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We allow of the Printing and Publishing of the Book Intituled, *A General Abridgment of Law and Equity*, Alphabetically digested under proper Titles, &c. By Charles Viner, Esq;

W. Lee.
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Tho. Abney.
T. Burnett.
A
General Abridgment
OF
LAW and EQUITY
Alphabetically digested under proper T I T L E S
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.
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**QQ**  How it may begin.

**RR**  For what Cattle.

**SS**  By the Cattle of whom.

**TT**  What shall be said Common in Grofs.

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**XX**  Seisin.

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(D) Pleadings.

1. IN Trefpafs the Defendant justified as Bailiff of J. S. to distrain for Br. Travels Rent arrear, and the Plaintiff said, that Richaues arrear, and a good Issue against the Bailiff; contra against the Lord bunself; Note the Diver-


plied, that he is not Bailiff; Prift; and there fee this held to be a good Plea. But contra if he

2. Bailiff shall have every Challenge to the Arreys and Pells as his Ma-


3. And may say, that the Tenements are in another Viz., but Bailiff shall

not disclaim in the Land, contra of Attorney, and Bailiff may plead mis-

named of his Master, and the other Pleas triable by the Assize. Ibid.

4. If there are two Co-partners of a Rent, and the one disarms and 

avows for his own, and justifies as Bailiff of his Companion, it is not tra-

verable that he is not Bailiff. Br. Travels per &c. pl. 118. cites 15

H. 7. 17.

5. In Assize, if J. S. appears as Bailiff of the Tenant, it is not tra-

verable if he be Bailiff or not. Br. Travels per &c. pl. 345. cites

15 H. 7. 17.

6. Replevin, the Defendant made Cognizance as Bailiff to the E. of S. C. cited by Trevor

Bedford, whereas in Truth he was not his Bailiff, but took the Diffrefs a-

gainst his will. It was held, that the Plaintiff cannot traverse, that he

was not his Bailiff, for it is not illuable; nor can the Earl disavow it for he is not Party; nor can the Earl have an Action upon the Cafe, be-

cause he is not dammified; but the Party whole Cattle are taken, may

bring an Action of Trefpafs for taking his Cattle; and if the Defendant

justifies as Bailiff, he may say De jure tort Demise non esse tali Cattle 

and to punish him. Cro. E. 14. pl. 3. Patch. 25 Eliz. C. B. the Earl of

Bedford's Cafe.

7. In Trefpafs 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. Anderdon Ch. J. said, that if one has Caufe to distrain my

Goods, and a Stranger of his own Wrong takes my Goods not as Bailiff or Trefpafs;

Servant to the other, and I bring Trefpafs against him, he cannot ex-

cufe himfelf by laying his Mifdeemors upon me; for once he was a Trefpafsor, and his Intent was manifelt. But if one disclaims us Bailiff, 

that in Truth he is not Bailiff, if he, in whole Right he does it, does 

afterwards affent to it, he shall not be punished as a Trefpafsor; for the 

Affent hath Relation to the Time of the Diffrefs taken, and fo is the 

Book of 7 H. 4. and to all this Periam agreed. And Anderdon held 

clearly, that the taking in this Cafe is not good, to which Rhodes as-


Not his Bail-

liff is not a

good Tra-

verie in

Not in

A Stranger, the Plaintiff has no Colour to have Trefpafs, be the Defendant Bailiff or not; but there it is held, that in Action for Rent as Bailiff to a Stranger fuch Travels is good, be-

cause there was no Trefpafs done if he was not his Bailiff. And to the Reporter says it is in the 

principal Cafe of Lee v. . The taking the Beaths of the Plaintiff in the Frankenement of a Stran-

ger is a Tort to the Plaintiff, unlefs he had good Authority from the Stranger to take them; for it 

may be, the Stranger may bring Trefpafs for the Damage done by the Beaths, and then which way can 

the Plaintiff aid himfelf against the Defendant, unlefs by this Travels; ideaquare.

B

8. In
8. In Replevin the Defendant made Confince as Bailiff to J. S. for Damage jezant; 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. abique hoc that he took them as Bailiff to J. S. and upon Demurrer all the Justices held clearly, that the Traverfe is good. And as to a Matter which was objected, that if this Traverfe should be allowed, the Meaning of the Defendant will be drawn in question, they said, that the same is not any Michiel; for so it is in other Cases, as be held to the Cafe of Reception. 2 Le. 215, 216. pl. 274. Patch. 29 Eliz. C. B. be well Fuller v. Trimwell.

9. In an Avowry for an Amendment 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 sufficient; also he must plead the Precept of the Steward for taking the Dittrels, or levying the Pain, and the Extraft of the Court, which the Bailiff ought to have for his Warrant. Mo. 574. pl. 789. Trin. 40 Eliz. Scroggs v. Stevenson.

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 jezant; the Plaintiff replied, De Injuria sua propria, abique hoc that he is his Bailiff. It was objected, that the Plaintiff could not travere that the Defendant was Bailiff, because he bad confessed the Franktenement in the Dean, in whole Right he justified. And Judgment was given per Cur. viz. Croke, Doderidge, and Haughton, that the Plea [Replication] is not good, and to against the Plaintiff. Roll Rep. 46. Trin. 12 Jac. B. R. Lee v. . . . .

11. In Replevin, the Defendant made Confince as Bailiff of J. S. for a Rent-charge; Plaintiff pleaded in Bar, that he took the Dittrels without the Privy or Command of J. S. and that such a Day after J. S. had first Notice of it, and then dyasayed 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 reply to, and to amend his Bar, paying Costs, and to go to Trial whether Bailiff or not. 3 Lev. 20. Patch. 33 Car. 2. C. B. Dobson v. Douglas.
Bailment.

per Cur. for tho' this is not traversable, and it had been ill u. o. 1 Demurrer, yet after Verdict it is good, and is not such an immaterial Issue as to cause the granting of a Repleader.  

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

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

1. If a Man pawns Goods to me for Money, and I put them among my other Goods, and all are itole 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 Aff. 29. Adjudged.  

2. But it had been otherwise, if the Tender of the Money was taken upon before the Stealing, (for by the Tender the Property was revestd in the Mortgagee) and I put a Bailee. 29 Aff. 28. Adjudged.

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 Aff. 28. per Thorp.

Cafe the Bailee is discharged, per Thorp. Br. Detinue de Biens, pl. 55, cites S. C. —— As where they
Bailment.

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

5. In Detinue, Goods were bailed at the Jeopardy of the Plaintiff, and the Defendant said how W. had taken the Goods. Per Rede, This is no Plea, for the Defendant might have Action against the Taker. Per Kebble, The Bailor shall have the Action, for he has the Property; and it was touched, that if Goods are robbed from the Bailor, he shall not be charged over, but if they are taken by a Trespasser of whom he may have Conscience, 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 Bailor shall recover no Damages, for he is not charged over to the Bailor. Br. Bailment, pl. 8. cites 3 H. 7. 4.

6. If on Bailment of Goods for sale Caflody, the Goods for want of good Custody are lost or destroyed. Case or Detinue lies, and Bailor shall be charged by Super se Aliumpiis; per Froswick, Ch. J. Kelw3 77.


And Robbery.

If the Bailee of certain Plate will not deliver it, Detinue lies; but if he changes it, a Trower & Conversion lies. Arg. Roll Rep. 59. 60.

D. 22. b. pl. 7. If the Bailee of certain Plate will not deliver it, Detinue lies; but if he changes it, a Trower & Conversion lies. Arg. Roll Rep. 59. 60. cites 3 H. 8. D.

S. P. resolv'd 8. If A. leaves a Chest locked with B. to be kept, and takes the accordingly, 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 truft 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, Lightning, and other like inevitable Accidents. And all these Cases were resolv'd and adjudged in B. R. And by these Diverlities, are by Holt Ch. all the Books concerning this Point reconciled, Co. Litt. 89. a. b.

1. 2. Ld. Raym. Rep 914. Trin. 2 Ann. in Case of Cogges 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 Cafe as in the other.

9. A.
11. If I deliver tool. to A. to buy Cattle, and he betows 50l. of it in Cattle, and I bring an Action for Debt for all, I shall be barred in that Action for the Money betowed 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 it 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.

to the Defendant, Part of the Condemnation Money, which he refused to take, paying the Plaintiff 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 Plaintiff 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. 55. Car. 2. B. R. The King v. Viscount of Hertford.

13. If a Man has Goods upon a naked Bailment, he is not chargeable. Holt Ch. J. if they are lost &c. neither is he chargeable for a common Neglect, and therefore Southcote's Cafe 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 both, but where there is a special Undertaking, he shall not be chargeable 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 if there be a general Bailment, and a general Acceptance, it shall not do it, if it is by Parol. Revolved per tot. Cur. Comyns's Rep. 134. 135. pl. 90. Pash. 2 Ann B. R. in Cafe of Coggs v. Barnard. to 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. 457. Pash. 13 W. 3. in Cafe of Lane v. Sir Robert Cotton.

In the Cafe of Coggs v. Bernard 2 Ed. Raym. 995 &c. the Judges delivering their Opinions Satur- tim, found great Fault with Southcote's Cafe ; Gould said it was a hard Cafe indeed, and observes that in Cro. E. 815. it was adjudged by two Judges only, viz. Gawdy and Clench, and Ibid. 912. Powell J. that all the Foundation of Southcote's Cafe is that in 9 E. 4. 44. b. there is such an Opinion by Darby. The Cafe in 5 H. 7. 4. was of a special Bailment, so that that Cafe cannot go very far in the Matter, 6 H. 7. 12. there is such an Opinion by the b. But there are Cases there cited, which are stronger against it, as to H. 7. 26. 29 Aff. 28. the Cafe of a Pawn. My Lord Coke would distinguish that Cafe 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, 6 E. 2. Fitzh. Deince 49. The Cafe of Goods bailed to a Man, locked up in a Chest and Stolen; and for the Reason of that Cafe, fore 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 thefe 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.

14. Some Hogheads of Brandy were bailed to carry and deliver them safely, but in the Carriage, one of the Casks was flopped and several Gallons of the Brandy were lost. The Bailee had no Premium for what he undertook; notwithstanding which, in an Action on the Cafe against the Bailee, Judgment was given for the Plaintiff. 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 Affumptit, the word Affumptit 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. Patch. 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. becauie 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 Dode-ridge J. in such case there needs specific 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 specific Request. Ibid.

2 Le. 57. pl. 36. S. C. in toto dem Verbis.


4. Snow, Mr. Warner’s Partner, a Goldsmith, having lost 21 Lottery-Tickets, and a Lottery-Order for 50l. immediately upon the Loss of them lends 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 Cafes, 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 pawnning 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 20,000l. 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 Plaintiff for a Satisfaction for these Tickets and Order; the Defendant informs 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 call'd 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 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 Convention; 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 Parry &c. 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 50l. of the Principal, which the Plaintiff appreced of; but whether this 50l. 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 50l. did not appear. The Defendants, without any express Authority, describe 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 Depositary to receive the Interests; that this was the only Power that a Banker is understood to have in such Cases which are common; that in regard to the 50l. Principal, he must be supposed to have had a particular Order for that, as it appeared to be a particular Transfaction. As to the Lottery-Tickets, that he had admitted himself to be accountable for the Losses 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 Depositary, 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 infilled, 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 possified of these Things, imply'd a Power to discharge or dispose of them. The Law inters such a Power from the leaving a Bond in the Hands of a Scrivener, who was Agent in the leading Money: He may receive it, and on Payment deliver up the Bond, without any express Authority. The Case of Party and Stokes, lately decreed, was much stronger:
Bailment.

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 Affiance, 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 moit 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 fits in this Court should act according to Law; that he fat there Jus dicere, non dare. This was agreeable to the Rule of judging secundum Discretionem boni viri; for VIRBonus eft quis? Qui consulto Patru, qui leges Jurat; fervat; That this Case is not at all accompany'd with any Impostion or Fraud, or Deign 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 flock to Ld. Cowper's Rule, that no Offer should prejudice the Person offering. As to the Case Mr. Lutwicn put of a Person intrusted to deliver over a Thing to another, he is in no Sense a Trustee, but a mere 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.
Bailment.

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
Courie of dealing in these Cafes 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
fold them (contracted for them) at a Premium. The second Point concern-
ing the Lottery-Orders is not so clear to be a Truth, nor do I think I need
declare any Opinion whether it was a Truth or not; so far it resembles a
Truth, 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 the 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 Sub-
scription, 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 Annuitles,
till the Government would have redeemed them? And should we de-
crease 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 Sub-
scription as to the Company, it has also as to the Proprietor. Bill dis-
mis'd per Jekyll, Matter of the Rolls.

