Singleton.

6. It is Criminal to *ſwear one into this Office that has no Manner of Right*, for which Crime an *Information* will lie; Arg. 8 Mod. 380. Trin. 11 Geo. in the Caſe of the King v. Harwood.

7. In an Action for a falſe Return a ſpecial Verdict found the *Cuſtom* to be *for the Pariſhioners* of *annually to elect a Church-warden*; that S. the *Plaintiff was elected by the Pariſhioners to ſerve* for Church-warden *for the Year* 1734. *and until another be choſen*; that *at a Veſtry the enſuing Year, he was re-elected by the Pariſhioners*, but *at the Veſtry then holden, the Vicar and one Church-warden adjourn'd the Veſtry to the next Day, and the Vicar then choſe Chapman.* A Mandamus had been directed to to admit and ſwear in the Plaintiff. It was argued for the Plaintiff, that the 89th Canon of 1603. that all Church-wardens and Queſt-men ſhall be choſen by the joint Choice of the Miniſter and Pariſh, if it may be, if not, then the Miniſter to chooſe one, and the Pariſh the other, has never been received at Law, and cited Cro. Jac. 532. Warner's Caſe. Cro. Car. 551. Hard. 378. and Carth. 118. where Holt Ch. J. ſays that where the Incumbant chooſes one, it is only by Uſage, and that a Church-warden is a Temporal Officer. Per Lee J. in all Councils and Elections the General Rule is, that the major Part binds, and cited 18 E. 4. 2. and Hackwell's Modus tenendi Parliament'. The Ch. J. ſaid that the Queſtion is whether the adjourning by Vicar jointly with one Church-warden, was a valid and good Adjournment, and he thought not, and that if Vicar and Church-warden had ſuch a Power, it muſt be by Cuſtom or by Rule of Common Law; but no Cuſtom is found, nor is there any Rule of Common Law to veſt this Power in the Vicar, nor is it in the Power of Church-wardens to adjourn; and then the Right is in the Aſſembly itſelf. Per Probyn J. the Vicar is not a neceſſary Party at the Veſtry, and Judgment for the Plaintiff per tot. Cur. MS. Rep. Trin. 1736. B. R. Stoughton v. Reynolds.

(C) Favoured or Relieved, or not.

1. THO' Church-wardens are *choſen for* 2 *Years*, yet for Cauſe Pariſhioners may diſplace them. 13 Rep. 70. cites 26. H. 8. 5.

2. By the Canons, no Eccleſiaſtical Judge ought to *cite* any Church-warden *to the Court, but ſo as he may return home* again to his Houſe *the ſame Day*. 12 Rep. 111. Hill. 10 Jac.

3. For ſuch *Things* as a Church-warden *does Ratione Officii*, no *Action by the Succeſſor* will lie againſt him in the Spiritual Court. Godb. 279. pl. 395. Hill. 16 Jac. B. R. Biſhop v. Turner.

The Bill was againſt the ſucceeding Church-wardens, to oblige them to make a Rate according to an Order of

4. Bill againſt Defendants lately Church-wardens, becauſe they *refuſed to make a Rate to re-imburſe the Plaintiffs* according to a Vote and Order of the Veſtry; and cited Jefferie's Caſe, 5. Rep. that the Majority may bind as to Pariſh Duties; 'twas objected that they ſhould have come when the Defendants were Church-wardens; that if they had been decreed to pay, they might have re-imburſed themſelves by a Rate; Per Serj. Philips, a Decree was againſt Doctor Crowther and his Succeſſor, ſo

ſo here would have it againſt Church-wardens and Succeſſors. 2 Vern. 262. pl. 246. Paſch. 1692. Battily v. Coke & al'.

Veſtry, to reimburſe them ſeveral Sums of Money laid out by Order of Veſtry, for *Repairs of the Church and Building two new Galleries* and their Accounts having, at their going out of their Office, been taken by *Auditors*, and paſſed and allowed by the Veſtry, but the *ſucceeding Church-wardens being out of their Office*, and new ones choſe; *after Examination and Publication*, no Remedy lay but in the Spiritual Court, or againſt ſuch particular Pariſhioners as employed them, the Money for the Repairs being all paid, and the Remainder due being for the Galleries. Ch. Prec. 42. Battily v. Cook.

5. The Plaintiff who was late Church-warden, was decreed to be *paid the Money laid out* for the Uſe of the Pariſh with Coſts, and the Decree went on and ſaid, for which Purpoſe the Veſtry of the ſaid Pariſh are to take Notice hereof, (viz. of the Decree) and to ſet a Rate accordingly, and what the Church-wardens ſhall pay in Obedience to the Decree, the ſame is to be brought into their Accounts, and to be allowed them when they paſs their Accounts with the Pariſh; cited Chan. Prec. 43. in Caſe of Battily v. Cook, as Trin. 2 W. & M. the Caſe of Birch v. Barſton & al'. Church-wardens of Lambeth. Ibid. cites 36 Car. 2. James v. Rich, S. P.

6. On a *Diſpute between Impropriator and Pariſhioners*, concerning a Right to a Houſe for which he brought an Ejectment; the Court would not compell the Church-wardens to *produce the Pariſh Books* and give him a Sight thereof, and Copies of what concerned his Title, for his and their Intereſt are diſtinct; for it was not a Parochial Right, but a Title which is now in Queſtion, and ſo no Reaſon to produce the Pariſh Books, which would be to ſhew the Defendant's Evidence. 5 Mod 395, 396. Paſch. 10 W. 3. Cox v. Copping.

7. The Church-wardens, *as Church-wardens*, *received* 20 *l. for the Uſe of the Pariſh* where *none was due*, and *by Miſtake only*, and upon being *ſenſible of the Miſtake*, *re-paid the Money*. The ſucceeding Church-wardens brought an Action for the Money againſt the former ones; Per Powell J. though the old Church-wardens could not plead *Ne unques Receiver*, yet they might *plead this Matter ſpecially*; and per Parker Ch. J. it is not neceſſary to ſhew Re-payment, but only that the Money did not belong to the Pariſh; and had they *paid it to the Pariſh before the Miſtake was known*, the Pariſh would have been charged with this Money, and this Re-payment was an Act done in Diſcharge of the Pariſh, and ſo a proper Plea before Auditors. See 10 Mod. 22. Paſch. 10 Ann. B. R. Biſhop v. Eagle.

8. In an Action by preſent Church-wardens againſt the former Ones, the Court was clear that the Church-wardens ſhould be *allowed their Expences and Surpluſage*, in Caſe their Expences out balanced &c. for Church-wardens are more than bare Receivers, and are in all reſpects Bailiffs. 10 Mod. 23. Paſch. 10 Ann. B. R. Biſhop v. Eagle.

9. *Bill* againſt 90 Pariſhioners *by Executrix of one of the Church-wardens* of Woodford, *to be re-imburſed* Money laid out by the Teſtator as Church-warden, *for re-building the Steeple of the Church*. It was objected that this Matter was proper for the Eccleſiaſtical Court, and not for this Court. But per Harcourt C. the Plaintiff is proper for Relief in this Court, and there are many Precedents of the like Nature. One in the Time of Cowper C. againſt the Pariſhioners of St. Clements for the Organ in the Church, and many more before; and ſo that Objection was over-ruled, and the Cauſe to proceed; and decreed that the Pariſhoners ſhould re-imburſe the Plaintiff the Money laid out by her Teſtator, with Coſts of this Suit, and that the Money ſhould be raiſed by a Pariſh Rate. MS. Rep. Paſch. 13 Ann. in Canc. Nicholſon v. Maſters & al'. Pariſhioners of Woodford in Com. Eſſex.

10. Church-wardens, as being a Corporation for the Goods of the Pariſh, *commence a Suit* by and with the Conſent, and by Order of the Pariſh, concerning a Charity for the Poor *in which they miſcarried*, and

then *brought a Bill againſt the ſubſequent Church-wardens, to be repaid the Coſts by* them expended, and had a Decree for it. But it was proved that *from Time to Time the Pariſh was made acquainted with what they did*; and though there was no Veſtry by Preſcription, yet a Veſtry Book, kept for the Pariſh Acts, was allowed as Evidence of their Conſent, they are the Truſtees of the Pariſh for all Matters, and therefore the Ceſty que Truſt ill. Pariſhioners ought to contribute, and not lay the Burthen upon theſe poor People the Church-wardens. The annual ſucceſſive Church-wardens need not be made Parties, as they are renewed. Per the Maſter of the Rolls. MS. Caſes, Trin. Vac. 1718. Radnor Pariſh in Wales.

(D) Actions by or againſt them; and what Remedy they have when their Time is expired.

Br. Treſpaſs, pl. 200. cites S. C. accordingly, and that 'tis ſaid elſewhere that *if they die their Executors* ſhall have the Action of Goods carried away in the Life of the Teſtator. But Brooke ſays Quære inde; for the *Succeſſor cannot* have the Action, *by reaſon that they are not incorporated.*

1. THE Opinion of the Court was, that the Wardens of the Goods of the Church ſhould have Action of *Treſpaſs of* ſuch *Goods* in their Ward being taken, notwithſtanding that they are not incorporated. Thel. Dig. 21. Lib. 1. cap. 23. S. 1. cites Hill. 11 H. 4. 12. and ſays that ſo it was held 8 H. 5. 4. & Trin. 37 H. 6. 30.

2. And ſuch Writ was brought where the Goods were *taken in the Time of other Wardens.* Thel. Dig. 21. Lib. 1. cap. 23. S. 2. cites Paſch. 19 H. 6. 66. and ſays that Fitzh. in the Writ of Treſpaſs in his Nat. Brev. Fol. 91. affirms that ſuch Writ lies well.

Thel. Dig. 21. Lib. 1. cap. 23. S. 3. cites S. C.

3. Though the Pariſhioners ſhall not have Account, yet they may appoint *new Wardens*, and they *ſhall have Account againſt the old Wardens*, and ſo ſee that *as to Things perſonal they are a Corporation* by the Common Law; Per Needham. Br. Corporation, pl. 55. cites 8 E. 4. 6.

Thel. Dig. 115. lib. 10. cap. 25. S. 3. cites S. C.— S. P. held accordingly per Littleton & Needham J. Br. Corporations, pl. 55. cites S. C.

4. Treſpaſs by Wardens of a Church *de Libro in Cuſtodia ſuæ exiſtente capt' & aſport' ad Damnum Parochianorum*, and not Ad Damnum of the Wardens; and good per Littleton & Needham; and here the *new Wardens ſhall have Action of Account againſt the firſt* Wardens. Br. Damages, pl. 124. cites 8 E. 4. 6.

5. Where an *Obligation* is *made to them and to their Succeſſors*, and they die, their Executors ſhall have Action, and not their Succeſſors. Thel. Dig. 21. lib. 1. cap. 23. S. 6. cites 20 E. 4. 2.

Br. Treſpaſs, pl. 289. cites S. C. that they may have an *Appeal of Robbery* of ſuch Goods.

6. It was ſaid that they ſhall have Action of *Treſpaſs, and Appeal of the Goods of the Pariſhioners*, becauſe they are charged with them &c. Thel. Dig. 21. lib. 1. cap. 23. S. 4. cites Trin. 12 H. 7. 27.

7. It was held that they ſhould have *Ejectione Firmæ*, if they are ejected of Land leaſed to them for Years. Thel. Dig. 21. lib. 1. cap. 23. S. 5. cites Trin. 15 H. 7. 8.

8. And they have had Action *upon the Caſe.* Thel. Dig. 21. lib. 1. cap. 23. S. 4. cites Trin. 26 H. 8. 5.

9. If

9. If *Goods of the Church are taken away*, and afterwards *the Church-wardens in whoſe Time* they were taken away *are out of their Office*, and they bring an Action for the Goods, they may *ſuppoſe it to be Ad Damnum ipſorum*, *Or* Ad Damnum *Parochianorum* at their Election; *but* if *the Succeſſors* bring the Action, they *muſt of Neceſſity ſuppoſe it Ad Damnum Parochianorum*. Agreed per Cur. and Judgment accordingly, tho' the Juſtices at firſt conceived that the Predeceſſor Church-warden could not have Action, his Time being paſt. Cro. E. 145. pl. 5. Mich. 31 & 32 Eliz. C. B. and ibid. 179. pl. 11. Paſch. 32 Eliz. B. R. Hadman v. Ringwood.

10. A Church-warden, by the Common Law, may maintain an *Action* on the Caſe for *defacing of a Monument* in the Church. Godb. 279. pl. 395. Hill. 16 Jac. B. R. Biſhop v. Turner.

11. *Writ iſſued to the Biſhop*, commanding him *to admit a* Church-warden elected by the Pariſh. Palm. 50. Mich. 17 Jac. B. R. The Pariſh of St. Balaunce in Kent.

12. A Prohibition was pray'd to the Archdeacon of Exeter, becauſe he proceeded to excommunicate the Plaintiff, for that he, being *Church-warden*, *refuſed to preſent a notorious Delinquent*, *being admoniſhed*; and a Prohibition was granted; for they are not to direct the Church-warden to preſent at their Pleaſure; but if one Church-warden does refuſe to preſent, he may be preſented by his Succeſſor. Freem. Rep. 298, 299. pl. 356. Hill. 1680. Selby's Caſe, cites 13 Rep. 5.

13. Action lies for *citing* Church-warden to Account, *that has accounted before*, tho' nothing more is done, and tho' nothing enſued but an Excommunication, and no Capias nor any expreſs Damage laid. 2 Show. 145. pl. 121. Mich. 32 Car. 2. B. R. Gray v. Dight, alias Day.

14. If *Money* be *diſburſed* by Church-wardens *for repairing* the Church, or any Thing elſe meerly Eccleſiaſtical or Spiritual, the Spiritual Courts ſhall allow their Accounts; but if there be any Thing elſe that is an Agreement between the Pariſhioners, the ſucceeding Church-wardens may have an Action of Account at Law, and the Spiritual Court has not Juriſdiction. 12 Mod. 9. Mich. 3 W. & M. in B. R. Styrrop v. Stoakes.

15. The Goods of the Pariſh are in his Cuſtody, and he may have *Treſpaſs* for them; per Holt Ch. J. 12 Mod. 116. Hill. 8 W. 3. The King v. Rees. Br. Treſpaſs, pl. 200. cites 3 H. 6. 30. S. P.

16. The ſucceeding Church-wardens may have an Action againſt their Predeceſſors for the Goods of the Pariſh. Comb. 417. Hill. 9 W. 3. B.R. in Caſe of the King v. Morgan Rice.

17. Church-wardens may *bring Actions* for Debts due to the Pariſh in their own Names; for they are a Corporation. Agreed. Farr. 116. Mich. 1 Ann. B. R. in Caſe of Thimblethorp v. Hardeſty.

18. If there be a *Cuſtom* for the Church-wardens *to collect Money for the Pariſh Clerk*, an Action on the Caſe will lie againſt him *for not doing it*. 6 Mod. 253. Mich. 3 Ann. B. R. in Caſe of Parker v. Clerk.

19. The Pariſhioners may call the Church-wardens *into the Spiritual Court for the Money that they have received*. MS. Caſes, Mich. 7 Ann. B. R. Holloway v. Knight; but Quære if one or two of the Pariſh may do this when all the reſt are agreed.

20. If Church-wardens *receive Money by Miſtake*, (it not being due to them) *and before Knowledge of the Miſtake pay it over to the Pariſh* for whoſe Uſe they received it, whether they may, after they are out of their Office, be charged in an Indebitatus Aſſumpſit for the Money was made a Queſtion, and Powell J. thought they might, but Parker Ch. J. thought they could not. See 10 Mod. 23. Paſch. 10 Ann. B. R. in Caſe of Eagle and Biſhop.

21. Two *Juſtices made an Order*, to compel the preſent Church-wardens of Ely *to pay to the precedent* ones, *or their Executors* 40 *l.* quaſhed per Shaw's Pariſh Law 199, 200. cites S. C.—— Ibid. 220. cites S. C.

per Cur. for they have no ſuch Authority. 2 Shaw's Pract. Juſt. 29. cites Hill. 1712. The Church-wardens of Ely's Caſe.

For more of Church-wardens in General, See **Prohibition**, and other Proper Titles.

Circuity of Action.

(A) Circuity of Action; and what is a Bar to it.

19 H. 6. 63. b S. P. by Paſton.

1. IF I grant to my Tenant *to hold without Impeachment of Waſte*, or a Lord grants to his Tenant that he ſhall not be puniſhed in *Ceſſavit &c.* or the *King grants* to one *to be diſcharged of Diſmes*, the ſame may be pleaded by *Rebutter*, and the Party not put to bring his Action of *Covenant*, or to ſue by *Petition*. Heath's Max. 44, 45. cites 19 H. 6. 62.

Br. Barre, pl. 52. cites S. C. & S. P. by Coningſby and Elliot; but Moore and Tremayle e contra, that it was only a Sparing for the Time, and no Releaſe; and Fineux Ch. J. at firſt to the ſame Intent, that it ſounds only in Covenant; and that if the Party breaks the Covenant, he ſhall only have an Action of Covenant; As where a Man grants to his Tenant that he will not diſtrain him before Michaelmas, there, if he diſtrains, the Tenant ſhall only have an Action of Covenant. But Brook ſays Quære inde; for it ſeems it ſhall be pleaded in Bar to avoid Circuity of Action. And per Fineux, if one leaſes Land for Life or Years, and after grants by another Deed that the Leſſee ſhall not be impeached of Waſte, and the Leſſor brings Waſte, there the Leſſee ſhall have only Action of Covenant. But Brooke ſays that the Practice is e contra; for he may plead it in Bar to avoid Circuity of Action. But afterwards Fineux changed his Opinion, and took a Difference between a Defeaſance of an Obligation and a Condition of an Obligation, and held that this Grant made the Obligation void; And ſo Fineux, Coningsby, and Elliot, were againſt Tremaile and Moore ——Br Grants, pl 58. cites S. C. & S. P. accordingly.——Br. Defeaſance, pl. 15. cites S. C. and Brooke ſays, that the beſt Opinion was, that it is a good Defeaſance in Bar of the Action; for Action Perſonal once ſuſpended is gone for ever; but that it is ſaid, that it cannot enure as a Releaſe or Acquittance, but as a Defeaſance ——S. C. cited Pl. C. 156. b.

2. And ſo it ſeems of *Waſte* in 21 H. 6. 47. [tho'] the Grant [be] by Leaſe, whereof Doubt is made afterwards in 21 H. 7. 23 & 30. where the principal Caſe was, that the Obligee granted, that if he did implead the Obligor (before ſuch a Day) the Obligation ſhould be void, and a good Bar; and upon that Reaſon ſhall the *Garniſhee*, or *Tenant by Receit*, rebutt by a Releaſe or Warranty. Heath's Max. 45.

3. And upon the Reaſon aforeſaid it is, that where one Thing is granted in Law *ſo* [*for*] *another*, eſpecially *of Things executory*, *and not executed*, if he be interpleaded of that which to him appertains, he ſhall plead the ſame in Bar of that whereof he made the Grant, as appears by Perkins in the Title of Exchanges, where Rent is granted for Diſtreſs. Heath's Max. 45.

4. But yet by 15 Ed. 4. [2.] 9 E. 4 [19.] and 24 E. 3 [54.] abridged by Brooke, Tit. Conditions, pl. 61. it ſeems in that Caſe to be to the contrary becauſe executed, and therefore not like where an *Annuity*

is

is granted *pro Conſilio*; the like where one holds *to incloſe taking the ancient Pale*, or where one grants to me an *Annuity to have a* Gorſe, or a *Gutter in my Land*, becauſe an *Eaſement*. Heath's Max. 45.

5. In *Aſſiſe* which *remains for Default of Jurors*, and after the *Plaintiff releaſes*, this ſhall be pleaded to avoid Circuity of Action, by Certificate of Aſſiſe after. And *ſo* where a Man is *bound in a Statute, and* after *releaſes*, the *Defendant ſhall have Venire Facias*, and this in Avoidance of Circuity of Action *by Audita Querela*. Br. Garniſh. pl. 9. cites 20 H. 6. 28.

6. A. *covenanted* with B. *to collect B's Rent* in D. and for not collecting them *B. brought Covenant*. A. *pleaded that B. himſelf interrupted his collecting the ſame*; Judgment ſi actio &c. It was inſiſted, that the Plea was not good; for if it was, then Action of Treſpaſs lay againſt B. in which A might recover his Damages. But the Court held the *Plea good in Avoidance of Circuity of Action*; for if A. ſhould bring Treſpaſs and recover Damages, then B. ſhould have Writ of Covenant againſt A. and recover, which Circuity of Action the Law will not ſuffer &c. Kelw. 34. b. 35. a. pl. 2. Hill. 13 H. 7. Anon.

7. If *you covenant to ſerve me, and I to give you 5 l. for your Service*, or you covenant to marry my Daughter, and I, in like Manner, to give you 20 l. as a Marriage Portion, if you ſerve me not, or marry not my Daughter, I may plead the ſame in Bar; otherwiſe if the Covenant on either Part had been expreſsly, and not *depending upon the other's Act*. Heath's Max. 45, 46. cites 15 H. 7. 10. Br. Covenant, pl. 22, cites S. C.

8. Circuity of Actions *is where there is an Equality to be recovered in both Actions*. Mo. 23. pl. 80. Paſch. 3 Eliz. Anon.

9. If A. enters into an *Obligation to B.* and *B. covenants not to put the Bond in Suit before Mich.* and B. brings Debt before Mich. A. cannot plead this in Bar, but muſt bring Action of Covenant; but if the Covenant had not been to ſue at all, it is reaſonable in ſuch Caſe, to avoid Circuity of Action, to allow its being pleaded in Bar of the Action, but not in the other Caſe. And. 307. pl. 316. Trin. 36 Eliz. Dowſe v. Jeffries. Cro. E. 252. pl. 7. Deux v Jefferies, S. C. accordingly as to the principal Point, that it is not to be pleaded in Bar, but the Party is put to his Writ of Covenant if he be ſued before the Time; but if the Covenant had been not to ſue at all, there, peradventure, it might enure as a Releaſe, and to be pleaded in Bar, but not here; for it never was the Intent of the Parties to make it a Releaſe it, and it was adjudged for the Plaintiff.

10. Debt on a Bond of 200 *l.* The Defendant pleaded, that after the Bond made the Plaintiff covenanted by Indenture ſhewn in Court, that if the Defendant ſhould at ſuch a Day pay 100 l. the Bond ſhould be void, and alleged, that he paid the Money at the Day; and upon Demurrer all the Court held, that he may well plead it in Bar, without being put to his Writ of Covenant by Circuity of Action. Cro. E. 623 pl. 16. Mich. 40 & 41 Eliz. B. R. Hodges v. Smith.

11. In Debt for Rent on Leaſe for Years; the Defendant pleaded in Bar, that the Leſſor did covenant that the Leſſee might deduct ſo much for Charges, and upon Demurrer this was adjudged a good Plea, it being a Thing executory, and the Covenant in the ſame Deed, and the Party ſhall not be put to Circuity of Action, and to bring Action of Covenant. Lev. 152. Mich. 16 Car. 2. B. R. Johnſon v. Carre. But not where the Covenant is in another Deed; for the laſt Deed has not taken away the Effect of the former; and a later Covenant cannot be pleaded in Bar of a former; but the Defendant muſt bring his Action upon the laſt Indenture if he would help himſelf. and Judgment accordingly, per tot. Cur. 2 Vent. 217, 218. Mich. 2 W. & M. in C. B. Gawden v. Draper.

12. If A. and B. are jointly and ſeverally bound to H. and H. covenants with A. that he will not ſue A. this is not a Defeaſance, for ſtill there is a Remedy on Bond againſt B. Otherwiſe if A. only had been bound, for then ſuch Covenant excludes him from any Remedy for

ever, to avoid Circuity of Action; Per Cur. 2 Salk. 575. pl. 3. Paſch. 13 W. 3. B. R. in Caſe of Lacy v. Kinaſton.

13. *Infinitum in Jure Reprobatur.* See Maxims.

For more of Circuity of Actions in General, ſee Bar, and other Proper Titles.

(A) Circumvention.

1. A Bill to be *relieved againſt a Bill of Sale.* The Caſe was; A. being in Priſon, B. his Landlord came to him, and pretending Friendſhip, and to procure his Enlargement, perſuaded A. to make over his Stock &c. to him, and he would pay A.'s Debts, and return the Overplus. A. made a Bill of Sale, and B. poſſeſs'd himſelf of the Goods, and more than was contained in the Bill of Sale, but paid no Debts, nor got him out of Priſon as he had *promiſed.* The Court being ſatisfied the Bill of Sale was *made on a Truſt*, decreed an Account. Fin. Rep. 175. Mich. 26 Car. 2. Jones v. Prior.

2. Aſſumpſit, that in Conſideration of half a Crown by the Plaintiff in Hand paid to the Defendant, he promiſed to pay 2 Grains of Rye upon Monday the 29th of March in ſuch a Year, 4 Grains the next Monday after, and ſo on by progreſſional Arithmetick every Monday for a Year, and Non Aſſumpſit pleaded. Per Cur. upon Motion, let them go to Trial; and tho' this would amount to a vaſt Quantity, yet the Jury will conſider of the Folly of the Defendant, and give but reaſonable Damages againſt him. 6 Mod. 305. Mich. 3 Ann. B. R. Thornborough v. Whiteacre.

In this Caſe it was decreed that the Defendant do account for the Rents and Profits of the Freehold Leaſes to the Plaintiff, and the Defendant to have all juſt Allowances for Debts and Legacies paid by him, and the Plaintiff to account for 150 Guineas to the Defendant with Intereſt &c. As to the

3. Francis Broderick being ſeiſed of a conſiderable Eſtate in Fee, made his Will, and deviſed it to Thomas Broderick the Defendant. Francis himſelf *executed the Will*, but it was *not atteſted in his Preſence by 3 Witneſſes.* Francis died, and the Defendant Thomas finding that the Will was void, for 100 Guineas paid by him to the Plaintiff Geo. Broderick, who was Francis's Heir at Law, *procured* from the Plaintiff *a Releaſe, which recited that Francis, by his laſt Will duly executed, had deviſed* his Eſtate to the Defendant Thomas; and the Defendant Thomas thinking himſelf not ſafe with the Releaſe only, for 50 Guineas more prevailed with the Plaintiff to *convey the Lands by Leaſe and Releaſe* to one Day, who was *Truſtee* for the Defendant Thomas, to whom Day afterwards conveyed. Afterwards the Defendant Thomas, upon a valuable Conſideration, conveyed Part to one Parker, who had not any other Notice of the Invalidity of the Will, ſave that he heard it mentioned in common Diſcourſe. The Plaintiff brought his Bill againſt the ſaid T. Broderick, Day and Parker, to have the Releaſe, Leaſe, and Releaſe delivered up as fraudulently obtained; and it not appearing that the Plaintiff, at the Time of his making the Releaſe &c. knew that the Will was bad, the Ld. C. Harcourt decreed that they ſhould be delivered up; and it not appearing that Parker was privy to the Fraud, tho' he had heard of the Invalidity of the Will as above, it was decreed that

that he, upon receiving his Purchaſe-Money with Intereſt, ſhould convey to the Plaintiff, and ſhould account for the Rents and Profits which he had received, and be allow'd what he had laid out in Repairs or otherwiſe. MS. Rep. Mich. 12 Ann. Canc. Broderick v. Broderick & al'.

Purchaſor bona Fide of Part of the Free-hold Lands, he ſhall re-convey to

the Plaintiff, upon Payment of the Purchaſe-Money with Intereſt at 5 l. per Cent. becauſe he had Notice of the Invalidity of the Deviſe by common Report, tho' not actual Notice from the Plaintiff or Defendant; and tho' he was not a fraudulent Purchaſor, yet he was a raſh one, and ought to have inquired into the Validity of the Will, or got the Heir at Law to join in the Conveyance to him; Per Harcourt C. Ex Relatione alterius.

4. Dr. Dent being Parſon of the Pariſh of C. in Eſſex, and Sir .... Buck having Lands in that Pariſh, told Dr. Dent that there was *a Modus of* 40 *s. per Ann. paid Time out of Mind* for his Lands in the Pariſh; and to ſatisfy and convince the Doctor of it, he *ſhew'd a Copy of a Record* in B. R. Tempore Eliz. *where a Prohibition was granted* againſt the Parſon in a Suit for Tithes in Court-Chriſtian upon a Suggeſtion of this Modus; whereupon Dr. Dent did agree with Sir .... Buck to take 40 s. per Ann. for the Tithes of Sir ...Buck's Lands in that Pariſh; but it appearing in the Cauſe that Sir Buck did *ſuppreſs Part of the Record, wherein afterwards a Conſultation was granted*, and thereby deceived Dr. Dent, and drew him into this Agreement, for that Reaſon the Lords did make void the Agreement, being obtained by ſuppreſſing the Truth. MS. Rep. Mich. 12 Ann. in Canc. cited in Caſe of Broderick v. Broderick, as the Caſe of Dr. Dent v. Buck in Dom. Proc.

For more of Circumvention in General, ſee **Covin, Fraud, Releaſe** (Y. a) and other Proper Titles.

Citation out of the Dioceſs.

(A) By Statute of *Hen.* 8.

1. 32 *H.* 8. *cap.* 9. *S.* 2. NO *Perſon ſhall be cited before any Judge Spiritual out of the Dioceſs, or particular Juriſdiction where the Perſon cited ſhall be inhabiting, except for any Spiritual Offence, or Cauſe done or neglected, by the Biſhop or other Perſon having Spiritual Juriſdiction, or by any other Perſon within the Juriſdiction whereunto he ſhall be cited;*

Lewis and Rocheſter who dwelt in Eſſex in the Dioceſs of London, were ſued for *Subſtraction of Tithes growing in* B. *in the ſaid County of Eſſex*, by Porter *in the Court of Arches of the Archbiſhoprick of Canterbury in London, where the*

S. 3. *And except it be upon Matter of Appeal, or for other lawful Cauſe wherein any Party ſhall find himſelf grieved by the Ordinary &c. of the Dioceſs &c. after the Matter there firſt commenced; or in caſe the Biſhop &c. will not convene the Party to be ſued before him; or in caſe the Biſhop &c. be Party to the Suit, or in caſe any Biſhop &c. makes Requeſt to the Archbiſhop or ſuperior Ordinary to take the Matter before him, and that only where the Law Civil or Canon doth affirm Execution of ſuch Requeſt to be lawful, upon Pain of Forfeiture, to the Perſon cited, of double Damages and Coſts, to be recovered againſt ſuch Ordinary &c. by Action of Debt, and upon Forfeiture of every Perſon ſo cited* 10 *l. one Half to the King, and the other Half to any one that will ſue for the ſame.*

S. 4.

Archbiſhop has a peculiar Juriſdiction of 13 Pariſhes, called a Deanry, exempt from the Authority of the Biſhop of London, whereof the Pariſh of St Mary de Arcubus is the chief.

S. 4. Provided that it ſhall be lawful for every Archbiſhop to cite any Perſons inhabiting within his Province for Cauſes of Hereſy, if the Ordinary immediate conſent, or do not his Duty.

S. 5. This Act ſhall not extend to the Prerogative of the Archbiſhop of Canterbury, of calling Perſons out of the Dioceſs for Probate of Teſtaments.

S. 6. No Archbiſhop &c. ſhall demand any Money for the Seal of a Citation than only 3 d. upon the Penalties before limited.

S. 7. This Act ſhall not be prejudicial to the Archbiſhop of York, concerning Probate of Teſtaments within his Province.

Reſolved, that the Body of the Act is, that no Manner of Perſon ſhall be henceforth cited before any Ordinary &c. out of the Dioceſe or Peculiar Juriſdiction where the Perſon ſhall be dwelling; and if he ſhall not be cited out of the Peculiar before any Ordinary, a fortiori, the Court of Arches, which ſits in a Peculiar, ſhall not cite others out of another Dioceſe; and theſe Words (out of the Dioceſs) are to be meant out of the Dioceſs or Juriſdiction of the Ordinary where he dwells, but the exempt Peculiar of the Archbiſhop is out of the Juriſdiction of the Biſhop of London, As St. Martin's, and other Places in London, are not part of London, altho' they are within the Circumference of it. It is to be obſerved, that the Preamble reciting the great Miſchief, recites expreſsly, that the Subjects were called by compulſary Proceſs to appear in the Arches, Audience, and other high Courts of the Archbiſhoprick of this Realm; ſo as the *Intention of the ſaid Act was to reduce the Archbiſhop to his proper Dioceſs, or Peculiar Juriſdiction, unleſs* it were *in 5 Caſes*; 1ſt, For any *Spiritual Offence or Cauſe committed or omitted, contrary to the Right and Duty, by the Biſhop* &c. which Word (*omitted*) proves that there ought to be a Default in the Ordinary. 2dly, Except it be *in caſe of Appeal, and other lawful Cauſe wherein the Party ſhall find himſelf grieved by the Ordinary, after the Matter or Cauſe there firſt begun*; ergo, the ſame ought to be firſt begun before the Ordinary. 3dly, In caſe that the *Biſhop of the Dioceſs*, or other immediate Judge or Ordinary, *dare not or will not convene the Party to be ſued* before him, where the Ordinary is called the immediate Judge, as in Truth he is, and the Archbiſhop, unleſs it be in his own Dioceſs (theſe ſpecial Caſes excepted) mediate Judge, viz. by Appeal &c. 4thly, Or in caſe that the *Biſhop* of the Dioceſs, or the Judge of the Place within whoſe Juriſdiction, or before whom the Suit by this Act ſhould be begun and proſecuted, *be Party directly or indirectly* to the Matter or Cauſe of the ſame Suit, which Clauſe in expreſs Words is a full Expoſition of the Body of the Act, viz. That every Suit (other than thoſe which are expreſſed) ought to be begun and proſecuted before the Biſhop of the Dioceſs, or other Judge of the ſame Place. 5thly, In caſe that any *Biſhop, or any inferior Judge*, having under him Juriſdiction &c. *make Requeſt* or Inſtance *to the Archbiſhop, Biſhop*, or other inferior Ordinary or Judge, and that to be done *in Caſes only where the Law Civil or Common doth affirm* &c. by which it fully appears that the Act intends that every Ordinary and Eccleſiaſtical Judge ſhould have the Conuſance of Cauſes within their Juriſdiction, without any concurrent Authority or Suit by Way of Prevention; and by this the Subject has great Benefit, as well by ſaving of Travel and Charges to have Juſtice in his Place of Habitation, as to be judged where he and the Matter is beſt known; as alſo that he ſhall have as many Appeals as his Adverſary in the higheſt Court at the firſt. Alſo there are 2 *Proviſoes* which explain it alſo, viz. That it ſhall be lawful for every Archbiſhop to cite any Perſon inhabiting in any Biſhop's Dioceſs within his Province for Matter of *Hereſy*, (which were a vain Proviſo if the Act did not extend to the Archbiſhop; but by that ſpecial Proviſo for Hereſy, it appears that for all Cauſes not excepted it is prohibited by the Act.) Then the Words of the Proviſo go further, *If the Biſhop or other Ordinary immediately* hereunto *conſent, or if the ſame Biſhop or other immediate Ordinary* or Judge, *do not his Duty, in Puniſhment of the ſame*; which Words (immediately) and (immediate) expound the Intent of the Makers of the Act. 2dly, There is a Saving for the Archbiſhop, the calling any Perſon out of the Dioceſs where he ſhall be dwelling in the Probate of any Teſtaments; which Proviſo ſhould be alſo in vain, if the Archbiſhop, notwithſtanding that Act, ſhould have concurrent Authority with every Ordinary thro' his whole Province; wherefore it was concluded that the Archbiſhop out of his Dioceſs, unleſs in the Caſes excepted, is prohibited by the Act of 23 H. 8. to cite any Man out of any other Dioceſe. Reſolved 13 Rep. 4. 6. pl. 2. Mich. 6 Jac. C. B. Porter v. Rocheſter.——S. C. cited Arg. 5 Mod. 451.