6. Securities were delivered by A. to B. in order that B. should advance a MS. Rep.
Sum of Money upon then the next Day; but no Money was then advanced. Geo. In Canc.
The Question was, whether B. can keep these Securities, to delivered
him for this particular Purpose, in order to have a Satisfaction for a hill & al
precedent Debt due to him from A. Per Ld.C. Macclesfield, B. ought v. Proct.
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 propo.
be to advanced and lent to him; and since B. did not advance the Money
to the Agreement, he ought to return the Pledge upon
Demand; and since he has not complied with his Part of the Agree-
ment, he shall not retain the Securities which he got into his Hands by
such a Pretenfe and Artifice, to secure to himself a Satisfaction for a
precedent Debt; and gave Coils against the Defendant.

and other Jexels, to which Defendant pleaded Not Guilty. Upon a Eater 1745.
special Verdict the Case was, That Plaintiff being Owner of the Gods in B. R. Rep.
mentioned in the Declaration on the 12th of January, 1729, lodged them, Husre.
for safe Custody only, in the Hands of Seymour the Goldsmith, included in a
Paper and Bag, and took the Receipt following. " 12th of Jan. Received
of Sir John Haring the following Jewels, mentioning them all which are
D
Bailment.

"sealed up in a Bag; which Bag, sealed up, I promise to take care of for his use." 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 tell him; 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 delivered to him, or from having Satisfaction; and if, 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; Southcot's Cafe, 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 Trespasser to the Plaintiff, and that Trespasses 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 Lots should fall on the Plaintiff than Defendant; and for this was cited Salk. 289. But that is not this Cafe: the Jewels here were sealed up with the Plaintiff's own Seal, which resembles the locking a Box, and taking away the Key, 1 Inf. 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 Cafes 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 inquired, 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 Acts. This is true; but if the Plaintiff had negotiated this Note to a 3d Person, then the Cafe 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 Affignee of the Note, Carth. 357. Salk. 344. So where Bank-bill, payable to A. or Bearer, and A. lofses 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 Cafes where the Owner has no Mark to know his own again, as in Money, Cro. Eliz. 745. Diggs n. Holt.
Bailment.

Bay, 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 their Jewels. On the Finding, it is infil'd 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. Plunt, 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. Po. 25. is in Point, where 'tis expressly 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.

There are six Sorts of Bailments. The first Sort of Bailment Comyn's 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 Deposition; 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 & Conduittio, and the Lender is called Locatoir, 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 Cafe of Coggs v. Bernard.

(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 compleat 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 jeasunt; 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 Bens, 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. refuseth, 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 he 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 he may declare upon a Trover. Quod nota, per Fineux. Br. Bailment, pl. 6. cites 21 H. 7. 29.

4. A delivers 25 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 the should have it. Cary's Rep. 12. cites D. 49.

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; otherwife 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 Cafe.

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 lease the Goods, because the Property of the Goods was always in him, and not alter'd by the Sale in Market-Overt. Godb. 16o. pl. 224. Mich. 7 Jac. B. R. Anon.


(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 Illy, if it was bailed in Pledge or not, and the Vine was where the Receipt in Pledge is supposed. Br. Traverfe per &c. pl. 41. cites 46 E. 3. 30.

2. Detinue of certain Charters. The Plaintiff counted of Bailment by S. P. but now he shall be charged to him who has Right. The Defendant, fo his Ment, may be cited. Where precedent, tor Plaintiff's Ed, and Plaintiff's Edters, Plaintiff's Ment. and Defendant, delivered Deeds, and a good Plea, per Martin, and the Bailment Br. Bailment, pl. 5. to Plaintiff, and to the said J. N. also. Quod nona; for it was not contradicted. Br. Traverfe per &c. pl. 60. cites 7 H. 6. 22.

3. Detinue, supposing the Bailment to the Defendant at B. in the County of N. to be bail'd &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 10 l. such a Day, that the Sale shall be void, and that he did not pay at the Day, abique hoc that the Plaintiff bailed them in the County of N. to bail'd, prout &c. and admitted for a good Plea. Br. Traverfe per &c. pl. 65. cites 8 H. 6. 10.

4. Trefpals of taking his Bawl. The Defendant said that the Plaintiff delivered it to W. E. in Pledge, who bailed it to the Defendant, who bail'd it to W. E. and the Plaintiff said that R. C. gave to him, and the Defendant took it, abique 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. Traverfe per &c. pl. 373. (bis) cites 10 H. 6. 25.

5. Detinue by Feme upon Bailment made by herself of a Chrift 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, abique hoc that the Plaintiff bailed them prout &c. and a good Plea; for the Bailment of the Baron without the Traverfe, nor the Traverfe without the Plea precedent, is not good. Br. Traverfe per &c. pl. 374. cites 11 H. 6. 9.

6. In Detinue, the Plaintiff counts upon simple Bailment, the Garnifhee may say that it was upon Condition, without traversing the simple Bailment, and if the Plaintiff lays that it was bailed upon other Condition, then he ought to traverse the Condition alleged by the Garnifhee, and so he did, and well; per Cur. Br. Confefs 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 Coun- try upon Condition &c. abique hoc that it was delivered in the Place &c. by reafon of the double Charge, if Action be brought of this again in the County; quod nona negatur. Br. Traverfe per &c. pl. 22. cites 33 H. 6. 25.

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

confers any Livery made by the Plaintiff, quod fuit conceffum. Br. Traverser per &c. pl. 29. cites 34 H. 6. 42.

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

10. And per Molt, 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.

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 be refused, by which the Defendant took it; the Plaintiff said, that J. G. gave them to him, abique hoc that be gave them to the Defendant prout &c. and so to liue, and found for the Plaintiff, who prayed Judgment, and the Defendant pleaded in Ar直升 of Judgment, that the Bar is not answered for, 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. Traverser per &c. pl. 200. cites 5 E. 4. 133.

12. In Detinue of Charters, the Defendant may traverse the Bailment, because he cannot wage his Law. Br. Traverser 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 Surplufage, as in Trespass De son tort Demefne is no Plea. Br. Traverser 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 he bailed to him to re-bail to the Plaintiff, prout &c. and a good Plea, tho’ the Defendant may wage his Law. Br. Traverser 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, abique 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. Traverser per &c. pl. 275. cites 22 E. 4. 29.

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

21. Debt was brought against T. because N. was indeluted 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 Tellerator, 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 Per Powel J. 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, nor to money but only an Account, tho' he never buys or merchandizes. 3 Le. 38. Good 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 Carts; but per Holt Ch. J. contra the Party did not take it as a Debt, but ad Computation, 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. cit 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 transferable, tho' generally Conversion is not transferable but upon special Matter; per Wray and Fener 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 failed, whereby Defendant acknowledged that he S. C. cited had received 9 l. ad Eminent fuch and such Things, and avers, that he Nay 72 in the Case of Bill, 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. 17.

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

27. Action on the Cafe, supposing that he had delivered to Defendant certain Woolos 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, ceteris Jvfticiarlis abinentibus. Cro. E. 781. pl. 17. Mich. 42 & 43 Eliz. B. R. Gumbleton v. Graiton.

28. Bailee, in Cafe 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. Pach. 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 Cafe of Game v. Harvy.

30. A. delivered Money to B. to the Use of C. In such Cafe 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 Cafe.

31. In Cafe 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 Garnisher to interplead with C.

Per
Bar.


33. If A. sells Goods to C. and after gives his whole Right in them to B. B. cannot maintain Detinute 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, Detinute, Entreplesder, and other proper Titles.

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


1. In an Action upon the Case, upon an Assumpst to pay a certain Sum upon Request for such a thing bought, if the Plaintiff be barr'd by Verdict upon non Assumpst Podo & Forma pleaded, yet in a new Action for the same Sum, for the same Thing, if the Count be upon an Assumpst 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 Sell.


Plaintiff had recovered in the first Action, it should be a Bar in this Action,Quad. fult per Underidge. But the Reporter says Quaer, because it cannot be intended the same

2. But otherways it had been if he had recovered in the first Action. By Reports 14 Jac. 8. but quare, for it seems that this cannot be the same Premonit.

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. Rich. 7 Jac. 8. between Strong and Watts, per Curiam.

4. If A. demists Lands to B. for Life with Warranty, and after a Warrantia Charter 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 Charter depending upon the same Warranty, because this
this Action is grounded upon the Edition of a Chartel, Seilect, a Lease for Heare, in which there cannot be any Dacour, Rebuter, or Warrantia Chartes. Hobart's Reports 5. between Rudge and Pincomb.


5. If an Informer exhibits an Information against B. upon the Statute for taxing Farms, and the same Day C. exhibits an Information for the same Cafe against B. In this Cafe the Defendant may plead the Truth of the Cafe to both, and bar them; for much 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.

judged 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.


8. A Man was difticed, and afterwards he brought Dun fuit infra statum, against the Dittefeor, in which he was nonfuiet, and afterwards was received to maintain Writ of Entry for Diffafex against the Dittefeor well enough. Thel Dig. 151. Lib. 11. cap. 38. S. 6. cites Mich. 3 E. 2. Eltroppe 257.

9. In Formeudon of a Gift made to his Mother and her Paron in Frank-Marriage, notwithstanding that the Demandant be nonfuiet 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' Eltroppe 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 Formeudon in Remainder, were it to be Formedon in Reporter; such Action without Judgment upon Verdiët or Demurrer &c. does not bar the Demandant of his rightful Action; and therefore if Demandant in such Cases be nonfuiet, 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. Eltroppe 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 Verdiët &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 Cafe cites 3 E. 3. Eltroppe 134. & 30. Aff. 8. accordingly.

11. If a Man brings Writ of Mefne, supposing the Defendant to be Mefne between him and one A. yet afterwards he may have Writ, supposing another to be Mefne between him and the Defendant of the same Land. Thel. Dig. 152. Lib. 11. cap. 38. S. 30. cites Patch. 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 Plaintiff 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 suppos'd to be made to B.* the Plaintiff was nonjuted, and brought another *Writ upon the same Obligation,* and counted *that it was made to C.* and held a good Writ per *Juyн.* *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. 16. Where *Writ of Replevin is abated,* and the Defendant has return, yet the Plaintiff shall have another *Replevin of the same taking,* for such Return is not irreplegiebile. *Thel. Dig.* 153. *Lib. 11.* cap. 38. S. 43. cites Paüh. 34 H. 6. 37. and that so agrees Wood, *Mich.* 12 H. 7. 5. Where one *sues Replevin and is non-juted,* and the Defendant has return, the Plaintiff shall not have another Replevin, but second *Deliverance by the Statute.* *Thel. Dig.* 153. *Lib. 11.* cap. 52. S. 45. cites Mich. 19 E. 2. *Replevin 23.* 17. A Bar in one *Formedon in Defender,* is a good Bar in any other *Formedon in Defender,* to be brought afterwards, *of the same Gift.* Co. *Litt.* 193. b. 18. In *Ejfection,* the Defendant pleaded in Bar a *Recovery had in B. R.* *againt the Jessor of the Plaintiff.* This was held by *Anderfon,* *Periam,* and *Rhodes* to be a good Bar. *Goldsb. 43. pl. 22. Mich.* 29 Eliz. *Clayton v. Lawson.* 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.* Car. 2. *B. R.* 40 & 41 Eliz. *C. B.* in *Ferrer's Cafe.* 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 *Cafe* he has no *Remedy,* but by *Error or Attain'd*; 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 *Right again,* because it concerns his *Freedom and Inheritance.* Resolved. 6 Rep. 7. a. b. *Mich.* 40 & 41 Eliz. *C. B.* *Ferrer's Cafe.* 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 *Cafe,* if a new *Action of the same Nature* be brought against the *Successor,* he may *fallify*; 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 *Cafes the Successor,* at the *Common Law,* shall not *fallify* in *Sci. Pa.* 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 Cafe.* 22. In *Trespass 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 Herit; and upon Demurrer, adjudged against the then Plaintiffs, and aver'd that the Taking was the fame &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 covenantly done, Et hoc paratus &c. Judgment if the Plaintiffs to this Action, of the fame Matter, shall be received &c. Walmelley and Kingmell held the Bar good; but Anderston and Glanvill e contra. Et adiornatur; and afterwards it was ended by Arbitrement. Cro. E. 667. pl. 24. PaSCh. 41 Eliz. C. B. Ferrers v. Aiden.

24. 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 Prunt pater 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. Etoppel 267.

2. In Quod permissat 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 non-suited, 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. Etoppel 261.

3. After one is barr'd in Affise, he may have Affise of Mortdanceflor. Thel. Dig. 151. Lib. 11. cap. 38. S. 12. cites 4 E. 3. It. Derby Etoppel 133. But adds Quere; for it is said that he shall not have it, without special Monisrance; As where the Heir enters upon the Discontinue, or Deseant, and re-enters &c. Per Littleton and Jenny. Mich. 12 E. 4. 13. Quere.