Holt Ch. J. took the Difference laid down by Dr. Lane, that a Suffragan Court may have a Juriſdiction when *a Man of another Dioceſs is taken Flagranti Delicto*; but Holt ſaid that where the Party goes into another Dioceſs, and is commorant there, and he comes back caſually into the firſt Dioceſs, then the Citation cannot be good; for ſuppoſe a Man comes caſually into the Dioceſs of London, and commits a Crime there, and then goes back to the Dioceſs where he dwells, and then caſually comes to London again, I do not think he can be here cited; but if he had been cited before he left London, then that would be Flagranti Delicto. Holt's Rep. 605. pl. 18. Trin. 5 Ann. in Caſe of Wilmett v. Loyd.

2. If one in Norfolk *comes within another Dioceſs*, and commits *Adultery* in the other Dioceſs during the Time of his Reſidence, he may be cited in the Dioceſs where he committed the Offence, tho' he dwell out of the Dioceſs; Per Coke, Warburton, & Winch J. Brownl. 45. Anon.

3. If

3. If a Man *inhabits in the Dioceſs of A. and has Cauſe to ſue for Tithes in the Dioceſs of A.* in which he inhabits, *and alſo for Tithes in the Dioceſs of B.* he ought to ſue in the Dioceſs in which the Defendant did inhabit, and not in the Dioceſs where the Tithes are payable, nor where the Plaintiff inhabits. Agreed. 2 Brownl. 28. Trin. 9 Jac. C. B. in Caſe of Jones v. Boyer. S. C. cited Arg. 5 Mod. 452.

4. The Exception in this Statute *extends only to Probate of Wills*; ſaid by Warburton J. to have been agreed by all the Juſtices. Godb. 214. pl. 306. Mich. 11 Jac. C. B. in Hughes's Caſe. S. C. cited Arg. Gibb. 110. Mich. 3 Geo. 2. B. R. in the Caſe of Edgworth v. Smallridge, where the Caſe was, that a Prohibition was pray'd to a Suit for a Legacy in the Arches againſt the Executor, for that he was cited out of his Dioceſs, contrary to 23 H. 8. cap. 9. and it appeared that the Teſtator having *Bona Notabilia* in ſeveral Dioceſes, his Will was proved in the Prerogative Court of Canterbury. Dr. Andrews for the Defendant inſiſted, that the Exception of the Probate of Wills draws after it, neceſſarily, an Exception of Suits ariſing upon ſuch Wills proved; that the 23 H. 8. is an Affirmance of the Canon Law. Now by the Canon Law a Will cannot be proved in the Arches, nor can Legacies be ſued for in the Prerogative Court, which is a Point miſtaken by the Reporters, who ſay the Legacy muſt be ſued for where the Will is proved. Both the Prerogative and the Arches are within the Archbiſhop's Juriſdiction; and if the Legatee is not ſuffered to ſue in the Arches, he can ſue no where; and Fazakerley, of the ſame Side, cited 1 Vent. 233. and as a Caſe in Point; and the Court denied the Prohibition.

5. It was held per Cur. that this Act did *not extend to the High Commiſſion Court*; for that was erected in 1 Eliz. and therefore it was not the Intent of the 23 to provide for a Court which was not then in Eſſe. Roll Rep. 174. pl. 10. Paſch. 13 Jac. B. R. Ballinger v. Salter.

11. Note, a Prohibition was awarded upon the 23 H. 8. becauſe the Party was ſued out of the Dioceſs; and now a Conſultation was pray'd, becauſe the Inferior Court had *remitted that Cauſe to the Arches*, and their Juriſdiction alſo, yet a Conſultation was denied; for it ought to be pleaded upon the Prohibition. Noy 89. Trin. 2 Car. B. R. Anon.

12. Upon View of the Statute, it appears clearly that it *extends* as well *to Suits out of the peculiar Juriſdiction*, as to Suits out of the Dioceſs. Cro. C. 162. pl. 3. Mich. 5 Car. B. R. Kadwalladar v. Brian.

13. Prohibition was granted to the Biſhop of Sarum, for citing one out of his Dioceſs, to appear at his Court at Sarum, whereas the Party was living in London. But it being a *Suit for Tithes of Lands* in the Dioceſs of Sarum, the Court, upon Notice thereof, granted a Conſultation, becauſe the Land lying in the Dioceſs of Sarum, the Suit cannot be elſe where, let the Defendant live where he will, and ſo this Caſe is not within the Statute; and a Conſultation was granted. Lev. 96. Paſch. 15 Car. 2. C. B. Weſtcote v. Harding.

14. The Court held that if a Man is *cited within the Dioceſe, though he be not an Inhabitant there, but comes thither to Trade only, or otherwiſe*, ſuch Citation is not within the Statute; and if it were otherwiſe, there might be Offences committed againſt the Eccleſiaſtical Law, which would not be puniſhed at all; for Men would offend in one County and then remove to another, and ſo eſcape with Impunity. Hardr. 421. pl. 8. Trin. 17 Car. 2. in the Exchequer. Dr. Blackmore's Caſe.

15. He that would have Advantage of the Statute for citing out of the Dioceſs *muſt come before Sentence*. Vent. 61. Hill. 21 & 22 Car. 2. B. R. Anon. See pl. 17.

16. A Prohibition was pray'd to the Eccleſiaſtical Court, for that they cited one out of a Dioceſs to anſwer a *Suit for a Legacy*, but it was denied, becauſe it was *in the Court where the Probate of the Will was*; for tho' it was before Commiſſioners appointed for Probate of Wills in the late Times, yet now all their Proceedings in ſuch Caſes are tranſmitted into the Prerogative Court, and therefore Suits for Legacies contained in ſuch Wills, ought to be in the Archbiſhop's Court; for *there the Exe-* S. P. by Holt Ch. J. Holt's Rep. 603. pl. 17. Trin. 5 Ann. in Caſe of Wilmet v. Lold.

cutor muſt give Account and be diſcharged &c. Vent. 233. pl. 1. Hill. 24 & 25 Car. 2. B. R. Anon.

By Pleading he had *admitted the Juriſdiction* of the Court

17. Prohibition does not lie *after Plea* pleaded for citing out of the Dioceſs. Cumb. 105. Paſch. 1 W. & M. in B. R. cites the Caſe of Vanacre v. Spleen.

and the Statute 23 *H.* 8. takes not away the Juriſdiction of all Matters ariſing out of the Dioceſs, but only gives him, that lives out of it, a new Privilege of Pleading to the Juriſdiction, which if he neglects he ſhall not have Prohibition after a Sentence. Carth. 33. cites the Caſe of Vanacre v. Spleen.

3 Keb. 562. pl. 78. Mich. 27 Car. 2. B. R. Vanacre v. Spleen, is that a Prohibition lies as well after Sentence as before; and whether an Appeal be depending or not; but nothing appears as to Citation. ——— S. C. cited by Dolben J. as adjudged in Ld. Hales's Time, in which he was of Counſel; and that it being moved afterwards, Ld Ch J. North allowed the ſaid Caſe to be good Law. Holt Ch. J. ſaid, it was reaſonable that it ſhould be good Law, but he doubted of it. Comb. 105, 109. in S. C.

18. A *Libel* was *for Words*, and a Prohibition was moved for, becauſe the Words mentioned in the Libel were *not ſpoken within the Dioceſs* &c. But per Cur. the Juriſdiction is not local as to the Cauſe of Action, but as to the Reſidency of the Perſon; and if the Perſon lives within the Dioceſs, it is not material where the Words were ſpoke. Comb. 105. 106. Paſch. 1 W. & M. in B. R. Anon.

S. C. cited Arg. 5 Mod. 452. ——— 3 Mod. 211. Woodward's Caſe, S. C. Paſch. 4 Jac. 2 B. R. but held e contra. ——— Comb. 132. Trin. 1 W. & M. Woodward v. Mackpeth, S. C. and a Conſultation was awarded; and Holt Ch. J. compared it to the Statute of Winton, where he ſhall be an Inhabitant within the Hundred, that occupies Land within the Hundred.

19. W. *lived in the Dioceſs of Litchfield and Coventry*, but *occupied Lands* in the Pariſh of D. in *the Dioceſs of Peterborough*, and *was there taxed in Reſpect of his Land* as an Inhabitant *towards a Rate for new caſting of the Bells*; and becauſe he refuſed to pay, was cited into the Court of the Biſhop of Peterborough, and libelled againſt for this Matter. Per Cur. this is not a citing out of the Dioceſs within the Statute 23 H. 8. cap. 9. for he *is an Inhabitant where he occupies the Land*, as well as where he perſonally reſides. 1 Salk. 164. pl. 1. Trin. 1 W. & M. in B. R. Woodward v. Makepeace.

Carth. 476. S. C. and the Court held the Suit local, and a Prohibition was denied. ——— 5 Mod. 450. S. C. ſays the Libel againſt him in the Spiritual Court at York, was 7 Years

20. A. *lived in N. within the Province of York*, and *ſubtracted Tythes there*, and then *removed to M. within the Province of Canterbury*; after he *happened to go to York and was there ſued* in the Arch-biſhop's Court for the Subſtraction, and had a Prohibition on the 23 *H.* 8. 9. But after Debate a Conſultation was awarded; becauſe the *Subſtraction of the Tithes is local* and muſt be ſued before the Ordinary of the Place where the Wrong was done, otherwiſe in Caſes tranſitory, Ubi Forum ſequitur Reum. And as it was argued by the Counſel, this is not citing out of the Dioceſs within the Statute, becauſe the Dioceſs where he lives has not a Juriſdiction; and *if he might not be cited in this Caſe, the Thing would be remedileſs* and diſpuniſhable. 2 Salk. 549. Mich. 11 W. 3. B. R. Machin v. Malton.

after his Removal from the Dioceſs of York; the Caſe was argued for a Prohibition, but the Court put off giving their Opinions to the next Term. ——— 12 Mod. 252. S. C. ſays that A. lived all his Life at Lincoln, and at the End of 7 Years after the Subſtraction, he being at York as an Evidence was ſerved with a Citation. A Prohibition was granted becauſe the Caſe was doubtful that it might be ſettled. But afterwards in Hill. Term upon Deliberation, a Conſultation was awarded, per tot Cur. ——— Ibid. the Reporter adds a Nota, viz. See the Words of 32 *H.* 8. *cap.* 7. *That the Party ſhall be ſued before the Ordinary of the Place where the Subſtraction was.* [I do not obſerve this Point taken Notice of in the Abridgments, either of Wing. or Cay; but the Words of the ſaid Statute are according to the ſaid Note, viz. that *the Party wrong'd or grieved, ſhall and may convene the Perſon or Perſons ſo offending before the Ordinary, his Commiſſary or other competent Miniſter or lawful Judge of the Place where ſuch wrong ſhall be done according to the Eccleſiaſtical Law, and in every ſuch Caſe or Matter of Suit, the ſame Ordinary &c. having the Parties or their lawful Procurators before them, ſhall and may by Virtue of this Act, proceed to the Examination, Hearing and Determination of every ſuch Cauſe or Matter, ordinarily or ſummarily, according to the Courſe and Proceſs of the ſaid Eccleſiaſtical Laws; and thereupon may give Sentence accordingly.*] ——— 3 Salk. 90. 91. pl. 2. S. C. and ſays this Caſe was ruled to ſtand upon a ſingle Reaſon; for whatever the Law might be in other Inſtances, yet in the Caſe of Tithes, the Statute 32 H. 8. expreſsly enacts, that the Party ſubſtracting

ſubſtracting them ſhall appear before the Ordinary of the Dioceſs where they were ſubſtracted; and therefore a Conſultation was granted in this Caſe.——— 2 Lutw. 1057. S. C. but S. P. does not appear.

21. F. *libelled* againſt G. in the Spiritual Court *for Cohabitation, claiming a Marriage* with her, and Prohibition moved for, upon *Suggeſtion that* the Citation was to anſwer out of the Dioceſs, it being to Eccleſiaſtical Court of Peculiar of Weſtminſter, whereas ſhe *lived in Cheſter*; but it appearing by *Affidavit*, that *ſhe dwelled for a conſiderable Time in London* Dioceſs, and even *to the very Day of the Citation*, which was ſerved upon her juſt as ſhe was going away; the Court would not grant a Prohibition. 12 Mod. 610. Hill. 13 W. 3. Fenwick v. Lady Groſvenor.

22. *Libel* againſt the Defendant in the Spiritual Court *at Worceſter, for getting his Brother's Wife with Child*, and he prays a Prohibition, becauſe he *went to live at York a Year before he was cited, though it was after the Woman was ſaid to be with Child*, and that he has a Dwelling in Yorkſhire, *but coming to Worceſter to chooſe Parliament Men he was ſerved with a Libel.* Holt Ch. J. ſaid if you *Appeal for Want of Juriſdiction*, you may ſtill have a Prohibition for that, becauſe you conteſt the ſame; *but if* you *Appeal upon the Merits or propter Gravamen*, though you inſiſt on the Juriſdiction of the Court by Proteſtation, yet this ſhall be taken for an Admiſſion of the Juriſdiction; Adjornatur. Holt's Rep. 603. pl. 17. Trin. 5 Ann. Wilmett v. Loid.

Ibid. pl. 18. the S. C. was argued by Civilians. Powell J. ſaid, ſuppoſe W. had only lived in Worceſter when this Crime was committed, and then before the Crime was found out he went to live in York; this perhaps ſhall not ouſt the Court of W. out of the Juriſdiction which was well begun there. Holt Ch. J. contra, becauſe a Citation is in Nature of a Proceſs, which in its Nature cannot be of Force in another Dioceſe. But that Point was no more inſiſted upon, being out of the Caſe. Holt Ch. J. Powis and Golud ſaid this Caſe was too nice to be determined on a Motion, therefore let a Prohibition go, and let W. declare forthwith. I am not giving any Opinion ſaid Holt Ch. J. but I think if the Citation be wrong, though that W. did plead informally to the Juriſdiction, and alſo appealed, yet all the Proceedings below muſt fall to the Ground.

For more of Citation in General, ſee **Prohibition**, and other Proper Titles.

Clerk of the Market.

(A) Clerk of the Market. His Power.

1. WHether a Clerk of the Market can *break Pots not being Meaſure?* Attorney-General ſaid that he could not, but muſt Order them according to the Form of the Statute. Savil. 57. pl. 122. Paſch. 25 Eliz. Anon.

2. At the Motion of Coke Attorney of the Queen, all the Juſtices of England aſſembled at Serjeant's Inn, upon Extortions committed by the Clerks of the Markets, becauſe they had *taken* 1*d. Fee for the View of Veſſels, though they found not any defect in them*, and ſealed them not, and if they did Seal them they took 2 d. And all the Juſtices agreed that this was

was grand Extortion, and that *no Preſcription can ſerve for taking* a *Fee for the View only*, unleſs they found Default or ſealed them. Mo. 523. pl. 690. Mich. 39 & 40 Eliz. Anon.

3. Clerk of the Market has to do with with nothing but *Victuals*. Het. 145. Trin. 5 Car. C. B. Cambridge Univerſity's Caſe.

4. In Treſpaſs Defendant juſtified as Clerk of the Market within &c. for a *Diſtreſs* of 3 s. 4 d. for not uſing *Meaſures marked according to the Standard* of the Exchequer. On Demurrer it was urged for the Defendant, that this was an Authority given by the 14 E. 3. cap. 12. S. 2. and held per Holt Ch. J. that the Clerk of the Market could not have Power to eſtreat Fines and Amerciaments otherwiſe than as a Franchiſe, and it is more reaſonable the Clerk ſhould bring the Standard with him, than that the People ſhould follow him, or attend at a Place out of the Market. 1 Salk. 327. Trin. 8 Ann. B. R. Burdett's Caſe.

For more of Clerk of the Market in General, See Market (A. 2) and other Proper Titles.

(A) Clerk of a Pariſh.

Cro. E. 71. pl. 26. S. C. and it was moved, that it was a good Preſcription, becauſe the Parſonage was a Parſonage impropriate, and by Intendment it commenced by the Act of the Parſon, viz. that he made a Compoſition that the Tithe of that Land ſhould be paid to the Clerk in Diſcharge of himſelf, and that he had uſed Time out of Mind &c. to pay to the Clerk 5 s. in Diſcharge of all Tithes &c. and the Court ſaid, if this ſpecial Matter be ſhewn in the Surmiſe perhaps it might be good, by reaſon of the Continuance, and that by this the Parſon is diſcharged from finding the Clerk, with which, perhaps, he ſhall be charged, and ſo is as a Payment of Tithes to the Parſon himſelf; but ſuch Matter is not ſhewn, and by common Intendment Tithes are not to be paid to the Pariſh Clerk, and he is no Party in whom a Preſcription can be alleged, and thereupon they awarded a Conſultation. —— Le. 94 pl. 122. S. C. accordingly.

1. THE Clerk of a Pariſh *preſcribed*, that he and his Predeceſſors had uſed *to have 5 s. per Ann of the Parſon for the Tithes of a certain Place within the Pariſh*, but a Conſultation was awarded, becauſe a Clerk dative and removable cannot preſcribe. Mo. 908. pl. 1274. 29 & 30 Eliz. Savell v. Wood.

Godb. 163. pl. 228. Paſch. 8 Jac. C. B. Candict v. Plomer, S.P. —— Le. 94. 95. pl. 122. S. P. by Clench. —13 Rep 70. pl. 34. Anon. S. C. and tho' where a Clerk is choſen by Cuſtom by the Pariſhioners, he is not deprivable by the Official, yet upon Occaſion the Pariſhioners might diſplace him, cites 3 E. 3. Annuity 70 —— And Ibid. ſays, tho' the Execution of the Office concerns Divine Service, yet the Office is merely Temporal.

2. It was held, that a Pariſh Clerk *is a mere Layman*, and ought to be *deprived by them that put him in*, and no others; and if the Eccleſiaſtical Court meddle with Deprivation of the Pariſh Clerk, they incur a Præmunire, and the Canon, which wills that the Parſon ſhall have Election of the Pariſh Clerk, is merely void to take away the Cuſtom that any had to elect him. 2 Brownl. 38. Paſch. 8 Jac. C. B. Gaudy v. Newman.

3. Re-

3. Reſolved, that if the Pariſh Clerk *miſdemean himſelf in his Office*, or in the Church, he may be ſentenced for it in the Eccleſiaſtical Court to Excommunication, but not to Deprivation. 2 Brownl. 38. Paſch. 8 Jac. C. B. Gaudy v. Newman.

4. Pariſh Clerk may *ſue in Court Chriſtian for his Fees*, which are called *Largitiones Charitativæ*. Arg. cites the Regiſter, fol. 52. for he is Quodam Modo an Officer Spiritual, cites 21 E. 4. 47. 2 Roll Rep. 71. Hill. 18 Jac. B. R. in Biſhop's Caſe.

5. In *Caſe* the Plaintiff declared, Quod cum extitiſſet Clerk of ſuch a Pariſh; the *Defendant diſturbed him in the Exerciſe of his Office, and hindred him to ſit in the Clerk's Seat, per quod he loſt the Profits of his Office.* It was objected, that this was rather a Service or Employment than an Office; that if it be an Office, it is Eccleſiaſtical, for of common Right the Parſon appoints the Clerk, and the Court will not intend a Cuſtom; and unleſs a Clerk comes in by the Election of the Pariſhioners, according to Cuſtom, he has not a Temporal Right, and the Court will *not grant a Mandamus* for a Clerk, *without an Affidavit that he is appointed by the Pariſh.* 2dly, It does *not appear that any Fees appertain unto his Office*, and no Action lies at Common Law for Diſturbance in the Enjoyment of a Seat in the Church without a Temporal Right, and ſo it is here; Adjornatur. 2 Salk. 468. pl. 7. Trin. 4 Ann. B. R. Lee v. Drake.

6. Pariſh Clerk nominated by the Parſon is, by Common Law, *an Officer*, and in *for Life*, without Deed. 2 Salk. 536. pl. 27. Hill. 10 Ann. B. R. Pariſh of Gatton v. Milwick. After the Parſon has put in a Clerk, he is then the Clerk of the Pariſh, and not the Parſon's Clerk only, and therefore he *cannot turn him out at Pleaſure*; Per Holt Ch. J. 11 Mod. 261. pl. 17. Mich. 8 Ann. B. R. the Queen v. Dr. Wall.

For more of Clerk of the Pariſh in General, See Prohibition, and other Proper Titles.

Clerk of the Peace.

(A) His Office. And appointed, and diſcharged by whom, and for what.

1. 37 *H.* 8. *cap.* 1. *S.* 3. *EVERY Cuſtos Rotulorum ſhall appoint the Clerk of the Peace, and grant the Office to ſuch able Perſon inſtructed in the Laws as ſhall be able to exerciſe the ſame, to hold the ſame during the Time that the Cuſtos Rotulorum ſhall exerciſe the Office of Cuſtos Rotulorum, ſo that the ſaid Clerk demean himſelf in the Office juſtly, and it ſhall be lawful to ſuch Grantee of the ſaid Clerkſhip to occupy the Office by himſelf, or by his Deputy inſtructed in the Laws, ſo that the Deputy be admitted by the Cuſtos Rotulorum.*

2. The Clerk of the Peace is *amerciable* by the Court of King's Bench *for gross Faults in Indictments* drawn up by him, and removed thither, and it hath often been so done (21 Car. 1. B. R.) for such Faults shall be intended to be Faults committed out of Negligence, and not out of Ignorance. L. P. R. 71.

3. 1 *W. & M. Stat.* 1. *cap.* 21. *S.* 5. *The Custos Rotulorum, or other Person to whom it shall belong to appoint the Clerk of the Peace, shall, where the Office of Clerk of the Peace shall be void, nominate a sufficient Person residing in the County or Place, to exercise the same, by himself, or his sufficient Deputy, for so long Time as such Clerk of the Peace shall well demean himself in his Office.*

4. *S.* 6. *If any Clerk of the Peace shall misdemean himself in the Office, and a Complaint in Writing of such Misdemeanor shall be exhibited to the Quarter Sessions, it shall be lawful for the Justices, upon Examination and Proof, to suspend or discharge him from the Office, and the Custos Rotulorum, or other Person to whom it shall belong, shall appoint another sufficient Person residing in the County &c. to be Clerk of the Peace, and in Case of Neglect to make such Appointment before the next Quarter Sessions, it shall be lawful for the Justices to appoint one.*

Show. 282. Mich. 3 W. & M. the S. C. it was objected, that there were no Articles or Complaint in Writing against him according to the Statute of 1 W. & M. and Holt Ch. J. declared, that the Justices cannot discharge a Clerk of the Peace for a Fault appearing in Court without Articles in Writing; and afterwards, for want of a Writing, a peremptory Mandamus was granted.—12 Mod. 13. S. C. it was argued, that the Statute 1 W. & M. vests a Freehold in the Clerk, Quamdiu se bene gesserit, and per Holt Ch. J. the Clerk of the Peace is a distinct Officer, and not a mere Servant, and a peremptory Mandamus was granted.———He draws up the *Issues upon Traverses*; Per Gregory J. Show. 523. Trin. 5 W. & M. in Case of Harcourt v. Fox ———He must be trusted with the Rolls to make Entries upon, and draw *Judgments*, and is to record Pleas, and join Issues, and enter Judgments; Per Holt Ch. J. Show. 350. in S. C.———S. C. cited Ld. Raym. Rep. 161.

5. The Clerk of the Peace *must make out all Process*; and when they are compleated must *deliver them to the Custos*, but as long as they are in Process they are to be with the Clerk, but for refusing to deliver the Rolls to the Custos, he was indicted and *removed*, and a Mandamus to restore him was denied per 3 Justices against the Ch. J. 4 Mod. 31. Pasch. 3 W. & M. in B. R. the King and Queen v. Evans.

4 Mod. 167. to 175. S. C. and per Cur. the Clerk of the Peace being in this Office by Virtue of this Act, for so long time as he shall demean himself well, those Words shall be construed most favourably to answer the Intent of the Law-makers, whose Design was to have the Office well supplied by a Man able and well skilled in the Laws, which will be effected when the Officer hath an Estate for Life; and for these Reasons Judgment was given in Trinity Term following for the Plaintiff, and afterwards affirmed in Parliament.———Comb. 209. S. C. adjudged for the Plaintiff. And Holt Ch. J. added, that it was the General Temper of the then Parliament, to make Offices more lasting (and said that our Places are so) and *Contemporanea Expositio est Optima.*———Show. 426. to 441. and 506. to 516. S. C. argued by Counsel. ——— Ibid. 516 to 537. S. C. the Opinions of the Judges delivered for the Plaintiff.——Show. Parl. Cases, 158. S. C. in the House of Lords, and Judgment affirmed.

6. In Indebitatus Assumpsit, and Non-Assumpsit pleaded, the Jury found the Stat. 27 H. 8. and 1 W. & M. and the several Clauses in them about Clerk of the Peace; that the Earl of Clare was *Custos Rotulorum* of Middlesex, and that he *named the Plaintiff to be Clerk of the Peace*, to exercise the Office by him or his sufficient Deputy, *Quamdiu se bene gesserit*; that the Plaintiff *was capable of the Office, and duly admitted*; that the *Earl of Clare was afterwards removed, and Earl of Bedford made Custos* Rotulorum, *who constituted*, by Writing under Hand and Seal, *the Defendant*, during the Time he was Custos Rotulorum, Quamdiu the Defendant se bene gesserit; and on solemn Argument Judgment pro Quer' per tot. Cur. for that he had Estate for Life, and was not removeable by the new Custos. 12 Mod. 42. Trin. 5 W. & M. Harcourt v. Fox.

Cumb. 317. S. C. and adjudged a good Return; for

7. By the *Statute* 1 *W. & M.* the *Custos Rotulorum is to appoint a Clerk of the Peace for so long Time only as he shall demean himself well.* Owen brought a Mandamus to the Justices to restore him to that Office. The Return was, that the Earl of Winchelsea, who was Custos Rotulorum, did

did *appoint O. to be Clerk of the Peace durante Beneplacito* &c. that the ſaid Earl being dead, the Lord Sydney was made Cuſtos, who appointed S. to be Clerk of the Peace of Kent, purſuant to the ſaid Act. The Queſtion was, whether a Grant of this Office during Pleaſure, which is only an Eſtate at Will, ſhall be ſo governed by the Statute as to make it an Eſtate for Life when once the Perſon is admitted to the Office, ſo that let the Cuſtos make what Appointment he will, tho' not purſuant to the Statute, it is the Statute, and not the Cuſtos, which gives an Intereſt and Eſtate to the Nominee? Adjudg'd, that no peremptory Mandamus ſhould go; for, by the Act, the Cuſtos is to nominate a Clerk to execute the Office ſo long as he ſhall demean himſelf well &c. and if he appoint him in any other Manner, he is no Clerk of the Peace, ſo that Appointment during Pleaſure is not purſuant to the Act; for he has not executed the Authority given him by the Act, and ſo the Defendant has no Title. 4 Mod. 293. Trin. 6 W. & M. in B. R. the King v. Owen.

the Statute gives the Cuſtos a particular Power to appoint the Perſon, Continuance, and Manner of holding the Office, and the Word (only) in the Act excludes the Power to name in any other Manner, and therefore the Appointment during Pleaſure being leſs than his Authority, and not warranted by it, is void. ——S. C. cited as reſolved accordingly in B. R. Paſch. 7 W. 3. after ſeveral Arguments. Ld Raym. Rep. 160.

8. It always belonged to the *Cuſtos Rotulorum* to *nominate* the Clerk of the Peace, but the Clerk of the Peace was *removeable* whenever the Cuſtos was removed or chang'd, and, moreover, was removeable at the Will of the Cuſtos till 37 H. 8. 1. which makes him to continue in quouſque the Cuſtos ſhall continue in, but now, by the late Act, he is to continue for Life, and tho' the Words are, Give and Grant to him, yet it is only an Appointment, and conſequently may be *without Deed*. Salk. 467. Trin. 10 W. 3. B. R. Sanders v. Owen.

After the Act of 1 *W. & M.* 21. the Cuſtos Rotulorum of the County of Kent, in open Seſſions then held for that County, at which Time J. S. was preſent in Court, ſaid, *I do nominate the ſaid J. S. to be Clerk of the Peace according to the ſaid Act of Parliament*; and this in C. B. was held good, though only by Parol, and in Error in B. R. a Parol Appointment was held good, but the Judgment was reverſed for the Inſufficiency and Inſenſibility of the Words, but that Judgment was reverſed in the Houſe of Lords. Carth. 426. S. C. ——12 Mod. 199. S. C. and the Reverſal reverſed accordingly.——Ld. Raym. Rep. 158. to 167. S. C. and the Reverſal revers'd accordingly.

9. He is no more than a *Miniſterial Officer*, and a Record made by him is not to be pleaded as a *Record*, and will not conclude the Judgment of B. R. Arg. 8 Mod. 43. Paſch. 7 Geo. 1. in Caſe of Colvin v. Fletcher.

Client and Attorney.

(A) Diſputes between them as to Deeds &c. in the Hands of the Attorney.

1. ATtorney being to draw a Deed has Writings brought to him, and amongſt them is one that concerns himſelf and his Title; tho' *But* where they *come to him in*

any other Manner, or on any other Account, the Party must

tho' the *Deed concerned the Attorney's own Title*, yet the Court forced him to *deliver it up*, and left him to take his proper Remedy at Law. 2 Show. 165. pl. 156. Mich. 33 Car. 2. B. R. Tyack's Caſe.

refort to his Action. 1 Salk. 87. pl. 5. Mich. 10 W. 3. B. R. Goring v. Biſhop.

S. P. unleſs the Party agrees to pay *his reaſonable Demands.*

2. Attorney having *Money due* to him *from his Client*, ſhall not be compell'd to deliver up the Papers before he is paid his Fees &c. Comb. 43. Hill. 2 & 3 Jac. 2. B. R. Anon.

12 Mod. 554. Trin. 13 W. 3. Anon.

8 Mod. 339. ſays the Court has gone ſo far as to compel a *Counſel* to deliver up the Writings intruſted with him.

3. An Attorney having Writings delivered to him to draw a Mortgage &c. may *detain* them *till the Money is paid for his drawing* them; but he cannot detain any Writings, which are *delivered to him on a Special Truſt*, for the Money due to him in that very Buſineſs; and if he does, an *Attachment* will go, and he will be ordered to pay *Coſts and Damages* to the Party. 8 Mod. 306. Mich. 11 Geo. 1. Lawſon v. Dickenſon.

4. Client delivered a Deed to his Attorney, in order to bring an Action of Covenant. The *Attorney loſt the Deed*, as he pretended. On a *Motion for an Attachment* againſt the Attorney for not delivering the Deed, it was propoſed by Mr. Strange, the Attorney's Counſel, that the Plaintiff ſhould bring a Bill of Diſcovery to make him ſet out whether there was not ſuch Deed, and what the Deed was; but he agreed that it ought to be at the Attorney's Coſts, and moved that the Court would not grant an Attachment. Page J. ſaid he thought the Attorney himſelf ought to procure a Diſcovery by Bill in Chancery, but that the Plaintiff ſhould allow him to make Uſe of his Name for that Purpoſe; Accordingly the Court granted an Attachment, but to lie in the Officer's Hands till further Directions given. 2 Barnard. Rep. in B. R. Paſch. 6 Geo. 2. Court v. Gilbert.

(B) Other Matters in General, as to Client and Attorney.

Mo. 366. pl. 500. S. C. adjudged.

1. HE may *expend Money as Attorney*, *but not as Solicitor*; per Popham, Clench, and Gawdy. Cro. E. 459. pl. 4. Hill. 38 Eliz. B. R. Rolls v. Germin.

2. If the Client in any Suit furniſhes his Attorney with a *Plea*, which the Attorney finds to be *falſe*, ſo that he cannot plead it for ſake of his Conſcience, the *Attorney may plead* in this Caſe Quod *Non fuit veraciter informatus*, and in ſo doing he does his Duty. Jenk. 52. pl. 100.

If an Attorney confeſs Judgment, the Party is bound by it.

3. If an Attorney *confeſs the Action without Conſent and Will of his Client*, this ſhall bind the Client; but otherwiſe it is in *Collateral Matters*; per 2 Juſtices. 2 Roll Rep. 63. Hill. 16 Jac. B. R.

Arg. Chan. Caſes 86, 87. Paſch. 19 Car. 2.

4. An Attorney may take Fees, but he may not lay out or *expend Money* for his Client; and if he does, Hobert doubted what Remedy he might have. Winch. 53. Mich. 20 Jac. C. B. Gage v. Johnſon, cites Sam. Leech's Caſe.

5. A

5. A Client brought *Action ſur le Caſe againſt his Attorney* for delivering to the Sheriff a Fi. Fa. againſt him in a Suit in which he was Attorney for him, and procuring it to be executed. It was inſiſted after Verdict, that the Suit was determined by Judgment being given, and conſequently the Truſt repoſed in the Defendant. Adjudged the Truſt ſtill continued; for the Defendant might have ſhew'd Cauſe why there ſhould not be Execution; and his procuring the Writ to be executed, ſhews that he *combined againſt his Client*; and Judgment for the Plaintiff, Niſi. Sty. 426. Mich. 1654. B. R. Lawrence v. Harriſon.

6. It was ſaid and admitted that an Attorney's *Aſſent to an Award* ſhall bind his Client. Ch. Caſes 87. Paſch. 19 Car. 2. in Caſe of Colwell v. Child.

7. *Money recovered, paid to the Attorney* on Record, is good Payment; for it is a Payment to the Client himſelf. 2 Show. 139. Mich. 32 Car. 2. . . . . v. Morton.

8. Bill by Adminiſtrator for Relief, after a *Special Plene Adm.* pleaded, and Verdict and Judgment, pretending that his Attorney without Direction pleaded that the Defendant (now the Plaintiff) had no Notice of the Original till the 12th of March, and had then fully adminiſtered. Iſſue was that the Defendant had Notice before the 12th, viz. on the 6th of March; whereas he had in Truth fully adminiſter'd before the 6th of March, and in Truth before the Original purchaſed; ſo that *by the falſe Plea by the Attorney the Right was never tried.* The Maſter of the Rolls diſmiſs'd the Bill, and Ld. Somers affirmed the Diſmiſſion. 2 Vern. 325. pl. 314. Mich. 1695. Stephenſon v. Wilſon.

9. In Aſſumpſit the Defendant pleaded Non-Aſſumpſit infra ſex Annos. The Plaintiff replied; and the Defendant not joining Iſſue in due Time, the Plaintiff's Attorney ſigned Judgment, but afterwards conſented to accept the Iſſue; but upon a Motion to compel him to accept the Iſſue, it was oppoſed, becauſe the Plea was a hard Plea, and the Client having Notice of this Advantage, ordered his Attorney to inſiſt upon it; and the Court ſaid they would not have held him to it, had he not conſented; but now they would, and the Client is bound by the Attorney's Conſent, and they could take no Notice of him. 1 Salk. 86. Mich. 8 W. 3. B. R. Latouch v. Paſherant.

10. An Attorney *may undertake for* his Client, *but not releaſe his Cauſe of Action*; per Holt Ch. J. 12 Mod. 384. Paſch. 12 W. 3. in Caſe of Stanhope v. Pemberton.

11. Action againſt an Attorney for *Money received to Plaintiff's Uſe*; the *Attorney ſhewed* to the Court *that he had been employed as an Attorney for the Plaintiff, and had applied ſome of his Money towards paying for his Labour, and ſome to a Solicitor* in the Cauſe; and moved to have his Bill taxed, and an Allowance of what ſhould then appear due to him. Per Cur. if the Plaintiff had applied by *Motion* to have us compel an Attorney by Virtue of our Power over him as our Officer, to pay the Money, there, for as much as that is diſcretionary in us, we would not help the Plaintiff, unleſs he did the fair Thing on his Side; but here, when he demands no Favour of us, we cannot deny him the Law, and let the Defendant take his legal Remedy againſt the Plaintiff. 12 Mod. 657. Hill. 13 W. 3. Craddock v. Glin.

12. As an Attorney has a Privilege not to be examined as to the Secrets of his Client's Cauſe, ſo the *Attorney's Privilege is the Client's Privilege*; and an Attorney, tho' he would, yet ſhall not be allow'd to diſcover his Client's Secrets; per Cur. 10 Mod. 41. Mich. 10 Ann. B. R. in the Caſe of Ld. Say and Seal;—and cites it as ſo adjudged in Holbeche's Caſe.

13. *But* as to the *Time of executing a Deed*, which was of a Date long before the Execution, that is not a Thing of ſuch a Nature as to be

called the Secret of his Client. 10 Mod. 41. Mich. 10 Ann. B. R. The Ld. Say and Seal's Caſe.

For more of Client and Attorney in General, See **Attorney**, and other Proper Titles.

Collateral.

(A) What ſhall be ſaid Collateral. And the Effect thereof.

1. AS to Collateral Acts there ſhall be *no Relation* at all. Reſolved. 3 Rep. 36. Mich. 33 & 34 Eliz. B. R. in Caſe of Butler v. Baker.

2. Privilege to be *without Impeachment of Waſte* is a Thing collateral. 2 Rep. 82. Hill. 43 Eliz. Per Coke in Cromwell's Caſe.

3. There is a Difference between a Thing Collateral *executory* and *executed*; As by Reverſal of an erroneous Judgment Collateral Acts executory are barr'd, ſo on Reverſal of a Judgment Eſcape out of Execution on that Judgment is gone; but if Judgment is had on the Eſcape againſt the Sheriff or Gaoler, and Execution is executed, this latter Judgment remains in Force, notwithſtanding the Reverſal of the firſt Judgment. Reſolved. 8 Rep. 142. a. b. Paſch. 8 Jac. in Dr. Drury's Caſe.

But Coke thinks Audita Querela lies, becauſe the Ground of the Collateral Action is diſproved and deſtroy'd by Reverſal of the firſt Judgment, and the firſt Plaintiff is reſtored to his firſt Action, on which he may have his juſt and due Remedy. Ibid. 143. b. 144.

A *Covenant* is more collateral than a Condition; Mich. 3 W. & M.

4. A *Condition is* Collateral without Dependence on the Eſtate. Arg. Keb. 31. Paſch. 13 Car. 2. B. R. in Caſe of Plunket v. Holmes. for a Condition is annex'd to the Eſtate, but Covenants are foreign. Arg. Show. 286.

(B) Collateral Promiſe. The Effect thereof.

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

1. IN Debt the Plaintiff *counted that A. borrow'd of him* 100*l. and did not pay it*, by which *the Defendant came to the Plaintiff and pray'd him to take him Debtor for A. and to give him till Michaelmas to pay it*, and ſo became principal Debtor at London, and ſhewed thereof Tally; and becauſe he had not Specialty, he took nothing by his Writ; quod nota; for per Mombray, by this Aſſumption the other is not thoroughly

ly discharged, and by consequence this Defendant is not Debtor, but the other remains Debtor as before; and also see that it is only *Nudum Pactum*. And so see that a becoming Debtor, which is *used in London by Custom, is not good at Common Law*. Br. Dette, pl. 36. cites 44 E. 3. 21.

2. 29 *Car.* 2. *cap.* 3. *S.* 4. *No Action shall be brought, whereby to charge any Executor or Administrator upon any Special Promise to answer Damages out of his own Estate; or whereby to charge the Defendant upon any Special Promise to answer for the Debt or Default of another, unless the Agreement upon which such Action shall be brought, or some Memorandum or Note thereof, shall be in Writing, and signed by the Party to be charged therewith, or some other Person by him authorized.* This Statute did not extend to any Promise made before the 24th of June. Resolved. Vent. 330. 331. Trin. 30 Car. 2. B. R. Gilmore v. Shuter.——2 Jo. 188. S. C. adjudg'd accordingly.——2 Lev. 227. S. C. resolved accordingly.——2 Mod. 310. S. C. adjudg'd accordingly.—— Freem. Rep. 466. pl. 637. S. C. held accordingly.

Assumpsit upon a Promissory Note, whereby the Defendant promised to pay so much *upon Account of his Mother*, and it being objected that there was no Consideration to it, Holt said, that to promise to pay to J. S is good, but to promise to pay to J. S. upon Account of J. N. is not good, for that is not within the Words or Meaning of the Act; the Consideration implied in the Act is, that when the Party promises upon his own Account, it must be presumed he is inbebted, or else he would not promise to pay it; aliter where the Promise is to pay upon Account of a third Person. In this Case Holt directed a Verdict for the Plaintiff, but under controul, and ordered the Postea to be staid. 11 Mod. 226. Pasch. 8 Ann. at Guildhall, Garnet v. Clerke.

Clearly the Words (*Default of another*) in the Statute, is the Default of another *in performing his Contract*, and if the *whole Credit be* not *entirely given to the Undertaker*, so as no Remedy lies against the Party upon the Contract, but that the Undertaker comes in Aid of the Credit given by the Contract to the Party, the Undertaking will be within the Statute; Per Cur. 6 Mod. 249. Mich 3 Ann. B. R. Bourkamire v. Darnell.——And they also agreed a Case put by Darnell, that *where* the *Plaintiff has an Action against the Party for whom the Undertaking is*, there no Action will lie against the Undertaker, without the Promise be in Writing; secus where no Action does lie against the Party, for then the whole Credit is entirely upon Account of the Undertaker, and the other looked upon as his Servant, and the Sale and Contract is, in Judgment of Law, to the Undertaker, tho' the Delivery be to the other Party as his Servant. Ibid.

3. An Indebitatus Assumpsit, or a Special Assumpsit, tho' it be on a Special *Promise to pay another Man's Debt*, and tho' it be collateral, and within the Statute of Frauds and Perjuries, yet the *not alleging a Note in Writing* in the Declaration is not Error to reverse a Judgment; for the Court will intend that a Note was given in Evidence; yet many, since that Act, do declare that *Assumpsit super se, prout per Notam* &c. but 'tis not necessary; and Judgment affirmed. 2 Show. 88. pl. 81. Hill. 31 & 32 Car. 2. B. R. Calcot v. Hatton.

4. If I *build a House for J. S. at the Request of J. N.* and J. N. promises to pay me, Debt will lie; 'tis true it will not raise a Promise, but an *express Promise* will well ground an Action. 2 Show. 421. Hill. 36 & 37 Car. 2. B. R. in Case of Ambrose v. Rowe.

5. In Assumpsit for the Debt of a Stranger, it was assigned for Error that it did *not appear to be by Writing*, and consequently by the Statute of Frauds and Perjuries it does not bind the Defendant; but per Cur. this is never done in Pleading, but *ought to be proved on the Trial*. Comb. 163. Mich. 1 W. & M. in B. R. Lee v. Bashpoole.

6. A. brought an *Action against B. C. and D.*—*B. promised* that in Consideration *A. would not prosecute the* Action, *he would pay him* 10 l. and the Question was, Whether this was a void Promise by the Statute, being not in Writing? But per Cur. this cannot be said to be a Promise for another Person, but for his own Debt, and therefore not within this Statute. 5 Mod. 205. Pasch. 8 W. 3. Stephens v. Squire. Comb. 362. S C accordingly.

7. Assumpsit in Consideration that the Plaintiff *would accept C. to be his Debtor* for 20 l. due from A. to B. The Plaintiff *in vice & loco A.* that C. would pay. B. averr'd that he did accept C. to be his Debtor &c. Adjudged good after a Verdict, without express Averment that *A.* 3 Salk. 14, 15, S C. adjudged, and affirmed accordingly.

—12 Mod. 133. S. C. adjudged, and Judgment affirm'd accordingly.

A. was discharged; and Judgment affirmed by 4 Judges againſt 3, and they conſtrued it to be a mutual Promiſe. 1 Salk. 29. pl. 30. Paſch. 9 W. 3. in Cam. Scacc. Roe v Haugh.

8. If *A. employs B. to work for C. without Warrant from C.* A. is liable to pay for it; Per Holt. 12 Mod. 256. Mich. 10 W. 3. Anon.

9. Aſſumpſit againſt B. upon a Promiſe ſuppoſed to be made by him to pay for Goods delivered by Plaintiff to A. Holt took this Difference. If B. deſires A. to deliver Goods to C. and promiſes to ſee him paid; there Aſſumpſit lies againſt B. though in that Caſe he ſaid at Guild-hall, he always required the Tradeſman to produce his Books, to ſee whom Credit was given to. But if after Goods delivered to C. by A. B. ſays to A. you ſhall be paid for the Goods, it will be hard to ſaddle him with the Debt. 12 Mod. 250. Mich. 10 W. 3. Auſten v. Baker.

10. Two Perſons go to an Inn-keeper, *one hires an Horſe, and the other promiſes* that if the Inn-keeper will deliver him to his Friend, *he will ſee it forth-coming*. This, as a Promiſe to make good the Default of another, is not good without a Note in Writing; yet the Defendant is chargeable upon the *Special Bailment*. Quod Nota, and ſo good without a Note. L. P. R. 118. cites 3 Ann. B. R.

6 Mod. 248. Bourkamire v. Darnell, S. C. & S. P. —— 3 Salk. 15, 16. S. C. and ſame Diverſity, and that in the laſt Caſe the third Perſon is only as a Servant.

11. Where the *Undertaker comes in Aid only* to procure a Credit to the Party, in that Caſe there is a Remedy againſt both, and both are anſwerable according to their diſtinct Engagements, and this is a Collateral Promiſe, and void by the Statute of Frauds; *Secus where the whole Credit is given to the Defendant*. 1 Salk. 27. pl. 15. Mich. 3 Ann. B. R. in Caſe of Birkmyr v. Darnell.

6 Mod. 248. Bourkamire v. Darnell, S. C. & S. P. accordingly.

12. If 2 come to a Shop and 1 buys, and the other to gain him Credit promiſes the Seller, *that if he does not pay you I will*; this is a Collateral Undertaking and void without Writing by the Statute of Frauds; but if he ſays, *Let him have the Goods I will be your Paymaſter*, or *I will ſee you paid*; this is an Undertaking as for himſelf, and he ſhall be intended to be the very Buyer, and the other to act but as his Servant; Per Cur. 1 Salk. 28. pl. 15. Mich. 3 Ann. B. R. in Caſe of Birkmyr v. Darnell.

13. There is a *Difference* between a *Conditional* and an *abſolute* Undertaking; As if A. promiſes to pay B. ſuch a Sum if C. does not, there A. is but a Security for C. But if A. promiſe *that C. will pay* ſuch a Sum, A. is the principal Debtor; for this Act was done on A.'s Credit, and not on C.'s; Per Lee J. and Judgment accordingly. Gibb. 303. pl. 7. Trin. 5 Geo. 2. B. R. Gordon v. Martin.

(C) Collateral Security.

S. C. cited and admitted. Ibid. 389.

1. A Having purchaſed Lands of the Duke of Norfolk, had for his Security *future Uſe limited on Condition of Eviction* of the purchaſed Lands to ariſe to him out of other Lands of the Duke within the Honour of Clun in Shropſhire; after which the Duke was attainted, and *Lands* of the Honour *came to the Crown*, and then the purchaſed Lands were evicted, and adjudged that A. could have no Remedy by Entry, Ouſter le Maine, Monſtrance de Droit &c. becauſe before the future Uſe accru'd, the Poſſeſſion of the Land came to the Crown, and therefore A. ſued to the Queen, who De Gratia granted the Land to him by Patent; Arg. Mo. 375. cites it as Yelverton's Caſe.

2. *Truſtees*

2. *Truſtees for Sale* of Lands for Payment of Debts, *with Power on Sale to give* Collateral Security on other Lands to a Purchaſor for *Diſcharge of Incumbrances, and Confirmation by the Heir*, when of Age, ſell to J. S. and give him Collateral Security. The Heir comes of Age, and *refuſes to confirm*, he pretending other Title, but could not make it out. Decreed that Truſtees ſell other Lands to diſcharge Incumbrances on the Lands purchaſed by J. S. and the Heir to join; and in Default by the Truſtees, J. S. to tender a Purchaſor to the Maſter, and the Heir to join in the Conveyance, and alſo immediately to confirm the Lands to J. S. with Warranty and Covenants according to the Condition of the Collateral Security; and that J. S. may proceed to get Judgment in Ejectment on his Collateral Security, with a Ceſſet Executio till further Order. Fin. R. 166. Mich. 26 Car. 2. Foley v. Lingen. 2 Chan. Caſes, 205. S. C. but not exactly S. P.

3. *Covenant to ſecure a Purchaſor by other Lands* within 2 Years. The next Term after the 2 Years expired the Purchaſor exhibits his Bill to have Collateral Security according to the Covenant. Ld. Keeper diſmiſſed the Bill and took a Difference between Covenants for further Aſſurance of the Lands ſold, and Collateral Security of other Lands to incumber the Eſtate; and the 2 Years being elapſed, diſmiſſed the Bill. Chan. Caſes, 252. Hill. 26 & 27 Car. 2. Erſwick v. Bond. Fin. R. 192. Bond v. Eversfield, S. C. but no Decree. But the Defendant might ſearch for Precedents, whether the Court can *enlarge the Time* for giving Collateral Security.

4. A. *ſells* Land to B. A. takes a Leaſe of the ſame Lands of B. at a Rent beyond the Value, with a Condition of *Re-entry*, and gives Collateral Security for the *Payment of the Rent*. A. was Arrear 5 Years Rent. B. re-entred. A. could have no *Relief* againſt the Collateral Security without Payment of the Arrears as well after as before the Re-entry; the Land was worth but 160 l. but the Rent was 250 l. per Ann. Chan. Caſes, 261. Trin. 27 Car. 2. Anon.

5. *Aſſignment of a Decree* is a Collateral Supplimentary Security; and ſo Finch. C. diſmiſſed the Bill brought by the Plaintiff to have a Releaſe of the Decree made by the Aſſignor ſet aſide. Chan. Caſes, 300. Mich. 29 Car. 2. Barns v. Canning and Pigot.

For more of Collateral in General, See **Conditions**, (S. c) (E. d) (F. d) **Heir, Voucher**, (U. b. 2) to (W. b) and other Proper Titles.

Collation.

(A) What is. In what Caſes it may be. And the Effect thereof.

1. IT was ſaid, that where the *Biſhop* ought to make Collation, and *is diſturbed*, his *Writ ſhall be to preſent*, and *his Count to make Collation*. Thel. Dig. 84. Lib. 9. cap. 5. S. 20. cites Mich. 16 E. 3. Brief, 660.

Hob. 316. in Caſe of Elvis v. Arch biſhop of York & al'. ——3 Le. 13. pl. 44. Hill. 14 Eliz. C. B. Anon S. P.——4 Le. 209. pl. 339. Mich. 18 Eliz. B. R. Anon. S. P. and ſeems to be ſame S. C ——Collation ſhall not put a Common Perſon out of Poſſeſſion. Cro. E. 241. pl. 14. Trin. 33 Eliz. B. R. in Caſe of the Arch biſhop of York v. Buck.

2. Collation by Lapſe *is in the Right of the Patron* and for his Turn. 24 E. 3. 26. And he ſhall lay it as his Poſſeſſion for an Aſſiſe of Darein Preſentment. Hob. 154. in Caſe of Colt v. Glover, and cites 5 H. 7. 43. F. N. B. 31. (F).

3. Note, that there *is no Privity* between the Incumbent of the Biſhop who is collated by Lapſe, and the Biſhop, as there is between the Maſter and Servant, and therefore if the *Biſhop pleads ſpecially* in Quare Impedit *how he preſented by Lapſe*, the *Incumbent* ſhall not ſay generally that he is in by Collation of the Biſhop by Lapſe, but *ſhall plead it as certainly as the Biſhop ſhall plead.* Br. Incumbent &c. pl. 12. cites 16 H. 7. 6.

4. If a Patron *preſents after 6 Months before a Collation*, the Ordinary muſt admit his Clerk as well as within the 6 Months, ſo that the Ordinary muſt plead that he made Collation ſuch a Day after the 6 Months, abſque hoc that the Plaintiff preſented before this Day, and this was held a good Traverſe; Per tot. Cur. Kelw. 50. b. Trin. 18 H. 7.

Collation *is* a giving the Church to the Parſon, and *Preſentation is* a giving or offering the Parſon to the Church, and that makes a *Plenarty*, but not a Collation; Per Cur. Le. 226. pl. 307. Paſch. 33 Eliz. C. B. in Caſe of the Queen v. the Archbiſhop of York.

5. *Collation is* where the Clerk is inducted without Preſentation to the Biſhop, As of Lapſe by the Biſhop, or of *Donative* of a free Chapple &c. where he himſelf may put the Clerk in corporal Poſſeſſion without Preſentation. Br. Quare Impedit, pl. 156. cites F. N. B. 32, 33.

6. *Biſhop collates after Lapſe is devolved on the Archbiſhop*, but before Collation by the Archbiſhop. This ſhall bind the Archbiſhop; for, at Common Law, when a Clerk was once admitted, he was not removeable, and *Collation remains at Common Law.* The Stat. W. 2. does not aid but in Caſe of Preſentation. Jenk. 281. pl. 7.

7. Collation of the Biſhop makes no *Diſappendancy*, and where it is made *within* 6 *Months* it makes not ſo much as a Plenarty, but the Church remains void, as Green's Caſe ſaith, that is, that it makes no binding Plenarty againſt the true Patron, but that he may not only bring his Quare Impedit when he will, but alſo *preſent* upon him ſeven Years after; and if the Biſhop receives his Clerk, the other is out Ipſo Facto, yet to all other he is a full Incumbent, (and not in Nature of a Curate only) and ſhall ſue for Tithes, and is capable of Confirmation from the King; and per Hobart Ch. J. if the Patron brought Quare Impedit on it, he muſt be named, or elſe could not be removed, and that ſuch a *Plenarty* barr'd the Lapſe of the Archbiſhop and King. Hob. 302. pl. 380. Hill. 17 Jac. in Caſe of Gawdy v. Archbiſhop of Canterbury.

8. *If the King preſents by Lapſe, it it not* any Collation, but a Preſentation, and ſo pleaded always, for he preſents as ſupreme Patron; Per Cur. Cro. J. 641. pl. 20. Mich. 20 Jac. B. R. cites 32 H. 6. 2. and 7 E. 4. 20.

9. If a *Biſhop collates the ſame Day that he dies*, the Succeſſor may collate notwithſtanding. Arg. Hard. 24. Mich. 1655.

10. This had been moved the two preceding Seals, and was now moved again. The Caſe was, that the Defendant, Sir Walter C. & al' were Truſtees of an Advowſon by *Settlement, upon Truſt, to preſent ſuch Perſon as the Heir of J. S. ſhould, by Writing under Hand and Seal, nominate, and in Default of ſuch Nomination, to preſent in their own Right* as they ſhould think. The Church becomes void, and *the Heir of J. S. is an Infant of about* 9 *Months old*; the Truſtees contend that the Infant is not

not capable of nominating by Writing &c. and that therefore they have Right to preſent Proprio Jure &c. Bill was brought by the Infant to compel the Truſtees to preſent according to his Nomination &c. Injunction was granted as to Defendants, to reſtrain them from preſenting without Leave of the Court, and *an Order that the Archbiſhop of York, (the Ordinary) ſhould not admit* &c. And the Queſtion now was, Whether this Order would prevent the Archbiſhop from collating when the 6 Months for preſenting expired, or that there ſhould be a particular Order to reſtrain the Archbiſhop from collating &c? And after a good deal of Debate it was agreed by Ld. Chancellor, & omnes, *that the Order* to prevent Admiſſion *was ſufficient to prevent Collation, becauſe Collation was Admiſſion, Inſtitution, and every thing but Induction*; and at Law, upon a Quare Impedit and Ne Admittas, the Ordinary cannot collate or take Advantage, and this Order *is in its Nature an Engliſh Ne Admittas*, and as to the Queſtion whether the Biſhop in this Caſe could take Advantage of Lapſe or not, Ld. Chancellor held clearly that he could not; for as at Law Lapſe was prevented by a Ne Admittas, ſo when the Title is in Equity, the Biſhop is equally reſtrained and prevented of Lapſe, by an Order not to admit, pending the Diſpute in this Court, and this was obſerved to have happened ſeveral Times before, in the Caſe of Mortgagor and Mortgagee, where the Mortgagee having the legal Title pretended to preſent, whereas in Equity the Preſentation (or the Right of Nomination) belongs to the Mortgagor. As to the main Point, Ld. Chancellor ſeemed ſtrongly to incline, that the Nomination by the Infant was good; for by Law Infants, of never ſo tender Age, are to preſent, and theirs, and all other Preſentations, are uſually in Writing, and cannot be otherwiſe when the Infant cannot ſpeak &c. But a Difference was endeavoured to be put, that here was a particular Method preſcribed by the Truſt, viz. by Writing under Hand and Seal &c. which muſt ſuppoſe the Perſon, who created the Truſt, did intend the Heir to nominate, and ſhould exerciſe a Diſcretion, and be capable of knowing as well as executing a Writing &c. MS. Rep. Mich. 4 Geo. 2. in Canc. Arthington v. Sir Walter Coverly & al'.

For more of Collation in General, See **Preſentation**, and other Proper Titles.

Colleges.

(A) How conſidered &c.

1. *Deviſe to a College by the Preſident* thereof is void; for when the Deviſe ſhould take Effect, the College is without a Head, and ſo not capable of ſuch Deviſe, for it was then an imperfect Body; held per Cur. on good Advice taken thereof. 4 Le. 223. pl. 358. Temps Queen

Dal. 31. pl. 13. 3 Eliz. S. C. in totidem Verbis, and cites 13 H. 8. 13 the like Point.

Queen Eliz. B. R. in the Caſe of the Preſident of Corpus Chriſti College in Oxford.

S. C. cited 2 Lev. 15 Arg.—Mod. 83. S. P. Arg. in Appleford's Caſe.——He cannot maintain Aſſiſe in any Caſe whatſoever, for he has no Sole, Seiſin, nor Eſtate to ſupport a Real Action, he is only a viſible Perſon of the Body aggregate, but has not the leaſt Title to the Rents and Profits of the College till after a Dividend made; Per Holt Ch. J. 4 Mod. 125. Trin. 4 W. & M. in B. R. in Caſe of Phillips v. Bury——S. P. by Holt Ch. J. Skinn. 488 in S. C.

2. It was agreed, if the *Maſter of the College* be *ouſted wrongfully* an Aſſiſe will lie, as it was ſaid in the End of * Canon's Caſe Dy. but not if he be ouſted *by his proper Ordinary or Viſitor*. Lev. 23. Paſch. 13 Car. 2. B. R. in Doctor Widdrington's Caſe.

* D. 209. a. pl. 20. Mich. 2 & 3 Eliz. at the End of Coveney's Caſe.——S. C. cited and queſtioned. Show. Parl. Caſes 47. in Caſe of Phillips v. Bury.

S. P. by Hale Ch. J. Mod. 84 Mich. 22 Car. 2 B. R. in Appleford's Caſe.——A College is a Lay Corporation; if they be *diſſeiſed* an Aſſiſe muſt be brought. Godb. 394. pl. 478. by Noy, Arg. Paſch. 3 Car. B. R.

3. Colleges *are not Spiritual Foundations*, but are *private Societies*, as Inns of Court. 2 Lev. 15. Trin. 23 Car. 2. B. R. the King v. New College.

4. Fellows of *Fellowſhips newly created* cannot pretend to have any *Shares* of the annual Profits, or the caſual Revenues which did belong to the Fellows of the *Old Foundation*, tho' they may be capable of all Offices and Employments in the College, if not hindered by the local Statutes. Fin. R. 222. Trin. 27 Car. 2. in Caſe of St. John's College Cambridge v. Platt.

For more of Colleges in General, See Eſtate, Grants &c. Mandamus (B) Viſitor, and other Proper Titles.

Colour in Pleadings.

(A) What it is. And the Reaſon thereof.

As in *Treſpaſs for taking* the Plaintiff's *Cattle*, the *Defendant ſaith, that before* the *Plaintiff had any thing* in them, *he was poſſeſſed of them as of his own proper Goods, and delivered them to T. S to re-deliver* to him again *upon Requeſt, but T. S. giving them to the Plaintiff*, who, ſuppoſing the Property was in T. S. at the Time of the Gift, took them, and the Defendant took them from the Plaintiff, and thereupon the Plaintiff brought his Action; this is

1. COLOUR *in Pleading is a feigned Matter*, which the Defendant or Tenant uſes in his Bar, when an Action of Treſpaſs for Land or Goods, or an Aſſiſe, or Entry ſur Diſſeiſin for Rent, or an Action upon the Statute of 5 R. 2. for Forcible Entry is brought againſt him, *in which he gives the Plaintiff or Demandant ſome colourable Pretence*, which ſeems at firſt Sight to intimate that he hath good Cauſe of Defence, the *Intent* whereof is *to bring the Action from the Jury's* giving their Verdict upon it, to be determined by the Judges; and therefore it *always conſiſts of Matter in Law*, and that which may be doubtful to the Lay-People. Brown's Anal. 7.

is a good Colour and a good Plea. Heath's Max. 27. cites Doct. & Stud. lib. 2. cap. 13. And Brooke, fo. 104. Title Colour in Aſſiſe, Treſpaſs &c.

2. Note, that Colour ought to be *Matter in Law*, or *doubtful to the Lay-Gents.* Br. Colour, pl. 64. Heath's Max. 31. cites S. C. & S. P. as that it muſt be doubtful to them, whether the ſame be good in Law or not.

3. Colour ſignifies *a probable Plea, but really falſe*, and hath this End, viz. *to draw the Title* of the Cauſe *from the Jury to the Judges.* Heath's Max. 26, 27.

4 Colour ought to be ſuch a Thing which is good Colour *of Title, and yet is no Title*; As a Deed of a Leaſe for Life, becauſe it hath not the Ceremony, viz. Livery. So of *Reverſion granted without Attornment.* But a *Deed of Gift of Goods* or Chattels is good without other Act or Ceremony. So of Colour by a *Leaſe for Years, or by Letters Patents*, it is not good, becauſe they make a good Title in the Plaintiff; and of that Opinion was all the Court. Cro. J. 122. pl. 6. Trin 4 Jac. B. R. Radford v. Harbin.

5. The *Reaſon* why Colour ſhall be given in Writ of Entry ſur Diſſeiſin, Writ of Entry in Nature of Aſſiſe, Aſſiſe, Treſpaſs &c. is that *the Law (which prefers and favours Certainty* as the Mother of Quiet and Repoſe) to the Intent that where the Court ſhall adjudge upon it, if the Plaintiff demurs, Or that a certain Iſſue may be taken upon a certain Point, *requires that the Defendant, when he pleads ſuch Special Plea, that the Plaintiff* notwithſtanding may have Right, *the Defendant ſhall give Colour to the Plaintiff, to the Intent that his Plea ſhall not amount to the General Iſſue, and ſo leave all the Matter at large to the Jurors*, which will be full of Multiplicity and Perplexity of Matter; and tho' the Colour be only Fiction, yet Lex fingit ubi ſubſiſtit Æquitas; cites Dr. & Stud. cap. 53. fol. 160. b. But when the Special Matter of the Plea, notwithſtanding the Plaintiff had Right before, utterly barrs him of his Right, in ſuch Caſe the Defendant need not give any Colour, becauſe he barrs the Plaintiff of his Right if he had any, and then it will be in vain to give the Plaintiff Colour, where it appears upon the Matter of the Plea that he had no Right; for by this, if in Real Action, as Aſſiſe, Writ of Entry in Nature of Aſſiſe &c. if *Collateral Warranty* be pleaded, and the Defendant relies upon it, or if *Eſtoppel* be pleaded, or *Fine levied with Proclamations* &c. there no Colour need be given, becauſe the Plaintiff is barr'd, tho' he had Right; and with this accords 35 H. 6. Tit. Treſpaſs 160. So, and for the ſame Reaſon, if the Defendant conveys to him Title by *Act of Parliament*, as is held 3 E. 4. 2. a. b. Reſolved per Cur. 10 Rep. 90. a. b. Hill. 8 Jac. in Cam. Scacc. in Dr. Leyfield's Caſe.

6. Whereſoever the *Defendant ſhews a Cauſe of Action in the Plaintiff*, either expreſs or implied, and *confeſſes and avoids it*, it is a good Plea; for by Confeſſion and Avoidance he confeſſes the Plaintiff has Cauſe of Action againſt him, were it not for ſome *Special Matter in Law*, by which is not meant a Queſtion in Law, but *a Thing which in Law avoids the Cauſe of Action, As a Sale in Market Overt*; and without leaving a Cauſe of Action, it will amount to the *General Iſſue*, and this is the *Reaſon* of Colour. 12 Mod. 121. Paſch. 9 W. 3. Hallet v. Birt.

(B) In what Actions Colour may or muſt be given.

Br. Error, pl. 30. cites S. C.—— Heath's Max. 29. cites S.C.

1. IN Error it appears that the Caſe was, *Lord, Meſne, and Tenant by 9 s. Rent*, and the *Meſne brought Aſſiſe againſt the Lord of the 9 s. Rent*, and *he pleaded that the Meſne held the Land of him by 9 s. Rent as Meſne, by which he took 9 s. Rent of him, and of ſo much Rent render'd as Tenant*, and if he demands other Rent, Nul Tort; and this Bar was awarded good upon Writ of Error brought thereupon, without any Colour; quod nota. Br. Colour, pl. 7. cites 50 E. 3. 18.

Fitzh. Colour, pl. 41. cites S. C.—10 Rep. 89. a. in Principio, cites S. C.—— Ibid. 91. a.

2. In *Treſpaſs* the Defendant *ſaid that J. N. his Maſter was Owner of the Goods*, by which *he at his Command took them* at S. and the Plaintiff would have retaken them, and he would not ſuffer him, Judgment ſi Actio, and no Plea; for he neither confeſs'd Property nor Colour in the Plaintiff. Br. Treſpaſs, pl. 70. cites 2 H. 4. 5.

S. C. cited per Cur. and admitted.——Br. Colour, pl. 6. cites S. C.

Br. General Iſſue, pl. 14. cites S. C. & S. P.—— Fitzh. Colour, pl. 8. cites S. C. & S. P.—10 Rep. 91. b. in a Nota of the Reporter.

3. Note that Colour in Aſſiſe or Action of Treſpaſs is ſufferable, if it be *Matter in Law*, and *difficult to the Lay Gents*; and otherwiſe it is not ſufferable, but the Party ſhall be drove to the General Iſſue, Nul Tort, or Not Guilty. Br. Colour, pl. 15. cites 19 H. 6. 21.

Br. Treſpaſs, pl. 132. cites S. C. —Fitzh. Colour, pl. 6. cites S. C. accordingly. —Heath's Max. 32. cites S. C. that to give Colour by Coparceners or Jointenants is good.

4. In Treſpaſs the Defendant *ſaid that J. was ſeiſed in Fee of the Houſe and 20 Acres* &c. *of which* &c. *and died ſeiſed, and B. and C. his Daughters and Heirs enter'd, and B. of her Moiety infeoffed the Plaintiff, and C. died, and K. her Daughter and Heir enter'd into the other Moiety, and was ſeiſed pro indiviſo, and infeoffed the Defendant, by which he enter'd* and did the Treſpaſs, Prout ei bene Licuit, and a good Plea without other Colour. Br. Colour, pl. 18. cites 19 H. 6. 46.

Heath's Max. 29. cites 28 H. 6. 27. and that in this Caſe he may [but it ſeems miſprinted for *muſt*] give Colour; [and likewiſe (28) ſeems miſprinted for (20)]

5. *Treſpaſs* de Clauſo Fracto, and eating his Graſs in D. The Defendant juſtify'd *in S. abſque hoc that he is guilty in D.* and no Plea per Cur. without giving Colour. Br. Colour, pl. 82. cites 20 H. 6. 27.

Heath's Max. 29. cites S. C.—— If the Defendant *ſays that his Father was ſeiſed, and died ſeiſed, and the Land deſcended to him*, there he ſhall give Colour; for he ſhall not bind the Plaintiff. Br. Colour, pl. 53. cites 12 E. 4. 15.

6. In Aſſiſe if the Tenant *pleads Dying ſeiſed and Deſcent to him*, he ſhall give Colour; for the *Poſſeſſion is bound, but not the Right*; but *where both are bound, he need not to give Colour*. Br. Colour, pl. 72. (bis) cites 22 H. 6. 18.

S. C. cited 10 Rep. 89. b. 90 a. in Principio. ——Where the Defendant *pleads His Franktenement*, he ſhall not give Colour. Br. Colour, pl. 53. cites 12 E. 4. 15. ——Heath's Max. 29. cites S. C. and 22 H. 6. 50. S. P.

7. In Treſpaſs *of breaking his Cloſe*, he *ſhall ſay that the Place where* &c. *at the Time of the Treſpaſs was the Franktenement of the Defendant*, without giving any Colour. Br. Colour, pl. 26. cites 22 H. 6. 50.

8. *So* where he *says that it was the Franktenement of J. S. and he by his Command enter'd* &c. Br. Colour, pl. 26. cites 22 H. 6. 50. In Treſpaſs *Feoffment made by the Plaintiff to J. N. who infeoffed M.* and the *Defendant as Servant of M. enter'd* &c. is no Plea without *Colour*. Br. Treſpaſs, pl. 166. cites 15 E. 4. 31.——Heath's Max. 28. cites S. C.

Treſpaſs for breaking his Cloſe. The Defendant *pleads that J. S. was ſeiſed of the Land, and let it to J. D. and he as his Servant entered*, and gave no Colour to the Plaintiff; and for that Cauſe the Plaintiff demurr'd; and it was argued that when the Defendant makes a *Special Title* to himſelf, or to any other, he ought of Neceſſity to give Colour to the Plaintiff; but when he pleads a General Plea, or that it is His Freehold, it is otherwiſe; and cited 2 Ed. 4. 8. But it was argued contra, becauſe the Defendant *makes no Title to himſelf, but juſtifies as a Servant*; and cited 18 E. 4. 3. Wray ſaid he ought to give Colour, tho' he juſtifies as a Servant; but moved the Parties to relinquiſh their Demurrer, and plead to Iſſue, which they did. Cro. E. 76. pl. 35. Mich. 29 & 30 Eliz. B. R. Dinham v. Beckett.