4. Where one is non-suited after Appearance in Writ of Besait, he may And not well have Writ of Chinage against the same Tenant of the same Land, withstanding of the same dying Issue of the same Ancestor. Thel. Dig. 152. Lib. 11. cap. 38. S. 16. cites Mich. 4 E. 3. 108. and 29 E. 3. 21. And if a of Ase, and Man may vary from the Descendent made by the Ancestor of the Demandant in another Writ. Ibid. cites Mich. 13 H. 4. 14. in Scire Facias. yet he may have Writ of Formidor in the Defender, 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 Pafh. 9. E. 3. 454 and e H. 4. 5; accordingly in Mortdanceflor.

And
And where in *Affife of Stagno exaltato ad Nucumnum liberi Tenementum &c.* after Illue taken upon the Enhancement, the Plaintiff was nonsuited, yet he was received to maintain *Affife of Nucumnum Square Land* out the same *Stagnum ad Nucumnum of the same Frankenstein.* Thel. Dig. 152. Lib. 11. cap. 38. S. 19. cites Patch. 8 E. 5. 589.

5. In *Affife,* it is no Plea in *Bar* of the *Affife,* that the Plaintiff had brought against him *Writ of Forndon 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 Aff. 6.

6. In *Affife 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 *Affife,* without shewing Record thereof sub *pede Sigilli.* Thel. Dig. 152. Lib. 11. cap. 38. S. 22. cites 16 Aff. 17.

7. In *Square Impedit* by the King against a Bishop, the Bishop said that the King at another Time had brought *Square non admittit* 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 Adwention, and adjudged no Plea. Thel. Dig. 153. Lib. 11. cap. 38. S. 46. cites Patch. 16 E. 3. *Square Impedit* 145.

8. After the bringing of *Affise,* the *Feme* had *Cui in Vita* of the same *Land* of her own *Seinf,* notwithstanding that it was found by the *Affise* that she was never seised. Thel. Dig. 152. Lib. 11. cap. 38. S. 23. cites Mich. 17 E. 3. 65. But adds *Square,* the *Tenant* in the *Cui in Vita* durft no *demur.*

9. After the bringing of *Dum non satis Compos* of the *Seinf* of his *Ancestor demanding Fee simple,* to which Suit he appeared, he cannot maintain *Forndon in Descendent* against the same *Tenant of the same Land,* making his *Descendent* 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 *Demendant* had brought *Cui in Vita* against him of all the *Land* of which &c. of the *Demife* of the same *Baron,* to which *Writ* the appeared &c. and adjudged a good Plea. Thel. Dig. 152. Lib. 11. cap. 38. S. 24. cites Trin. 19 E. 3. Eltoppel 221. & 33 Aff. 18. agreeing.

11. In *Forndon,* if *Affise* be taken upon the *Gift,* and found against the *Demendant,* that he Ne dons Pa &c. yet the *Demendant* may afterwards have *Affise of Mortidancefor* upon the dying seised of the same *Ancestor* to whom the Gift was suppos'd to be made. Thel. Dig. 152. Lib. 11. cap. 38. S. 26. cites Patch. 19 E. 3. Eltoppel 227.

12. In *Writ* upon the *Statute of his Servant and Apprentice* taken and elfigned; the *Defendant* said, that the *Plaintiff,* pending this *Writ,* brought *Writ of Restitution of Ward* against the same *Defendant,* supposing the *Restitution* out of his Ward of the same *Peron* whom he suppos'd to be his *Servant,* and held a good *Plea* to the *Writ.* Thel. Dig. 152. Lib. 11. cap. 38. S. 29. cites 27 Aff. 21.

13. In *Forndon in Remainder,* if the *Demendant* be nonsuited, he may well fee *Seire 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 dispossessed, and after the Death of the Baron he brought Cui in Vita upon the Demand 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 the brought Affise against the Heir of A. and others, Differeurs, who continued their Eliate by the first Differeut till she entered, and was seised till at another time dispossessed, and adjudged that the Affise lay well. Thel. Dig. 153. lib. 11. cap. 38. S. 31. cites Mich. 30 E. 3. 24. 30 Aff. 43.

16. Where 3 join in Affise, and afterwards are non-suited, two of them, leaving out the third, may have a new Affise 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 Aff. 14.

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

18. After Non-suited 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, &c contra. Thel. Dig. 153. lib. 11. cap. 38. S. 35. cites 40 Aff. 1.

19. The Demandant brought Formedon in Remained, and counted of the Gift of S. and afterwards he brought Formedon in Descender, and upon the said S. 3. 21. counted of the Gift of E. and therefore well, by Finch J. but he held, 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 Bsk. held, that the Formedon in Remained 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 Remained or Reverter, &c. Br. Formedon, pl. 77. cites S. C. & S. P. by Fincham J. Quære. But Bsk. held, that the Formedon in Remained 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.


21. After Non-suited in Appeal of Maihem a Man cannot have Action of but after the Trespaies of Battery, and of this same Maihem. Thel. Dig. 153. lib. 11. cap. 38. S. 35. cites 43 Aff. 39 R. 2. Corone 110. Plaintiff in Appeal of Maihem has recovered

Damages for the Maihem, he may bring Writ of Trespaies of that Battery, and recover Damages for the Battery. Br. Trespaies, pl. 32. cites 22 Aff. 82. Br. Appeal, pl. 60. cites S. C. In Trespaies of Affault and Battery the Plaintiff recovered, and had Execution, and afterwards brought an Appeal of Maihem against the same Perfon 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 Cae.

22. If a Man fues Replevin of his Beast taken, and has Deliverance, he cannot have Action of Trespaies Vi & Armis of the same taking. Thel. Dig. 153. lib. 11. cap. 38. S. 39. cites Hill. 5 H. 4. 2. and says, that fuch Plea to the Writ was held good. 38 E. 3. 41. 46 E. 3. 26. and 17 E. 3. 58.
23. After the bringing of Writ of Debt by one as Administrator, he may have another Writ as Executor to the same deceased Peron against the same Defendant. Thel. Dig. 151. lib. 11. cap. 38. S. 13. cites Palch. and the De. 17 H. 6. Etoppel 273.

fendant
pleads, that before the Purchase of this Writ, the said A. one of the Plaintiff's, 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. Pending lite between the Executors of the said Will, whereupon Defendant demurred, and it was adjudged for him, and pleads this Matter by way of Etoppel, 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 barred as to the Action of the Writ, viz. to have any Action as Administrator, but this Mistake of his Action is no Bar nor Etoppel to his bringing his true Action. 5 Co. 32, 33. Palch. 1 Jac. C. B. Robinson's Cafe.—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.

24. In Rescous, supposing that the Defendant held of the Plaintiff one House and three Acres of Land, by 10 Marks Rent. The Defendant said, that the Plaintiff at another Time brought Affioe 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 Plaintiff by this Rent, in which Affioe he was noninitit: Judgment, if he shall be received now to say, that the Rent is now flowing out of the House and the three Acres of Land only &c. and non Adjudicatitur; 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 Plaintiff had sued against the Ordinary for the same Debt, supposing that the Treakor 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. Trefpas Quare Clausum fregit &c. the Defendant pleaded, that before this Time he had brought an Action against the same Plaintiff, and recovered and had Execution &c. Judgment of the Key &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.

27. If one be bound in an Obligation, and afterwards promises to pay the Money, Affsumpt 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. Ahbrooke v. Snape.

Agreed by all, that Damages recovered in an Affsumpt, may be a Bar of a Debt, yet it is not so by Law where the Consideration is Collateral. Cro. J. 119. pl. 7; Hill. 3 Jac. B. Ri in Cafe of Lee v. Mynde.—Yelv. 48. S. C.

28. In Affsumpt to pay 100l. the Defendant pleaded that the Plaintiff had brought Action of Account against him for the same Money; Judgment of the Key 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 Cafe, but not in Action of Account. No. 453. pl. 633. Mich. 38. & 39 Eliz. Barkby v. Foster.

But unless he bring a Writ of a more higher Nature than Rep. 7. b. in Ferrer's Cafe.

29. If any be barred by Judgment in any real Action of the Saiton 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; resolv'd. 6 in which he was barred, he and his Heirs are not only barred of the same Action, but also, so long...
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 Alliff is, a Bar in every other Alliff, and Regularly a
in Writ of Entry of Alliff; for both are of his own Possession and of one and
the same Parties. 6 Rep. 7. b. in Ferrer's Cafe.

Nature. But this Rule hath three Exceptions. 1st, In case of a Present, Prebend, or Tenant in Tail, as the
Book of S Ed. 3. 25. is. 2dly, If be in from any Title, as 10 H. 7. 5. 22 H. 6. 15. 3dly, If he
be an Infant, as £ Ed. 3. 32. For an Alliff is not so strong an Entitle as other Actions; Per

31. Bar in a wrong Action brought is not any Bar where the right
As where Action is brought. Cro. E. 668. pl. 24. Patch. 41 Eliz. C. B. in
Cafe of Ferrers v. Arden,

against the Bille for those Goods, and be barred by Verdift or Demurrer, that shall not be a Bar in
Defence or Account, per Anderson and Glanville, but per Wallifley J. where a Title is pleaded in
Bar to a Thing demanded, and by Resent thereof, the Plaintiff is barred upon Demurrer or Verdift, the
Interes thereby is bound, and the Plaintiff shall be barred from bringing a new Action, per Anderson

32. S. fals all his Corn standing and growing in such a Close for so
much, and afterwards brought an Alliffmt for the Money. It was
objected, that Debtor lay, but not this Action; but it was held, that a
Recovery or Bar in this Alliff, 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 Caffe upon Alliffmt,

(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 Formdon in Remainder,
and died pending this Plea, yet his Son and Heir may maintain
Writ of Entry for Difference made to the same Ancestor of the fame
Land; because the one Writ is not of a higher Nature than the other.
Thel. Dig. 152. Lib. 11. cap. 38. S. 15. cites Patch. 4 E. 3. 132.
& 14. All. 6.

2. Where the Ancestor has brought Writ of Right, in which View
But Bidl. S. Voucer have been had &c. yet his Heir may maintain Writ of Entry of the
18. lays Herle held the
same Land, against one who was not Party to the Writ of Right, nor Heir
to the Party, per Opinionem. Theel. Dig. 152. Lib. 11. cap. 38. S. 17.
tary, Patch. cites
7 E. 5. 321.

Demant the

Demant himself brought the one Writ and the other, and the first Tenant had
inferred the 2d
Tenant with Montrans of Record sub pede Sigilli &c. and that such bringing of Writ of a more
high Nature, shall abate Writ of a more baf Nature, and cites 53 All. 18 agreeing.

3. Notwithstanding that the Father has had Quod permitat of Common
of Possure, yet his Son and Heir may have Alliff of the same Common.
Thel. Dig. 152. Lib. 11. cap. 38. S. 21. cites 15 All. 3.

4. If Demant be barred in Writ of Error, on Release of his An-
cestor, yet his Alliff in Tail shall have a new Writ of Error, for he
claims in not only as Heir, but per Formam Doni, and by the State-
that 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.
Bar.

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

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

(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.

*Tol. 54.*

Thompson.

1. In an *Action upon the Cafe*, if A, the *Plaintiff* declares, whereas

he the Magnam Curam de Negotiis in Lege of B. the *Defendant*,

habuit & a permultis perculis ipsum præservaverit; and whereas the

*Plaintiff* at the *Request* of the *Defendant* idem *Defendentri præmis-

lit to take to Wife the Daughter of the *Defendant*, the *Defendant* did

assume to pay to the *Plaintiff* 1000l. and upon Non *Atumpst* pleaded,

the Jury find for the *Defendant*, and Judgment is given accordingly; and after A. brings another *Action*, and declares, that in Con-

sideration that the *Plaintiff* ante tunc, at the *Request* of the *Defendant*, Magnam Curam de Negotiis in Lege of the *Defendant* habuit &

ipsum *Defendentem* a multis perculis præservaverit, and to the *De-

fendant* ad tunc, at his Request *Promissit* durece in UXorem fiam

filiam *Defendentis*, the *Defendant* did assume to pay to the *Plaintiff*

1000l. cum inde requitus efficat. The Judgment in the first *Action*

is not any *Bar of this Action*, because the *Promise* is a collateral

*Promiss*, and the *Defendant* promised to pay the 1000l. gene-

rally 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 co-

lateral *Promise*; but this is not to be alleged in the first *Promise*,

because no *Request* is mentioned to be Part 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 *Bromfield*, adjudged upon

*Demurrer*.

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


20 H. 6. 11.

3. *Tho* the *Statute* gives *Writ of Quare Eject* infra *Terminus* for the

*Lessor* who is out of, yet he may have *Writ of Covenant against his*

*Lessor*, which is given by the Common Law; therefore *Quere in this*

*Cafe*, if he brings *Quare Eject* infra *Terminus* against the *Feoffee* also, if


4. For he may recover twice in *Quare Impedit* against several *Dis-

turbors*, by several *Writs of Quare Impedit*. Br. *Parliament*, pl. 8. cites

46 E. 3. 4.

6 Rep. 8. b.

in *Ferrer's Cafe*, in a

5. *Notwithstanding a Recovery be had in Affize against one*, yet he

shall be restored to his first *Action* to demand his *Right*; as in the *Cafe* of

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.

7. In Trepass, Judgment in another Writ of Trepass of the same Trepass is no Plea, without Execution. Br. Execution, pl. 5. cites 20 H. 6. 11, 12.

8. A Recovery upon Bailment in one County cannot be intended a Recovery upon Bailment in another County, nor 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.

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. 45. cites S. C. that it is no Plea, That the Plaintiff at another Time recovered in Account, Debt, Trepass &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 5.) And there it is laid 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 59. S. C. has the Word (not)

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

11. In Trepass upon the Stat. of 5 R. 2. by 3 Persons, a Recovery of a Part of a Moteity against one of them, and Execution thereupon is a good Bar. Heath's Max. 62. cites 18 E. 4. 28. Bro. 70.

Cur.——Br. Barre, pl. 83. cites S. C.

12. Debt upon an Obligation with Condition, and the Oblige 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 Ejjectment against B. Afterwards B. made a new Lease for Years to F. S. and A. ousted him. F. S. brought an Ejjectment, and A. pleaded the former Recovery. This was held a good Bar by all the Justices except Windham and Periam, who held it no Etoppelle; for the Conclusion shall be Judgment in Actio, and not Judgment if he shall be answer'd; and tho' it be an Action Personal, and in Nature of Trepass, yet the Judgment is Quod habeat Possessionem Terminii 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. Pach. 28 Eliz. C. B. Spring v. Lawson.


15. A Recovery in Assumpsit against the Father, upon a coUateral 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 bad 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 alleged. 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.

17. After Action brought Plaintiff attacks 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. Pach. 36 Eliz. Moy v. Middleton.

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

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

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 eft Factum pleaded, it was found Not his Deed; and the Entry was, that the Defendant recovered Damages against the Plaintiff, and should go fine 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 to the Plea was held naught by the whole Court. Brownl. 81. Pach. 9 Jac. Level v. Hall.

20. In Trespass for taking and driving away 100 Sheep, Judgment was given for the Plaintiff, and 2d. 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 2d. 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. Pach. 2 Car. C. B. Lacon v. Barnard.

See Tit. Actions (L. 5) pl. 50.
21. In Cafe for falsely and maliciously procuring a Commission of Bank-ruptcy 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 defrauded, and left his Trade, to his Damage &c. and the Defendant pleads, that the Plaintiff had before brought an Action of Trespafs 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 fame Thing as the former was, that being for the Trespafs, and this for the Loss of his Credit, and consequently his Trade, and in the Action of Trespafs 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. Warton v. Norbury.

22. Assumpsit against Executor, he pleads a Judgment in Debt against Sid. 372. pl. him upon simple Contrails; tho' Debt lies not in the Cafe, the Judgment is a Bar of the Assumpsit till it be reversed. 3 Lev. 181. cited per Cur. as the Cafe of Partner v. Lawfon.


24. The Plaintiff brought an Indebitatus Assumpsit, and an Infemal Comptantoffit 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 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. Rofe 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 fame Concernment. As a Bar to one Trespafs is a Bar in another for the same taking; but a Bar in Trespafs is not a Bar in Detinue, or a Bar in Trover is not a Bar in Account. Arg. Skin. 48. in Cafe of Foot v. Raffall. And Saunders said, that a Recovery in Trespafs is a Bar in Detinue, or a Bar in 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 Trespafs 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 nullum cantillium per tantam Curiam. Skin. 57. S. C.

26. A Difference was taken, per Pemberton Ch. J. that where the Raym. 422. same Evidence will maintain the one or the other Action, there a Bar in the S C. Mich. one will be fo in the other, as in Ferrar's Cafe; but where it will not, 2 Show. 213. Trin. 34 Car. 2. B. R. in Cafe of Putt v. it is otherwise. 2 Show. 213. Trin. 34 Car. 2. B. R. in Cafe of Putt v. 

27. Bar for want of Assumption of a Life in one Action is no Bar in another, in which the Continuance of the Life is aver'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 Cafe of Ingram v. Bray.

28. Trover of Goods; the Defendant pleads in Bar, that Trespafs was formerly brought against him for the same Goods, and upon Not Guilty Put v. Ray- pleaded, a Verdict for him; the Plaintiff demur'd; and by Pemberton his Ch. a judge for
the Plaintiff Ch. J. Jones, and Raymond, (Dolben habitante) Judgment was given in Trover, for the Plaintiff. 2 Show. 211. pl. 219. Trin. 34 Car. 2. B. R. Putt v. because Tre- Royton. ver and Trefpafs are sometimes Actions of different Natures; for Trover will lie where Trefpafs 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 Trefpafs; because here was no tortious Taking; but where there is a wrongfull Taking and detaining the Goods, the Plaintiff may have either Trefpafs or Trover, and in such Case Judgment in one Action is a Bar to the other, and the Rule is, viz. wherefoever 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 avail with Ferrer's Case; for here it is to be presumed that the Plaintiff, in the first Action, had mistaken his Action, by bringing Trefpafs Vi & Armis, whereas he had no Evidence to prove a wrongfull Taking, but only a Demand and Refusal, and for that Reason the Verdict passed against him in the Action of Trefpafs, 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 Trefpafs will not, and if the Plaintiff has mistaken his Action, that will be no Bar to him. — 3 Mod. 1. S. C. adjudged by 5 Judges for the Plaintiff — Pelllex. 634. to 643. 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. Raffall, S. C. adjournatur; but Ibid. 57. pl. 1. adjudged nifs. — But in the Case of Lechmere v. Topley, Show. 126. Hill. 1 W. & M. it was held, that Judgment in Trover on a special Verdict is a good Plea in Bar to Trover brought for the fame Goods. — See Tit. Actions (L 5) pl. 53. 56.

29. T. brought Trefpafs of Assaull and Battery in B. R. against S. to which S. pleaded Son Assaull Demenef, and found for the Plaintiff. Afterwards S. brought Trefpafs of Assaull and Battery against T. in C. B. and T. pleaded this Verdict and Judgment in Bar, and the Court would not fuller this Action to proceed. Cited Skin. 58. Mich. 34 Car. 2. by Pelllexfen, Arg. as the Cafe of Turbervill v. Savage. 30. If there be 2 Obligees, and Debt is brought against one, and he pleads Non est Datum, 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 [illegible]. Skin. 58. Arg. pl. 1. Mich. 34 Car. 2. B. R. in Cafe of Foot v. Raffall.

31. The Plaintiff declared in an Action of Covenant, that whereas the Defendant had covenanted and agreed with the Plaintiff not to relapse to f. S. without the Plaintiff's Consent, that notwithstanding he had relapsed 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 Cafe 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 pled in Bar, and they could never get over it. Cited by Pelloxen, as a Cafe 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 Hoyle, and spoiling Goods; upon which was a Verdict, and 140 I. Damages, is a good Bar to an Action of Trefpafs brought after by A. alone for Damages, little varying from what was alleged in the former Action, as Lots of Trade &c. 3 Lev. 179. Trin. 36 Car. 2. C. B. Barwell v. Kenley.

34. Recovery in Trover, or Battery against an insolvent Person, is a Bar to sue any other of the Parties. Arg. Show. 165. Trin. 2 W. & M. 35. Debt
Bar.

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. Hutchefon.

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

37. Recovery in Trespasses 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, tho' the Unskilfulness of Surgeons, yet it is Felony in A. Per Holt Ch. J. 12 Mod. 544. Trin. 13 W. 3. in Cause 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, the lesse 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 Trespasses for Battery and Wounding is not like the Cafe of a Nuisance in erecting a Peut-boufe, 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 Nuisance 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 stoped, is a new Nuisance; 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.

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 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. in Pigot.

Execution also, because Execution is not a Satisfaction; but if the one satisfies the Plaintiff, he shall have Execution after. Br. Executions, pl. 132. cites 29 H. 8. per tot. Cur. in C. B. In Cause of an Obligation against 2, each of them is chargeable and liable to the entire Debt, and therefore a Recovery against the one is no Bar against the other till Satisfaction; per Cur. Cro. J. 74. pl. 5. Trin. 3 Jac. B. R. —— Yelv. 61. S' P. obiter, cites 4 H. 7. 22. —— see 5 Rep. 80. b. Bluemfield's Cafe. —— 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. 49. 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 Actionum, notwithstanding the Judgment against the other. 6 Rep. 45 a. 36. a. Mich. 3 Jac. C. B. in Higgins's Cafe.

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

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

2. In an Action upon the Cafe, upon a Promise, if the Plaintiff declares, that in Consideration that he demised to the Defendant a Houfe 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 5l. to the Plaintiff, and for the Non-delivery of the Possession, or Payment of 5l. 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 Demife; for if it should be admitted, yet the Delivery of the Key and Possession is a sufficient Consideration to bind the Defendant, either to receive the Possession, or give 5l. Hitch. 13 Car. B. R. between Page and Loxness, adjudged upon Demurrer.

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

1. IN Debt against Executors who paid Pleni Administration, and it is S.P. and 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.

determined; per Martin; quod tot. Cur. concefills. But Brooke says Quere inde; for it seems that Debt does not lie after the Plaintiff is once barr'd. Br. Executor, pl. 83. cites 4 H. 6. 4.—S. P. Br. Dette, pl. 105. cites S. C.

2. So in Debt against the Heir, who pleads Ricas per Descend, and after Assists 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. 53. cites 21 H. 7. 23.

4. Grant that a Man shall not be discovered for 3 Years, or that he shall not be impeached of Waife; 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 Cases a Man may be restored to his Action.

1. IF a Man who has Title of Action of Affise of Mortdancefor diffises the Tenant, and the Tenant recovers by Affise, the other is restored to his Affise of Mortdancefor; for the Estate and Jalt Seifin is now defeated. Br. Retiore, pl. 3. cites 5 All. 1.

2. A Man died seised, and the Land descended to W. N. and after J. S. Br. Mortdancefor died seised, and his Heir enter'd, and the Heir of W. N. entered Mortdancefor, upon him, against whom the Heir of J. S. brought Affise and recovered; Br. S. cites there the Heir of W. N. may have Affise of Mortdancefor, and confes and avoid the Recovery in Affise of Novel Diffisins; for he is restored to the first Action. Br. Retiore, pl. 4. cites 10 All. 16.

3. In Affise the Plaintiff was outlaw'd in Action of Trespaft after the Diffisins, and after obtained Charter of Pardon, and brought Affise, and the Defendant pleaded the Outlawry in Trespaft in Bar, and the Plaintiff showed the Charter of Pardon; and by this the Affise lies well of the first Diffisins, without Title after the Outlawry; for by the Charter of Pardon the Plaintiff is restored to his first Action, viz. the Affise, without other Seifin or Entry after. Br. Retiore, pl. 7. cites 13 All. 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 recovered the first Judgment, and Execution thereupon by Writ of Dilect, and enter'd; and the first Plaintiff brought another Scire Facias to execute the same Fine, and the Affise taken if the Feoffment was single, or upon Condition. Br. Retiore, pl. 2. cites 38 E. 3. 16.

5. Dower
5. Dowar 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 new Demandant; and she said as to Parcell, that she held of the Document of the same Baron, and of whose Document she now holds, as the Assignment of W. C. and prayed Aid of him; and to the rest, that she held for Term of Life of the Demise of this same W. C. and prayed Aid of him; upon which came the Prayer, and they pleaded Possession of the Baron, to whom the Remainder of the Fee-simple by the same Fine was intrusted, to whom the new Tenant and then Plaintiff in the Scire Facias said that Richs pass'd by the Deed; and after the Prayer made Default, and the new Demandant, then Tenant, maintained the same Plea which was found against the Feme new Demandant; by which the new Tenant, then Plaintiff in the Scire Facias, had Execution; Judgment if against this Recovery, against herself, she shall be receiv'd to demand Dowar, and the Demandant demur'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 lothes 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 Tert, as by Disjoin upon a Descent to the Heir of the Disjoine, or by Entry upon a Discontinuance, and the Heir of the Disjoine or the Discontinuance recovers, there the Disjoine, or the Feme, or his Heir, shall have in the one Cafe Writ of Entry, and in the other Cal 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 Illue is upon the Entry; but if the Illue he upon a Releafe, 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 Whic, where Land is recovered against the Baron upon Dilatory, As Noutemure, Missuiiauer of the Vill &c. there the Feme shall have Dowar, 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 Dowar. Note the Diversity. Br. Replore, pl. 1. citas 50 E. 3. 7.

6. An Infant had Title by Fine Executory and Entry, and he upon whom he enter'd ousted him, and the Infant brought Affise, and the Defendant pleaded to the Affise, and the Jury found for the Defendant in the Affise; 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 Affise; and yet he after brought Scire Facias to execute the Fine, and the Tenant in the Affise pleaded Record of the Affise, by which the now Plaintiff was barr'd in the Affise, 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. Replore, pl. 6. citas 7 H. 4. 22.