9. *So* where he *says that J. S. leaſed to him for Years, or at Will*; per Newton. Brooke ſays Quære inde. Ibid. It is no Plea in Treſpaſs to ſay *that the Plaintiff leaſed to W. for Life*, the *Remainder to the Defendant*, [*and that*] *W. died, and he entered in his Remainder*; Per Brian, Br. Treſpaſs, pl. 166. cites 15 E. 4. 31.——Br. Colour, pl. 27. cites S.C. & S. P. by Brian.

But it is a good Plea *that the Plaintiff leaſed to the Defendant for 20 Years, which yet continues* &c. without Colour; *for there he confeſſes the Franktenement to be in the Plaintiff*; per Brian, quod nota. Br. Treſpaſs, pl. 166. cites 15 E. 4. 31.——Br. Colour, pl. 27. cites S. C. For it confeſſes the Franktenement to be in the Plaintiff at the Time of the Treſpaſs; per Cur.

Where the *Defendant doth convey from the Plaintiff himſelf*, in ſome Caſe he ſhall give Colour, and in ſome not; As 6 H. 7. 14. where the Defendant conveys from the Plaintiff *for Life or Years*, there he ſhall not give Colour; and ſo is 22 H. 6. 50. Otherwiſe as it ſeems by 8 Eliz. Dyer 146. where the Defendant pleads a Leaſe for Years from a Stranger. Heath's Max. 28.

10. *But* where he *juſtifies at another Day, and will traverſe the Day in Time*, there he ſhall give Colour. Brooke makes a Quære of that Diverſity. Br. Colour, pl. 26. cites 22 H. 6. 50. In Treſpaſs *of breaking his Cloſe the 18th of Auguſt*, the *Defendant pleaded Recovery of the ſame Land againſt a Stranger the 20th of October, abſque hoc that he is Guilty before the Day of the Recovery*; and per Cur. this is no Plea without giving Colour to the Plaintiff, inaſmuch *as the Recovery is againſt a Stranger*. Br. Colour, pl. 53. cites 12 E. 4. 15.

11. Treſpaſs *upon the 5th of* R. 2. The *Defendant ſaid that the Father of the Plaintiff was ſeiſed, and infeoffed him, and the Plaintiff ſuppoſing that his Father died ſeiſed where he did not die ſeiſed*, enter'd &c. and no Colour per Cur. For it is not Matter in Law, nor doubtful; for *he deſtroys it himſelf by his own Shewing*; quod nota. Br. Colour, pl. 3. cites 33 H. 6. 54. And concordat 37 H. 6. 54. that in this Action of Treſpaſs a Man ſhall give Colour as in other Actions of Treſpaſs.

12. Treſpaſs *of 30 l. at D. in the County of York taken and carried away*, (and ſo ſee that as it ſeems Property may be of Money.) The *Defendant intitled himſelf as Parſon, and gave Colour that he deliver'd the Money to J. N. to keep to his Uſe, who delivered it to the Plaintiff, and he retook it*, and it was admitted that *Offering changes Property*, and yet it was admitted that he ought to give Colour; quod nota. Br. Colour, pl. 5. cites 34 H. 6. 10. 10 Rep. 89. a. cites S. C. and that the 30 l. was Money offer'd to the Image of Noſter Dame in a Chapel of our Lady in the Pariſh of the Defendant, where People uſed to offer Gold and Silver, and that he took it, as lawfully he might.——Ibid. 91. a. cites S. C. and ſays that in that Caſe no Colour need be given; but that Moyle, towards the End of the Caſe, ſaid that if any one takes my Goods or Money, and offers them to an Image, in this Caſe I am barr'd againſt him, as of *Goods ſold and toll'd in Fair or Market*, in which Caſe no Colour ſhall be given.

13. *When Matter in Law is, then there is no need of Colour*; Per Laicon, Priſot and Moyle. Br. Treſpaſs, pl. 222. cites 36 H. 6. 7.

14. In Treſpaſs, the Defendant *juſtified for Goods waived by a Felon, and he ſeiſed them*, and did not give Colour, therefore ill; Quod Nota. And yet it was ſaid there, that * 5 E. 3. a Man juſtified for † *Wreck de mere* and did not give Colour and good, and ſo here by the Reporter; * 10 Rep. 91. a. ſays the Caſe is intended is Hill. 5 E. 3.

For 3 a.

† He that juſtified in Treſpaſs for Wreck, was compelled to give Colour. Br Colour, pl. 31. cites 9 E. 4. 22

For by this Plea, the Property is not denied to be in the Plaintiff before the Stealing; for it is ſufficient Colour to the Plaintiff, or Plea in Bar to the Plaintiff; but here the Defendant againſt the Opinion of the Court gave Colour that the Plaintiff ſuppoſed the Property in him before the Thief took them &c. this is no Colour. Br. Colour, pl. 37. cites 39 H. 6. 2.

——Treſpaſs of Goods taken, viz. 2 Buts of Wine; the Defendant pleaded that he is Lord of the Manor of D. and preſcribed to have Wreck within the ſaid Manor, and ſaid that the ſame Buts were in a Ship in the High-Sea, which Ship was drown'd, and that by the Re-flowing of the Sea, the Buts were caſt upon his Manor and he took them as Wreck &c. and the Defendant was compelled to give Colour, and ſo he did. Br. Preſcription, pl. 32. cites 9 E. 4. 22.——Br. Colour, pl. 37. at the End cites S. C. accordingly. —— 10 Rep 90. b. cites S. C accordingly, but ſays it is held in 21 E. 4. 18. b. & 21 E. 4. 65. a. that in ſuch Caſe no Colour ſhall be given, and that the Reaſon of all the other Books agree herewith. So when the Matter of the Plea bars the Right of the Plaintiff, no Colour ſhall be given.——to Rep. 91. a. cites S. C and ſays that as to the Caſe of Waif, when the Defendant alleged that the Property was in the Plaintiff &c. it was reſolved that no Colour ſhould be given.

In *Trover of 6 Oxen* in London, and there converted &c. the Defendant pleaded that he ſeiſed them in the Manor of D. in Eſſex, as Good *waived* there, and ſo juſtified Abſque hoc, that he was Guilty in London. Per Cur. This is no Plea; for it amounts only to the General Iſſue, containing no Matter local to make the Place material. Cro. E. 174. pl. 5. Hill. 32 Eliz. B. R. Bullock v. Smith.

15. In Treſpaſs the *Place is an Acre, of which J. S. was ſeiſed in Fee before the Treſpaſs, and leaſed to W. N. for* 10 *Years*, and *he as Servant of W. N. and by his Command entered and did the Treſpaſs*, and no Plea without giving Colour to the Plaintiff. Contra, where he ſays *that the Place is the Frank-tenement of W. N. and he as Servant* &c. *entered* and did the Treſpaſs. Br. Colour, pl. 48. cites 2 E. 4. 5.

Heath's Max. 27. cites S. C.

16. In Raviſhment of Ward, it was agreed that where the Defendant *intitles himſelf to the Ward by a Stranger*, there he ſhall give Colour. Br. Colour, pl. 50. cites 2 E. 4. 27.

17. In *Treſpaſs upon 5 R.* 2. it was admitted that Colour ſhall be given in this Action as in Treſpaſs, and the Defendant may plead Not Guilty, and ſo to Iſſue. Br. Actions ſur le Statute, pl. 29. cites 3 E. 4. 1.

Colour ſhall be given in Writ of Forcible Entry. Heath's Max 27. 28. cites Br. Forcible Entry, pl. 5. and Colour, pl. 23. 21 H. 6. 39. and ſays, that ſo is 35 [33] H 6. 54. and other Books that Colour may be given in an *Action upon the Statute of 5 R.* 2. and in no other Writs or Actions as I can find, nor in theſe neither, as the Pleading may be, As if the Defendant *pleads the General Iſſue* and does not juſtifie; *or* pleads ſome *Plea that* meerly *determines the Right*; as a Feoffment with Warranty, Fine, Recovery, and the like, as appears in Brook, 14 Aſſiſe.

18. In Treſpaſs upon the ſaid Statute it was admitted that Colour ſhall be given in this Action, but the Defendant *pleaded that King H.* 6. *by Act of Parliament gave it to the Predeceſſor of the Defendant, by which he was ſeiſed, and after he reſigned, and after this the Defendant was elected Maſter of the College, upon whom the Plaintiff entered, upon whom the Defendant re-enter'd* &c. and Per Danby Ch. J. and Arden J. the Defendant need not give Colour; for an Act of Parliament binds every Man, and after the Parties accorded by Arbitrement. Br. Colour, pl. 51. cites 3 E. 4 2.

19. In Treſpaſs upon the 5 R. 2. it is a good Plea, *that R. was ſeiſed till by the Plaintiff diſſeiſed, and the Defendant entered as his Servant* &c. and this without Colour; becauſe it ſeems that *Entry after Diſſeiſin binds the Meſne Acts*. Br. Colour, pl. 74. cites 11 E. 4. 5.

20. Treſpaſs by W. P. & R. againſt J. N. The Defendant, *ſaid that W. P. the Plaintiff was ſeiſed, and infeoffed T. who infeoffed M. and* that *the Defendant as Servant to M. entered and did the Treſpaſs*, and no Plea, Per Cur. becauſe he did not give Colour. Farf. ſaid the Writ is brought by two, and the Defendant pleads the Feoffment of the one &c. and after Pigot paſſed over and *gave Colour by the Defendant*. Per Brian, then you need not ſpeak of the Feoffment of the Plaintiff; for *you ſhall not give Colour but by him by whom you commence your Title*, and after Pigot *ſaid that the Plaintiff*

Plaintiff was ſeiſed as above &c. *and infeoffed as above* &c. *and the Plaintiff claiming in by Colour of a Leaſe made to them for Term of Life, where nothing paſſed &c. entered, upon whom the Defendant at the Time of the Treſpaſs, as Servant of the Feoffee, entered*; and this was held a good Plea, notwithſtanding that he gave Colour by the Defendant himſelf. Quod Nota, Quia Mirum. Br. Colour, pl. 27. cites 15 E. 4. 31.

21. In Treſpaſs the Defendant *juſtified the Entry and the cutting of the Corn, becauſe C. M. was ſeiſed of the Place* &c. *in Fee, and ſowed the Land, and the Defendant as Servant* &c. *entered and cut* &c. and by all the Juſtices where he juſtifies as Servant &c. he ſhall not give Colour to the Plaintiff. Br. Colour, pl. 54. cites 18 E. 4. 3. Heath's Max. 29. cites S. C. — A. brings *Treſpaſs* againſt B. *for taking* and carrying *away his Tithes*. The Defendant *pleads*, that the *King was ſeiſed* in Fee of the Rectory to which the ſaid Tithes belong, *and gave* them by Patent *to C. for Life, who made a Leaſe for Years* of them *to E.* and that the Defendant as E.'s Servant and by his Command, took this Corn and carried it away, without giving Colour, or ſhewing the King's Patent made to C. The Plea was adjudged bad; the Plaintiff had Judgment affirmed in Error. For in the Caſe of *Parties or Privies in Intereſt, who come to a particular Eſtate derived out of another, which requires a Deed to create it*, as in the Caſe of the King's Patent, or a Leaſe of a Corporation, or in the Caſe of a Grant of a Rent, or of any other Thing which lies in Grant, the firſt Patent or Deed ought to be ſhewn. *Otherwiſe* of thoſe who come to ſuch Things *by Act of Law*; as Tenant by Elegit, or Statute, or Tenant in Dower, Tenant by the Courteſy &c. Jenk. 305. pl 80. 8 Jac. Dr. Leyfield's Caſe.

S. C. cited 10 Rep. 89. a. b. Arg. ——Ibid. 89. b. ad finem cites S. C. and that there needs no Colour, becauſe notwithſtanding the Fee and Frank-tenement is to one, yet the Plaintiff may have a Leaſe for Years &c. and that with this accords 22 H. 60. 50. a. —— But when a ſpecial Title is made as in 2 R. 3. 8. a. where John Atwood brought Treſpaſs of his Cloſe broken againſt one John Dingle and W. Dingle; the Defendant pleaded that one Tho. Atwood was ſeiſed, and infeoff'd J. B. and R. S. who infeoff'd Sir John Norbury Knt. and the ſaid John Dingle in his own Right, and the ſaid W. Dingle as Servant to him, and gave Colour to the Plaintiff by the ſaid Tho. Atwood, cited 10 Rep. 90. a. in Principio.

22. In Treſpaſs in Lands, the Defendant *ſaid that the King gave to him the Lands in Tail, by Virtue of which he ſeiſed* &c. *and after he leaſed to the Plaintiff at Will, and after entered* &c. *of which Entry the Action is brought*, and good Colour, per Cur. by the Leaſe at Will; Quod Nota. Br. Colour, pl. 55. cites 18 E. 4. 10. Heath's Max. 32. cites S. C.

23. *So* if Defendant pleads *that W. was ſeiſed in Fee, and was attainted of Treaſon, by which the King was ſeiſed and leaſed to the Plaintiff at Will, and after by his Letters Patents gave the ſame Land to the Defendant*; this is good Colour. Br. Colour, pl. 55. cites 18 E. 4. 15.

24. In *Entry ſur Diſſeiſin of Rent* Colour may be given; admitted. Br. Colour, pl. 56. cites 19 E. 4. 3. Heath's Max. 27. S. P. cites S. C. and ſays, ſo is E. 4. 17.

25. He who *pleads to the Writ* ſhall not give Colour, and a Man may plead to the Writ a *Plea which goes to the Action*, and not give Colour and well. Br. Colour, pl. 56. cites 21 E. 4. 4. Heath's Max. 29. cites S. C.— 10 Rep. 91. a. in Principio cites S. C.

26. In Treſpaſs, per Brian, he who *juſtifies for Tithes as Parſon*, ſhall not give Colour. Br. Colour, pl. 57. cites 21 E. 4. 18. Heath's Max. 28. cites S. C.

bnt is miſ-printed (Diſtreſs for Diſmes).——In Treſpaſs of certain Loads of Oats, taken and carried away at Bodmon, againſt the Prior of Bodmon; the Defendant ſaid that tho Oaths grew in a certain Place in B. in the Pariſh of Bodmon, of which he was Parſon Impariſonee, and being compelled by Rule of Court to ſhow how he came to the ſame Parſonage) ſaid that he had the Impropriation by Preſcription, and that the Corn was ſevered from the 9 Parts, and that he took them as his own Goods, and gave Colour that he delivered them to one T. who bailed them to the Plaintiff to keep, and the Defendant took them. 10 Rep. 38. a. Arg. cites 11 E 4. 65. a. [but it ſeems miſ-printed, and that it ſhould be 21 E. 4 65. S. C. as in Brooke, pl. 59.]——S C. cited ibid. 90. b. as 21 E. 4. 65. a.——Br. Colour, pl. 59. cites 21 E. 4. 65. that he need not give Colour; but Brooke ſays Quære.—No Colour can be given; for of common Right they belong to the Parſon Jenk. 306. pl. 80.

Heath's Max. 28. cites 21 Ed. 4. 18. & 15. that Colour may

27. *So* of him who juſtifies *for Wreck* de Mere *bought in Market overt, Waif or Stray*. But Brook ſays Quære inde. Br. Colour, pl. 57. cites 21 E. 4. 18.

be given where one *juſtifies for Wreck or Waifs and Eſtrays*, or any other Matter of Record; but ſays, ſee there other Books, viz. 2 & 12 Ed. 4. 38 H. 6. 7 and 37 H. 6. 7. varying whether one ſhall give Colour where the Defendant doth juſtify for Wreck, Waifs and the like &c. and ſo 34 H. 6. 10. in the ſame and for *Offerings*. ——— 10 Rep 90. b. 91 a. S. C. cited per Cur. ——— Br. Colour, pl. 5. cites 34 H. 6. 10. S. P. —— Br. Colour, pl. 59 cites 21 E. 4. 65. S. P. But Brook ſays Quære —— Where a Man juſtifies for *Wreck* he ſhall give Colour, and ſo he did, Quod Nota bene. Br. Treſpaſs, pl. 182. ——— Br. Preſcription, pl. 32 cites 9 E. 4. 22. S. C.

28 In Treſpaſs, per Brian, if a Man *juſtifies* by any *Matter of Record*, he need not to give Colour; But Brooke ſays, Quære. Br. Colour, pl. 59. cites 21 E. 4. 65.

Br. Forcible Entry, pl. 24. cites S. C.

29. R. brought Writ of *Forcible Entry upon the Statute* 8 *H.* 6. againſt J. B. who *pleaded, that J. H and H. A. were ſeiſed &c. and infeoffed F. and S. in Fee, and the Defendant as Servant* &c. and gave Colour as he ought, and traverſed the Force; for when the *Defendant makes ſpecial Title to him in whoſe Right he juſtifies as Servant*, there it ſhall not be intended that the Plaintiff has any Intereſt in the Land, and ſo there is a Diverſity. 10 Rep. 90. a. cites 1 H. 7. 19. a. b.

In Treſpaſs the Defendant intitled himſelf by a Deviſe, and

30. He who pleads *Deviſe by Teſtament* ſhall give Colour in Treſpaſs or Aſſiſe; for it is only as a Feoffment. Br. Colour, pl. 75. cites 5 H. 7. 10.

gave Colour to the Plaintiff. Br. Colour, pl. 41. cites S. C. —— Heath's Max. 29. cites S. C.

10 Rep. 91. a. in principio, cites S. C. and 13 H. 7 6. that when the Defendant intitles himſelf by the Plaintiff himſelf no Colour ſhall be given.

31. In *Treſpaſs* it is a good Plea, *that the Plaintiff leaſed to the Defendant for Term of Life*, for the Leſſor has *Intereſt by the Reverſion* to enter, and ſee if there be Waſte or not, and therefore a good Plea without other Colour. Br. Colour, pl. 77. cites 6. H. 7. 14. per Brian.

32. *Contra upon Feoffment*, for this amounts to Not-Guilty. Br. Colour, pl. 77. cites 6 H. 7. 14.

Br. Treſpaſs, pl. 166. cites 15 E. 4. 31. S. P. by Pigot. —— Br. Colour, pl. 84. (85) cites 20 H. 7. 14. the ſame Diverſity.

33. In Treſpaſs *Feoffment of the Land to W. N. whoſe Eſtate the Defendant has* is no Plea in Treſpaſs without giving *Colour*, but *immediate Feoffment* of the Plaintiff to the Defendant is a good Plea without giving Colour; contrary in Aſſiſe. Br. Treſpaſs, pl. 424. cites 10 H. 7. 22.

Heath's Max. 29. cites S. C. and 21 H. 7. 23. S. P.

34. In Treſpaſs, when the Defendant ſhews Cauſe, and *prays Aid of the King*, or *demands Judgment Rege Inconſulto*, he ſhall not give Colour to the Plaintiff; Per Cur. Quod Nota. Br. Colour, pl. 28. cites 15 H. 7. 10.

Treſpaſs in Land, the Defendant *alleged Poſſeſſion in the King*; Judgment ſi Rege Inconſulto there ſhall not be Colour.

35. In Treſpaſs, per tot. Cur. where the *Defendant intitles himſelf by Leaſe of a Biſhop by Copy according to the Cuſtom of the Manor, and that now the Temporalties are in the Hands of the King*, and demands *Judgment Si Rege Inconſulto* &c. he need not to give Colour, As where he pleads in Bar; Note the Diverſity. Br. Colour, pl. 33. cites 21 H. 7. 43.

Br. Colour, pl. 72. (bis) cites 15. H. 7. 10.

36. Where the Defendant *binds the Right of the Plaintiff by Feoffment with Warranty, Fine, Recovery, Diſſeiſin, or Re-entry* &c. there needs not any Colour. Colour ſhall not be given but upon Plea in Bar. Br. Colour, pl 64.

37. In

37. In an *Aſſiſe* where *Entry and Re-entry* are *pleaded with a Diſſeiſin*, there is no Occaſion to give Colour. Jenk. 21. pl. 40.

38. Colour ſhall be in an *Aſſiſe, tho' the Reverſion be in the King.* Jenk. 171. pl. 33.

39. If *in Bar Defendant fails* of giving Colour, *where it is neceſſary* to give Colour, that Omiſſion is *remediable by* Plaintiff's *Replication*, for he ought to take Advantage of his want of Colour before he replies; Per Holt. 12 Mod. 316. Mich. 11 W. 3. Anon.

40. Where *General Iſſue is ſpecially pleaded* Colour ſhould be given, elſe it is good Cauſe for Demurrer; Per Cur. 12 Mod. 354. Paſch. 12 W. 3. in Caſe of Horn v. Luines.

41. *If you give Colour you may plead Matter in Law Specially*; As in Debt for Rent you may plead Nil debet, and give a Releaſe in Evidence; Per Holt Ch. J. 12 Mod. 377. Paſch. 12 W. 3.

42. *Treſpaſs* for *entering into the Plaintiff's Houſe, and keeping the Poſſeſſion* thereof for ſo long. *Defendant pleads that J. S. was ſeiſed in Fee* thereof, and he, being ſo ſeiſed, *gave Licence* to the Defendant to enter into and poſſeſs the ſaid Houſe, till he give him Notice to leave it; that thereupon he entered, and kept the Houſe for the Time mentioned in the Declaration, and had not any Notice to leave it all the Time; and a ſpecial Demurrer, becauſe the Plea amounted to the General Iſſue; And per Cur. he might have given this Matter in Evidence againſt all People, except J. S. but againſt him he muſt have pleaded it; ſo he ſhould here either have pleaded the General Iſſue, or given Colour to the Plaintiff. Ergo Jud' pro Quer' 12 Mod. 513, 514. Paſch. 13 W. 3. ..... v. Saunders.

43. If one would plead a *Plea amounting to the General Iſſue*, he ought to give the Defendant Colour, *either expreſs or implied*; per Holt Ch. J. 12 Mod. 537. Trin. 13 W. 3. Anon.

(C) What ſhall be ſaid to be good Colour.

1. IN Aſſiſe it is no Colour *to ſay that the Land is held of the Plaintiff, and that after that the Tenant enter'd by Deſcent the Plaintiff as Lord abated after the Death of the Anceſtor of the Tenant*; * but if he had ſaid *that the Plaintiff as Lord enter'd, ſuppoſing that the Anceſtor had died without Heir*, this had been Colour. Quære inde; for this is not doubtful to the Lay-Gents, and he ought to confeſs it &c. Br. Colour, pl. 38. (bis) cites 2 Aſſ. 7.

* Heath's Max. 32. cites S. C. that it is a good Colour to ſay that the Plaintiff claimed to enter as Lord by Eſcheat &c.

2. In Aſſiſe the Tenant *pleaded Dying ſeiſed of his Father, and that he entered as Heir, and the Plaintiff abated as Son and Heir of one J. who was a Baſtard*; and it was held no Colour, becauſe *there is no Privity of Blood between them*, by which he added to it that J. the Plaintiff, as Son and Heir of J. who was Son of R. his Father, who *was born before the Eſpouſals, claiming to be Heir of R. his Father, where he was a Baſtard, abated* &c. and admitted then for Colour. Br. Colour, pl. 38. (bis) cites 2 Aſſ. 9.

3. In Aſſiſe the Tenant *pleaded Leaſe for Life by J. N. to the Father of the Plaintiff, the Remainder to the Tenant*, and the *Plaintiff ſuppoſing that his Father had died ſeiſed in Fee*, enter'd &c. and good Colour. Br. Colour, pl. 9. cites 9 H. 4. 3.

Heath's Max. 31 cites S. C. —In Aſſiſe the Tenant *gave Colour to the Plaintiff*, viz. *that his Father made Feoffment, and this Heir, viz. the Plaintiff, ſuppoſing that he had died ſeiſed, entered* &c. This ſeems to be no Colour; for it *is not Matter in Law, nor doubtful.* Br. Colour, pl. 10. cites 11 H. 4. 3.

4. If

4. If a Man *pleads that J. S. was seised in Fee, and died*, and one *W. entered as Heir, who was seised and died, and S. his Heir entered* &c. *and gives Colour by J. S.* this is well; for here is no Dying seised. Quod nota; for he *did not say that he died seised.* Br. Pleadings, pl. 149. cites 11 H. 6. 19.

10 Rep. 91. b S. C. cited by the Reporter in a Nota —— Fitzh. Colour, pl. 8. cites S. C. and all the Points following, as cited by Brooke as of the same Year.

5. It is good Colour *that J. N. granted to him the Reversion, and the Tenant for Term of Life died, and he claiming by the Reversion granted it where the Tenant for Life did not attorn*; for the Lay Gents think that it passes by the Grant. Br. Colour, pl. 15. cites 19 H. 6. 21.

6. So where the Tenant *says that he leased for Life, and the Tenant surrender'd*; for the Lay Gents are ignorant if Surrender may be by Parol. Br. Colour, pl. 15. cites 19 H. 6. 21.

7. *So* where the Tenant says *that the Father of the Plaintiff leased to J. for Life, and after released to him, and the Plaintiff supposing that his Father died seised of the Reversion, ousted him after the Death of Cesty que Vie.* Br. Colour, pl. 15. cites 19 H. 6. 21.

8. *So* if he says *that the Father of the Plaintiff infeoff'd him, and after he suffered him to occupy at Will, and he supposing that he had died seised* &c. Ibid.

It is good Colour that the *Plaintiff claiming as Heir where he was a Bastard eigne*; but it is no Colour if he *does not say this Word* (*eigne*); for Bastard only is no Plea nor Colour; for Bastard eigne may be vouched as Heir for the Possession. Br. Colour, pl. 36. cites 38 H. 6. 7.

9 And *so* to say *that the Plaintiff claimed as eldest Son, where he was a Bastard* &c. is good Colour. Br. Colour, pl. 15. cites 19 H. 6. 21.

It is good Colour that a Man *claims as Heir where he was a Bastard*; per Paston. Br. Colour, pl. 14. cites 19 H. 6. 20.——Heath's Max. 32. cites S. C. and says that so it is in the same Year, Fol. 21. Or to say that the Plaintiff pretending Title to a Reversion without Attornment, is a good Colour.

In Assise the *Tenant made Bar as Heir, and the Plaintiff claiming as Heir where he was born out of any Espousals*, entered; and there it was held that he ought to give the Plaintiff a Mother, and so he did. Br. Colour, pl. 39. cites 25 Ass. 13.

In Trespass it was permitted for Colour that the *Plaintiff claimed in as Son and Heir* &c. *where he was a Bastard.* Br. Colour, pl. 66. cites 11 H. 4. 84.

It is no Colour *that the Plaintiff claiming as Heir where he was youngest Son, enter'd* &c. Br Colour, pl. 36. cites 38 H. 6. 7.

10. So to say *that the Plaintiff claim'd as youngest Son*; for this is no Difficulty. Br. Colour, pl. 15. cites 19 H. 6. 21.

11. So if he says *that he leased to the Father of the Plaintiff for Life, for Years, or pur Auter Vie, and he supposes that his Father had died seised in Fee* &c. this is no Colour. Ibid.

12. In Trespass the Defendant *said that A. was seised in Fee, and gave to the Baron and Feme in Tail, who died seised, and the Land descended to the Defendant, and the Plaintiff claiming by Colour of Deed of Feoffment by the said A. before the Gift* &c. *enter'd* &c. and good Colour, tho' it be given before the Dying seised, which binds the Entry. And he who pleads in Assise that his Father was seised in Fee, and died seised, and he entered as Heir, and gave Colour by his Father before the Descent, yet the Colour is good. And so see *where the Possession is bound, and not the Right*, yet the Defendant shall give Colour; contra *where he binds both.* Quod nota a good Diversity here. Br. Colour, pl. 17. cites 19 H. 6. 43.

And per Prisot, *in general Writ of Trespass* it is *good Colour of Entry into the Whole by Colour of one Moiety per My, & per Tout* he may enter into the Whole; *but in* this Action of *Trespass upon the Statute of 5 R. 2. the Writ expresses into how much he entered*, and therefore Bar for a Moiety to enter into the Whole is no Plea; for the Writ expresses Certainty. Quare in the General Writ of Trespass. Br. Colour, pl. 36. cites 38 H. 6. 7.——Fitzh. Colour, pl. 19. cites S. C.

13. In Trespass Ubi ingressus non datur per Legem, if the *Defendant pleads Feoffment of the Moiety, and gives Colour to the Plaintiff of the Moiety, by which the Defendant entered into the whole*, this is no Colour for Entry into the whole; for it may be of one Moiety severed from the other Moiety. Br. Colour, pl. 36. cites 38 H. 6. 7.

15. In

14. In Treſpaſs of Goods waived, if the Defendant *ſays that the Plaintiff ſeiſed them to the Uſe of the King*, this is no Colour if he does not *ſhew that he was Bailiff of the King, Eſcheator, or other Officer accountant* to the King; Per Priſot clearly, but contra Littleton and Danby. Br. Colour, pl. 37. cites 39 H. 6. 2. and ſee that 9 E. 4. 22. Colour was given by him who juſtified for *Wreck* de Mere &c.

15. *Treſpaſs done the 3d of June* 36 *H.* 6. The Defendant *pleaded Feoffment the 3d of May* 37 *H.* 6. and gave *Colour by the ſame Feoffor, Anno* 37 *H.* 6. *abſque hoc that he is Guilty before this Day*, and a good Plea. Br. Colour, pl. 45. cites 5 E. 4. 79.

16. *Feoffment of the Plaintiff to the Tenant* is no Plea in Aſſiſe; Quære of *Feoffment to J. N. que eſtate the Tenant has*; Per Pigot; Quod non negatur. Br. Colour, pl. 27. cites 15 E. 4. 31.

17. In Treſpaſs the Defendant *juſtified by Letters Patents of King E.* 4. and gave *Colour to the Plaintiff by Letters Patents of the ſame King made to him during the Life of J. N. who is now dead.* Nota. Br. Colour, pl. 81. cites 7 H. 7. 14.

18. In Treſpaſs for chaſing in his Park, the Defendant *ſaid, that the Plaintiff incoffed two of the Park, and he by their Command entered and chaſed*, and a good Plea, without Colour, becauſe he *conveyed the Intereſt of the Plaintiff Meſne*, and not by a Stranger. Br. Colour, pl. 85. (86.)

19. Every Colour ought to have 4 *Qualities*; 1ſt. It ought to be *doubtful* to the Lay-Gents; As where the Defendant ſays that the Plaintiff claiming by Colour of a Deed of Feoffment &c. this is good; for it is doubtful to the Lay-Gents, whether Land ſhall paſs by Deed only, without Livery, or not? 2dly, That Colour, as Colour, *ought to have Continuance*, tho' it wants Effect; As if the Defendant gives Colour by Colour of a Deed of Demiſe to the Plaintiff for the Life of J. T. who before the Treſpaſs was dead, this is not any Colour, becauſe it does not continue, but the Defendant may well deny the Effect thereof. 3dly, The Colour ought to be ſuch, that if it was of any Effect it will *maintain the Nature of the Action*; As in Aſſiſe to give Colour of Franktenement, and not as Guardian in Chivalry, nor to his Anceſtor where the Action is of his own Poſſeſſion. 4thly, Colour ought to be *given by the firſt Conveyance*, or otherwiſe all the Conveyance before is waived. 10 Rep. 91. b. Hill. 8 Jac. in a Nota by the Reporter, and cites ſeveral Books for the ſeveral Diviſions, [which may appear under this Title]

(D) What Colour ſhall be good in a Writ of Treſpaſs of Goods taken, and what not.

1. IN Treſpaſs of Goods carried away, the Defendant *ſaid, that J. N. was poſſeſſed Ut de Proprio, and made the Defendant his Executor, and died, and the Plaintiff claiming J. N. as his Villein where he was Frank, took the Goods, and the Defendant re-took them*, and the Defendant e contra, and ſo to Iſſue, therefore it is admitted good Colour. Br. Colour, pl. 80. cites 47 E. 3 23.

2. Where a Man *confeſſes Poſſeſſion in the Plaintiff of the proper Goods of the Defendant by a Tort meſne*, this is good Colour in Treſpaſs; As of the Caſe of the *Chaplain and Feme who have the Goods of the Defendant in their Poſſeſſion*, and the *Defendant enters the Houſe and retakes them.* Br. Colour, pl. 8. cites 2 H. 4. 13. Heath's Max. 30, 31. cites S. C. & S. P. for that amounts only to the General Iſſue, but there it is more doubted in another Caſe, where the Defendant in *Treſpaſs of Trees* did plead, that he

he was *ſeiſed until by the Plaintiff diſſeiſed*, who did cut the Trees, and ſquared them ; and then he, the Defendant, did re-take them. Heath's Max. 30.

Heath's Max. 31. cites S. C. —In Treſpaſs of Goods carried away, the Defendant *juſtified as Executor, and the Plaintiff claiming as Executor where he was Not Executor, took the Goods*, & non allocatur ; by which he *ſaid, that the Teſtator bailed to him to keep* &c. And the Plaintiff ſaid, ſhew what Day he made you Executor, & non allocatur ; and therefore it ſeems that the *Bailment* is good Colour. Br. Colour, pl. 40. cites 1 H. 7. 10.

3. Treſpaſs by a Feme *of Goods carried away*. The *Defendant juſtified as Executor of the Baron of the ſame Feme*, and the *Feme claimed to be Executrix where ſhe was Not Executrix ; priſt* &c. and this was admitted good Colour ; quod nota. Br. Colour, pl. 1. cites 2 H. 6. 15. and 19 H. 6. 12.

4. Treſpaſs of *Goods taken*. The Defendant *ſaid that before the Plaintiff any Thing had, the Property was in S. who bailed the Goods to W. to keep, who made the Defendant his Executor, and the Defendant ſeiſed them as Executor, and the Plaintiff took them out of his Poſſeſſion, and the Defendant re-took them*, and a good Colour ; Per Cur. by Poſſeſſion as above without Title ; Quære in Aſſiſe as it is ſaid there. Br. Colour, pl. 12. cites 7 H. 6. 35.

Heath's Max. 31. cites S. C.

5. It is good Colour in *Treſpaſs brought by a Parſon*, where the *Defendant juſtifies as Patron, to give Evidence, and Colour by Leaſe at Will by the laſt Parſon who reſigned*, per Strange and Martin, and ſome e contra ; by which Chaunt gave Colour that the *Biſhop, in Time of Vacation, granted to the Plaintiff to hold the Parſonage by a certain Time* &c. and this was admitted for good Colour. Br. Colour, pl. 13. cites 8 H. 6. 9.

6. In Treſpaſs of Goods taken, it is no Colour *that the Plaintiff claimed by Gift of the Teſtator where he did not give*, by which he ſaid that he claimed as Executor &c. Br. Colour, pl. 69. cites 19 H. 6. 12.

Heath's Max. 31. cites S. C. ——to Rep. 88. b. Arg. cites S. C. ——Ibid. 91. a. S. C. cited per Cur. ſays, that ſince he took upon him to give Colour, if any was neceſſary, ſuch Colour as he gave was not good.

7. Treſpaſs *of Grain carried away*, the Defendant *ſaid that he is Parſon, and the Grain grew in ſuch a Place*, and ſhewed where &c. *which was his Tithes, and he took it as Parſon, and the Plaintiff claiming to be Parſon there where he was not inſtituted nor inducted, took them, and he re-took them*, and the beſt Opinion was, that it is no Colour ; for he *does not confeſs Poſſeſſion in the Plaintiff, but as Uſurper*. Br. Colour, pl. 14. cites 19 H. 6. 20.

Treſpaſs *of carrying away Corn and Barley* ; Markham ſaid, *A. B. was Parſon of C. and the Pariſhioners ſowed* the 1ſt Day of May, *and after the Parſon made the Defendant his Executor, and the Plaintiff was inſtituted and inducted Parſon there, and after the Pariſhioners ſevered the Tithes, and the Plaintiff, as Parſon, took them as his proper Goods, and the Defendant, as Executor*, took them ; Judgment &c. and admitted good Colour. Br. Colour, pl. 20. cites 21 H. 6. 30.——— Br. Emblements, pl. 9. cites S. C. —— S. C. cited Arg. 10 Rep. 88. b. but ibid. 91. a. it was ſaid per Cur. that Colour was given in that Caſe, but that there was no Rule of Court for the giving it.

Quære, where he *ſays that the Property was to J. N. who bailed them to W. P. who gave to the Plaintiff, who took them, and J. N. re-took them, and gave them to the Defendant* ; Judgment &c. Br. Colour, pl. 22. cites 21 H. 6. 36.

8. In Treſpaſs *of Charters and Minuments taken at D.* it is *no Plea that the Property was to J. N. who bailed to the Defendant, and the Plaintiff took them, and the Defendant re-took them* ; for no Colour is given to the Plaintiff. Br. Colour, pl. 22. cites 21 H. 6. 36.

It is good Colour *that J. was poſſeſſed and bailed to T. who gave to the Plaintiff, and the Defendant re-took* Br. Colour, pl. 71. cites 21 H. 6. 37.

Treſpaſs of taking Slippers and Shoes, the Defendant *ſaid, that he was poſſeſſed of three Dickers of Leather, and bailed them to J S. who gave them to the Plaintiff, who made thereof Slippers, Shoes, and Boots*, and the Defendant came and took them, Prout ei bene licuit ; Judgment ſi Actio, and good Colour Per Cur. by *Gift of the Bailiff*, becauſe he had lawful Poſſeſſion. Br. Colour, pl. 42. cites 5 H. 7. 15.

9. It

9. It is no Colour in Treſpaſs of Goods *that J. was poſſeſſed and bailed to the Defendant, and the Plaintiff took them, and the Defendant re-took them.* Br. Colour, pl. 71. cites 21 H. 6. 37.

10. Colour was given *in Treſpaſs of Corn, where the Defendant juſtify'd as Tithes ſevered from the 9 Parts* &c. gave Colour that the *Plaintiff ſuppoſing the Place where &c. to be in the Pariſh of D. where M. P. is Parſon, where it is in the Pariſh of A. where the Defendant is Parſon, which M. P. had ſold to the Plaintiff all the Tithes in the Pariſh of D.* came, and would have taken the Corn, and the Defendant would not ſuffer him, and good Colour, and the Plaintiff recovered upon Verdict. Br. Colour, pl. 25. cites 21 H. 6. 43.

11. Treſpaſs *of Goods taken*, the *Defendant ſaid that J. N. was thereof poſſeſſed and made the Defendant his Executor and died, and he ſeiſed them and bailed them to the Plaintiff for him to re-bail them, Quando* &c. *and he requeſted him to re-bail, and he would not, by which he took them* &c. and the Opinion of the Court was, that it is no Colour; for the *Property was never out of him* &c. Br. Colour, pl. 2. cites 28. H. 6. 4.

12. Treſpaſs *of taking and carrying away his Timber*; the *Defendant ſaid that the Place is* 20 *Acres, where* 20 *Wyches grew, which was the Frank-tenement of the Defendant, and the Plaintiff entered and cut the Wyches and made Timber and carried them away out of the Land, and the Defendant came and retook*; *Judgment*; and per Littleton it is good Colour, becauſe the Wyches were Frank-tenement in the Defendant, and in the Plaintiff they were Chattles, viz. Timber. But Priſot contra; For *though the Nature is altered, yet it is one and the ſame Thing which may be well known*, and the *Property is in the Owner of the Soil when they are cut, till they are carried away*, therefore no Colour. Br. Colour, pl. 6. cites 35 H. 6. 2.

And ſo long as the *Defendant confeſſes that the Frank tenement is in him, and not in the Plaintiff* by Diſſeiſin nor otherwiſe, is no Colour; quod nota, and therefore does not amount but to the General Iſſue, viz. That it was the Timber of the Defendant, and the Plaintiff took it, and the Defendant retook it, and is Not guilty in Effect; by which the Defendant ſaid that J. N cut the Trees, and gave them to the Plaintiff, and the Defendant retook them, and the Plaintiff imparled. Br. Colour, pl. 6. cites 37 H. 6. 6. And it is no Plea that the Property was in his Maſter, without giving Colour. Ibid. cites 2 H. 4. 5.——Heath's Max. 30, cites S. C.

13. Treſpaſs of Sheafs taken. Littleton ſaid Actio non; for *the Place is* 10 *Acres, of which the Defendant was ſeiſed in Fee, and before the Treſpaſs the Plaintiff came and plow'd the Land, and ſowed it with his own Grain, and the Defendant entered and cut the Corn and put it into Sheafs, and at the Time of the Treſpaſs, the Plaintiff came and would have carried them away, and the Defendant would not ſuffer him but took and carried them away*; *Judgment* &c. and per Danby and Davers, this is good Colour, contra per Priſot; for when the Plaintiff ſowed and had nothing in the Frank-tenement, and the Defendant entered before ſeverance and cut them, the Property is clearly to the Defendant, by which he *ſaid that the Defendant was ſeiſed, till by the Plaintiff diſ-ſeiſed, who ſowed the Land and cut the Corn, and the Defendant re-entered, and the Plaintiff would have carry'd away the Corn, and the Defendant would not ſuffer him, but carried it away*; and the Opinion of the Court was, that it is a good Plea; for per Danby, by the Regreſs of the Diſſeiſee, he puniſhes all meſne Treſpaſſes, and ſo in Effect the Poſſeſſion always continued in him, but Billinge Serjeant contra, and that the Diſſeiſee after Severance ſhall not have the Emblements. Br. Colour, pl. 32. cites 37 H. 6. 6.

In Treſpaſs *of Corn*, it was admitted good Colour *that the Plaintiff entered and ſowed the Land of the Defendant after the Death of the Tenant for Life, and the Defendant entered, and cut, and carried away.* Br. Colour, pl. 68. cites 38 E. 3. 28. —— Treſpaſs of Corn taken wrongfully. Per Fineux Ch. J. it is a good Bar and Colour in itſelf, *that the Place where is two Acres* of Land, *of which the Defendant was ſeiſed in Fee, and the Plaintiff ſowed the Land with his proper Grain, and the Defendant cut and took it.* Br Colour, pl. 44. cites 12 H. 7. 25.

So, that the Defendant was ſeiſed till by the Plaintiff diſſeiſed, who ſowed the Land, and the Defendant re-enter'd, and took the Corn; quod nota. Br. Colour, pl. 44. cites 12 H. 7. 25.

14. In

14. In *Tre paſs upon* the Statute of 5 *Rich.* 2. 7. the Defendant pleaded that a long Time before the Treſpaſs, *A. was ſeiſed* of the Land *in Fee, and* being ſo ſeiſed *gave it to the Defendant's Father in Tail*, who died ſeiſed, and the ſaid Land *deſcended to the Defendant*, and gave Colour to the Plaintiff by A. the Plaintiff replies that he was ſeiſed in Fee till the Defendant entered upon him and ouſted him; and he traverſes the Gift in Tail, and this is well by all the Judges of England. For no Poſſeſſion ſhall be intended in the Defendant but by this Eſtate Tail, which he himſelf has pleaded. An Eſtate Tail cannot be gained by Diſſeiſin, Melior eſt Conditio poſſidentis, ubi Neuter jus habet. The firſt Poſſeſſion will ſerve to maintain Treſpaſs where the Defendant has not a Title. In this Caſe, the Colour given by the Defendant to the Plaintiff, gives the Plaintiff the firſt Poſſeſſion. Jenk. 118. pl. 36. cites 3 E. 4. 18.

15. In Treſpaſs it was admitted for good Colour, *that J. N. before that the Plaintiff had any Thing, was poſſeſſed of the Goods ut de Propria, and gave them to the Defendant, and made the Plaintiff his Executor and died, by which the Plaintiff was poſſeſſed, and the Defendant took them* &c. and ſo ſee that the Executor finding the Goods among other Goods, is good Colour. Br Colour, pl. 65. cites 1 E. 3. 3.

But where a Man bails his Goods to J. N. and he bails them to W. S. this is good Colour to W. S. becauſe it is not immediate Bailment by the Defendant to the Plaintiff. Br. Colour, pl 43. cites 5 H. 7. 18.

16. In Treſpaſs of Boards taken, the Defendant ſaid *that he was poſſeſſed of them, and delivered them to the Plaintiff to keep, and re-deliver them, quando* &c. *and he carried them to D. and the Defendant re-took them* and no Plea, for there is no reaſonable Colour; for *he never confeſſed Property in the Defendant*, and the *immediate Bailment to the Plaintiff by the Defendant is no Colour*; for he does *not confeſs Intereſt in the Plaintiff*. Br. Colour, pl. 43. cites 5 H. 7. 13.

And in Treſpaſs it is a good Plea that he *bailed the Goods in Pledge, and paid the Money and re-took them*; for the Plaintiff has Intereſt quouſque &c. Br. Colour, pl. 43. cites 5 H. 7. 18.

17. But if the Defendant pleads *Bailment upon Condition*, or *Gift upon Condition, and for the Condition broken he re-took it*, this is good Colour; for the Party *has Intereſt for the Time*, and by the Condition broken the Property is re-veſted in the Defendant, and he may bail it or give it immediately without any Seiſin. Br. Colour, pl. 43. cites 5 H. 7. 18.

18. *So of Bailment of Sheep by the Defendant to the Plaintiff to Compeſter his Land*, and after he re-took them, this is good Colour to the Plaintiff; for he *has Property pro tempore*, and all thoſe Caſes were agreed. Br. Colour, pl. 43. cites 5 H. 7. 18.

Heath's Max. 31. cites S. C. but cites 28 H. 6. 4. that and there is no Privity between the Bailor and the Donee. Br. Colour, pl. 76. cites 6 H. 7. 7. to give the Plaintiff Colour only by a Bailment is ill, notwithſtanding that to give him Colour by the Gift of the Defendant, as Bailor, is good by 7 H. 6. 31.——The Caſe was, in Treſpaſs *of Beaſts taken* the *Defendant ſaid that before the Plaintiff any Thing had, he was poſſeſs'd as of his proper Goods, and bailed to A. B. to rebail to him quando* &c. *and A. B gave to the Plaintiff, and he ſuppoſing the Property to be in A. B. at the Time of the Gift took them, and the Defendant retook them*, and a good Plea and good Colour. Br. Colour, pl. 11. cites 7 H. 6. 31.

19. In Treſpaſs of Goods, the Defendant *ſaid that J. was poſſeſſed and bailed to the Plaintiff, and after J. gave to the Defendant who took them*; and good Colour; for the Bailee has Property againſt all but the Bailor,

20. In Treſpaſs of *Corn* &c. *cut and carried away*, the Defendant *pleaded* that 10 Eliz. he was *ſeiſed of the Rectory* of O. *and demiſed the ſame to A. for Life, who demiſed to B. for Years, and* the Defendant *as Servant to B. took the ſaid Corn* &c. *as Tithes ſevered from the 9 Parts, and averred the Life of B.* The Plaintiff demurred, for that the Plea amounted

amounted to the General Iſſue; and Judgment was given in B. R. for the Plaintiff. The Defendant brought Error in Cam. Scacc. and aſſign'd for Error, that the Plea amounted to the General Iſſue only, becauſe the Defendant did not give the Plaintiff any Colour, and therefore Judgment ought not to be given againſt the Defendant, but only a Reſpondeas Ouſter. But reſolved that in this Caſe Colour ought not to be given to the Plaintiff; for he need not deny the Property of the Plaintiff; becauſe *the Matter of the Plea bars the Plaintiff of his Right.* 10 Rep. 88. a. Hill. 8 Jac. Dr. Leyfield's Caſe.

(E) Where Colour given by an Eſtate which is void or determined, ſhall be good, or not.

1. IN Aſſize the Caſe was that the *Feme was ſeiſed in Fee*, and *took Baron, and had Iſſue T.* The *Baron and Feme died. T. entered and died ſeiſed without Heir of his Body.* The *Tenant entred.* The *Plaintiff claiming as Couſin and Heir of the Part of the Father abated*, and the Tenant re-entred; and good Colour as Heir of the Part of the Father, though the Land came of the Part of the Mother. Br. Colour, pl. 29. cites 24 E. 3. 50. Heath's Max. 32. cites S. C. and cites alſo 21 H. 6. 43 [but the Book ſeems to be miſcited] that it was doubted whether it was a good Colour *to ſay that the Plaintiff claimeth by the Son and Heir of him by whom the Defendant pretends Title.* —— Heath's Max. 32. ſays it appears by 2 Aſſ. 7. that to give the Plaintiff Colour by Abatement, is no Colour.

2. Entry in the Nature of Aſſiſe, the Tenant *ſaid that F. his Father was ſeiſed in Fee, and leaſed to N. for Life. N. died, and F. entred in his Reverſion and died ſeiſed, and the Tenant entred as Heir, and the Demandant claimed by Deed of Feoffment made by N.* &c. and it was held no Colour; for by the Death of the Tenant for Life, and the Entry of the Leſſor, the Eſtate of N. is determined, and the Title is by the Dying ſeiſed of the Father, and the Tenant cannot enter upon a Deſcent by him whoſe Eſtate was determined before, and ſo to give Colour by a Diſſeiſor, and conſeſs Entry upon him, or by Feoffee upon Condition, and conſeſs Entry upon him by the Condition; for his Eſtate is defeated. Br. Colour, pl. 49. cites 2 E. 4. 17.

3. Per Littleton, if I ſay *that J. S. was ſeiſed and infeoff'd me, and after J. S. infeoff'd the Plaintiff, upon whom I entered*, this is no Colour; for by the Plea I have deſtroy'd the Colour, quod nemo dedixit; for J. S. at the Time of the Feoffment of the Plaintiff was a Diſſeiſor, which is purged by the Entry. Br. Colour, pl. 55. cites 18 E. 4. 15.

4. Entry ſur Diſſeiſin of Rent of Diſſeiſin done to the Predeceſſor of the Plaintiff. The Tenant *ſaid that W. N. was ſeiſed of the Rent in Fee, and granted it to the Predeceſſor of the Demandant for Term of his Life, and after W. died, and* then *the Predeceſſor died, and the Tenant entered as Son and Heir of W. N.* and it was held good Colour by all the Juſtices and Serjeants except Brian. And Brooke ſays it ſeems to him, that *Eſtate determined* cannot be Colour; for *it is not doubtful to the Lay Gents nor Matter in Law*. and therefore it is contrary to the Ground of the Colour. Br. Colour, pl. 56. cites 19 E. 4. 3. Heath's Max. 30. cites S. C.

5. Treſpaſs in Separali Piſcharia againſt an Abbot. The *Defendant preſcribed in the Piſchary there, and that the Abbot, Predeceſſor of the Defendant who preſcribed, leaſed to the Plaintiff for Life and died, and that this Defendant was elected Abbot, and ſith'd*, and a good Colour; Per Cur. Brooke ſays the Book, Heath's Max. 30. cites S. C. and ſays that it ſeems by

that tho' the Eſtate appears to be determined, yet the Colour is good.

ſays that it ſeems the Leaſe was for the Life of the Leſſor, for an Abbot cannot diſcontinue, and therefore if it was for the Life of the Leſſee it is no Bar; but that this does not appear by the Book which is reported briefly. Br. Colour, pl. 78. cites 7 H. 7. 13.

(F) By claiming in by Deed &c. Where nothing paſſes by it, and where good.

Heath's Max. 32. cites S. C.

1. ASSISE by Baron and Feme againſt the Prioreſs of C. who *ſaid that ſhe herſelf leaſed for* Term of *Life to the Baron and Feme, and the Feme dying the Baron took this Plaintiff to Feme, and the Tenant confirmed their Eſtates for Term of Life. The Baron died, the Tenant enter'd as in his Reverſion, and the ſecond Feme Plaintiff claiming by Colour of the Confirmation, which is void as to her*, held her in; and good Colour, per Finch, tho' it be a void Confirmation. Br. Colour, pl. 79. cites 40 E. 3. 23.

Heath's Max. 32. cites S. C. & S. P.

2. *So*, to ſay *that a Feme entered, claiming to have the Land in Dower*, and yet a Feme cannot enter into her Dower without Aſſignment; and yet good Colour, per Finch; quod Caund. conceſſit, by reaſon that ſhe has Colour to claim Dower. Br. Colour, pl. 79. cites 40 E. 3. 23.

Heath's Max. 32. cites S. C. & S. P.

3. *So*, per Finch, to ſay *that the Father of the Tenant leaſed to the Plaintiff for Years, and the Tenant being within Age confirmed his Eſtate, and he after the Term ended claimed in by this Confirmation*; but if the Father had been Tenant in Tail, and the Iſſue confirmed within Age, Brooke ſays it ſeems to him that this ſhall be good Colour &c. whereupon the Plaintiff above made Title. Br. Colour, pl. 79. cites 40 E. 3. 23.

Br. Colour, pl. 70. cites S. C.

4. Forcible Entry into the Manor of D. The Defendant *ſaid that before the Plaintiff any Thing had, A. was ſeiſed in Fee, and gave to B. and C. his Feme, and to the Defendant, and to the Heirs of the Baron, and the Baron and Feme died, and the Plaintiff claiming by Deed of the Baron and Feme, where nothing paſs'd by the Deed, enter'd with Force* &c. and the Colour was challenged, becauſe the Baron and Feme were dead before the Claim; & non allocatur by which he challenged, becauſe it is no Colour but only to the Moiety, & non allocatur, becauſe one Jointenant may inſeoff another of all the Land. Br. Colour, pl. 19. cites 19 H. 6. 49.

Br. Colour, pl. 23. cites S. C. Co'our ſhall be given in Forcible Entry where the Defendant does not bind the Plaintiff.

5. In *forcible Entry* with Force, *and Detainer* with Force, the Defendant *pleaded that long before the Plaintiff any Thing had, he himſelf was ſeiſed in Fee, and diſſeiſed by the Plaintiff, upon whom he entered peaceably, and traverſed* his Entry with Force, or Detainer with Force; and Paſton J. held this a good Plea and Colour; but Markham Serj. e contra, that it is no Colour; whereupon the Defendant ſaid that T. H. was ſeiſed in Fee, and died ſeiſed, and the Land deſcended to the Defendant, and the Plaintiff claimed by Deed of Feoffment made by T. H. where nothing paſs'd &c. whereupon the Defendant as Son and Heir of T. H. enter'd peaceably, abſque hoc that he enter'd with Force. The Plaintiff replied that W. was ſeiſed, and inſeoffed him, whereby he was ſeiſed till the Defendant ouſted him with Force, abſque hoc that the ſaid T. H. died ſeiſed, and ſo to Iſſue. Br. Forcible Entry, pl. 5. cites 21 H. 6. 39.

Heath's Max. 30. S. P. cites 2 H.

6. Entry *in the Quibus* of Diſſeiſin to the Father of the Demandant. The *Tenant ſaid that B. recover'd the Manor of D. againſt C. of which the Land in Demand is Parcel, One Eſtate of the ſaid B. the Tenant has, and the*

the Demandant claim'd by Deed made by the ſaid C. where nothing paſs'd &c. and ſo gave Colour by him whoſe Eſtate is defeated, and yet good Colour; per Cur. Br. Colour, pl. 30. cites 9 E. 4. 18. 4. and 9 E. 4. 15. [but it ſeems miſprinted, and that it ſhould be (18) as in Brooke.

7. So where Tenant in Aſſiſe *ſays that he was ſeiſed till by B. diſſeiſed, and the Plaintiff claiming by Colour of a Deed made by the ſaid B. &c. enter'd, upon whom he re-enter'd*; and good Colour per Cur. Br. Colour, pl. 30. cites 9 E. 4. 18. In Treſpaſs if the Tenant *ſays that he was ſeiſed till by the Plaintiff diſſeiſed, upon whom he re-enter'd*, this is no Colour; for it is not Matter in Law, nor difficult to the Lay Gents. Br. Colour, pl. 15. cites 19 H. 6. 21. ——Br. Colour, pl. 67. cites 9 H. 6. 32. S. P.

8. *Treſpaſs* by *H. B. Warden of the Chantery of D. and the Chaplains* thereof. The Defendant *ſaid that the ſaid H. B. was ſeiſed in Fee, and leaſed to him for Years*, and no Plea; for the Warden without the Chaplains cannot leaſe, and it ſhall be by Deed, by which he *ſaid by a ſtrange Name that H B. was ſeiſed, and leaſed and gave Colour to the Plaintiff for Term of Life by Deed of H. B.* and no Colour per Cur. For a *Corporation cannot die*, therefore he ſhall not ſay for Term of their Lives, by which he gave Colour for Term of Life of the Leſſor. Br. Colour, pl. 60. cites 21 E. 4. 75.

(G) Where Colour, without alleging or confeſſing Poſſeſſion or Property in the Plaintiff, ſhall be good or not.

1. TReſpaſs upon the 5 R. 2. The Defendant *ſaid that the Father of the Plaintiff was ſeiſed of the Land in Fee, and held of C. in Chivalry, and died, the Plaintiff within Age, by which C. ſeiſed the Ward of the Land and Body, and granted it to J. S. who granted it to the Defendant* &c. and the Defendant entered &c. and this good Colour without Poſſeſſion in Fact in the Plaintiff; for there is *Poſſeſſion in Law*, and if the Guardian be ouſted, the Heir ſhall have Aſſiſe; and ſo upon Leaſe of the Father for Years &c. Et Cur. conceſſit that it was good Colour. Br. Colour, pl. 47. cites 2 E. 4. 5.

2. In Treſpaſs the Defendant *ſaid that F. was poſſeſs'd of the Goods, and bail'd them to the Defendant, and after F. gave them to the Plaintiff, and the Defendant took them*; and no Colour, inaſmuch as the Plaintiff was not poſſeſs'd by reaſon of the Gift, and without Poſſeſſion he cannot have Action. Br. Colour, pl. 73. cites 2 E. 4. 23.

3. In Treſpaſs the Defendant *juſtify'd for Waif.* The Plaintiff challenged for Default of Colour; and it was ſaid that if he *intitles himſelf to Eſtray*, that he need not confeſs Property in the Plaintiff; for if the Property was in him, yet by the Stealing and Waiving, the Goods are forfeited. Br. Colour, pl. 52. cites 12 E. 4. 6. Br. Eſtray, pl. 6. cites 12 E. 4. 5. S. C.—— 10 Rep. 90. b. S. C. cited

4. *And* it was held by all the Juſtices that if the Defendant had *ſaid that A. had been poſſeſs'd of the Goods as of his proper Goods, and that B. had ſtole them* &c. that he ought to give Colour to the Plaintiff; but where he *ſays that they were ſtole extra Poſſeſſionem ignoti*, there needs no Property. Br. Colour, pl. 52. cites 12 E. 4. 6. [5. b.] per Cur. as 12 E. 4. 5. b. [and ſo it is in the Year-books, pl. 14] and that by his ſhewing that they were ſtolen extra Poſſeſſionem cujuſdam ignoti, and ſo it is not denied that the Property was the Plaintiff's, therefore he is not bound to ſhew expreſsly in whom the Property was.

5. *So*

S. P. per Brian & Fairfax, Br. Colour, pl. 52. cites 12 E. 4. 12.——10 Rep. 90. b. cites 12 E. 4. 5. b. S. P.

5. *So* of *Sale in Market Overt*, if he says that N. sold to him, he need not give Colour. Br. Colour, pl. 52. cites 12 E. 4. 6.

10 Rep. 90. b. cites 12 E. 4 5. b. S. P. that if he says he sold them to him in Market Overt, he ought to give Colour. But the Reporter says it seems to him that this Case is not well reported; for the Reason there given makes against the Opinion of the Justices; for their Reason is, that the Plea shall not be good without Colour when the Property is alleged in a Person certain, because this proves that there was no Property in the Plaintiff, and so has no Colour of Action, and consequently this is a good Reason that no Colour shall be given, because it is an absolute Bar of the Property, and of all the Right of the Plaintiff; and so is the Book of 32 H. 6. 1. a. b. in the same Case, when the Property is alleged in a Person certain; and with this accords 21 E. 4. 18. b. and 21 E. 4. 65. a.

6. *Contra* if he says *that N. was possessed as of his proper Goods, and sold them to him*; for there he proves no Property was in the Plaintiff, and then he has no Colour of Action, but in the other Case it is not denied but that the Property was in the Plaintiff, and there Colour need not be given. Br. Colour, pl. 52. cites 12 E. 4. 6. [5. b.]

7. *So* per Cat. & Pigot, where a Man *justifies for Damage feasant*, he shall not give Colour; but there he does not claim Property in the Goods. Br. Colour, pl. 52. cites 12 E. 4. 12.

8. Trespass of a Close broken, and *Apples taken* &c. The Defendant *justified the Entry by Lease for a Year, and the Apples grew there*, and the Opinion was, that this was no Colour for the Apples; for it shall be intended that the Plaintiff had Property by other Matter, by which the Defendant gave *Colour by Possession in the Plaintiff*. Br. Colour, pl. 58. cites 21 E. 4. 52.

Br. Property, pl. 35 cites S. C. —— Heath's Max. 32. cites S. C. —— 10 Rep. 89. a. versus finem Arg. cites S. C.

9. It is good Colour in *Trespass of Sheafs between Parson and Vicar*, that the *Plaintiff claimed them as Parson, and the Vicar took them*; for by the Claim the Property is in him, and the Possession also, tho' he does not claim them, quod Brian and Chocke concessit. Br. Colour, pl. 62. cites 22 E. 4. 23.

But it seems it should be L. 5. E. 4. 9. and so it is in the Marg. of Dyer 366.

10. A naked Colour in an *Ejectione Firmæ* is not sufficient, as it is in Assise or Trespass &c. which does not comprehend any Title or Conveyance in the Writ or Count, as this Action does in Both. D. 366. a. pl. 35. Mich. 21 & 22 Eliz. in Ld. Cromwell's Case, and says, that according to this is L. 5. E. 4. 5. in Formedon much argued.

(H) Where Colour given, and after destroyed by Pleading, or given by a Stranger, or one whose Estate appears in Pleading after to be defeated and avoided, shall be good or not.

1. THE *Alienation which he in Remainder defeated by his Entry* was admitted for good Colour, viz. the Alienation of the Tenant for Life to the Plaintiff. Br. Colour, pl. 67. cites 2 H. 4.

2. Trespass, the Baron was *seised, and infeoffed D. in Fee, and conveyed the Descent from D. to J. and from J. to G. Feme of the Defendant, as Sister and Heir, and the Defendant in Right of his Feme entered, and the Plaintiff claimed by Colour of a Deed of Feoffment made by N. Son of the said*

R.

R. the Feoffor, where nothing paſſed &c. entered, upon whom the Defendant re-entered, and did the Treſpaſs. Port. ſaid this is no Colour, but Newt. and Paſt. Juſtices e contra; for he has acknowledged the Franktenement was once in the Plaintiff. Port. ſaid, in Aſſiſe it is no Plea, quod fuit conceſſum. Afterwards Port. ſaid it is not good; for it is given by N. Son of R. the Feoffor, and he *has not ſhewn that N. ever had Poſſeſſion*, and therefore it is not to the Purpoſe, tho' N. was Heir to R. And alſo the Defendant ſaid that it is not good, inaſmuch as he ſays that he re-entered, and cut the Trees, in which Caſe, at the Time of the Treſpaſs ſuppoſed, the Franktenement was in the Defendant, and ſo no Colour to the Plaintiff, and as to this Intent the Plea was held good by all the Juſtices, and ſo to the other Intent; for the *Franktenement was confeſs'd in the Plaintiff at one Time*, by which the Plaintiff had Judgment to recover. Br. Colour, pl. 24. cites 21 H. 6. 40.

3. It is no Plea *that the Baron of a Feme was ſeiſed* &c. *and died, and W. M. abated, and endow'd the Feme, and the Plaintiff claimed by Colour &c. made by W. N.* This is no Colour for the Feme, after the Endowment is in by the Baron, and the Eſtate of the Abator determined. Br. Colour, pl. 36. cites 38 H. 6. 7.

4. Entry in the Quibus; the Tenant *ſaid, that J. S. was ſeiſed in Fee, to whom J. D. releaſed all his Right* by his Deed &c. *and J. S. infeoffed H. Que Eſtate the Tenant has*, and gave Colour to the Plaintiff by J. S. and J. D. who releaſed, and was not ſeiſed; Per Priſot, the Colour by J D. is not good, by which Laycon gave Colour by J. S. only; Quod Nota; and by the Reporter the firſt Colour was good; for by Littleton, *if it be void by J. D. yet it is good by J. S.* Br. Colour, pl. 35. cites 38 H. 6. 5. Heath's Max. 29, 30. cites S. C.

5. Treſpaſs *Ubi Ingreſſus non datur per Legem*; the Defendant *ſaid, that before the Entry J. S. was ſeiſed in Fee, and infeoffed him, and that P. claiming the Land by Colour of a Deed made to him by J. S. before the Entry, and before the Feoffment made to Defendant, entered, and infeoffed the Plaintiff*, and the beſt Opinion was, that it is no good Colour, becauſe it is *given by P. a Stranger, and not by J. S. by whom the Defendant claimed*, and after the Defendant amended it, and by the Reporter the Court ſtayed in this the more, for that it would be an ill Example of changing the ancient Courſe of Pleading than for any Default in the Colour. Br. Colour, pl. 36. cites 38 H. 6. 7.

(I) Where, and in what Actions Colour ſhall be good, without an immediate Entry upon the Plaintiff. In what not.

1. IN Treſpaſs, the Defendant *ſaid, that J. S. was ſeiſed, and diſſeiſed by B. who infeoffed the Plaintiff, upon whom J. S. re-entered, Que Eſtate the Defendant has*, this is no Plea, Per Brian, and the Juſtices of B. R. becauſe the Entry of the Defendant is not immediately upon the Plaintiff, and then this is no Colour to the Plaintiff; contra *if the Entry had been immediately by the Defendant upon the Plaintiff, to whom the ſaid J. S. had releaſed all his Right*, and yet there the Defendant was Treſpaſſor to the Plaintiff till the Releaſe came; but Brooke ſays, it ſeems that the Plaintiff ſhall not puniſh this without Regreſs, and he cannot make Regreſs after the Releaſe. Br. Colour, pl. 83. cites 5 H. 7. 11.

(K) By whom, or to whom it muſt or may be given.

Heath's Max. 30. cites 9 H. 6. 22. [but ſeems miſprinted for 19 H. 6. 32.] that where the Defendant in Aſſiſe or Treſpaſs pleads that he was ſeiſed till by A. diſſeiſed, who did infeoff the Plaintiff, and he did enter, and a good Colour.

1. IN Treſpaſs the Defendant *pleaded his Franktenement*; the *Plaintiff ſaid, that before the Defendant any Thing had, F. was ſeiſed, and infeoffed him, and the Defendant claiming by Colour of a Deed* &c. *made by F. where nothing paſſed, entered, upon whom he re-entered, and brought the Action*, and per tot. Cur. he ſhall not give Colour to the Defendant, but Colour ſhall be given only to the Plaintiff, but he ſhall ſay that F. infeoffed him, by which he was ſeiſed till the Defendant entered &c. and diſſeiſed him, upon whom he re-entered and brought the Action. Br. Colour, pl. 16. cites 19 H. 6. 32.

Colour ought always to be given by him who is firſt in the Conveyance, or otherwiſe all before is waived. 10 Rep. 89. b. Arg. ſays, that with this accords * 10 H. 7. 14. b. 15 E. 4. 32. a. 18 E. 4. 10. a. and 22 E. 4. 25. a. —— Ibid. 91. b. per Cur. S. P. accordingly, and cites 10 H. 7. 14. b. 15 E. 4. 32. a. 18 E. 4. 10. a. 22 E. 4. 25. a. Long 5 E. 4. 134. a. and 21 H. 6. 32. b. * Br. Colour, pl. 84, (85) cites S. C.

2. In Treſpaſs *of Trees cut*; the Defendant *ſaid, that W. N. was ſeiſed in Fee, and gave to J. in Tail, and died, and the Land deſcended to S. who died, and the Defendant as Son and Heir entered, and gave Colour by S.* Quod Nota; and not by W. nor J. and yet admitted. Quære, inaſmuch as it is by one Meſne in the Conveyance. Br. Colour, pl. 21. cites 21 H. 6. 32.

3. In Treſpaſs, the *Defendant pleaded Fine levied between T. and C. and the Plaintiff claiming for Term of Life by Leaſe made by T. where nothing paſſed*, and Wangl. would have demurred, becauſe in the Pleading of the Fine the Defendant did *not ſhew Seiſin in the one nor the other, who were Parties to the Fine, but ſaid Quod finis ſe levaſſet inter* &c. *by which T. acknowledged all the Right* &c. for the Fine is good if the one or the other are ſeiſed, by which the *Defendant ſaid that T. was ſeiſed* &c. *and levied the Fine between him and the ſaid C.* and gave Colour as above, and then well &c. Br. Colour, pl. 4. cites 34 H. 6. 1.

4. Where a Man *claims by divers Feoffments to his Father, who died ſeiſed*, it is better to give *Colour by the Father than by the firſt Feoffor*; for this is the Title to the Heir. Br. Colour, pl. 49. cites 2 E. 4. 17.

Heath's Max. 29. cites S. C. —— *And* concordat 3 E. 4. N. [17] that where a Man alleged *Gift in Tail and ſeveral Deſcents*, and gave *Colour by him who laſt died ſeiſed*, and well. Br. Colour, pl. 46.

5. Note, that it was admitted, that in Treſpaſs, if the Defendant *pleads Feoffment by A. to B. who infeoffed C. who after infeoffed the Defendant*, he may *give Colour by A. to the Plaintiff, or by B. or by C.* who was in the meſne Conveyance, Quod nemo negavit. Br. Colour, pl. 46. cites L. 5 E. 4. 134.

Colour muſt always be given by the firſt, and not by any Meſne in the Conveyance. Heath's Max 29. cites S. C. —— 10 Rep. 89. b. Arg. cites S. C.

6. *Entry in the Quibus*, the Tenant *ſaid that his Grandfather was ſeiſed, and by Proteſtation died ſeiſed, and the Land deſcended to his Father, who entered, and was ſeiſed, and by Proteſtation died ſeiſed, and the Land deſcended to the Defendant as Son and Heir*, and *gave Colour by the Father*, and becauſe he *did not give Colour by the Grandfather*, therefore the Deſcent to the Father is void, and ſhall be ouſted, and ſo he was; contra if he had given Colour by the Grandfather. Br. Colour, pl. 63. cites 22 E. 4. 24.