7. In some Cafe the Original may be revived by Writ of Error, and in some Cafe the Action; As where an Exception to the Writ is awarded good, by which the Writ abates, and after the other reveres it by Error, the Original is reviv'd, and he shall have Writ of Refummons; but if an ill Bar be adjudged good, and the Demandant recovers it by Writ of Error, he is restor'd to his Action. Brooke says, fee elsewhere if

Bar.
in such Case the Court will not award that the Demandant recover; and 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 Detinue, Error, or Assize, 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 revolt it in me by the Reversal of the Recovery. Contra if he had not made Feoffment. Br. Restores, 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 be 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. Restores. 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 Efflu 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 be 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. Heath's Max. 41. cites 9 Ed. 4. 12. by Moyle.

So if a Bar be good to 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 500l. and that they have nothing in their Hand above and above that Sum. If this Bar should be taken strong 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 Intent 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 left 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 a Bar la Reversion Matre or Substance to it, and be good to common Intent it is sufficient, albeit it is not good to every special Intent; as where one dies as Executor, and the Defendant saith, That the Testator made the Plaintiff and one J. S. Executors, and does not lay 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 55 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 Titin. 10 H. 7. 25. S. P. So upon an Obligation to perform Covenants, the Defendant alleged two Covenants, and faith he hath performed them, and doth not say there are no more Covenants in the Deed to be by him performed, 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 Heath. Barre 89 and Br. Condition, pl. 144 S. C.
3. If a Lease be made to A. and B. for Life, the Remainder to C. and if C. should die during the Life of A. or B. then that it shall remain to E. for Life; St 1 pil object esse Reichens &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 forth in his pleading, As in a Formedon in Defendant, if the Tenant pleads in Bar a Releas on the Demandant without Warranty, it is good; and yet the Releas 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. [Pach. 4 E. 6. Colthrift v. Bejuftin.]

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 faith 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.

So if one faith 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. 7 H. 2. b. S. P. by Doderidge. J. Lat. 171. &c. 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 Dures &c. unless it be shew that the Time, Heath's Max. 55.—Pl. C. 27. b. S. P. And if the Leifer covenant with the Leffer, that if he be estated within the Term, that he shall have as much other Land, he must shew that he was estated on such a Day in certain within the Term. Heath's Max. 55.—Pl. C. 27. b. S. P. Arg. &c. to plead in Bar, that 9. S. died seised, and R. S. entered 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. b. S. P. So where the Ancestor is Tenant par alter se, and the Heir pleads to be estated as heir to him, says not that he entred first after his Death, for Occupanti concordat. Heath's Max. 56.—Pl. C. 28. b. S. P. &c. cited Fitz. Barre 72. & Br. Affile 22. in 27 Alf. 31.

5. Debt against an Execution upon a Bond of the Tenant. The Defendant pleaded a Statute acknowledged by the Tenant &c. and averred that he has not, nor at the Day of the Bill brought, he had not any Goods which were the Tenant's tempore moris sita, in his Hands to be administered, 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 Tenant's Goods tempore moris sita; 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 Ailts, being special Ailts, unless it was specially shewn; 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 Circumstances, in pleading the Matter he must shew it to be within the Circumstances. 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 Confection.
Baron and Feme.

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trinis scripti Obligatorii & semper post Confessionem &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. R. Harlow v. Wright.

8. The Reason why a Bar is good to a common Intent, is because it Heath's is to exclude from a Charge. But a Replication must have a general Cer-

tainty, because it is to destroy the Exculpation of the Defendant, which is always received favourably. Per Holt Ch. J. 12 Mod. 665. Hill. 13 W. 3.

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

Baron and Feme.

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

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

2. If a Woman takes a 2d Husband, living the first Husband, this is both Marriage by our Law, as by the Spiritual Law. Con-

(""")

Fol. 340.

Ditrat. (A.) pl. 1. &c. (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 Ellis. C. B. Riddlefden v. Wogan.

3. If a Man baptizes the Cousin of A. S. and after marries with A. S. Br. Balfard they are Baron and Feme till a Divorce. 39 Ed. 3. 31. b. 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 Kyser mentions it to be still observed in the Eastern Churches) — See Tit. Balfard (A. z) 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. Balfard pl. 23. cites S. C. — See Tit. Balfard. (A. z) pl. 3. S. C.

5. If a Man takes A. S. to Wife by Durefs, tho' the Marriage be * Fitch. Co. solemnized in Facie Ecclesiæ, yet it is merely void, and not Baron and Feme; because there is not any Content, and can nor be a Marriage without a Content. Dubitatur * 11 H. 4. 13. S. C. 19 H. 7.

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that Marriage by Dare's was good, contrary to the Opinion of Frowike. Cro. (Kelw.) 52 because otherwise upon such Allegation Divorces will be frequent to satisfy Mens Lulls, and cites Firth, Attachment for Prohibition S. and 11 H. 4. 13, and Swinb. 241. — Marriage by Force and Dares of the Feme is void, and Trespafs thereof well lies; per Windham J. and cites it as by Babington, in L. 4, 5, 61. b. 2 Ind. 68. S. P. cites 11 H. 4. 14. Rot. Parl. 17 H. 6. Numb. 15. 16. (Lady) Butler's Case. —See 2 Mod. 102. Mich. 1 Ann. B. R. the Queen v. Swanston & al. — See Tit. Marriage (H. 2) per rotum.

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 defray 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.

8. If an idiot a Matriculate 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 Petition.

9. If a Man takes the Order of a Deacon, and after takes Wife, this Marriage is not void; for the Issue is no Ballard. 21 H. 7. 39. 19 H. 7. Ballard 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. Ballard 33. per Frowik. 11. So if a Nun takes Husband, it is not void, but voidable, contra idem, par Dabbist.

The Age of a Feme for Content to Marriage is 12 Years. Br. Age, pl. 73, cites.

Lib. B. fol. 117. — Br. Gard, pl. 7, cites 53 H. 6. 42. S. P. — Mo. 341. Arg. cites S. C. & S. P. by Hankford. 2 Ind. 90. S. P. — Co. Litt. 19. 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 he be 'Apta Fere.'

12. If a Man within the Age of 14, takes a Wife above the Age of 12, this is a Marraige, and they are Baron and Feme de Facto, so that the Baron may have Trespafs de Nuilete Abduca cum bonus uirt. Trin. 12 Jac. B. between Bradshaw and Fletcher, per Curiam.

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

Mo. 575. pl. 179. Warner v. Babington, S. C. the Queriel's new was, if the ought to agree or disagree ante Anno Nuibles, or what Time the Law has appointed for it; Popham said, that if the marries another Baron infra Anno Nuibles, this shall be a Disagreement to which Fenner agreed; & adjourned. — See pl. 16.

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 Bar-
Marriage, and after the Husband takes another Wife, and has Issue by her, this is a Bastaard; for the first Marriage continues, notwithstanding the Disagreement of the Woman, for she cannot dis- agree within the Age of 12 Years, and so her Disagreement void. 


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 Contests of Patrimony each ought to be bound, and equal Election given to both. 

Co. Lit. 79. b. 

16. If a Man marries a Woman that is within the Age of 12 Mo. 175. pl. 792. Years, and after the Feme, within the Age of Content, disagrees to the Marriage, and after the Age of 12 Years marries another, bington, now the first Marriage is absolutely dissolved, so that he may take another Wife; for tho' the Disagreement within the Age of Content was not sufficient, yet her taking another Husband after the Age of Consent affirms the Disagreement, and so the Marriage avoided ab initio. 

B. R. between Babington and War.-the Feme au, adjudged in a writ of Error upon a Judgment given in Ban- co, where the same Point was also adjudged. 

Plaintiffs replied, that the Feme ad Annos Nobilis disagreed; and upon Demurrer it was adjudged for the Plaintiffs, because after the Age of Consent she always cohabited with the second Baron; and for 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 lays, that so was the Opinion of Noy, Attorney General, and Harrington, Reader of Lincoln's-Inn, 1632; and Noy's Reason was, that the Church providing against Change of Lutf, 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 Content, 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 Mar- riage, 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 bind- ing Disagreement, but that they may well after agree to the first Marriage without any New Marriage, for Assertion may increase. 

B. J. between I. and A. B. adjudge 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. 

Trin. 12 Jac. 25. 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. 25. per Curiam. 

21. If Baron and Feme are divorced Caua Adulterii, yet they continue Baron and Feme; for the Divorce is but a Henda & Thoro, & Patrimonii Obliguis. 

By Reports, 14 Jac. * Motam v. Motam, and Matam, 44 Eliz. * Stevens against Fewe, Trin. 2 Jac. 25. Nov. S. C. & S. P. 1815. between F. and Wibbe, adjudged; and that the shall not lose her Dower by this Divorce. 

Ludov. vide Co. Lit. 33. b. 

426. pl. 19. 


reolved. — Godd. 145. pl. 192. Lady Stowel's Cafe, S. C. adjudged. — S. P. cited Cro. C. 463. — S. P. declared per tot. Cur. in the Star Chamber accordingly, and Archbishop Whiggin said, that he had called him at Lambeth the most Age Divines and Civilians, who all agreed to the fame. 

Mo. 63. pl. 942. Hill. 44. Eliz. Rye v. Fullcumbe. — Nov 100. Rye v. Fullcumbe, S. C. & S. P. accordingly. — S. P. Mar. 101, pl. 175. Trin. 17 Car, B. R. Williams's Cafe; resolved, without Ar- gument by Bramton Ch. J. and Heath J. abstinent alias, that it is within the Nature of 1 Jac. cap. 11. and Heath said that, by the Law of Holy Church, the Parties divorced Caufa Adulteri might mar- ry; but Pairs nee without Licence. 

L. 

21. If
Baron and Feme.

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. Contr. * to C. 4. B. Rot. 25. adjudged; for their Mue adjudged a Baron.

22. Marriage by a near 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.

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

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 Huber, 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. Instituciones.

Fitzh.Garde, pl. 59. cites S. C. but I do not observe S. P.

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.

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.

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


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 confilteh in Privity. Co. Litt. 351. a.
Baron and Feme.

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

1. If a Statute be acknowledged to Baron and Feme, they are join-tenants of this, and the Feme shall have all by Survivor. * Ed. 3. 12. b.

But the Baron alone may make Defeance, 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, Peradven- ture the same Law

Contra 48. Ed. 3. 12. b.

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 Ann. 45.

(But the Saying is 48 E. 3. 15. 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 in Action against the ten-tenants to have Execution of the Damage, and one came and said that the Baron is dead; Judgment of the Wit, and upon Nient desire the Wit abated. Br. Brief, pl. 293. cites S. C.—Finch. Execution, pl. 112. cites S. C. accordingly.

4. If Baron and Feme recover Damages in a Real Action, they may sue Execution jointly. 28 Ann. 45.


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 Account of the Money, for by the Receipt this was become a Thing in Possession. Trin. 39. Eliz. B. R. per Popham.

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.

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. 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. 149. cites 9 H. 6.
Baron and Feme.

9. In Detinue by the Plaintiff, the Defendant pleaded, that after the
Bailment the took Husband, who after his Inter-marriage released all Ac-
tions 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. Patch. 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, Re-
mainder to his Wife for Life, and dies; the Ld. admits accordingly; the 
Wife takes Baron and dies, another takes Administration, and is ad-
mitted by the Ld. yet resolved the Entry of the Baron lawful, unless 
there is a special Cause 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. Hau-
chett's Case.

But the Re-
porter says
Quere; for 
the Rent be-
longing to a
Feme does, 
In Case the
Wife was 
the
Survive the
Husband,

II. 300 l. Portion was charged on Lands to a Feme, who afterwards 
marrid W. R. who settled a Jointure on her, and had no other Port-
ion 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. Keep-
er 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 

Wife, and fo
do the Arrears that incur during the Couverture. Ibid. cites Co. Litt. 351.— 3 Salk. 65. pl. 8. 
S. C.

Bill for a Discovery of Assets, and to have a Satisfactory for a Debt due by Bond brought against
the Widow and Executors of the Obligor. Defendant insists by Anwver, 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 Hand. Her Husband before Marriage 
makes a Marriage Settlement, and in Consideration of a confidurable Portion 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 
Chafe 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 Eftate, 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 Purchator 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 fa-
vour of a fair Creditor, who otherwise must lose his Debt, and if there had not been such a Settlement 
made, might have had a Satisfactory 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 Per-
son 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 Chafe 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 Purchator, and well intituled 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 

(E) Chattles real.

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

1. I  a Feme termor takes Husband, yet the Term continues in her.
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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 its atut ante.—Fitzh. Charge, pl. 2. cites S.C.


§ See infra, pl. 5.

3. The same Law of a Ward. *48 Ed. 3. 13. † 14 D. 4. 24. * 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. Ravindham de Garde, pl. 15. cites S.C. — Fitzh. Jointen in Action, pl. 20. cites S.C. & S.P. admitted.


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 Executals; contra of Goods which she has as Executrix. Br. Property, pl. 22. cites 21 H. 7. 29.