7. So where he *ſays that J. being ſeiſed, infeoffed B. who infeoffed the Defendant, and gives Colour by B.* the Feoffment of J. ſhall be ouſted; contra if he had given Colour by J. quod nota, per Brian, Catesby, & Vaviſor, by which the firſt Deſcent was ouſted. Br. Colour, pl. 63. cites 22 E. 4. 24.

8. Note that Colour ought to be Matter in Law, and doubtful to the Lay Gents, and *ſhall be given to the Plaintiff*, and *not to one* who is *Meſne in the Conveyance*, and ſhall *not* be given *to a Stranger who infeoffed the Plaintiff*, and ſhall not be given *by Poſſeſſion determined*, viz. *where it appears in Pleading* that the Poſſeſſion is determined. Br. Colour, pl. 64. Heath's Max. 31. cites S.C.

9. He who *claims no Property* in the Thing, *but takes it as a Diſtreſs* &c. ſhall not give Colour. Br. Colour, pl. 64.

For more of Colour in Pleadings in General, ſee Aſſiſe, Traverſe, Treſpaſs, and other Proper Titles.

Commiſſions and Commiſſioners.

(A) Good. And what may or muſt be done by Commiſſion, and what by Writ.

1. IF *Commiſſion* iſſues *to take J. S. and his Goods, without Indictment, or Suit of the Party, or other Proceſs*, this is not good; for it is againſt the Law; per Cur. Br. Corone, pl. 194. cites 42 Aſſ. 5. 12, 13. S. P. and one who juſtified Impriſonment of the Party by this Commiſſion, the Commiſſioners of Oyer and Terminer took from him this Commiſſion, becauſe it was againſt Law, and ſaid they would ſhew it to the King's Counſel; quod nota. Br. Commiſſions, pl. 15. cites 42 Aſſ. 5.——A Commiſſion was made under the Great Seal *to take* J. N. (*a notorious Felon*) *and to ſeiſe his Lands and Goods.* This was reſolved to be againſt the Law of the Land, unleſs he had been indicted or appeal'd by the Party, or by other due Proceſs of Law. 2 Inſt. 54. cites 42 Aſſ. 5. Rot. Parl. 17 R. 2. Nu. 37.

2. And if *Writ* iſſues *to inquire of Champerty, Conſpiracy, Confederacy, Ambodextries, or* to inquire *what Felony J. S. did to W. N.* all Indictments taken by Force of ſuch Writs are void, and the Parties ſhall be diſmiſs'd, and ſhall not be put to anſwer; for it ought to be by Commiſſion. Ibid. S. P. and per Knivet J. this Writ iſſues againſt Law; for this is no Warrant to them without Commiſſion, and damn'd that which was done &c. by Advice of all the Juſtices; quod nota. And Brooke ſays, ſo ſee that a *Thing cannot be done by Writ which ought to be by Commiſſion.* Br. Commiſſions, pl. 16. cites 42 Aſſ. 12.——S. C. cited 4 Inſt. 164.

3. A Commiſſion *is a Delegation by Warrant of an Act of Parliament, or of the Common Law*, whereby Juriſdiction, Power, or Authority is conferr'd to others; for all Commiſſions of New Invention are againſt Law, until they have Allowance by Act of Parliament. 4 Inſt. 163. cap. 28. *No new Commiſſions* can be framed *without Act of Parliament*, how neceſſary ſoever they ſeem to be; and Commiſſions of new Inquiries &c. and of new Invention, have been condemned by Authority of Parliament, and by the Common Law. 2 Inſt. 478, 479.

4. Com-

4. Commiſſions under the Great Seal were directed to ſeveral Commiſſioners within ſeveral Counties, to inquire of divers Articles annex'd to the Commiſſions, and which were to inquire of Depopulations of Houſes, converting Arable Land into Paſture &c. but that they ſhould have no Power to hear and determine the ſaid Offences, but only to inquire of them. Reſolved by the 2 Chief Juſtices and 7 Juſtices, that the ſaid Commiſſions were againſt Law, becauſe the Offences inquirable were not certain within the Commiſſion itſelf, but in a Schedule annexed to it; and alſo becauſe it was to inquire only, which is againſt Law; for thereby a Man may be unjuſtly accuſed by Perjury without Remedy, it not being within the Statute of 5 Eliz. and the Party may be defamed, and ſhall not have any Traverſe to it. 12 Rep. 30, 31. Trin. 5 Jac. The Caſe of Commiſſions.

4. 6 *Ann. cap.* 7. *S.* 27. *No greater Number of Commiſſioners ſhall be made, for the Execution of any Office, than have been employ'd in the Execution of ſuch Office before the firſt Day of this Parliament.*

(B) Who may be Commiſſioners. And their Power.

1. IF any are made Commiſſioners, and *afterwards others are made* Commiſſioners, the *firſt Commiſſion is determined.* Godb. 105. pl. 123. Mich. 28 & 29 Eliz. C. B. Anon.

2. One who has been *Solicitor* in a Cauſe, is *not fit to be* a Commiſſioner in the ſame Cauſe. Godb. 193. pl. 276. Trin. 10 Jac. C. B. Forteſcue v. Coake.

3. A *Commiſſion* was directed out of *Chancery on Ded. Poteſt.* to A. & al'. The other Commiſſioners would *examine A. their Fellow-Commiſſioner* as a Witneſs; and by the Opinion of Ainſcomb, they cannot compel him to be examined, which Doderidge granted; Brook of the Middle-Temple e contra. Quære, that if he would *aſſent* to be examined, if yet this Examination be not taken *coram non Judice.* 2 Roll Rep. 90. Paſch. 17 Jac. B. R. Sir Nich. Parker's Caſe.

4. Time and Place is only for the fix'd [firſt] Meeting of the Commiſſioners; but after they may *adjourn* to another Time or another Place; per Ld. Chancellor. Chan. Caſes 282. Trin. 28 Car. 2. Brown v. Vermuden.

5. A *Commiſſioner* may be *a Witneſs*, but then he ought to be examin'd before any other Witneſs be examined. Vern. 369. pl. 362. Hill. 1685. Bright v. Woodward.

And if others are examined before him in his Preſence, he cannot be afterwards examined, having heard the former Examinations; and therefore the 17th of Dec. 1681. a Commiſſioner who had ſo done, came as afterwards and was examined in Court, and his Depoſition was ſuppreſs'd. 2 Chan. Caſes 79. Mich. 33 Car. 2. North v. Champernoon.

(C) Misbehaviour of Commiſſioners. What is. And puniſhed How.

1. A Commiſſioner *certifying falſely* that a Witneſs was examined on Oath and ſworn, who never was examined, is a great Fault, and fineable. Cro. E. 623. pl. 17. Mich. 40 & 41 Eliz. B. R. Fiſh v. Thoroughgood.

2. Com-

2. Commiſſion to examine Witneſſes went out to Sir Alexander Brett and others, who made Certificate againſt Sir Alexander of *partial Proceedings*. Philipps Serj. moved at the Rolls for a Commiſſion to others, to examine in whom the Miſdemeanor was, if in Sir Alexander, or in the Certifiers, & ſuit negatum; for ſuch *Collateral Certificates* are not required of the Commiſſioners; but let them certify the Matters committed to their Charge, and if there be Miſdemeanor, let the *Party wronged* thereby *make Affidavit thereof*, and then take out his *Attachment*. Cary's Rep. 43. cites 13 Nov. 1 Jac. Commiſſioners to be examined upon Occaſion of *Partiality and Practice* Toth. 102. cites 9 Car. Morgan v. Bowdler.

3. If a Commiſſioner in a Cauſe in Canc. *takes Bribes* for the executing thereof, he may be indicted and fined by the Common Law; Per Popham Ch. J. Cro. 65. pl. 4. Paſch. 2 Jac. C. B. Moor v. Foſter. But no Remedy lies by *Action*, per 2 Juſtices. Ibid.

——Yelv. 62. S. C.——S. C. cited Arg. Show. 343.

4. The Plaintiff's Commiſſioner would not let a Witneſs declare the whole Truth, but *held* him *ſtrictly to the Interrogatories to ſtifle the Truth*, this was held a Miſdemeanor, and that Commiſſioners to examine ought to be Indifferent, and by all Means to expreſs the Truth, and they are not ſtrictly bound to the Letter of the Interrogatories, but to every Thing alſo which ariſes neceſſarily upon it for manifeſting all the Truth concerning the Matter in Queſtion; and where one of the Commiſſioners *went out of the Place to the Plaintiff* into another Room during the Examination, and had private Conference with him, it was held that a Commiſſioner ought not before Publication, *diſcover* to any of the Parties what any Witneſs has depoſed, nor *to confer with the Party after he has begun to examine* on the Interrogatories to take new Inſtructions to examine further than he knew before, and if he does he is puniſhable by Fine and Impriſonment. 9 Rep. 70. b. 71. a. Trin. 9. Jac. in the Star-Chamber, Peacock's Caſe.

5. One of the Commiſſioners *letting the Defendant eſcape* being taken upon a Commiſſion of Rebellion, was *to ſtand committed* to Priſon till he brings in the Defendant. Toth. 100. cites Hill. 18 Jac. Sacheverel v. Sacheverel.

6. Commiſſioners upon a Commiſſion of Rebellion, letting the Party go where he liſted, were *ordered to be committed till they Pay the Debt*. Toth. 101, 102. cites Trin. 18 Jac. Nelſon v. Yelverton.

7. The Defendant's Commiſſioners for examining Witneſſes *met* at the Time and Place appointed, but *refuſed to join* and act in the Execution of the Commiſſion; and upon Affidavit made of this, the Court ordered that the Defendant ſhould Name other Commiſſioners, and 'twas pray'd that the Plaintiff might *name other Commiſſioners* too, becauſe one of his Commiſſioners was not there, ſo that it ſeemed to have been a Practice, and the Court doubted whether an *Attachment* lay againſt the Defendant's Commiſſioners or not; Et Adjornatur. Hard. 170. pl. 6. Trin. 12 Car. 2. in Scacc. .... v. Forteſcue & al'.

8. If a Commiſſioner to take *a Fine executes it corruptly*, he may be *fined* by the Court; for in Relation to the Fine (which is the proper Buſineſs of this Court of C. B.) he is ſubject to the Cenſures of it as Attornies &c. 2 Vent. 30 Paſch. 29 Car. 2. C. B. Parrot's Caſe.

9. If a Commiſſioner *refuſes to ſit*, the Suitor has no Remedy by Action againſt him, and though perhaps his Refuſal will be a Contempt to the Court if without Excuſe, yet doubtleſs they will never puniſh the Perſon for it unleſs his reaſonable *Charges allowed*; Arg. Show. 343. Mich 3 W. & M. Stockhold v. Collington. And a Quantum Meruit lies for ſerving as a Commiſſioner upon a Commiſſion to examine Witneſſes, though it was objected that he acted by Command of the Court, and therefore could not take a Promiſe of Reward for the Service any more than a Sheriff or Bailiff; ſed non Allocatur; becauſe he is appointed at the Nomination of the Party who ought to pay him if he imploys him. 1 Salk. 330. pl. 1. S. C. —— Carth 208. S. C. adjudged accordingly. —— Show. 342. 343. S. C. &

S. P. adjudged.——Comb. 186. Stockton v. Colliſon, S. C. but S. P. does not appear. —— 12 Mod 9. Stockwell and Colliſon S. C. but not clearly S. P.

(D) Commiſſions granted. In what Caſes, and How to be executed.

1. A Commiſſion out of this Court *to prove whether a Child was legitimate*. Toth. 100. cites Paſch. 11 & 12 Eliz. Creſey v. Hull.—Ibid. cites 22 Jac. contra, Hobby v. Smith.

2. A Commiſſion to examine Witneſſes on both Parts *upon* 14 *days Warning*, to be given *to the Defendants*. L. *one of the Defendants made Oath that neither he nor U. had any Warning, but if any* Warning was given, *it was given to S.* the other Defendant, *who is little intereſted in the Cauſe*, but made a Party as the Defendant's Counſel ſuppoſeth, to take away his Teſtimony from the other Defendant. Therefore ordered a Commiſſion be awarded, whereof the ſaid L. ſhall have the Carriage directed to the former Commiſſioners, and 14 Day's Warning ſhall be given to the Plaintiff, and he to examine if he will. Cary's Rep. 129, 130. cites 22 Eliz. Hollingworth v. Lucy, Varney and Smith.

2 And 203, 204. pl. 20. S. C.

3. Commiſſions *by ſeveral Warrants* cannot be executed and ſatisfied Simul & Semel by one and the ſame Inquiſition, but ought to be divided and ſeveral, as the Warrant is ſeveral. Poph. 94. Paſch. 37 Eliz. Pigot's Caſe.

4. A Commiſſion was awarded *to prove Cuſtoms*, but Parties intereſted ſhall not be examined as *Witneſſes*. Toth. 101. cites 10 Jac. Hopton v. Higgins.

5. The Court ordered that a Commiſſion ſhould go forth *to ſet out Lands that lie promiſcuouſly* to be liable for Payment of Debts. Toth. 101. cites 14 Jac. Mullineux v. Mullineux.

6. A Commiſſion *to ſet out Copyhold Land from Free Land* which lie obſcured; if the Commiſſioners cannot ſever it, then to ſet out ſo much in lieu thereof. Toth. 101. cites Mich. or Hill. 5 Car. 2. Pickering v. Kimpton.

7. Where a Man is to *perfect his Anſwer on Interrogatories* or to be *examined for a Contempt*, though the Rule of Court is that he ſhall be examined in 4 Days or ſtand committed; yet if the Party be in the Country, he ſhall have a Commiſſion to take his Examination. M. 35 Car. 2. 1683. Vern. 187. Anon.

8. A Commiſſion *returnable fine Dilatione* muſt be executed before the ſecond Return of the next Term, if executed afterwards it is void, and the Depoſition ought to be ſuppreſſed. 2 Vern. 197. pl. 179. Mich. 1690. Anon.

(E) New Commiſſions granted. In what Caſes, and How.

1. THE Plaintiff and Defendant both *joined in Commiſſion to examine* Witneſſes, and the Plaintiff having the Carriage of the Commiſſion did *not execute the ſame, but did examine Witneſſes here in Court*, therefore order'd the Defendant ſhould have a new Commiſſion to the

the former Commiſſioners, wherein the Plaintiff might alſo examine if he liſt, and at the Return thereof Publication; and in the mean time Publication is ſtay'd. Cary's Rep. 160. cites 21 Eliz. Mackworth v. Swayefield & al'.

2. Whereas a Commiſſion iſſued out *to examine Witneſſes* on both Parties, which is returned executed, upon Oath made by one G. B. that he ſerved Precepts from the Commiſſioners upon A. B. C. and D. to be examined on the Defendant's Behalf before the ſaid Commiſſioners, who *appeared not*, it is therefore ordered that a new Commiſſion be awarded *to the former Commiſſioners at the Defendant's Charge*, as well to examine the ſaid 4 Witneſſes as any other. Cary's Rep. 158, 159. cites 21 Eliz. Shepherd v. Shepherd & al'.

3. A *Witneſs* having *committed a Miſtake in his Examination* before Commiſſioners, applied himſelf to them to rectify it, who told him that the *Commiſſion was returned* to London, and he coming there *made Oath* of it, and *that he was ſurprized by a haſty Examination*; but the *Commiſſion not being opened*, it *was returned back to the Commiſſioners, with a ſpecial Commiſſion to open it, and permit the Witneſs to rectify his Miſtake*; and afterwards the Special Commiſſion being executed and returned, a Motion was made to ſuppreſs the Depoſitions, becauſe unduly taken, and that no ſuch Special Commiſſion ought to have been; whereupon it was referr'd to the Maſter of the Rolls to examine into it, who call'd to his Aſſiſtance the Six Clerks, and they were all of Opinion that no ſuch Commiſſion had ever been or ought to be now granted; ſo *the Depoſitions and the Special Commiſſion were ſuppreſs'd.* Neſ. Chan. Rep. 92, 93. 15 Car. 2. Randall v. Richards. Chan. Caſes 25 Randal v. Richford, S. C. accordingly.

4. The Defendant having exhibited *Writings* at a Commiſſion for Examination of Witneſſes, ſuggeſted that they were *altered and interlined ſince the Commiſſion executed*, and pray'd a Commiſſion to examine that Point. It was objected that when the Party has a Commiſſioner preſent, he can never examine new Interrogatories by Commiſſion. To which it was anſwered, that this is true as to the Merits; but the Matter complain'd of has happened ſince, and not examined into by the Commiſſioners, it not being then in Being; and tho' it was replied by asking How the Defendant could know this but by Diſcovery of his Commiſſioner, who ought not to diſcover the Examination, yet the Ld. Chancellor ordered a Commiſſion. Chan. Caſes 273, 274. Hill. 27 & 28 Car. 2. Richardſon v. Lowther.

5. *After Publication and Hearing*, a Commiſſion was granted to examine *new Matters ſtarted at the Hearing*, upon Condition of Conſent to go to Trial the next Term, (an Iſſue being directed to be tried at Law) and return the Commiſſion before the Term; but the Trial not to ſtay, tho' the Commiſſion ſhould not be returned (which was to be from Barcelona) by the Time; and the Ld. Chancellor directed that the Commiſſion ſhould be delivered to Mr. Herne to ſend by the Poſt to Barcelona, and when executed to receive the ſame back. 2 Chan. Caſes 76. Mich. 33 Car. 2. Newland v. Horſeman. Vern. 21. pl. 13 S. C. but S. P. does not appear.

6. If either Party have a Commiſſion De Novo after he has been examined on a former, he *muſt examine on the ſame Interrogatories* as were exhibited by him on the former Commiſſion, *and no other, without an Order or Conſent of Parties.* P. R. C. 221. Curſ. Canc. 243. S. P. in totidem Verbis.

For more of Commiſſions and Commiſſioners in General, ſee **Examination, Fine,** and other Proper Titles.

(A) Com-

(A) Commiſſion of Rebellion.

1. THE Defendant made his *perſonal Appearance* upon a Commiſſion of Rebellion, for ſaving his Bond made to the Commiſſioners in that Behalf. Cary's Rep. 82. cites 19 Eliz. Brown v. Derby.

2. Commonly it is *uſed to take the Bonds in the Name of* the Ld. Chancellor, Ld. Keeper of the Great Seal of England, the Maſter of the Rolls, or any 2 of the Maſters of the Chancery, all which are good and allowable by the Practice of the Court of Chancery. Cary's Rep. 83.

3. A Commiſſion of Rebellion *for not Payment of Coſts* was awarded againſt the Defendant to one John ap David, who did thereupon apprehend the Defendant, and for his more ſafe keeping delivered him to Thomas Moſton, Eſq; *Sheriff* of the County of Flint, who took Charge of the Priſoner accordingly, and now *refuſes either to deliver the Priſoner* to the Commiſſioner, or to bring him himſelf into the Court at the Day. Day is therefore given to the ſaid Sheriff to bring into this Court the Body of the ſaid Defendant by Thurſday next, upon Pain of 10 l. Cary's Rep. 150. cites 22 Eliz. Evans, Dean of St. Aſaph, v. Ap Rees & Ap Bennet.

4. Bail may be taken on a Commiſſion of Rebellion for the Breach of a Decree; but in caſe they refuſe *Bail*, then they ought to bring the Party up to the Court without Delay; and for the not doing it, but keeping him in Priſon for 6 Weeks in the Houſe of H. who arreſted him, H. was ordered to the Fleet for his Abuſe, and to pay the Defendant his Coſts and Charges ſuſtained by the Impriſonment. Chan. Rep. 261. 15 Car. 2. Inglett v. Vaughan.

5. A Commiſſion of Rebellion, by the Courſe of the Court *iſſues only to the Sheriff of Middleſex*. 2 Wms's Rep. (657) pl. 206. in a Note there by the Editor.

For more of Commiſſion of Rebellion in General, ſee **Commiſſion and Commiſſioners**, (C) pl. 5, 6. and other Proper Titles.

(A) Commitment.

(A) Form of Commitments. How. In Caſes not Criminal.

Mich. 8 W. 3. A. was committed by *Commiſ-*

1. THE *Difference* where a Man is committed as *a Criminal*, and where only *for Contumacy* in refuſing to do a Thing required &c. For in the firſt Caſe the Commitment muſt be *until diſcharged according*

cording to Law; but in the latter *until he comply*, and perform the Thing required; for in that Case he shall not lie till Sessions, but shall be discharged upon the performing his Duty. Carth. 153. Trin. 2 W. & M. in B. R. The Mayor and Church-wardens of Northampton's Case.

Sioners of Bankrupts, for his *refusing to answer*; and they concluded their Warrant, viz. *Until he conform himself to our Authority, and be thence delivered by due Course of Law.* But upon Return of an Habeas Corpus he was discharged, because the *Conclusion was not pursuant to the Statute of Bankrupts*; and the Mayor of Northampton's Case was cited for an Authority. Carth. 153. in Marg. Bracy's Case. —— 5 Mod. 308. S. C. by the Name of Bracy v. Harris.—The Court thought the Word (*conform*) instead of the Word (*submit*) to be well enough, tho' the Word in the Act is (submit,) because it is *of the same Sense*; but because the Commissioners had other Authorities besides those of examining, and it did not appear but it might require a Submission to them in other Respects, and because all Powers given in Restraint of Liberty must be strictly pursued, and that in this Case they had but a *Special Authority*, and must not exceed it, they held the Return naught. 1 Salk. 348. Mich. 8 W. B. R. Bracy's Case.

So where the Warrant returned of a Commitment by Commissioners of Bankrupt, for refusing to be examined by them, was, viz *Or otherwise discharged by due Course of Law*, it was held naught; for the Statute is, *he shall be committed until he submit himself to be examined by the Commissioners.* 1 Salk. 351. Hill. 1 Ann. B. R. Hollingshead's Case.

2. Defendant was committed, upon a Conviction for *Deer-stealing*, for a Year, and till such Time as he should be set in the Pillory, whereas the Act says for a Year only, and therefore he was discharged. Cumb. 305 Mich. 6 W. & M. in B. R. Clark's Case.

3. An *Overseer*, who by the Stat. 43 *Eliz. cap.* 2. may be committed till he account, was committed till he should be delivered by due Course of Law; and adjudged void, because it did not *pursue the Law*. Cited per Wright Serj. Cumb. 305. Mich. 6 W. & M. in B. R. in Clark's Case.

But it should be, there to remain *until he shall account*, as 43 El. 2. doth appoint. Carth. 152. The Mayor and Church-wardens of Northampton's Case.

4. Record of Commitment should be *in the present Tense*; per Holt Ch. J. 12 Mod. 516. Pasch. 13 W. 3. The King v. Brown.

For more of Commitment in General, see **Habeas Corpus**, (F. 2) and other Proper Titles.

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* Common.

Fol. 396.

* There are only 4 *Manner of Commons*, viz. Common *Appendant*, *Appurtenant*, *in Gross*, and *by Reason of Vicinage*; And as to Common *Ratione Residentiæ*, or Commorantiæ, it is not any of them; Resolved, by all the Justices of C. B 6 Rep 90. a. Hill. 14 Jac. C B in Gatewood's Case. —— S. P. accordingly. Cro. E. 363. pl. 25. Mich. 36 & 37 Eliz. C. B. in Case of Fowler v Dale.——See Tit. Inhabitants (B).

(A) Common, *as Lord.*

1. THE Lord of the Manor, seised of the Wastes in which the Tenants have Common, may feed the Common per mie & per tout of Common Right, without Disturbance. 18 E. 3. 43. 18 Ass. 4.

Admitted, Arg. that the Owner of the Soil may feed with his Tenant who has a Right of Common. 2 Mod. 275. Mich. 29 Car. 2. C. B.

For by this the Soil is not granted; Per Brooke J. Quod non negatur. Br. Common, pl 49. (48.) cites 8. C.

2. If the Owner of the Soil grants to another Common ſans Number there, yet the Grantee cannot uſe the Common with ſo many Cattle that the Grantor ſhall not have ſufficient Common for his Cattle. 12 H. 8. 2.

———It was ſaid by Coke Ch J. that he never knew ſuch Common granted, but yet, notwithſtanding ſuch Grant, the Lord may Common with ſuch Grantee; and alſo, the Grantee ought to uſe the Common with a reaſonable Number; and to this the Lord Chancellor agreed. Roll Rep. 365. pl. 18. Paſch. 14 Jac.———If a Man claims by Preſcription, any Manner of Common in another Man's Land, and that the Owner of the Land ſhall be excluded to have Paſture, Eſtovers, or the like, this is a Preſcription, or Cuſtom, againſt the Law, to exclude the Owner of the Soil; for it is againſt the Nature of this Word Common, and it was implied in the firſt Grant, that the Owner of the Soil ſhould take his reaſonable Profit there, as has been adjudged. Co. Litt. 122. a (k) ———See (I) pl. 5. S. C.

It ſeems admitted per Cur. that the Licence of the Lord to a Stranger to put his Beaſts into the Common is good, if ſufficient Common be left for the Commoners. 2 Mod. 6. Hill. 26 & 27 Car. 2. C. B. in Caſe of Smith v. Feverel.

3. The Lord by Preſcription may agiſt the Cattle of a Stranger in the Common. 30 E. 3 27.

4. But without Preſcription the Lord cannot agiſt the Cattle of a Stranger in the Common. 30 E. 3. 27.

Cro. J 208. pl. 1. Trin. 6 Jac. B. R. S. C. & S. P. admitted.——

5. One may *preſcribe* to have *ſole Paſturage* in ſuch a Place, from ſuch a Time to ſuch a Time, *excluſive*, of the Owner of the Soil. Cited Cro. J. 257. to have been ſo reſolved in Kenrick's Caſe.

Yelv. 129. Kenrick v. Pargiter, S. C. & S. P. admitted. ———Noy 130. S. C. & S. P. adjudged.——— S. C. cited Bulſt. 94.

6. If one is ſeiſed of a Manor, in the Waſte whereof the Tenants have Common, and the *King grants Warren to the Lord in ſuch Diviſion of the Manor*; adjudged, that the Lord cannot uſe his Warren, and put Conies in the Waſte in Prejudice of the Commoners. Jo. 12. Mich. 18 Jac. C. B. Griſell v. Leigh.

7. Copyholders may plead a Cuſtom to have *ſolam & ſeparalem Paſturam* Omni Anno, Omni Tempore Anni, and that excluſive of the Lord, and in ſuch Caſe Levancy and Couchancy is not neceſſary. 2 Lev. 2. Paſch. 23 Car. 2. B. R. Hopkins v. Robinſon.

For there may be Trees, Mines, &c. Vent. 123. 163. in S. C.

8. Tho' the Copyholders have *Solam & ſeparalem Paſturam* &c. yet the Lord may diſtrain, for other Damage, the *Beaſts of a Stranger*, who has no Right to put in his Beaſts, tho' the Lord has no Intereſt in the Herbage; Per Hale Ch. J. 2 Saund. 328. Paſch. 23 Car. 2. in Caſe of Hoskins v. Robins.

(B) Common of the Lord. *Who* ſhall have it.

1. If the Lord alien in Fee the Soil where the Common is to be taken, ſaving his Power of feeding as Lord, he ſhall have Common there as Lord. 18 E. 3. 43. 18 Aſſ. 56. admitted.

* The Argument in the Year-book of 18 E. 3 30. b. is, that tho' the Lord could not have Common in his own Land, yet he had Paſture there in lieu of this Profit, and when he has diſmiſſed himſelf, his Feoffee

2. If the Lord, without any ſaving, aliens the Soil where the Common is to be taken, his Common as Lord is gone by the Feoffment, but the Alienee of the Soil may feed it as the Lord might have done before, for that this Common is given becauſe it is in his Soil, where the Lord has it, and not becauſe he is Lord, and this Reaſon holds here. See * 18 E. 3. 30. b. 43. for it ſeems that they may approve it. † 18 Aſſ. 56. b.

Feoffee ſhall have Common in lieu of the Paſture which he had. Adjornatur. [This may help to explain Roll, pl. 2. which ſeems ſomewhat obſcure.] † Br. Common, pl. 22. cites 18 Aſſ. pl. 4. S. C.

(C) Common Appendant. What. [*And how.*]

1. IT is not Common Appendant unleſs it has been appendant Time out of Mind. * 40 E. 3. 10. b. † 26 H. 8. 4. 17 E. 3. 26. b. 5 Aſſ. 2.

* Fitzh. Iſſue, pl. 143. cites S. C. —— † Br. Common, pl. 1. cites S. C. accordingly, and a Man cannot make ſuch Common at this Day, and it is appendant only to arable Land, and not to the Houſe, or any other Land, and it ſhall be only for the Beaſts which feed the ſame Land to which &c. Per Hales, to which Fitzherbert agreed. ——Common appendant is to have Common to his arable Land, and for his Beaſts that plough his Land, and compeſter his Land, viz. for his Horſes and Oxen to plough, and for his Cows and Sheep to compeſter. Br. Common, pl. 13. cites 37 H. 6. 34. —— * Br Common, pl. 16. cites S. C. & S. P. and therefore it cannot be claimed to Land newly approved out of the Waſte.——Br. Aſſiſe, pl. 37. (36) cites S. C. & S. P.

2. For ſuch Common can not be created at this Day. * 26 H. 8. 4. † 5 Aſſ. 9. per Herle.

* Br. Common, pl. 1. cites S. C. & S. P. and ſee pl. 1. ſupra, and the Notes there. † Fitzh. Aſſiſe, pl. 134. cites S. C.

3. Common appendant is of Common Right. 26 H. 4.

This ſhould be 26 H. 8. 4. —— Br. Common, pl. 1. S. C. & S P. that it is of Common Right before Time of Memory. —— S. P. per Cur. 4 Rep. 37. a. in Tirringham's Caſe, and that it commences by Operation of Law, in Favour of Tillage.

4. If the Lord of a Manor, before the Statute of Quia Emptores Terrarum, had made a Feoffment of Parcel of the Manor to hold of him, the Feoffee, as incident to the Grant, ſhould have had Common in the Waſtes of the Lord. Mich. 9 Jac. B. per Coke and Foſter.

In ſuch Caſe the Feoffees ad Manute-nendum Servitium Socæ ſhould have

Common in the ſaid Waſtes of the Lord for two Cauſes; 1ſt. As incident to the Feoffment, for the Feoffee could not plough and manure his Ground without Beaſts, and they could not be ſuſtained without Paſture, and conſequently the Tenant ſhould have Common in the Waſtes of the Lord for his Beaſts which do plough and manure his Tenancy, as appendant to his Tenancy, and this was the Beginning of Common appendant. The 2d Reaſon was for Maintenance and Advancement of Agriculture and Tillage, which was much favoured in Law. 2 Inſt. 86 —— See (G) pl. 6.

5. Common appendant may be thro' all the Year, ſaving at a certain Time, at what Time the Lord feeds it. 27 E. 3. 86. b.

6. If a Man *grants* 80 *Acres* of Land *with Common in Q. as much as pertains to two Oxganges of Land*, this does not make the Common to be Appendant if it was not Appendant before; Per Herle J. & non negatur; for it ſeems clearly that it *cannot be Appendant but by* Time of *Preſcription*; Quod Nota, but contra elſewhere of Appurtenant. Br. Incidents, pl. 9. cites 5 Aſſ. 9.

Br. Commoner and Common, pl. 37. cites S. C. —— Br. Preſcription, pl. 45. cites 3 Aſſ. 9. S. P and ſo are all the Editions, but they ſeem miſ-printed, there being no ſuch Point there; and it ſhould be, as here, 5 Aſſ. 9.

7. Every *Common by Reaſon of Vicinage is Common Appendant*; Per Littleton J. which none contradicted nor affirmed. Br. Common, pl. 30. cites 7 E. 4. 26.

8. In

8. In Treſpaſs, the Defendant juſtified becauſe he and all thoſe whoſe Eſtate he has in ſuch Lands, have had Common Appendant to the ſaid Land, in the Place where &c. with all Manner of Beaſts, Levant and Couchant upon the ſame Land, by which &c. Per Fairfax, this is Common Appurtenant; for if it was Common Appendant he ſhall not have *Common with all Manner of Beaſts.* Br. Common, pl. 12. cites 9 E. 4. 3.

Co. Litt. 121. b. S. P. 9. The Word *(Pertinens)* is Latin as well for Appurtenant as Appendant, and therefore the *Subjecta Materia*, and the Circumſtance of the Caſe muſt direct the Court to judge the Common to be either Appendant or Appurtenant; Sic dictum fuit; 4 Rep, 38. a. Mich. 26 & 27 Eliz. B. R. in Tirringham's Caſe.

13 Rep. 65. 66. Hill. 7 Jac. C. B. S. C. reſolved that 10. A. ſeiſed of 2 Yard-Lands with the Appurtenances, had Common of *Paſture for a certain number of Cattle*; this was Common Appendant. Brownl. 180. Morſe v. Wells.

there is no Difference when the Preſcription is for Cattle Levant and Couchant, and for a certain Number of Cattle Levant and Couchant, but otherwiſe of Common Appurtenant.

11. Common Appendant unto Land is as much as to ſay Common *for Cattle Levant and Couchant upon the Land in which* &c. Reſolved. 13 Rep. 66. Hill. 7 Jac. C. B. Morſe v. Webb.

Fol. 397. (D) The ſeveral *Sorts* [of Common Appendant.]

As where a Man had Common in 100 Acres when it is not ſown, this is conditionally. Br. Common, pl. 13 cites S. C. per Moyle.—— Fitzh. Treſpaſs, pl. 85. cites S. C. 1. A **Common Appendant may be** upon Condition. 37 H. 6. 34. (it ſeems to be intended limited.)

Br. Common, pl. 13. cites S. C.— Fitz. Treſpaſs, pl. 85. cites S. C. 2. **Common Appendant may be** unlimited, ſo quamdiu he pays ſo much, **ſo tamdiu** as he ſhall be living upon ſuch a Houſe **to which the Common is appendant.** 37 H. 6. 34.

Br. Common, pl. 13. cites S. C. & S. P. implied.—— A Man *preſcribed* to have Common Appendant in the Place where &c. for all Cattle Commonable &c. (viz.) *if the Land was ſowed by the Conſent of the Commoner*, then *he was to have no Common till the Corn was cut*, and *then to have Common again till the Land was ſowed by the like Conſent* of the Commoner; it was objected that this Preſcription was againſt Common Right, for it was to prevent a Man from ſowing his own Land without the leave of another; but the whole Court held the Preſcription good, for the Owner of the Land cannot Plough and Sow it, where another has the Benefit of Common; but in this Caſe both Parties have a Benefit, for each of them have a qualified Intereſt in the Land. 1 Le. 73. pl. 100. Mich. 29 & 30 Eliz. C. B. Hawkes v. Mollineux. 3 So, **Common Appendant may be to Common** after the Corn is ſevered, till it is re-ſowed. 17 E. 3. 26. F. N. 180. E. 37 H. 6. 34.

4. So **it may be to Common in the Meadow** after the Hay carried till Candlemas. 17 E. 3. 26. 34.

5. So **it may be to Common in the** Paſture from the Feaſt of St. Auguſtin till All-Saints. 17 E. 3. 26. b. 34.

6. So **it may be to Common** between the ſaid Feaſts **before mentioned**; and if the Tertenant puts in his Cattle before the Feaſt of St. Auguſtin, then he may Common there alſo from the Invention of the Holy Croſs till All-Saints. 17 E. 3. 26. 34.