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

1. ANDS were devised to Trustees and their Heirs, to pay and dispone the Rents and Profits to a Feme Covert, or to such Person as for by Writing should appoint, whether sole or Covert, and the Husband not to intermeddle, or have any Benefic thereof; and as to the Inheritance of the Premises in Trust for such Person or Persons, and for such Estate and Estates as he by any Writing purporting her Will, or other Writing, should appoint, and for seant 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 not decreted 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 Commonalty, 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 Alligence and the Husband, to compel them to assign over this Estate to her separate Use. The Matter of the Bill 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 Last, and where by Act of the Party. As in Case of a Devise charging Lands with Debts
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Debts and Legacies, the Heir taking such Lands by Decent is but a Trustee, and no Remedy for those 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 intituled 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 the in the present Case the Bankrums might be 'Tenant by the Curtesy, yet he should but Trustee for the Heirs of the Wife; and the Tenant having Power to have devised the Premises 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 Allignes, 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 Jof. Jekyll at the Rolls. 2 Wms's Rep. 516. to 519. Mich. 1725. Bennet v. Davis.

The Wife cannot have a separate Property in a personal Thing without a Trustee; Per Ed C Macclesfield, in Case of Powry 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.

* Br. Baron 1. If Baron and Feme are Jointenants for Years of Land, the Baron may dispose of the whole. * 47 Ed. 3. 12. b. admitted. S. C & S. P. ttd. + 49 Ed. 3. 13. 2 H. 4. 19. b. 14 H. 4. 24. b. admitted.—

† Br. Baron and Feme, pl. 24. cites S. C, but S. P. does not appear.


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 Garden 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. Ali. 134.

5. If a Baron polishe'd of a Term for Years grants it over in trust, and for the Benefit of his Feme, he may after dispose or forfeit this Truf't and bar the Feme. Patches 8 Jac. in Camera Scaracart, 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.

6. If the Baron makes a Leafe for Years to another, to the Use of his Feme if the lives so long, for the Jointure of the Feme, the Baron cannot dispose of this Truf't. Patches. 8 Jac. in Camera Scaracart.

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. Ditributur, •Patcl, 8 Iac. in Camera
Cafe, S. C. Seacearn.
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 pinned, 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.


9. But if after such a Divorce the Feme sues without her Hus-

band, as the way for a Detainment in the Spiritual Court, and re-
covers, and Penance enjoyed, & Expense lists taxed, the Baron becomes incapable of discharging it; for the Penance is but to restore her to the P. held according to her Credit, and the Courts are but depending thereupon, my Records, and therefo the whole Court a Prohibition was denied. — Roll. Rep. 426. pl. 19. S. C. and the Court inclined accordingly, but adviue vult; and it was said that this Case is not like the Case of Stevens and Tottie, because there the Thing for which the Suit was vizi. 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 * Yelv. 216. will marry C. his Brother, that he will give B. 10 l. if the fur Tin. 3c. vives C. and after B. takes C. to Husband accordingly; C. carries no burden. But B. the S. C. can not discharge A. of this Promise, by his Release to B. after his Death, because the Promise stood in a Contingent Action during the Life of E. the Husband. Bill. 6 El. [Iac.] B. R. between * Brench 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 Iac. 6. in * Smith and Staff. ford's Case, and this is cited, Hobart's Reports, Case 279. But there it is said, that the Words will not extend to discharge the Promise, without express Words of Promise.

Discharge; for though the Promise was present, yet the Execution was future, and such as the Releaser 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 Eile. —Brownl. 15. S. C. adjudged the Release no Bar. —Cro. J. 222. pl. 2. S. C. and the Plea of the Releaser adjudged ill. —S. C. cited Hob. 216. pl. 250. Hill 15 Iac. in Case of Smith v. Stafford by Hobart Ch. J. for the Plaintiff, because none of the Words would reach it, but says the Cafe was com-
pounded and to no Judgment was entered. —S. C. cited by Wartouron 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, the it was to take Effect by Contingency in future, and to Winch J. also thought. —S. C. cited Hunt. 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. Pam. 99.

11. If a Leafe 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 lute. —S. P. cited by the wrong, because the Feme had but a Possibility and no Interest. Popathom Co. Lit. 46. b. cites Hill. 17 El. 29 R.

special Verdict in the County of Somerset, about the 20 Eliz. and afterwards adjudged, that the Remainder be

is rotation correction 0, is table false, is diagram false,
Baron and Feme.

being limited in the Cafe to the Survivor, the Wife surviving should have it, because there was nothing in either to grant over until there was a Survivor. Poph. 5 — S. 1 held accordingly by Popham Ch. J. and said by him to have been resolved as above. 4 Le. 18. pl. 283, Mich. 29 Eliz. C. B. Anom. — S. C. cited Hurt. 17. The Baron after Marriage purchased a Term for Years to himself and Wife and the Survivors, and the Executors, Administrators and Assignees of such Survivor for the Receipt 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 Assignees should quietly enjoy. The Matter 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 it when 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 Affixes to pay Creditors with whom he had contracted Debts 7 Years after the Mortgage. 2 William's Rep. 364. Trin. 1726. Watts v. Thomas.—See Tit. Grants (M) pl. 5. 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 Asife. 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 Deceafance, 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 debts, the Feme shall be barred; and it 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.

15. In second Deliverance, the Defendant made Conuance as Bayliff to P. and H. his Wife, and set forth that the Plaintiff being seized of the Lands, granted a yearly Rent of 10 l. with a Clause of Disafft, both on the said H. for Life; the afterwards married the said P. and for Rent Arrear, the Defendant made Conuance at Lady-Day 4 & 5. P. & M. The Plaintiff in his Replication pleaded an Aequittance 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 Conuance. Mo. 87. pl. 219. Hill to Eliz. Morton v. Hopkins.

D. 271. pl. 26. S. C. Harper and Dyer thought the Arrears gone by the Acquittance, but Welch and Welfon contra, because all the Arrears unless those of the last Term were due to the Feme dum sola sole, and were not due to the Baron.—And. 14. pl. 50. S. C. adjudged that the Acquittance was a good Bar. —Bendf. 186. pl. 225. S. C. with the Pleadings and adjudged that the Acquittance was good.


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 it the survives she shall have it. Moor 522. pl. 689. Patch. 40 Eliz. C. B. Thompson v. Butler.


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. Effe for Life, the Husband may assigne it. G. Equ. R. S8. Mich. 1714 Atkins v. Dawbury.—If after Release of the Legacy by the Baron, he and his Wife suit in Court Chriftian for the Legacy, the Executor shall not have Prohibition, because the Temporal Judges cannot meddle with the Legacy, nor by Conferences can they determine whether the Release will extinguish it. Yelv. 172; 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 married, and after attains that Age, the Baron during the Minority of the Feme, made an Affignment 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 Strickland to operate in an Affignment, yet it would be good as an Agreement, especially being for a valuable Consideration. Trin. 1731. 3 William's Rep. 662 668. D. of Chandos v. Talbot.

15. A.
Baron and Feme.

18. A promiss C. that if she would marry B. if be did not sufficiently release (U) provide for her during Covcrture, then be would leave her 100l. at his Death. 22. cites Hill 6 Jac. The Baron cannot release this, during Covcrture, by Release of all Ac- B. R. Rel- tions and Demands, because it is executory, and in Contingency; but it cer v Husband may be relieved by a Release of all Promises. Arg. 2 Roll Rep. 162. for, S. P. Patch. 18 Jac. cites it as adjudged, and affirmed in Error, inMahon's Hoa 216. Cafe.

19. It was agreed, that if a Woman do convey a Lease in Trust for her Ufe, and afterwards marries, that in such Cafe 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 Cafe.

20. Leafes were devised to the Defendant by his eldest Brother, to be sold for several Purposes; and amongst others in Truth, 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 Affigns. The Bill was to inforce the Payment of this Annuity. The Defendant in- filted by Anwer, 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 Content, 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 Truth for the Plaintiff's Wife (who is the Defendant’s Mother) and her Affigns; and so insisted that the Plaintiff not inhabiting with her, be 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 co- habit, but she refused. The Matter of the Rolls declared, That in this Cafe the Husband was the Allegiance 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. Cafes, 194. Hill. 22 & 23 Car. 2. Dakins v. Beriford.

21. The Wife having pledged her Term in Truth for herself before Mar- riage, and then the Husband, without the Trudeau joining, mortgages the Term. The Husband died. The Mortgagor exhibits his Bill to have the Land convey'd to him, or that they should redeem; and the Court required 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 In- cumbrances and Acts of the Husband upon the Truth of the Wife's Term, and that he shall neither charge or grant it away; and it is the Term in common Way of providing Jointares for a Woman, to convey a Term in Truth 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 Purpliance of Articles of Marriage, or being the Wife's Term it is adjusted before in Truth, or if on other good and after- wards 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 bar'd. Ld. C. Finch decreed, That a Sale by the after Husband of the Truth-Term made by the former Husband was not good, and should not bind; and a former Precedent in Point shewn. Chan. Cafes, 357, 368. Patch. 39 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 revoked; but it was agreed, that where a Term is adjusted in Truth for a Feme, by the Privy and Consent of her Husband, the Husband, without Doubt, cannot interfere or dispose of it. Vern. 7. pl. 1. cites Mich 35 Car. 2. Sir Edward Turner's Cafe — S. C. cited as decreed in the House of Lords, that the Husband might dispose of the Truth of the Term; and says the Ld Chancellor seemed to wonder at the Resolution. Vern. 18. pl. 10. Mich. 1681. in Cafe of Pitt v. Hunt. — S. C. cited accordingly, 2 Freem. Rep. 78. pl. 86. in Cafe of Hunt v. Pitt, S. C.
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 Cafe. 2 Freem. Rep. 138. pl. 174. Doly v. Perfall.

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. Cafes, 225. Mich. 27 Car. 2. in Cafe 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. S. pl. SS. S. C. & S. P. admitted. — If a Husband makes a Leave for Years in Trust for the Wife voluntary, and he sells it, this may bind the Wife, because of the Fraud; per Pitch C. Chan. Cafes, 308. Patch. 30 Car. 2. in Cafe of Lady Turner v. Bromfield. — S. P. by Ld Keeper Finch. Chan. Cafes, 225. Mich. 25 Car. 2. because it is fraudulent against Purchasers; and said that this was the great Exchequer-Chamber Cafe.

24. Feme sole poss'd of a Term for Years, mortgage it to T. for 100l. and afterwards, a Day or 2 before Marriage, affigns 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 Witnes's to the Trust-Deed. D. pays off the Mortgage, and takes an Assignment, and then surrenders his Leafe to the Reverloner, and takes a new Leafe for the same Term, and dies. The Court held, that tho' the Eftate in Law was wholly in the Mortgage, and the Feme convey'd nothing but an Equity in Trust, yet when the Mortgage assign'd 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 Leafe 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. 52. Hill. 1677. Draper's Cafe.

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 200l. a Year on her; (whereas the first Jointure was of 300l. a Year.) The 2d Husband sold the Wife's Jointure made by the first Husband. Ld. Chancellor agreed, that if the Husband make a Leave 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 Cafe, bona Fide, the Husband can in no wise bind the Wife, unlefs 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. Cafes, 308. Patch. 30 Car. 2. Turner v. Bromfield.

Vern. 7. pl. 5. Sir Edward Turner's Cafe, Trin. 35 Car. 2. S. C. says this Decree was reversed in the House of Lords; but that it was agreed that where a Term is assign'd in Trust for a Feme, by the Privy and Consent of the Baron, there without doubt the Husband cannot dispoze of it. — S. C. cited 2 Vern. 271. in pl. 355. Trin. 1692. Tudor v. Samyne, where the first Husband assign'd a Term for the separate Use of the Wife, yet the Dispoze thereof by the 2d Husband was held good, tho' he made no Provision for her.

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

27. A poss'd of a Term, devise it to his Wife for Life, Remainder to his Children unprec't, and makes her Executrix. A. dies; the agents to the Legacies; afterwards the takes Husband; he sells the Term; the Wife dies; the Children unprec't enter; their Entry is concealable. Jenk. 264. pl. 66.

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

29. If the Wife hath a Choise en Action in her own Right, and an Action is brought by the Husband and Wife, and they declare Ad Dammum ipforum, and they set Judgment, by this the Property is alter'd; but otherwise 'tis, if the Choise 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. I Salk. 326. Hill. 11 W. 3. B. R. in Case of Gage or Grey v. Aeton.

He may release his Wife's Share of an intestate's Estate. See to Mod. 65; 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. affigns 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 Benefic of the said Affignment; and tho' it was instituted 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 Matter 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 Conference) that there may be an Uniformity of Judgment. Trin. 1703. Ab. Equ. Cales, 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 de- vised 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 referred 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 intituled both to the Principal and Interest. 2 Vern. 659. pl. 583. Trin. 1710. Harvey v. Harvey.

33. A Man by his Will gives a Legacy of 300 l. to a Feme Covert C. Equ. without creating any separate Trust or 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 Affignment 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 Executor, and dies; the Estate for Life drops. The Court decreed, that as the Husband had made a good Affignment of it in Equity, (tho' as a Choise en Action it was not assignable at Law) that she should be answerable to the Children. Mich. 1714. Abr. Equ. Cales 45, pl. 9. Atkins v. Daws- beny.

34. A Mortgage in Fee to the Wife the Husband alone cannot dispose of, and therefore if the Husband without her joining, affigns such Mortgage, and dies, the Effece, 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 Lata- tick; Feme married while in Committee's Hands, and tho' the Compound had laid Hands on her Effece to secure her a Settlement, yet the dying in the Life of the Husband, tho' no Settlement made, and he having affigned
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C. Cowper, and took the same Diversety. assigned it in her Life, it was held good; Per Cowper C. Ch. Pree, 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. Bull. 118. Pach. 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. Bull. 118. Pach. 9 Jac.

3. A Feme sole conveyed Leases to Trustees, and after married J. S. the received the Rents, and bought Jewels with part, and part the 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 Cafe.

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 Cafe.

(G) What shall be a Disposition.

2. The Baron may forfeit the Land of the Feme. 7 H. 6. 2. b. If the Wife and this shall bind the Feme. 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. 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 P. 4. 19. b. the Baron by the Right of the Feme, and the Baron grants a Rent out thereof, and dies, the Feme shall hold it. S. C. —

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. S. C. —

6. [So] If a Baron be possessed of a Term in the Right of the Baron, Feme, and Damages are recovered against him, Execution cannot be upon the Term of the Feme; for the comes paramount the Charge. * 9 P. 6. 32. b. Contra 1 7 H. 6. 2.

7. But otherwise if it is if it be extended thereupon, or upon a Rents cognisance in the Life of the Baron. 9 H. 6. 52. b. S. P. does not appear. ——Fitch. Charge, pl. 2. cites S. C. but S. P. does not appear. ——Fitch. 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, he extended, and after the Baron grants S. C. but dies, the Feme shall have the Residue, after the Extent incurred. S. P. does not appear. ——Fitch.

9. If the Baron grants the Herbage or Pasture of this Land, which he holds with his Feme for Years, and dies, the Grantee shall have the Herbage or Pasture. 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 Eliz. 204. 40. admitted. * Co. Lit. 46. b.


11. But if the Baron reserves a Rent upon the Grant, the shall S. P. per Person not have it, because the comes Paramount the Reservation. Co. Lit. 46. b. But the Executor at the Baron shall have the Rent, contra Perkins, Sect. 834.

Cafe.—For the Rent is not incident to the Reversion, because the was no Party to the Lease. Co. Litt. 46. b. ——S. C. cited Arg. 2 Lev. 100. ——S. P. in a Nata, 2 Vern. 63. at the End of pl. 55. cites Co. Litt. 46. b.
The Wife shall have it as anned to the Reversion or Term which she had; but the Reporter says Quere; for the other Justices delivered no Opinion. Cro. E. 279. pl. 5. Paich. B.R. in Lofus's Calf.—See (C. a) Blaxton v. Heath.

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 the Lease shall have the Reversion, and not the Executor of the Baron. Pope Hain's Reports, 4. adjudged. It as a Jointenancy in the Baron and Feme — S. C. cited Mo. 355. pl. 514. in a Note there, as adjudged that the Lease was good. — S. C. cited by Gawdy J. as adjudged accordingly. 1 Rep. 155. a.

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.

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 Fac. B. between Radford and Young, per Cowtiam.

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. Paich. 12 Fac. B. per two Justices.

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.

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.

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.

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.

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

22. If
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22. If Baron has a Term in Right of the Wife as Executor, and he Dal. 32. pl. * purchases the Reversion, the Term is extinct as to the Feme, if the survivor; but in respect of all Strangers the shall make Account, as Affects in her Hands. Held by all the Justices. Mo. 54. pl. 157. Paotch. 5 * Because the Husband has done an Act which destroys the Term, viz. the Purchase. But intermarrying with him in Reversion does not distinguish 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. Patch. 13 Eliz. C. B.

23. Lease for Years assigned the Term to the Wife of the Leesor and a Stranger; and afterwards the Leesor bargained and sold the Land for Money by Died 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 Cafe 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.

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 Leesor 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. 595. 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 Leesor afterwards inoffends the Baron, who died seised. The Feme survives and claims the Term, and bewixt 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 surrendered 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 Co-tenant for further Assurance, and was adjudged that that alter’d the Property. Cited Vern. R. 396. pl. 366. Paotch. 1686. as the Case of S. P. Nordon v. Levet.

S. P.—Frem. Rep. 442. pl. 598. S. C. is not S. P.

27. If Baron * grants a Rent-charge out of a Term which he has in Right * Co. Lit. 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. Paotch. 1686.

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

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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 the is in by Survivorship before the Will can take Place. Arg. Ch. Prec. 120. Trin. 1700.

In Cafe of Burnett v. Kinnamon.

The Wife was to Party to the Articles, and soon after died without Issue, and described for the Administrator De Bonis non of the Wife.

S. C.—S. C. cited Arg. G.


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 absoluted Power over the Mortgage, but as 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.


31. The Wife had a Term, the Baron made an Underlease for ten Years, and upon borrowing Money of Feme, 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. i. Steed v. Cragh at the Rolls.

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

F.N.B. 121. 1. If a Feme having a Rent for Life takes Baron and dies, the Baron shall have the Arrearages incurred during the Coverture. *10 P. 6. 11, 12. Co. 4. Dignel 51.

*10 P. 6. 11, 12. Co. 4. Dignel 51.


See the Exposition of this Statute 52 H. 8. cap. 37. S. 3. at Tit. Rent (S. b.) Fol. 544.

4. If a Feme leaves for Years, rendering Rent, and, after takes Husband, and dies; the Baron shall have the Arrearages incurred during the Coverture. 10 P. 6. 11.

5. If a Feme Seigniores takes Baron, the Rent incurs, and hath Issue and dies, by which the Baron is Tenant by the Curtsey of the Seigniory, he shall have the said Arrear incurred during the Coverture. Kell. incerti Temporis 118. b.
6. If Baron and Feme, in the Right of the Feme, be seized of an Advowson and the Church becomes void, and after the Feme dies, the Baron shall present to this Church; for this cannot be granted over, yet it is not merely a Thing in Action. Co. Lit. 120.

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. Lit. 32. a. B. 2. H. 4. This is against Lord. 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. Patch. 22 Jac. C. B. Blunt & al' v. Hutchinson.

7. But if a Man be bound to a Feme covert, and the 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 * Hauchett's Right of the Feme, and after the Feme dies, the Interest of the Lease is presently, by Law, vested in the Husband, and he 25. P. in shall have it, and not the Administrator of the Feme. * D. 8 the Time of Eliz. 251. 90. per Curtiss adjudg'd, Comm. Wrottesley & Adams, 192. b. Curtiss, b. Co. Lit. 46. b.

This Entry was adjudged unlawful, because it was the Wife's Term; but otherwise it had been, if the Wife had been 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 Leaves 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 real in her Right. Co. Lit. 299. b. 500.——All Chattells 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. Lit. 251. b.

Chattels real consisting merely 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 Rights of Ward, a Future Marriage, a Forfeiture of Marriage, and the like, whereunto the Wife was intituled before the Marriage. Co. Lit. 551. 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, although he reduces them not into Possession in her Life-time; but if the Wife survives him, the shall have them. As if the Husband be seized of Rent-Services, 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 Arrears; but if the Wife survive the Husband, the shall have them, and not the Executors of the Husband. Co. Lit. 551. 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 furnished to the Husband. Patch. 12 Jac. B. be tween Young and Radford, adjudged. Rob. Reports 4.

B. Aton cites 20 Eliz. on a special Verdict before Popham Ch. J. but the same was not received

(G) 15 S. C.

12. If
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 Prochaim Amy. D. 3 Et. 156.

13. If a Term for Years be granted in Truft to the Use of a Feme Cover, the Baron shall not have this Truft after the Death of the Feme. Patch. 10 Jac. 5. per Coke, to be adjudged in Waterhouse's Cafe.

14. If Tenant in Dover takes a second Baron, and they two lease the Land which he had to her Dower of the Dowment of her first Baron for Years, rendering 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 Dover 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, rendering Rent to him, his Executors, and Assigns, and dies, tho' the Wife survives, the shall not have the Rent, because she comes in paramount the Lease. 4 Lc. 185. pl. 285. Mich. 29 Eliz. cites it as resolved by Popham Ch. J. on a special Verdict in the County of Somerset, 29 Eliz. Anon.

16. A Truxt 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.

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.

18. If a Feme sole be possessed of a Chattel real, and be thereof disposed, 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 the inter-marries, the Law makes no Gift of them to the Husband, altho' he survived her. Co. Litt. 351 a.
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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 Priuity, and so it has been resolved by the Justices. Co. Litt. 351. a.

21. If Husband dies before he seizes an Estate 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 dies, and if the hereditary 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 the represented the Person of Went Off. the Testator. Went. Off. Ex. 86, 87.

23. A Bond was given to a Feme sole, who takes Baron, and dies, J. S. No Debts due to the Wife shall go to the Husband for it was a Thing in Action, and therefore the Plea is not good. Sty. by Virtue of the Inter-marriage, if the dies before they are recovered, but her Administrator will be intituled 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 Chas. in Admin. Agreed. 3 Mod. 182. Hill. 3 Jac. 2. B. R. in Cæs of Obrin 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 over 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. Hurit 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 over Administration, and the Legacy was decreed to him. Fin. R. 9.1. 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 intituled 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.

(1) What Charge of the Baron shall bind the Feme.

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


* cites S. C. accordingly.—(F) pl. 5. S. C. 
‡ Br. Charge, pl. 41. and in pl. 1. ibid. 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 Charnle, and yet he cannot charge it; and yet to the King it may be charged. Br. Forfeiture de Terres, pl. 69. cites H. 6. 1.
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If a Man be poss'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 Esp. 2. Act del Rep. 114.

If the Husband be poss'd of a Term for Years in Right of his Wife, it may be held 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. 238. in Case of Miles v. Williams.

—See (G) pl. 6.

5. If the Baron be indebted to the King, and purchaseth 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 All. 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 intituled 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 be and his Feme purchaseth Land for 60 Years, and he dies, the Feme shall be charged. Br. Jointenants, pl. 30. cites 50 All. 5.

8. And yet if A. be indebted to the King, and A. and B. purchases jointly in Fee, and A. dies, and B. survives, he shall not be charged. Note the Diversity; for the other is only a Chattell, all which the Baron may alien without his Feme. Br. Jointenants, pl. 30. cites 50 All. 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 compelled 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 Petronel v. Hickman.

See Tit. Disclaimer (C)

10. An Avocary 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 Proclamation, 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. 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 the avoids it by her Entry; but as to the Right, it determined by the Death of the Husband. Arg. 3 Bulk. 272. cites PL. 6. 69. b. [but it should be 137. b.] 6 E. 6.] in Browning and Befeton's Case; and cites 9 H. 6. 43. and 28 H. 8. Dyer. Fol. 28. [b. 29. a.]

13. In Debt on Bend 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
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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 rendering Rent, it had been a good Deed of the Wife, because the might have afterwards accepted the Rent, and made the Deed good. Cro. E. 769. pl. 12. Trin. 42 Eliz. B. R. Ship with v. Steed.

14. Husband devided 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 Leafes, 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 had set 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 the account for all the Profits that herself or her Husband took; for the shall be paid to them as Guardian till 14, and after as Bailiff, and was to answer what her Husband took as in a Devolution. 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 Leafes, tho' for Fines and full Rents, the Court would not make them good, because she could not set or lease Lands. Chan. Cases, 126. Patch. 21. Car. 2. Hele v. Stowell.

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

16. Devise of £3,000 l. to be invested in Land for the Benefit of the Wife of &. for her Life, and afterwards to her Children, and the Intereft 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 Intereft to be paid to the Trustee to be laid out in Land and settled according to the Will. 2 Vern. R. 96. Van-denanker 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 Relidue, 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 Affignee shall bring the Action in his own Name. Per Parker Ch. J. Wms's. Rep. 255. Trin. 1714. in Case of Miles v. Williams.

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. Welley.

20. If the Wife had recovered a Judgment at Law, and Eligit thereupon, the Husband would have had a Power to assign that Intereft of the Wife, for or without Consideration &c. in Trust for himself or as he pleased; so by Pa-
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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. Lt. Hardwick MS. Rep. Feb. 26. 1734. in the Case of Fashall v. Lt. Carteret & al'.

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

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


3. If Land is given to a Feme upon Condition to sell, and to distribube the Money &c. for the Soul of the Feoffor, she takes Baron, and the Baron and Feme sell and distribube the Money, and the Baron dies, the Feme shall not have Cui in Vita nor Subpoena; 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 Feme. Br. Cui in Vita, pl. 16. cites 34 E. 3.