7. So

7. So it may be to Common 2 Years after the Corn cut and carried away, till it is re-lowed, and every 3d Year; Per totum Annum. 22 Aſſ. 42. admitted.

8. A Man may have Common Appendant for 30 Cattle in one Place, and to the ſame Land Common appendant alſo in another Place, for Part of the ſaid Cattle, and ſo may take it where he pleaſes. 17 E. 3. 34 b.

(E) *To what* it ſhall be appendant.

1. It ought to be appendant to arable Land. * 37 H. 6. 34. †26 H. 8. 4. * Br. Common, pl. 13. cites S. C.

—— † Br. Common, pl. 1. cites S. C. ——F. N. B. 180. (B) in the Marg. of the new Edition, [419.] cites S. P. by Priſot, 20 H. 6. 4 and by Hulls accordingly, 5 Aſſ. 2.

2. Not to other Land than arable. 26 H. 8. 4. Not to a Houſe. 26 H. 8. 4. 26 Br. Common, pl. 1. cites S. C.

and both the ſame Points. —— It is only appendant to ancient arable Land Hide and Gaine; Per Cur. 4 Rep. 37. a. Mich. 26 & 27 Eliz. B. R. in Tirringham's Caſe.

It is againſt the Nature of Common appendant to be appendant to Meadow or Paſture, and therefore in the principal Caſe, the Preſcription being laid to have Common appendant Time out of Mind, to a Houſe, Meadow, and Paſture, as well as to arable Land, by which it appeared to the Court that there had been a Houſe, Meadow, and Paſture, Time out of Mind, it was reſolved for that Reaſon, that this was Common appurtenant and not appendant; But if a Man has had Common for Beaſts which ſerve for his Plough, appendant to his Land, and perhaps of late Time a Houſe is built upon Part thereof, and ſome Part is employed to Paſture, and ſome for Meadow, and this for Maintenance of Tillage, which was the original Cauſe of the Common, in this Caſe the Common remains appendant, and it ſhall be intended in reſpect of the continual Uſage of the Common for Beaſts Levant and Couchant upon ſuch Land that at firſt all was arable; but in Pleading he ought to preſcribe to have it to the Land. 4 Rep 7. a. b. in S. C. per Cur.

3. It cannot be appendant to Land which is approved within Time of Memory out of the Waſte of the Lord. 5 Aſſ. 2. Br. Common, pl. 16 cites S. C.

——Br. Aſſiſe, pl 117 (116) cites S. C ——F. N. B. 180. (B) in the Marg. of the new Edition, 419. cites S. C. and 10 E. 2. accordingly, and there the Land to which it may be appendant is called Aid, [Hide] and Gain.——4 Rep. 37. b. S. C. cited per Cur.

4. Common of Turbary cannot be appendant to Land. 5 Aſſ. 9. Adm. [Admitted.]

5. The *Lord* may have in the Land of his Tenant Common appendant *to his own Demeſnes*; Per Green. F. N. B. 180. (D) in the new Notes there (d) cites 18 E. 3. Admeaſurement 7.

6. A Man may preſcribe to have Common appendant *to his Manor*; for all the Demeſnes ſhall be intended arable, or at leaſt, in Conſtruction of Law, (Reddendo ſingula ſingulis) ſhall be appendant to ſuch Demeſnes as are ancient arable Land, and not to Land newly gained and improved out of the Waſtes and Moors, Parcel of the Manor; Per Cur. 4 Rep. 37. b. Mich. 26 & 27 Eliz. B. R. in Tirringham's Caſe.

7. Common may be appendant *to a Carve of Land*, and yet a Carve of Land may contain Meadow, Paſture, and Wood, as is held 6 E. 3. 42. but it ſhall be applied to that which agrees with the Nature and Quality of a Common appendant, and no Incongruity appears; Per Cur. 4 Rep. 37. b. Mich. 26 & 27 Eliz. B. R. in Tirringham's Caſe.

8. A Man preſcribed for Common for all Commonable Beaſts as *to his Houſe* appertaining, and in Arreſt after Verdict the Court ſaid, that upon Demurrer it might perhaps have been ill; but after Verdict, *tho' it*

be neither appendant nor appurtenant &c. in Strictneſs of Law, yet it is good enough, and they ought to intend it appurtenant, and Judgment for the Plaintiff. 2 Sid. 87. Trin. 1658. Stoneby v. Muſſenden.

1 Salk. 169. pl. 2. S. C. held accordingly; and Holt Ch. J. ſaid he remembered the Trial of an Iſſue whether Levant and Couchant, before Hale Ch. J. who held the *Foddering of the Cattle in the Yard Evidence of Levancy and Couchancy*: 6 Mod. 114. Anon. S. C. and the Court held, that a *Cottage implies a Court and Backſide.*

9. A Preſcription for Common for all Cattle, Levant and Couchant, as appendant *to his Cottage*, was held a good Preſcription, by Holt Ch. J. and the Court; And by Powell J. a *Cottage contains a Curtilage*, and ſo there may be a Levancy and Couchancy upon a Cottage, and it has been ſo ſettled, and there is no Difference between a Meſſuage and a Cottage as to this Matter; the Statute De Extentis Manerii ſays, that a Cottage contains a Curtilage, and that they will ſuppoſe that a Cottage has at leaſt a Court to it. 2 Ld. Raym. Rep. 1015. Hill. 2 Ann. Emerton v. Selby.

(F) [Appendant.] For what Cattle.

* Br. Common, pl. 13. cites S. C. ——Ibid. pl. 1. cites 26 H. 8. 4. that it ſhall be only for ſuch Beaſts as compeſter the ſame Land &c. —— Co. Litt. 122. a. S. P. —— S. P. per Cur. and ſame Caſes cited 4 Rep. 37. a. in Tyrringham's Caſe.

1. It ought to be for ſuch Cattle as plough his Land, (to which it is appendant, as it ſeems) and compeſter it, ſcilicet, Horſes and Oxen to plough the Land, and Cows and Sheep to compeſter it. * 37 H. 6. 34. 10 E. 4. 10. b.

Br. Common, pl. 13. cites S. C. for theſe are not neceſſary to plough his Land, or to feed it. ——Fin. Law, 8vo 56. S. P.

2. But he ſhall not uſe it with Goats, Geeſe, or ſuch like, for theſe are not neceſſary to do it ſupra. 37 H. 6. 34.

* Br. Common, pl. 13. cites S. C. that where a Man claims Common for all Manner of Beaſts, he may put in Hogs, Goats, and the like. † See (M) pl. 2. which ſeems to be the Caſe intended here, and that it ſhould be 14 H. 6. 6. as it is there.

3. And therefore a Preſcription to have Common appendant for all Manner of Cattle is not good, becauſe it comprehends Goats, Geeſe, and ſuch like; but this is Common appurtenant. * 37 H. 6. 34. b. per Curiam. Contra † 4 H. 6. 6. b.

4. In Aſſiſe, the Plaint was *of Common with all Manner of Beaſts*; Fiſher ſaid, that Goats and Geeſe are not Beaſts of Common; Judgment of Plaint; & non allocatur; the Reaſon ſeems to be, becauſe it ſhall be *intended Beaſts* which are *Commonable.* Br. Common, pl. 42. cites 25 Aſſ. 8.

5. A Man cannot have Common for Beaſts in which he has not a general or ſpecial *Property.* 2 Show. 329. pl. 337. Mich. 35 Car 2. Manneton v. Trevillian.

(G) Com-

(G) Common. [Common appendant.] *For how many* Cattle.

1. THE Common is admeasurable, according to the Quality and Quantity of the Freehold to which he claims to have this Common appendant. 37 H. 6. 34. Br. Common, pl. 13. cites S. C. & S. P. as to the Quantity.

2. Scilicet, For all those which are levant and couchant upon the Land. 10 E. 4. 10. b. * 15 E. 4. 32. b. 11 H. 6. 12. Fol. 398.

* Br. Common, pl. 8. cites S. C.

3. He that claims Common by Force of a Prescription, as an Inhabitant of a Town, shall have no other Cattle to common there but what are levant and couchant within the same Town. 15 E. 4. 32. b. Curia. See (I) pl. 4. S. C. For there is no Difference between this and *Common appendant*; for he who has Common appendant to an Acre of Land, shall not use the Common with other Beasts but those which are levant and couchant upon the said Acre; per Pigot, with which agreed the Opinion of the Court. Br. Common, pl. 8. cites 15 E. 4. 32.

4. Common appendant may, by Usage, be limited to any certain Number of Cattle. 17 E. 3. 27. 34. b.

5. *So many* Cattle *as the Land, to which* the Common is appurtenant, *may maintain in the Winter*, so many shall be said levant and couchant; It was reported by Serj. Attee to have been so said by Coke Ch. J. at Norfolk Assises, and to this Warburton and Hutton agreed. Noy 30. in Case of Cole v. Foxman. Brownl 17. Hill 14 Jac. Coles v. Flaxman, seems to be S. C but S. P. does not appear.——Sheep levant and couchant, is intended as many as the Land will maintain. Vent. 54. Hill. 21 & 22 Car. 2.——Prescription for all Beasts levant and couchant upon a House, shall be intended those Beasts which are nourished and fed upon the Land, and may there lie in Summer and Winter. Agreed. But some thought that Beasts cannot be levant and couchant upon a House without a Curtelage. 2 Brownl. 101. Mich. 9 Jac. C. B. in Case of Patrick v. Lowre.

6. In Replevin the Plaintiff declares for taking 64 Sheep in a Place called Somer-lees in the Parish of D. in Somersetshire. The Defendants avow the Taking, for that the Place where &c. contains 100 Acres of Land; that at and before the Taking Rich. Bowes was seised in Fee &c. and that the Cattle were Damage feasant, and that they distrained them as his Bailiffs. The Plaintiff in Bar to this Avowry pleads, that long before and at the Time when &c. one Philip Biggs was seised in Fee of a certain Acre of Land called Old Haster, situate in D. and *that he, and all those whose Estate he hath, have used to have a Right of Common for all manner of Sheep &c. as appendant to the said Acre*; and that the said Biggs being so seised on the ... Day of .... 5 W. 3. made a Demise to J. S. for 99 Years, if 3 Lives so long lived; and that afterwards in 1704, J. S. made an Under-Lease to the Plaintiff's Father Robert Bennet for the Residue of the Term, who enter'd and was possess'd, and afterwards died, leaving the Plaintiff his Executor, who thereupon, as such, enter'd, and then avers that the Lives are still in Being; and the said Plaintiff being so possess'd upon the 28th of Sept. 1737, (being the Day of the supposed Taking) did put his Cattle in the said Place to depasture, and enjoy the Common as appendant to the said Acre; and that while they were so depasturing the Defendants seised them, and this he is ready to verify. The Defendants *reply, protesting as to the Common, and* MS. Rep. Mich. 14 Geo. 2. C B. Bennet v. Reeve & al'.

and ſay that before and at the Time of the Taking, the ſaid Sheep nor any of them were not levant or couchant on the Land. To this the Plaintiff demurs; and the Defendants join in Demurrer. Per Cur. the ſingle Queſtion upon this Demurrer is, *Whether Levancy and Couchancy is incident to Common appendant as well as to Common appurtenant?* If it be incident, then the Plaintiff having by his Plea in Bar ſet forth that they were levant and couchant, the Defendants Replication has put a material Matter in Iſſue, and the Demurrer muſt be over-ruled. Whether the Plaintiff was bound to have pleaded Levancy and Couchancy is another Queſtion, and might be very doubtfull; but that is not now neceſſary to be determined, ſuppoſing the Defendants Replication material as we think it is. So likewiſe as to ſome other Objections which have been made to the Defendant's Plea, I ſhall paſs them over as of no great Weight. And as to the Point in Queſtion, I think it could never have been made a Doubt at the Bar, and the Nature and Original of Common Appendant been rightly underſtood. It was ſaid that *Common Appendant took its Riſe* from hence, that Tenants of Manors being by their Tenure obliged to plough and till the Lord's Land, therefore they had the Liberty of putting their Cattle to be maintained in the Lord's Waſt, as they were to be employ'd in his Service. But I think that this Opinion is a Miſtake, and not warranted either by Law or Reaſon, and that were it to prevail, it would be attended with the utmoſt Abſurdity and Inconvenience. I admit that Common appendant is incident only to arable Land; ſo is Co. Litt. 122. b. and ſo are all the Books as to this Point, though in other Matters of Common appendant they differ widely. Therefore as it is incident, it cannot be ſevered from the Land, and then the Conſequence of that will be, that if Land be divided into never ſo many Parts or Parcels, the Tenant of each diſtinct Parcel has a Right to ſuch Common as appendant to the Land, in the ſame Extent and Degree as the Tenant of the whole Land had before the Tenancy was divided; and ſo every Tenant of the Manor muſt keep the ſame Number of Horſes or Oxen to plow and cultivate the Lord's Land, and on that Account to feed them on the Waſte, whether he be Tenant of 100 Acres or only of a ſingle Acre, which ſhews the Abſurdity of ſuch an Opinion, and has fell out to be the very Caſe at preſent. There is another Anſwer to be given againſt that Opinion, and that is, that a Man may have Common appendant for Cows and Sheep as well as Horſes and Oxen, as appears by 1 Roll Abr. 397. and ſeveral other Books, and was admitted by the Plaintiff's Counſel very rightly; becauſe elſe, this being a Replevin for Sheep, they would have made an End of their own Caſe. But if there may be Common appendant for Sheep, then ſuch Common can never be enjoyed upon Account of keeping them to plow the Lord's Land, becauſe they are not capable of being uſed in that Manner. But I take this to be the true Reaſon, that every Tenant had a Right to this Common for his own Benefit, and that as he had no Place for keeping his Cattle after they had done Ploughing his Land, he might turn ſuch Cattle as were employed by him that Way, upon the Waſte of the Lord, till the Hay or Corn was cut and the Ground cleared; and this appears to be the Caſe in Co Litt. 122. before cited, and ſeems to be a clear and intelligible Account of the Matter. For if this Account be true, that it was a Right of Common for ſuch Cattle as were employ'd in Ploughing the Tenant's Land, then it can extend to ſuch only as are Levant and Couchant on it. And there will be no Abſurdity as in the former Caſe; for then if the Land be divided into Parcels, the Common will be divided into Parcels likewiſe; and a Tenant of one Acre of Land will never be able to claim Common for 64 Sheep, as in the preſent Caſe, becauſe the original Tenant (perhaps) of 1000 Acres had a Right to it. The Conſequence of this will likewiſe be, that a Tenant

ſhall

ſhall not be at Liberty to borrow a Stranger's Cattle and put them on the Common, at leaſt unleſs borrowed for a conſiderable Time, ſo as to be employ'd, and be levant and couchant on the Tenant's own Land at other Times. Having thus explained the Nature and Origin of Common appendant, it becomes a very plain Caſe for the Defendants; but I will juſt add a Caſe or two in Confirmation of our Opinion, tho' I think the Caſe does not need it; and that is 4 Co. 38. b. and 1 Roll Abr. 398. with ſeveral Year-Books there cited, all to prove that Common appendant is only for Cattle levant and couchant on the Land, for the Reaſons I have before mentioned. Therefore we are all of Opinion that there muſt be Judgment for the Defendants.

(H) By the Cattle of whom it may be uſed.

1. GEnerally the Commoner cannot uſe the Common but with his own proper Cattle. * 11 H. 6 22. b. † 22 Aſſ. 84.

* He that has Common appendant cannot uſe it but with his own proper Beaſts, or Beaſts that compeſter the Land to which the Common is appendant; but he who has Common for 20 Beaſts by Grant, or for Beaſts ſans Number, may uſe it with the Beaſts of another; but contra where he has a Grant of Common pro 20 Averiis ſuis, or Common ſans Nomber pro Averiis ſuis; Per Paſton, quod non negatur. Br. Common, pl. 48. (47) cites 11 H. 6 22. ——Fitzh Common, pl 3. cites S C.

† Br. Common, pl. 41. (40) cites S C. ——Fitzh Aſſiſe, pl. 228. cites S. C.

2. If the Commoner hath not any Cattle to manure the Land, he may borrow other Cattle to manure it, and may uſe the Common with them; for by the Loan they are in a manner made his own Cattle. ‡ 45 E. 3. 26. 11 H. 6. 22. b. 11. b. ¶ 14 H. 6. 6. b. 22 Aſſ. 84. Quære 4 H. 4. 4. b.

‡ Br. Common, pl. 5. cites S. C.——Br. Seiſin, pl. 5. cites S C.

¶ Br. Common, pl. 14. cites S. C ——Fitzh. Treſpaſs, pl. 33. cites S C.

A Man cannot uſe his Common appendant with the Cattle of Strangers, unleſs he brings them to ſoil his Land; but he cannot agiſt other Cattle there for Money, which do not manure his Land. F. N. B. 180. (B) cites 6 H. 7. 4. 45 E. 3. 25 ——Ibid. in the new Notes there (a) cites theſe Diverſities as agreed 11 H. 6. 22. in Strode's Caſe, and 14 H. 6. 6. and refers to Raym. 171. Rumſey v. Rawſon.

3. He can not agiſt the Cattle of a Stranger. 11 H. 6. 22. b. 11. b. ‡ 22 Aſſ. 84.

* Br Common, pl 48. (47) cites S. C.——Fitzh. Common, pl. 3. cites S. C. † Br. Common, 41. (40) cites S. C.—— Fitzh. Aſſiſe, pl. 228. cites S. C.——F. N. B. 180 (B) S. P. accordingly.——Vent. 18. Paſch. 21 Car. 2. B. R. Rumſey v. Rawſon, S. P. held accordingly; but after Verdict in Replevin found for the Plaintiff that the Beaſts were levant and couchant, the Court ſhall intend they were Beaſts which were procured to compeſter the Land, and the Right of the Caſe is tried, and ſo aided by the Statute of Oxford.——Raym. 171. S. C.——2 Keb. 504. pl. 72. S. C. The Court agreed that a Man cannot put in the Beaſts of a Stranger, but only to compeſter his Land.

4. If he takes the Cattle of a Stranger to fold, and folds them accordingly, being levant and couchant upon the Land, he may uſe the Common with theſe Cattle; for he has a ſpecial Property in them for the Time. Mich. 10 Car. B. R. between *Jaſon and Hellyard*, per Curiam, upon Evidence at the Bar.

(I) Common ſans Number. [*How it may be, and how uſed.*]

Br. Common, pl. 8. cites 15 E. 4. 32. S. P. by Pigot.—See pl. 4.

1. If a Man as an Inhabitant of a Town claims Common for all manner of Cattle in a Place, and claims the Common by reaſon that he is an Inhabitant there, he ſhall have no other Beaſts to common there but thoſe that are levant.

Br. Common, pl. 8. cites 15 E. 4. 32. but

2. A Man may preſcribe to have Common for all manner of Cattle, by reaſon of his Perſon. 15 E. 4. 33.

that is as to an Inhabitant's claiming Common.

Mar. 83. pl. 137. Paſch. 17 Car. B. R. cites it as adjudged in Say's Caſe of the County of Lincoln, that ſuch Preſcription was not good, but ſaying levant and couchant would make it a good Preſcription.

3. If a Man claims Common by Preſcription for all manner of commonable Cattle in the Land of another, as belonging to a Tenement, this is a void Preſcription, becauſe he does not ſay that it is for Cattle levant and couchant upon the Land to which he claims it to be appurtenant; for a Man cannot have Common ſans Number appurtenant to Land; and when he claims the Common for all Cattle commonable, and does not ſay for Cattle levant and couchant upon the Tenement, this ſhall be intended Common ſans Number according to the Words; for there is not any Thing to limit it, when he does not ſay for Cattle levant and couchant. Paſch. 16 Car. B. R. between *Cobham and White*, adjudged in a Writ of Error upon a Judgment in Windſor-Court, and the Judgment there given reverſed for this Cauſe, the Lord Brampſton only being in Court. Intratur M. 14 Car. Rot. 403, 404.

—Lev. 196. Mich. 18 Car. 2. B. R. Cheadle v. Miller, S. P. and adjudged ill without Special Demurrer; but agreed that it was cured by Verdict, and cited it as adjudged 14 Car. 1. in the Caſe of Ld. Say v. Young, tho' it was doubted in Caſe of * Stone v. Muſſelton.——Sid. 313. Cheedley v. Mellor, S. C. adjudged, and cites the Caſe of Say v. Young.

* 2 Sid. 87. Trin 1658. B R. Stonesby v. Muſſenden, S. C.——S. C. cited Mod. 7. as the Caſe of Maſſelden v. Stoneby, where Maſſelden preſcribed for Common ſans Number, without ſaying levant and couchant, and that being after a Verdict, was held good; but if it had been given upon a Demurrer, it would have been otherwiſe; Cited by Twiſden, and Liveſey ſaid that he was Agent for him in the Caſe.——S. P. cited as cured by Verdict, 3 Mod. 162.——Mod. 75. pl. 31. Twiſden J. cited Stoneby v. Muckleby, S. C. & S. P.

Br. Common, pl. 8. cites S. C.—For he who has Common appendant to one Acre of Land, ſhall not uſe this Common but with Beaſts which are levant and couchant upon the ſame Acre. And ſo where Inhabitants in a Place have Common, the Houſe in which the Inhabitant inhabits is the Cauſe of his Common, and therefore the Beaſts levant and couchant there ſhall be put into the Common, and no others; per Pigot, and ſo was the Opinion of the Court. Br. Preſcription, pl. 28. cites S. C.—S. C. cited Arg. Cro. E. 363. in pl. 25.—Inhabitants of a Town may well preſcribe. 3 Le. 202. pl. 254. Arg. cites 18 E. 4. 3.——4 Le. 235. pl. 369. Arg. S. P. and cites S. C.——Ld. Raym. Rep. 406. Arg. cites S. C.——See Cro. E. 362, 363. pl. 25. Mich. 36 & 37 Eliz. C. B. Fowler v. Dale.

4. If a Man claims Common for all manner of Cattle in a Place as an * Inhabitant within a Town, and claims the Common there, by reaſon that he is an Inhabitant there, he ſhall have no other Beaſts to common there but thoſe which are levant and couchant in the ſame Town; for there is no Diverſity between this and Common appendant. 15 E. 4. 32. b.

* See Tit. Inhabitants (B)——See Tit. Preſcription.

Fol 399. For by this the Soil is not granted.

5. If a Man grants Common ſans Number, the Grantee cannot put in ſo many Cattle, but ſo that the Grantor may have ſufficient Common in the ſame Land. 12 H. 8. 2. Per Newport.

Br. Common, pl. 49. (48) cites S. C. per Brooke J. quod non negatur.

6. Com-

6. Common ſans Number *cannot be appendant to any Thing but Lands*, and it is called Common ſans Number, becauſe it *is only for Beaſts levant and couchant*, and it is uncertain how many thoſe are, there being in ſome Years more than in others; but it *is a Common certain in its Nature*; for id certum eſt, quod certum reddi poteſt; Per Cur. Hard. 117, 118. pl. 3. Trin. 1658. in Scacc. Chichley's Caſe.

7. In Caſe of Common ſans Nombre, if there be a *Sur-charge*, it *muſt be remedied by a Writ of Admeaſurement*; agreed per Cur. 2 Ld. Raym. Rep. 1187. Trin. 4 Ann. in Caſe of Follet v. Troake.

(K) Common by Reaſon of Vicinage. [And Pleadings.]

1. If there be a Common by Reaſon of Vicinage between two Manors time out of Mind &c. yet one may incloſe againſt the other. Co. Lit. 122.

S. P. by Wray Ch. J. 4 Rep. 38. b. Mich. 27 & 28 Eliz. B. R. in Tirringham's Caſe.——And ibid 38 b. the Reporter cites S P. as lately adjudged in B. R in the Caſe of Smith v How accordingly, though it was objected that having been uſed by Preſcription time out of Mind, it would be hard to break what had been of ſuch long Continuance; and it might be that the Waſte of the one, was larger or of greater Value than the Waſte of the other, and it might be that thoſe who at firſt had the leaſt, gave a Recompence to have Common in the greater, and therefore it would be unreaſonable now to incloſe; but it was anſwered and reſolved, that the Preſcription imports the Reciprocal Cauſe in itſelf, viz. for Cauſe of Vicinage, and no other Cauſe can be imagin'd and it is rather an Excuſe of Treſpaſs when the Beaſts of the Tenants of one Manor ſtray into the Waſte of the other, than any certain Inheritance——They may incloſe the one againſt the other; Per Powell J. 11 Mod. 73 pl. 3. Paſch. 5 Ann. in Caſe of Bromfield v. Kirber.

2. If there be Common pur Cauſe de Vicinage between two Manors, and the Lord of one Manner incloſes, yet it ſhall not bind a Copyholder of the ſame Manor, but that he may have Common pur Cauſe de Vicinage as he had before. Mich. 13 Jac. Banco pur Hubert.

3. [But] If there be Common pur Cauſe de Vicinage between two Manors, and the Lord of one Manor incloſes any Part of his Common, the Common pur Cauſe de Vicinage is gone. M. 13 Jac. Banco per Hubert.

4. Where there is Common pur Cauſe de Vicinage between two, yet one cannot put his Cattle into the Land of the other, but they ought to eſcape thither of themſelves by Reaſon of the Vicinity; for this is but an Excuſe of the Treſpaſs. Co. Lit. 122.

S. P. by Wray Ch. J. 4 Rep. 38. b. in Tirringham's Caſe; And ibid. the Reporter cites S. P. then lately adjudged accordingly in B. R. in Caſe of Smith v How & Redman.——S P. by Powell J. 11 Mod. 72, 73. pl. 3. Paſch. 5 Ann. B. R. in Caſe of Bromfield v. Kirber.

5. Every Common pur Cauſe de Vicinage is a Common appendant. 7 E. 4. 26. per Lit. Br. Commoner, 29.

Br. Commoner &c. pl. 30. (29) cites S. C. and ſays Quod nemo dedixit neque Affirmavit. —— Wray Ch. J. ſaid that Common for Cauſe of Vicinage is not Common Appendant, but in as much as it ought to be by Preſcription as Common Appendant ought, it is in this Reſpect reſembled to Common Appendant. 4 Rep. 38. a. in Tirringham's Caſe.

6. A Man need not preſcribe in a Common pur Cauſe de Vicinage, but it is ſufficient to ſay that he and all thoſe whoſe Eſtate &c. have uſed to intercommon cauſa Vicinagii, becauſe this is Common appendant, *Preſcription was, that all Occupiers of B. haue-runt &*

pendant, Old Books of Entries, Treſpaſs in Common 11. (but Quære this) and See 13 H. 7. 13. b. a Preſcription for Common pur Cauſe de Vicinage.

habere conſueverunt Common in ſuch a Down in C. ratione Vicinagii, *without alledging Time out of Mind.* The Court held the Pleading ill, becauſe the Preſcription is the Ground for the Common by Vicinage, but it is otherwiſe *where one claims Common Appendant*, for in ſuch Caſe *the alleging a Preſcription would make the Plea double.* Lat. 161. Trin. 2 Car Jenkyn's Caſe.—Poph. 201. Jenkin v. Vivian, S. C. & S. P. agreed. — See D. 47. b. pl. 13. Trin. 32 H. 8. Anon.

7. Aſſiſe of *Common in A. appendant to his Franktenement in B.* The *Defendant ſaid that A. & B. do not intercommon*, Judgment if for Common appendant &c. and a good Plea, by which the Plaintiff preſcribed in Common there, and the other e contra, and ſo ſee that Iſſue may well be taken upon Preſcription in Aſſiſe. Br. Common, pl. 43. cites 30 Aſſ. 42.

Br. Common, pl. 7. cites 22 H. 6. 10. 43.

8. Note, that it is no Preſcription in *Treſpaſs of trampling his Graſs in D.* that *H. is Lord of the Vill of S. which is adjoining to D. and* that *H. and all the Lords of the Vill of S. have had Common by Reaſon of Vicinage in the Vill of D. for their Franktenements for Term of Life, of Years, and at Will, and that the Defendant held 12 Acres in S. of the ſaid H. for Term of Life*, by which he put his Beaſts in D. to uſe the Common as lawfully he might, Judgment ſi Actio and no Preſcription; for by this Word *Lord* ſhall be intended *him, of whom the Vill is held, and not he who is ſeiſed of the Vill*; for if there be 20 *Meſnes* every one of them is Lord of the Vill, and yet none ſhall have Common but he who is ſeiſed in Poſſeſſion of the Vill, by which he *ſaid that H. is ſeiſed of the Vill of S. and that he and all thoſe whoſe Eſtate he has in S.* &c. *have had Common for Cauſe of Vicinage Time out of Mind for him and his Franktenants* of the ſaid Manor for Term of Life, of Years, or at Will, *in the Vill of C.* and pleaded all as above &c. Br. Preſcription, pl. 27. cites 22 H. 6. 51.

* So are the Engliſh Editions, they copying after one another, but the French Edition is, viz. *Though neither of them be Lord of the Vill* &c.

9. *None ſhall claim* Common by Vicinage *but the Lord who has the Poſſeſſion of the Town*, 23 H. 6. But yet it ſeems that one Neighbour may claim Common by Vicinage in the Land of another Neighbour, * although he be Lord of the Town &c. F. N. B. 180. (D).

S. P. by Manwood J. D. 316. b. pl. 4. Mich. 14 & 15 Eliz.

10. Of Common by Reaſon of Vicinage, the *one cannot put his Beaſts into the Land of the other*; for there thoſe of the other Vill may diſtrain them Damage Feaſant, or ſhall have Action of Treſpaſs, but they ſhall put them in their own Fields, and if they *ſtray* into the Fields of the other Vill, they ought to ſuffer them. Br. Common, pl. 55. cites 13 H. 7. 13.

11. *And* the *Inhabitants of the one Vill ſhould not put in more Beaſts*, but having Regard to the Franktenements of the Inhabitants of the other Vill. Ibid.

12. A great *Field* lies *between 2 adjoining Vills*, and *one that has Land in the one Vill has Common there with the Tenants of the other Vill.* The Queſtion was, if he be to make Title to this Common, Whether he ſhall make it as to Common appendant, or by reaſon of Vicinage? Per Cur. This is Common by reaſon of Vicinage. D. 47. b. pl. 13. Trin. 32 H. 8. Anon.

13. If there are 3 *Vills, D. S. and V.* and *S. lies in the Middle* between D. and V. the Vills of D. and V. cannot intercommon by reaſon of Vicinage, becauſe they are not Vicini Adjacentes; Per Shelly. But Bauldwin e contra, and took a *Difference where one Vill has Common in another Vill in one Seaſon of the Year, and the other has Common in the other Vill in another Seaſon of the Year, or every 2d Year*; this is not Common by reaſon

ſon of Vicinage, inaſmuch as they do not intercommon at one and the ſame Time, but at *ſeveral Times*. D. 47. b. 48. a. pl. 14. Trin. 32 H. 8. Anon.

14. If the Commons of the Vill of A. and B. are adjacent, and that the one ought to have Common with the other for Cauſe of Vicinage, and the *Vill of A. has* 50 *Acres, and the Vill of B. has* 100 *Acres of Common*, the *Inhabitants of A. cannot put more Beaſts into their Common than their* 50 *Acres will depaſture*, without having any reſpect to the Common of B. nec e converſo; the original Cauſe of this Common being not for Profit, but for preventing of Suits for mutual Eſcapes; and therefore if the Vill of A. puts in 50 Beaſts, and the Vill of B. 100, here is no Prejudice to either, if the Beaſts of the one eſcape into the Common of the other. Reſolved. 7 Rep. 5. b. Hill. 27 Eliz. in Scacc. Sir Miles Corbet's Caſe.

15. Common for Cauſe of Vicinage *muſt be next adjoining*, but it may be *in ſeveral Manors*; Per Holt Ch. J. 11 Mod. 72 pl. 3. Paſch. 5 Ann. B. R. Bromfield v. Kirber.

16. If a Man *goes* into the Common of Vicinage *to drive his Cattle off into his own Common*, (for he ought not to keep them in the Common of Vicinage) *he may juſtify* this Treſpaſs; but if they *go into a third Common*, ſuch Excuſe, perhaps, will not hold; Per Holt Ch. J. 11 Mod. 72. pl. 3 Paſch. 5 Ann. B. R. Bromfield v. Kirber.

17. In Pleading this kind of Common it ought to be *pleaded mutual*; Per Holt Ch. J. 11 Mod. 73. pl. 3. Paſch. 5 Ann. B. R. in Caſe of Bromfield v. Kirber.

(L) Common Appurtenant. *What is.*

1. IF a Man hath Time out of Mind had Common of Eſtovers in a certain Place, to be burnt in ſuch a Houſe, and to mend the old Houſes and old Hedges, this is not Common appendant but appurtenant 11 H. 6. 11. b.

2. If a Man and his Anceſtors, and all thoſe whoſe Eſtate he hath in a Houſe, have had Common for two Beaſts in a certain Place, this is not appendant, but appurtenant. 11 H. 6. 12.

3. If a Man bargains and ſells Blackacre to B. and after, before the Deed is inrolled, by another Deed grants a Common to the ſaid B. for all his Cattle which ſhould manure and feed in the ſaid Blackacre, which he hath bargained and ſold to the ſaid B. or the which he hath mentioned to be bargained and ſold, and after the Deed is inrolled, this is a good Common appurtenant to the ſaid Blackacre, altho' the Grantee had nothing in the ſaid Land at the Time of the Grant, and tho' it be admitted that it ſhall not relate to ſettle the Eſtate in him ab initio, inaſmuch as this has Reference to the Bargain and Sale, and to the Eſtate which he had by Force thereof. Mich. 15 Jac. B. R. between *Gawen and Stacy*, agreed per Curiam. Roll Rep. 424, 425. pl. 16. S. C. argued, ſed adjornatur. — Godb. 270. pl. 377. Ludlow v. Stacy, S. C. adjudged a good Grant of the Common; and that the Inrolment ſhall have Relation as to that, tho' for collateateral Things it ſhall not have Relation.

4. So if a Man grants a Common to another for all his Cattle, which ſhould be Levant and Couchant, upon the Land which he ſhould purchaſe (*) within a Month after, and after he purchaſes certain Land, this is a good Common appurtenant to this Land, tho' he had no- * Fol. 400.

thing in this Land at the Time of the Grant, inasmuch as the Grant had Reference to this which he should purchase; for it is not necessary that he should have the Land at the Time of the Grant. Mich. 15 Jac. B. R. between *Gawen and Stacy*, agreed per Curiam.

5. So if a Man bargains and sells Blackacre to B. and after, before the Deed is inrolled, by another Deed, grants a Common to the said B. for all the Cattle which should manure and feed in the said Blackacre, and after the Deed is inrolled, this shall be a good Common appurtenant to the said Blackacre, tho' the Grant has no Reference to the said Bargain and Sale, inasmuch as the Grantee had a Possibility and Inception of an Estate, and an Use in the said Acre at the Time of the Grant, and it seems that this shall relate for the Possession sufficiently to support this Grant, for he need not have to full an Interest in this Land to annex the Common to it. Mich. 15 Jac. B. R. between *Gawen and Stacy*, adjudged per totam Curiam, upon a special Verdict, and the Court said it should be so without any Help of Relation.

6. If a Man grants to B. Common for all his Cattle which manure Blackacre, where he has nothing in Blackacre, and after he purchases it, this shall be a good Common appurtenant to this Acre, tho' he had nothing in it at the Time, nor the Grant hath Reference to any Purchase after, for this shall be a good Grant upon a Contingent, scilicet, if he purchases the Land; so that this is as much as if he had said, that he should have the Common quandocunque he shall have the Land. Mich. 15 Jac. B. R. between *Gawen and Stacy*, per Curiam, and the principal Case was adjudged upon this Reason. (But Quære, inasmuch as the Grant had no Reference to a future Purchase.)

Cro. C. 482. pl. 5. S. C. adjudged accordingly, and tho' afterwards only Part of the Land was conveyed by the Grantee of the Crown to the Defendant, and not the Intire, yet it is Common Appurtenant as Common for the Beasts Levant and Couchant upon the said Tenements, and may well pass with them by the Words Cum Pertinentiis; and tho' it be Common created within Time of Memory, yet it is Common appurtenant, and may be apportioned. ——— Jo. 396. pl. 5. S. C. adjudged.

7. In 2 H. 4. A. was seised in Fee of a Waste called Wittenhall-Heath in C. and the Prior of Stone was seised in Fee of certain Messuages, Lands, Meadow, and Pasture in S. and they being so seised, A. by Deed dated 2 H. 4. grants to the said Prior and Convent Common of Pasture, pro se & omnibus Tenentibus suis in S. prædict' (scilicet, Stallington in Comitatu Staffordiæ) cum omnimodis animalibus suis omni Tempore Anni in Wittenhall-Heath præd' habend' to them and their Successors, and Tenants in Fee, this is a Common appurtenant to the said Land which the Prior had in S. aforesaid, for this cannot be a Common sans Number, and therefore ought to be interpreted a Common appurtenant to the said Land by a reasonable Construction, inasmuch as it is granted for him and his Successors and Tenants there, which refers to the Land. Mich. 13 Car. B. R. between *Sacheverel and Porter*, per totam Curiam, adjudged without Difficulty upon a special Verdict. Intratur, Trin. 11 Car. Rot. 324. tho' it was objected by myself, that it is not found that by Usage it had been so interpreted after the Grant.

Fitzh. Assise, pl. 354. cites S. C.

8. If a Man grants to another Quandam Assartam cum Communia Turbariæ quantum pertinet ad duas bovatas Terræ cum Pertinentiis in D. this is a Common in Gross, being a Grant De Novo, not by Prescription, and not appurtenant to the said Assart. 5 Ass. 9. adjudged.

9 Common *for all Manner of Beasts is* Common appurtenant. Br. Common, pl. 13. cites 37 H. 6. 34.

10. Common appurtenant *may be made at this Day, and may be ſevered* from the Land to which it is appurtenant. Br. Common, pl. 1. cites 26 H. 8. 4.

11. If a Man grants Common appurtenant to ſuch a Cloſe, it is good, and ſhall paſs by Grant of the Cloſe; for Common appurtenant may be created at this Day. 2 Sid. 87. Trin. 1658. B. R. in Caſe of Pretty v Butler.

(M) Common Appurtenant. How it may be. [And for what Cattle.]

Fol 301.

1. IF a Man preſcribes to have Common of Eſtovers to his Freehold, ſcilicet, a Houſe, he cannot preſcribe to ſell the Wood, for this cannot be appurtenant. 11 H. 6. 11. b. A Preſcription to take Eſtovers for the Building of new Houſes, as well as to repair old Houſes, was held good by all the Court, præter Williams, who ſaid, that then the Defendant might cut down all the Wood and deſtroy it; but, notwithſtanding, it was adjudged for the Defendant. Cro. J. 25. pl. 1. Paſch. 2 Jac. B. R. Arundel (Counteſs of) v. Steere.

2. A Man may preſcribe to have Common appurtenant to a Manor for all manner of Cattle. 14 H. 6. 6. b. It ſeems to be intended of Common appurtenant; but there this is called Appendant, which cannot be. Br. Common, pl. 14. cites S. C.—Fitzh. Treſpaſs, pl. 33. cites S. C.— A Man preſcribed to have Common appendant for all manner of Beaſts, and it was held that it could not be Common appendant, becauſe that is only for thoſe Cattle which manure his Lands. F N B. 180. (B) in Marg. of the new Edition [419] cites 9 E. 4. 3. 37 H. 6. 34. and 14 H. 6. 6. but it is Common appurtenant. Old N. B. 26.

3. So a Man may preſcribe to have Common appurtenant to his Freehold for all manner of Cattle. 25 Aſſ. 8. But this is there called appendant, but it ſeems to be intended appurtenant. Br. Common, pl. 42. (41) cites S. C. but S. P. does not appear.

4. A Man may preſcribe that he, and all thoſe whoſe Eſtate he hath in the Manor of D. have uſed to have a Fold-courſe, ſcilicet Common of Paſture for Sheep, not exceeding 300, in a Field, (ſcilicet, Canefield, as the Caſe was in Norfolk) as appurtenant to the ſaid Manor, tho' he does not preſcribe to have them levant and couchant upon the ſaid Manor, there being a certain Number limited. Mich. 11 Car. B. R. between *Day and Spooner*, in a Writ of Error, agreed per Curiam. Intratur Mich. 6 Car. Rot. 183. and Hill. 11 Car. adjudged accordingly. Cro. C. 432. pl. 2. Spooner v. Day, S. C. but S. P. does not appear.—Jo. 375. pl. 1. S. C. but S. P. does not appear.— It was ruled by Holt Ch. J. at Dorcheſter Lent-Aſſiſes, 10 W. 3. at a Trial at Niſi Prius, that if a Man preſcribes for Common *for a certain Number of Cattle as appurtenant* &c. it is not neceſſary nor material to *ſhew that they were levant and couchant*, becauſe it is no Prejudice to the Owner of the Soil, for that the Number is aſcertained. Ld. Raym. Rep. 726. Richards v. Squibb.

5. A Man may preſcribe to have Common appurtenant for his Cattle not commonable, as Hogs, Goats, and ſuch like. Co. Litt. 122. Br. Common, pl. 13. cites 37 H. 6. 34. S. P. — See pl. 10.

6. [So]

Br. Common, pl. 42. (41) cites S. C. & S. P. as to all manner of Cattle; but says nothing as to every Season of the Year.

6. [So] a Man may prescribe to have Common appurtenant to his Freehold for all manner of Cattle, at every Season in the Year. 25 Ass. 8. adjudged.

See pl. 5. and pl. 10.

7. A Man may prescribe to have Common appurtenant for Hogs levant and couchant upon such Land. Mich. 5 Jac. B. per Curiam.

Ibid. in Marg. of the new Edition (419) cites it as admitted 22 H. 6. 42 27 H. 6. 34. ——And in the new Notes there (c) cites 22 H. 6. 44 and 11 E. 3 Common 11. one claims Common as appendant to his Manor, and Issue joined thereupon, where it is said that if one has Common appendant to his Carve of Land, whereon he has a House, this shall not be said appendant to his House, but to the Land; and says, Note there a Special Prescription.——It was ruled by Holt Ch. J. at Winchester Lent-Assises, 10 W. 3. that a Man may prescribe for Common for Cattle levant and couchant upon a Messuage; and he said that he knew Hale Ch. J. to have been of the same Opinion at Norfolk Assises. Ld. Raym. Rep. 726. Hockley v. Lamb.——2 Brownl. 101. Mich. 9 Jac. C. B. Patrick v. Lowre, S. P. and it shall be intended that there is a Curtelage to it.—— Brownl. 198. Trin. 9 Jac. Patry v. Welch, S. P.

8. A Man may claim Common *Ratione Messuagii*; but it seems it shall be taken that he has Land lying to his House &c. which the Cattle ought to soil &c. Quære. F. N. B. 180. (B)

In Trespass the Defendant prescribed for Common of Pasture *for all Beasts levant and couchant upon a Messuage.* Exception was taken, because of the Word (Messuage); but held good enough, and said to have been frequently adjudged so; for a Messuage includes in it Yards and Curtelage, and the like. 2 Show. 248. pl 250. Mich. 34 Car. 2. B. R. Scambler v. Johnson.——2 Jo. 227. S. C. The Court held the Prescription good; for this is not Common appendant, but appurtenant, and such Common is usual in the County of Lincoln, and other Counties, and that it is maintainable better for Beasts levant and couchant than otherwise.

As if at this Day a Man grants to one Common of *Estovers*, or of *Turbary in Fee-simple to burn in his Manor*, by that Grant it is appurtenant to the Manor, and if he make a Feoffment of the Manor, the Common shall pass to the Feoffee. F. N. B. 181. (N)

9. Common appurtenant to a Manor may be *for Cattle without Number, or to a certain Number*, and *may be appurtenant to a Manor by Prescription, or by Grant made since Time of Memory*, and that as well for Cattle certain as without Number. F. N. B. 180, 181. (N)

And *so* if he grant to a Man and his Heirs *Common as appurtenant to his Manor of F. to common in such a Moor* &c. now by that Grant the Grantee shall have the Common appurtenant to his Manor, and if he make a Feoffment in Fee or for Life of the Manor, the Feoffee or Lessee shall have the Common. F. N. B. 181. (N)

See pl. 5. & pl. 7.

10. A Man cannot claim Common appurtenant for *Hogs* or *Goats*, because they are not commonable Beasts. D. 70. b. pl. 39. Trin. 16 E. 6. Withers v. Isham.

Ow. 4. Wakefield's Case, S. C. agreed accordingly. ——Godb. 96. pl. 110 S. C. adjudged.—— And. 151. pl. 200. S. C. adjudged.——Goldsb. 38. pl. 13. S. C. adjudged.—Sav 81. Wakefield v. Coftard, S. C.——But if the House of a Freeholder, which hath used to have Common for Beasts levant and couchant, falls down, and he erects a new House in another Place of the Land, he shall have Common to the new-erected House as he had before; and took a Difference betwixt the Case of Estovers, where a new Chimney is erected, and this Case. Arg. 2 Le. 44. in pl 58. Trin. 30 Eliz. C. B ——Godb. 97. in pl. 110.

11. *Houses newly erected* cannot have Right of Common where it is claimed by Prescription. 2 Le. 44. pl. 58. Trin. 30 Eliz. C. B. Coftard v. Wingfield.

Ibid. says it was so held after several Amendments in Case of the Corporation of Derby, between Miller v. Spareman.——See Tit. Prescription (Y) pl. 3. S. C.

12. *Burgagers in a Borough* may have Common *appurtenant to their Burgages by Prescription.* Held upon Demurrer. Sid. 462. pl. 4. Trin. 22 Car. 2. B. R. Miller v. Walker.

13. It

13. It was ruled by Holt Ch. J. at Winchester Lent-Assises, 10 W. 3. that a Man cannot *prescribe for Common appurtenant to a Farm*, because it is uncertain of what a Farm consists, perhaps of 10 Acres, or of 100 Acres; but the Prescription ought to be laid to a Messuage, and so many Acres of Land. *But* if there is *an ancient Farm, and the same Lands always occupied with it*, a Man may have Common of Pasture to depasture his Cattle tilling that Farm. Ld. Raym. Rep. 726. Hockley v. Lamb.

(N) Common Appurtenant. The User. How it shall be used. With what Cattle.

1. HE that hath Common appurtenant cannot agist the Cattle of a Stranger. 30 E. 3. 27. S. P. nor can he agist with his own Cattle if they are levant and couchant upon some other Land than that to which he hath Common appurtenant. Skinn. 137. 138. pl. 8. Mich. 35 Car. 2. B. R. Molliton v. Trevillian.

2. He that hath Common appurtenant may borrow Sheep of another to compester his Land, and with these he may use the Common. 14 H. 6. 6. b. It seems it is intended Common appurtenant, tho' it is called appendant. Br. Common, pl. 14. cites S. C. and mentions appendant. —— Fitzh. Trespass, pl 33. cites S. C. ——S. P. of Cattle borrow'd to compester his Land; for he has a Special Property in them, and so are said his Cattle, Arg. and of this Opinion was the Court. Skin. 138. pl. 8. Mich. 35 Car. 2. B R.

3. A Man may use Common appurtenant to his Manor with Cattle which are for his Houshold. 14 H. 6. 6. b. The Book is of Common appendant; but it seems to be intended by the Book appurtenant. Br. Common, pl. 14 cites S. C & S. P. admitted.

4. But he can not use the Common with Cattle which are to sell. 14 H. 6. 6. b. as it seems the Book is intended. Br. Common, pl. 14. cites S. C.

(N. 2) Common Appurtenant Pleadings.

1. TRespass of Grass trampled in D. Chaunt. said *Actio non*, for *T. was seised of the Manor of D. in Fee, and* that *he and all those whose Estate he has in the Manor, have had Common* in the Place where &c. *with all Manner of Beasts* Appurtenant, and that the Place extended to such Place &c. *and after T. leased the Manor with the Appurtenances to the Defendant* for 10 Years &c. and after he borrowed Sheep to compester his Land, and put them in to use his Common as he lawfully might; the *Plaintiff said that he had Common there for all Beasts except Sheep and Hogs*, and no Plea by Award of Court, by which he said that he had Common there for all Beasts except Sheep and Hogs *Absque hoc, that he had Common with all Manner of Beasts Time out of Mind, Modo & Forma prout* &c. and Note, that the Reason why he pleaded that he borrowed Beasts to compester the Land, is because that Tenor cannot put any Beasts in the Common but those which he had to Manure his Land, or

for his Houſhould, and not for Sale. Br. Common, pl. 14, cites 14 H. 6. 6.

2. Aſſiſe of Common, and the *Plaint is of Common Appurtenant to his Franktenement in D.* and *ſhewed* for Title *that he was ſeiſed of a Meſſuage and of a Carve of Land in D. to which the Comtion is Appurtenant, and that he and his Anceſtors, and thoſe whoſe Eſtate* &c. *had uſed Common of Paſture with* 10 *Beaſts*, and well by theſe Words *(was ſeiſed)* as well as if he had ſaid *(is ſeiſed;)*. Per Huſſey. Br. Common, pl. 54. cites 16 H. 7. 12.

Brownl. 1 So. Morſe v. Wells, S. C. but S. P. does not appear.— 2 Brownl. 297 S. C.

3. When the Preſcription is for Common Appurtenant to Land, *without alleging that it is for Cattle Levant and Couchant*; there are *a certain Number* of the Cattle *ought to be expreſſed*, which are intended by the Law to be Levant and Couchant; reſolved. 13 Rep. 65, 66. Hill. 7 Jac. C. B. Morſe v. Webb.

See more of this at the Diviſions of Pleadings at the End of this Title of Common.

(O) Common in Groſs. How it may begin.

If a Man has a Way to his Manor or Houſe by Preſcription, this cannot

1. COmmon Appendant cannot be made Common in Groſs; for this is for Cattle Levant and Couchant upon the Land to which &c. and therefore it cannot be ſevered without Extinguiſhment. 9 E. 4. 39. 26 H. 8. 3.

be made in Groſs, becauſe it is Appendant to the Manor or Houſe; but Common Appurtenant, or a King's Highway, or an Advowſon Appendant may be made in Groſs; but Common of Eſtovers to burn in ſuch a Houſe cannot be made in Groſs, nor Common Appendant which is by Reaſon of the Tenement &c. Br. Common, pl. 28. cites 5 H. 7. 7 by Fairfax J. pro lege.—Paſturage claimed for Sheep Levant and Couchant upon the Defendant's Land it Common Appendant, and cannot be ſevered from the Soil by Grant. Cro. C. 542, 543. pl. 7. Paſch. 15 Car. B. R. Arg. cites 4 H. 6. 13. & 8 E. 4.

Fol 402. Cro J. 15. pl. 19. Drury v. Kent, S. C. adjudged that he could not grant it over, becauſe he had it Quaſi ſub Modo, viz. for Beaſts Levant &c. but Common Appurtenant for Beaſts certain may be granted over.

2. So Common Appurtenant for Cattle Levant and Couchant upon the Land, cannot be made in Groſs for the aforeſaid Cauſe. Mich. 384 19 H. 6. 33. b. Paſch. 1 Jac. B. between *Drury and Rant* adjudged. Contra, 26 H. 8. 4.

Cro. C. 432. pl. 2. Spooner v. Day, S. C. adjudg'd in C. B. and affirmed in Error in B. R. — Jo. 375. pl. 1. S. C. the Court held that this being Common Appurtenant, may be ſevered from the Manor, eſpecially when it is granted with Parcel of the

3. If A. and all thoſe whoſe Eſtate he hath in the Manor of D. have had Time out of Mind a Fouldcourſe, viz. Common of Paſture for any Number of Sheep not exceeding 300, in a certain Field as Appurtenant to the ſaid Manor, he may grant over his Foldcourſe to another, and ſo make it in Groſs, becauſe the Common is for a certain Number, and by the Preſcription the Sheep are not to be Levant and Couchant upon the Manor; but it is a Common for ſo many Sheep appurtenant to the Manor, which may be ſevered from the Manor as well as an Advowſon, without any Prejudice to the Owner of the Land where the Common is to be taken. Mich. 11 Car. B. R. between *Day and Spooner*, in a Writ of Error upon a Judgment in B. R. per Curiam, Prater Berkly, who ſeem'd to doubt of this. Intratur Mich. 6 Car. Rot. 183. But there the Caſe was, whether it might be granted over with Parcel of the Manor, and ſo ſhould be Appurtenant to this Parcel, and ſo it is adjudged in Banco, that it ſhould paſs as Appurtenant to this Parcel, and ſo held per Curiam in B. R. prater Barkly, who doubted of this, but afterwards Hill. 11.

11 Car. it was so adjudged by the Consent of Barkly and all the Court; and Judgment affirmed accordingly. Manor; and this Common being for a certain Number of Sheep, viz. 300 the Party may grant 250 to one, and reserve 50 to himself well enough, and affirmed the Judgment in C B.

4. If a Man has a *Way to his* Manor or *House by Prescription*, this cannot be made in Gross, because it is Appendant to the Manor or House, but Common Appurtenant, King's Highway, or Advowson Appendant may be made in Gross, but Common of Estovers to be burnt in such House cannot be made in Gross nor Common Appendant, which is by Reason of the Tenement. Br. Common, pl. 28. cites 5 H. 7. 7.

5. Common Appurtenant and in Gross may be by Prescription, or may commence at this Day by Grant; Per Wray Ch. J. 4 Rep. 38. a. b. Mich. 26 & 27 Eliz. B. R. in Tirringham's Case.

(P) For *what Cattle.*

1. A Man may prescribe to have it for all Manner of Cattle. 15 E. 4. 33.

2. The Grantee of Common for a certain Number of Cattle cannot Common with the Cattle of a Stranger. 18 E. 4. 14. b. F. N. B. 180 (B) S. P.

3. A Man may prescribe to have Common *for all Manner of Beasts* very well, by Reason of his Person &c. Per Pigot. Br. Prescription, pl. 28. cites 15 E. 4. 32.

4. A *General Licence ad ponenda Averia* shall be intended only of commonable Cattle, and not of Hogs; sed contra, if the Licence had been *only for a particular Time*; Per North Ch. J. and it was admitted. 2 Mod. 7. Hill. 26 & 27 Car. 2. in C. B. in Case of Smith & Feverel.

(Q) By the *Cattle of whom.*

1. If a Commoner hath no Cattle, he cannot agist the Cattle of others to use the Common. * 45 E. 3. 25. b. Curia. † 22 Ass. 84. * Br. Seisin, pl. 5 cites S. C.—— F. N. B. 180, (K) cites S. C.——He that has Common by Specialty cannot agist the Beasts of others. Br. Common, pl. 5. cites S. C

† Br. Common, pl. 41. (40) cites S. C.——Fitzh. Assise, pl. 228. cites S. C.

2. So he cannot command his Tenants at Will to use it with their Cattle in his Name. * 45 E. 3. 25. b. † 22 Ass. 84. same Case. * Br. Common, pl. 5. cites S. C. —Br. Seisin, pl. 5 cites S. C

† Br. Common, pl. 41. (40) cites S. C.——Fitzh Assise, pl. 228. cites S. C.

3. But if he borrows other Cattle to manure his Land, he may use the Common with them, for they are in a Manner his Cattle by the Borrowing, and the Cattle, which manure the Land, of Right ought to have Common. * 45 E. 3. 25. b. ‡ 22 Ass. 84. * Br. Common, pl. 5. cites S. C. —— Br. Seisin, pl. 5. cites S. C

‡ Br. Common, pl. 41. (40.) cites S. C but the Borrowing them in order to manure his Land is not sufficient, unless he manures in Fact with them.——Fitzh. Assise, pl. 228. cites S. C

4. So

Br. Common, pl 48. (47.) cites S C.—— Fitzh. Common, pl. 3. cites S. C.——F. N. B. 180. (B) S. P.

4. So he that hath Common in Groſs for a certain Number of Cattle, may put in the Cattle of a Stranger, and uſe the Common with them. 11 H. 6. 22. b.

Br. Common, pl. 48. (47) cites S. C. —— Fitzh. Common, pl. 3. cites S. C.——F. N. B. 180. (B) S P.

5. So he that hath Common in Groſs ſans Number, may put in the Cattle of another Man, and uſe the Common with them. 11 H. 6. 22. b.

(R) Common in Groſs. What ſhall be ſaid Common in Groſs.

Br. Common, * Fol. 403. pl. 23. cites S. C. & S. P. unleſs he and his Anceſtors claimed the Common to be in Groſs among the Commoners, but if they had uſed it with ſuch Beaſts ſo Levant and Couchant, and with other Beaſts coming &c. then it ſhall be taken as in Groſs.——Fitzh. Common, pl. 19. cites S. C. and by their claiming it as in Groſs always among the Commoners, their Claim is known, which otherwiſe it would not have been &c.

1. If a Man at all Times hath uſed Common with his Cattle Couchant and Levant in certain Places, and not with other Cattle coming, this (*) is Common appendant to this Place, and not in Groſs. 22 Aſſ. 36. Curia.

2. If one *grants to J. S. 8 Acres of Land, ſimul cum ſo much Common as belongs to his Oxgange of Land in a certain Place*, this is not Common appurtenant, but in Groſs; per Herle. F. N. B. 180, 181. (N) in the new Notes there (c) cites 7 E. 3. 48.

3. But ſee there it is adjudged, if one *grants an Aſſart ſimul cum tota Communia quant' pertinet ad unam Bovatam Terræ*, this is Common in Groſs, and he ſhall take as much as another takes for 2 Bovates or Oxganges in groſs, and when he pleaſes, becauſe ſuch Common cannot be appendant to Land. F. N. B. 181. (N) in the new Notes there (c).

4. If a Man *grants Common to the Mayor and Burgeſſes for all their Cattle in ſuch a Place*, it is good, and in groſs, and not appurtenant; Per Cur. 2 Lev. 246. Hill. 30 & 31 Car. 2. B. R. in Caſe of Stables v. Mellon.

(S) Common in Groſs. *What* ſhall be *a good Grant.*

Br. Grants, pl. 5. cites 9 H. 6. S. P. by Paſton, quod non negatur.

1. If I grant Common to another for Years, and do not declare in what Place he ſhall have it, this is void. 9 H. 6. 36.

Br. Grants, pl. 5. cites 9 H 6.—— Br. Common, pl. 3. cites 9 H. 6 36. but S. P. does not appear.—Fitzh Common, pl. 2. cites S. C.——S. P. Arg. Roll Rep. 427. in pl. 16.

2. If a Man grants to another Common, Ubicunque averia ſua ierint, this is a good Grant, by Averment in what Place his Cattle fed at the Time of the Grant, before or after. 9 H. 6. 36.

3. But

3. But without such Averment this is not good Grant. 9 H. 6. 36. Br. Grants, pl. 5. cites S. C. & S. P. per Cur.

4. If I grant Common to another in my Land every Year, and it lies fresh, this is good, tho' it be at my Will, whether he shall have any Profit, for I may sow it. 17 E. 3. [34 b.]

5. If A. grants Common to B. in certain Land, for all his Cattle which shall be Levant and Couchant upon Blackacre, where B. hath nothing in Blackacre, so that it cannot be appurtenant, yet this shall not be a Common in Gross, because the Intention and Limitation of the Grant is to Cattle Levant and Couchant. Trin. 15 Jac. B. R. between *Gawen and Stacy*, agreed at the Bar. Roll Rep. 424. pl. 16. Trin. 14 Jac. S. C. A Man bargained and sold Lands by Deed indented; and afterwards, but before Inrolment of the Deed, he granted to the Bargainee and his Heirs Common for all commonable Beasts manuring and feeding on the said Land beforementioned, and afterwards the Deed was inroll'd The Point was, Whether this Inrolment shall relate so as to make the Grant of the Common good? It was argued, sed adjornatur ——Godb. 270. pl. 377. Mich. 15 Jac. Ludlow v. Stacey, S. C. adjudged a good Grant of the Common, and the Inrolment shall have Relation, tho' for Collateral Things it shall not have Relation.

6. [So] if A. grants to B. Common in certain Lands for all his Cattle which shall manure and feed in Blackacre, whereas B. has nothing in Blackacre, by which this cannot take Effect as a Common appurtenant, yet this shall not take Effect as a Common in Gross, inasmuch as it is expressly limited to such Cattle which manure and feed in the said Land.

7. [But] Trin. 15 Jac. B. R. between *Gawen and Stacy*, the Court seemed e contra; but Mich. 15 Jac. they seemed to waive this Opinion, and Croke held expressly e contra. See pl. 5. and the Notes there.

8. A Man may grant to another Common in one Place for all Manner of Cattle, and in another Place for 10 Beasts; and so the Grantee may put the 10 Beasts in either of the two Places. 17 E. 3. 34. b.

9. If *a Man has Common appurtenant to a Messuage and Lands for a certain Number of Beasts*, he may alien the same; otherwise if he have Common *for all his Beasts Levant and Couchant on such Lands*, he cannot alien this from the Land; Per Hale Ch. J. 2 Lev. 67. Mich. 24 Car. 2. B. R. in Case of Daniel v. Hanslip.

(T) Common *in Gross upon* a *Grant*. *In what Place* it shall be *taken*.

1. IF a Man grants to me Common for my Cattle ubicunque averia sua ierint, if the Cattle of the Grantor did never feed in any Place before the Grant, or at the Time of the Grant or after, the Grantee shall have no Benefit by the Grant. 9 H. 6. 36. Br. Common, pl. 3. cites S. C. but is only a Reference to Br. Grants, pl. 5. which cites 9 H. 6. that if after the Grant the Grantor has no Beasts, the Grantee in such Case shall not have Common.—— Perk. 109. S. P. only the (Ubicunque) in the Original in Fol. 23. a is wrong translated in the English Edition (whensoever.)

2. [But] if a Man grants Common to another, ubicunque averia sua ierunt, and after he Occupies and Manures 100 Acres of Land with his Cattle, and after he becomes so poor that he hath no Cattle, yet the Grantee shall have the Common in the 100 Acres. 9 H. 6. 36. Curia. Br. Grants, pl. 5. cites 9 H. 6. S. P. accordingly.—— Br. Common, pl. 3. cites S. C. but it is only a Reference to Br. Grants, pl. 5.

3. [So] if a Man grants a Common to me for my Cattle ubicunque averia sua ierint, if the Grantor at the Time of the Grant, or after, feeds his Cattle in any Place, the Grantee may have Common there also. 9 H. 6. 36.

Br. Common, pl. 5. cites S. C. but for the Opinion refers to Br. Grants, pl. 5. which cites 9 H. 6. S. P. by Babbington accordingly.

4. [And] upon such Grant of Common ubicunque averia of the Grantor ierint; if the Grantor puts his Cattle in his Garden, or in his Corn, the Grantee may put his Cattle there also. 9 H. 6. 36.

Fol. 404.

5. [But] if the Grant be of Common ubicunque averia sua ierint, and the Grantor dies; Quære, whether the Grantee shall have Common after his Death. 9 H. 6. 36.

Br. Grants, pl. 5. cites 9 H. 6. S. P. by Babbington. ——But such Grant is not any Restraint to the Wastes or Commons, but the Grantee may claim Common in any Part of the Manor, without pleading that it was Waste or Common. Agreed by Croke and Berkley, cæteris Justiciariis absentibus, and Judgment accordingly. Cro. C. 599. pl. 20. Mich. 16 Car. B. R. Stringer's Case.

6. If one Man grants Common to another for all his Cattle throughout his Manor, yet he cannot Common in the Garden of the Grantor Parcel of the Manor, but only in such Places where a Man of Common Right ought to common. 9 H. 6. 36.

7. Note, per Fitzherbert, there is a *Diversity between Common for certain Beasts*, and *Pasture* for his Beasts; for *if I grant to you Pasture* for certain Beasts *in my Manor*, *I shall appoint you where you shall have it*; *but* if I *grant to you Common* for certain Beasts in my Manor, *you shall* * *have it per my & per tout*, and it was agreed that [Præcipe] quod reddat lies of Pasture *for two Oxen*, but *e contra* clearly per Fitzh. of Common *for two Beasts*, because by him [Præcipe] quod reddat never lies of Common. Br. Common, pl. 2. cites 27 H. 8. 12.

* Orig. is (Pur ceo.)

8. If a Man *grants certain Lands* to one *Cum Communia in omnibus Terris suis* &c. and does *not express any Place certain*, he shall have Common in all his Lands which he had at the Time of the Grant. F. N. B. 180. (G).

(U) Common in Gross by Grant. In what *Time* it is to be taken.

Fitzh. Common, pl. 2. cites S. C. — Perk. S. 109. S. P. and cites S. C.

1. If a Man grants Common to me quandocunque averia sua ierint, the Grantee shall not have Common, but when the Cattle of the Grantor are in the Common. 9 H. 6. 36. Curia.

——So that if *afterwards the Grantor has no Beasts*, the Grantee shall not have Common; Per Martin, quod fuit concessum. Br. Grants, pl. 5. cites 9 H. 6 ——S. C. cited by Hobart Ch. J. that if the Grantor employs the Land to Tillage, or lets it lie fresh, the Grantee has no Remedy, and says that so is the Book of 17 E. 3. 26 Hob. 40. in pl. 47.——S. C. cited Cro. C. 599. in pl. 20. and Berkley J. said that the Clause of Quandocunque Averia sua ierint is void, because it restrains all the Effect of the Grant; for if the Grantor will not put his Cattle in, the Grantee shall never have his Common; but Crooke J. held the Restraint good, because this is not a total Restraint, & Modus & Conventio vincunt Legem; and it is not intendable that the Grantor would totally forbear to put in his Cattle to defraud the Grantee of his Common ——1 Rep 87. a. cites S. C. that this is Modus Donationis, and the Grantee shall not have Common but in this manner.

2. Where

2. Where a Man *grants Common for* 10 *Beaſts a Year in D.* and he *does not take* Common *by two Years*, he *ſhall not put in* 30 Beaſts *the* 3*d Year*, and ſo of Eſtovers, Fuel, Hay &c. Br. Common, pl 4. cites 27 H. 6. 10.

Br Parnour de Profits &c. pl 2. cites S. C.—Fitzh. Common, pl. 6. cites S C.—Br. Grants, pl. 8. cites S. C.

(X) Common. Seiſin.

1. A Tortious Uſer of Common cannot put him in Seiſin. 45 Ed. 3. 25. b. 26 22 Aſſ. 84.

2. As, the Commoner cannot gain Seiſin by Cattle which he agiſts, for ſuch Uſer is not lawful. * 45 E. 3. 25. b. † 22 Aſſ. 84. Curia.

* Br. Common, pl 25. cites S C. —— Br. Seiſin, pl. 5. cites S. C.

cites S. C. † Br. Common, pl. 41. (40) cites S. C.——Fitzh. Aſſiſe, pl. 228. cites S. C.

3. So, he cannot gain Seiſin by the Uſer of his Tenants at Will, being his Servants, with their Cattle by his Command in his Name; for their Uſer with their Cattle is tortious. * 45 E. 3. 25. b. † 22 Aſſ. 84. ſame Caſe.

* Br. Common, pl 5. cites S. C. —Br. Seiſin, pl. 5. cites S. C.

† Br. Common, pl. 41. (40) cites S. C. ——Fitzh Aſſiſe, pl 228. cites S. C.——The Uſer of Common by Tenants at Will ſhall be a Seiſin to him in Reverſion to have an Aſſiſe, if he or his Tenant at Will be after diſturbed to uſe the Common. F. N. B. 180. (I)

4. But if the Commoner hath no Cattle, and ſo takes the Cattle of another, and the Tertenant delivers Seiſin to the Commoner, and is preſent when the Cattle are put in, and he aſſents to the Uſer and putting in, or commands him ſo to do; this is a good Seiſin. * 45 E. 3. 20. 22 Aſſ. 84. per Thorpe.

* Br. Seiſin, pl. 36. cites S. C. & S. P. by Thorpe.

5. So if the Commoner hath no Cattle, he may take Seiſin by the Cattle of another, and chaſe them back preſently; for the Continuance is tortious, and this is a good Seiſin. * 45 E. 3. 26. per Thorpe; but Bro. Commoner, * 51. [ſays] Quære of this (and it ſeems not to be Law; for the putting them in without Continuance is tortious. † 22 Aſſ. 84. per Thorpe.

* Br. Common, pl. 5. cites S. C. & S. P. by Thorpe, and Brooke makes a Quære of it.

——Br Seiſin, pl. 5. cites S. C. † Br. Seiſin, pl 36. cites S. C.——Fitzh. Aſſiſe, pl. 228, cites S. C.

6. If a Man hath Common ſans Number, if he hath been ſeiſed of this with Cattle without any certain Number, as 20, 30, or 40; this is a good Seiſin. 11 H. 6. 23.

7. If a Man recovers a Common, and the Sheriff upon a Writ of Seiſin comes to the Place, and by Parol delivers to him Seiſin of the Common; this is a good Seiſin of Common to have an Aſſiſe. 22 22 Aſſ. 84. per Thorpe.

Br. Seiſin, pl 36 cites S. C. Brooke ſays Quod quære bene.

——Fitzh. Aſſiſe, pl. 228. cites S. C. ——Br. Aſſiſe, pl. 31. cites 45 E. 3. 25. S. P. that he ſhall have Aſſiſe or Redifſeiſin upon the firſt putting him in Poſſeſſion; becauſe the Law adjudges him in Poſſeſſion by the firſt Seiſin; Quod non negatur. But Brooke ſays, Tamen Quære.

(Y) In

(Y) In what Caſes the *Seiſin of one* ſhall *ſerve for others.*

* Br. Seiſin, pl. 5. cites S. C. 1. THE Seiſin of the Father is not ſufficient for the Heir. * 45 Ed. 3. 25. † 22 Aſſ. 84.

† Br. Seiſin, pl. 36. cites S. C.—Fitz. Aſſiſe, pl. 228. cites S. C.

* Br. Seiſin, pl. 36. cites S. C. & S. P. by Seaton & Mombray.—Fitz. Aſſiſe, pl. 228. cites S. C. 2 The Seiſin of a Leſſee for Years of a Common, is ſufficient for him in Reverſion. 45 E. 3. 26. * 22 Aſſ. 84.

This concludes Lord Roll's Abridgment, Title Common, the Additions whereto will be contained in a ſubſequent Volume, it being ſuppoſed much more proper ſo to do, than to break the Thread thereof by taking in any ſmall Part of it here.