4. The Feme cannot waive her Interest gained by the Difficu in during the Life of the Baron. Br. Affile, pl. 330. cites 35 Alb. 5.

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

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

Note, That a Sale or Gift to a Feme Coverture, or a Sale of the Goods of the Baron by a Feme Coverture is good, if the Baron agrees, or does not disagree; per Cur. Br. Contract, pl. 5. cites 27. H. 8. 25.

8. Tenant for Life, Remainder to his Daughter and Heir apparent, who was a Feme Coverture, in Feme. The Father made a Feoffment in Feme with Warranty, and afterwards levied a Feme with Warranty to certain Uses, and died. The Daughter for herself, and in the Name of her Husband, and by his Consent, entered within the Year, and claim'd the Inheritance. The Justices held, that the Entry by the Wife alone, without
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without her Husband, he agreeing to it, was good; and that the Warrantye defecting upon her during the Couverture, did not bind her, because her Entry was lawful. Cro. Eliz. 72. pl. 28. Mich. 29 & 30 Eliz.


9. Affent 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 her, is not a justification to T. being held not good. Pl. 318. S. C. F. v. F.'s Successor, contra Gaudy J. Cro. E. 245. pl. 5. Mich. 33 & 34 Eliz.


11. She cannot take an Executorship upon her without the Consent of See 2 H. 7. 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 freed, they cannot say that the never was Executor, and he doubted whether her administering without the Husband's Privity and Affent, tho' the Will be not proved, do not conclude her Husband as well as herfelf 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 Executor during Couverture, refuses, but yet the Husband will administer, she is bound during his Life, tho' after his Death the may refuse. See Wm. Off. Executor, 202. to 205.

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; Provifio, 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 Provifio. Godd. 327. pl. 419. Patch. 21 Jac. B. R. Anon.

13. Lands were devised by the Baron to his Feme, to dispose at her Will Jo. 157. pl. 6. and Pleasure, and to give it to which of his Sons she should please. She 3. Trin. 2 Car. B. R. Daniel v. Upley, S. C. adjudged another Husband. Adjudged that the Feme, notwithstanding the Coverture, might execute the Power; for the Son is in by the Devilor. Noy 80. Daniel v. Upton.

Lat. 10. 99, & 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 the marriages, yet this Power continues in her, and is not transferred to the Husband, and by her Nomination she doe not any ways charge the Lands by virtue of any Interest arising from her, but that is done by the Will of the Testator. Plin. Rep. 346. Patch. 50 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 Couverture; so Feoffment to a Feme Covert, upon Condition to enfeoff J. S. Admitted. Jo. 138. pl. 3. Trin. 2 Car. B. R. in Caffe of Daniel v. Ubley.

15. If
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But if the
is Feoffee,
upon Condition to convey it over, the shall be bound by her Feoffment, because she was but an Infeoffment.

15. If Feoffment be made to a Feme Covert upon Trust, and Confidence to convey it to J. S. Per Jones J. he 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. Quere. 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 54 E. 3. Cite 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 the 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. 38; Trin. 30 Car. 2. Wall v. Eastmend & Hakes.


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 change the Feme after the Death of the Husband.

So in Tref-

1. If a Recovery be in an Allsi fur Dissentin against them, Execu-

tion shall be against the Feme after the Death of her Husband, as well for the Damages as for the Principal. 39 D. 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 Allsi or Trefpafs. 39 D. 6. 45.

Mod. 66. pl. 14. S. C. & S. P. agreed accordingly by the Counsel for the Defendant, but infided on a Fault in the Pleadings.—Ibid. 291. pl. 37. S. C. & S. P. agreed by the Counsel of both Sides, and alfo by the Court.—Sid. 466. pl. 2. S. C. and in a Note at the End says, it seems to be admitted by all that Action of Covenant lies upon the Concessfit in the Fine without a Deed. Quod

3. Baron and Feme levied a Fine fur Concessit of Lands with Warrant to W. The Baron died. W. is ejected. The Court held, that Covenant lies against the Feme upon this Warrant 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
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(L. 2) Bound by her own Act. By Relation.

1. If Feme sole commands f. 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 Med. 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. 13 Ed. 3. 23. 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 sole. After Marriage that Feme received the Rent of the Lease, who had no Notice of the Coverture, (by any thing which appeared) nor was it re- solved, 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.

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 the usually received and paid Money for him, it was ordered that he acknowledge Satisfaction thereupon. Chan. Cases 38. Mich. 15 Car. 2. bis. by the Master of the Rolls. Scabourne v. Blackstone.

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 Beaches. 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 Affent; for it rests till he dissent; but where the Wife had an Estate before, an Affent is necessary, because it cannot be devised 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 £1. per Annun 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. Lucw. 413. Hill. 3 & 4 Jac. 2. Tonfhill v. Williamson.

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

* Trin. 11 Jac. in Mary Portington's Case. 43. 18 P. 6. 27. * 17 Aff. 17.

* Br. Fines levied, pl. * 17 Aff. 17.
†—Br. Couver, pl. 77. cites S. C. — Fitzh. Eltollip, pl. 153. cites S. C. — Rep. S. a. b. S. P. per Cur. Mich. 28 & 20 Eliz. in the Court of Wards, in the Earl of Bedford's Cafe, and the Comitee shall not have the Land; for by the Entry of the Baron the entire ESTATE of the Comitee is defeated, and the ancient ESTATE of the Feme re-vested in her, and the Baron feized of the entire ESTATE as in Right of his Wife, and says, that with this agrees 17 E. 2. 52. b. 11 Aff. 17. 7 H. 4. 23. 2 R. 5. 9 H. 6. 52. — 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 Natur in a special kind, and therefore allows a Fine levied by the Husband and the Wife; because she is examined of her FreeWill judicially by an authentic Person, trusted by the Law, and by the King's Writ, and to be taken in a fort as a sole Woman, as also when the 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 the 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. Quere,
3. But, if a Feme Covert suffer a common Recovery, if this
binds the Feme after the Death of the Husband, if he does not a-
void it during Coverture.

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.

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 Reserv

to be sold by her, she cannot make a Deed, and yet her Sale is good with-
out Deed without any Atornment, nor can she levy a Fine; and the
Reason seems to be, inasmuch as when the Sale is made it passes by the

6. A Feme Covert bought Goods for 10l. the Baron paid the 10l. and
took the Goods; the Vendor brought Trepass; Per Yaxeley, the Sale is
void, by reason that the who bought is a Feme Covert. But per Red; the
Buying by her is good, because her Baron agreed to it. Fineux con-
tra; 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; if I give
Goods to a Feme Covert, it is good if the Baron agrees; but if a * S. P. Br.
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

7. And if I command my Feme to buy Things necessary, and the buys it,
Contract, pl. this shall bind me by the general Command, tho' I did not express to her

8. And if my Feme buys a Thing for my House, as Bread &c. and S. P. per
I have no Knowledge of it, there, tho' it was expended in my House, I shall Fineux Ch.
not be thereof charged. Quod Nota bene. Ibid.

9. Baron and Feme levied a Fine of the Wife's Lands to the Use of them-

selves 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 Hus-
band, (though made by her alone while she was Covert) by Reafon of

10. The Baron being gone beyond Sea, the Feme levies a Fine of her.S. C. ad-

other this had avoided the whole Fine? And held that it had; for what
Aet sooner he doth in disaffirmance of the Fine, shall avoid it. Freem.

(N. 2) What Aet 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 disa-
agree thereto, and deport the whole Eiitate; but if he neither agrees nor dis-
agrees, the Purchase is good. But after his Death, though her Hus-
band agreed therunto, yet the 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. 5. a. at the
Top.

But a Letter of Attorney by Baron and Feme to deliver a Lease upon
the Land, is merely void as to the Wife. Yelv. 1. Patch. 44 Eliz.
B. R. Wilton v. Riche.

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. Patch. 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,
having 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 Content made the Will, and thereby bequeathed 50 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.


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.

Cham. Cases 50. S. C. at the Rolls, says that there appeared some probable Evidence that the Husband

I. 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. to 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
Baron and Feme.

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 did close 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 Matter of the Rolls said that this was perfectly a new Case; for here the 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 Case 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 the 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 the shall be bound. Ch. Prec. 328. pl. 249. Hill. 1711. Bell v. Hyde.

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

1. If they are Diffidors, the Feme cannot take the Profits with her Husband, but the Baron alone in his own Right, and the Right of his Feme. 39 V. 6. 44. Citia.

&c. pl. 15. cites S. C.—3r. Maintenance de Brief, pl. 31. cites S. C.—Br. Parnour, pl. 24. cites 4 E. 4. 50. S. P. by Danby & al.—But the Feme Covert cannot take the Profits, yet the alleging 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. Difjelfin, (D) (E) (F) (G).

2. If Baron and Feme lease for Years the Land of the Feme, this is the Lease of both. 7 V. 4. 15.


(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
may be given in Mitigation of Damages. 12 Mod. 232. Mitch. 10 W. 3. Coot v. Berry.

2. If Alliety be committed with another Man’s Wife without any Force, but by her own Consent, the Husband may have Affault 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 Affault 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 Usarens rapit, and not to lay it Per quod Confortium amissi; per Holt Ch. J. and per Cur. accordingly; for that the Offence is not merely spiritual. 7 Mod. 81. Mich. 7 Ann. B. R. in Case of Rigault v. Gallifard.

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

WHERE the Feme is examined by Writ, the shall be bound, else not. Co. 10. 43.

1. In Alliety of Novel Lif.

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

See Tit. Finis (T)

3. Baron and Feme suffer a common Recovery, this binds the Feme; for she is examined in this. Co. 10. 43; f 23 H. 8. S. 37.

Com. Eyre and Snow, 515.

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.

of the Feme.

It shall not be inroll’d, because it is not the Deed. 10. 43.

Br. Coverture, pl. 47. cites 7 E. 4. 8. — Br. Faits inroll’d, pl. 11. cites S.C.— Fitch. Edoppel. 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 the be bound with her Baron in Statue-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.
5. If the Baron and Feme are bound in an Obligation of 100 l. for a Re-
lease made to them of the Land de jure Usoris, and the Baron dies, this
Obligation shall bind the Feme, because it was made for her Releafe, be-
which is a Benefit to her; per Belknap. Quere; for it was not adjudg'd.
Br. Baron and Feme, pl. 77. cites 44 E. 3. 33.

6. If a Man leaves to Baron and Feme for Years rendering Rent, and
dies, the Feme shall be bound by it; contrary of other collateral Cove-
nant. Br. Baron and Feme, pl. 73. cites 45 E. 3. 11.

7. Quem juris emanat by Baron and Feme against Tenant for Life, upon
Fine levied of the Reversion, who came and said, that styling to the him the
Advantage of his Deed of Leafe, which he said's forth, which was with-
out Impeachment of Wafe, he is ready to attorn; and the Advantage to him
was full and, 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. Couverture, pl. 10. cites 45 E. 3. 11.

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

9. A Man was infeffed to the Use of a Feme sole, who takes an Huf-
band. They both for Money sell the Land to B. who pays it to the
Wife, and she and her Husband do pray the Feeffee to make Efflate to B.
Afterwards her Husband dies. Now, by the Chancellor and all the Ju-
Jitices, the shall have Aid against the first Feeffee by Subpoena, to fa-
tify her for the Land; and if the 2d Feeffee were Coniunct, a Subpoena
shall be against him for the Land; for all that the Wife did during her
Couverture (as they said) shall be taken to be done for fear of the Husband.

10. Husband and Wife, seised of Lands to them and the Heirs of the S. C. cited
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 Cus-
tom of London, which is as binding as a Fine at Common Law, and
that it should be to the Use of the Receivers, until 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 Husband. The Leafe
was made accordingly, and afterwards the Husband died. All the Judges
were of Opinion, that the Wife shall not avoid this Leafe, because her
former Estate was gone and extinguished by the Recovery; and Judg-
ment accordingly; and the Reporter says that all the Juities of B. R. were
of the same Opinion. Dyer 290. a. pl. 61. Trin. 12 Eliz. Luther
v. Banbong.

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, that
Warbunton, Walesley, 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 Husband. The Leafe
was made accordingly, and afterwards the Husband died. All the Judges
were of Opinion, that the Wife shall not avoid this Leafe, because her
former Estate was gone and extinguished by the Recovery; and Judg-
ment accordingly; and the Reporter says that all the Juities of B. R. were
of the same Opinion. Dyer 290. a. pl. 61. Trin. 12 Eliz. Luther
v. Banbong.

12. A. having 3 Daughters, B. C. and D. entails his Land upon them.
Afterwards C. married, and being a Feme Covert, agreed with Consent of
her
A Feme Covert by Durefs joins in a Lease with her Husband, the shall be bound by it; Per Manwood J. 3 Le. 72. pl. 110. Hill. 20 Eliz.

2. Baron and Feme feited 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 400l. 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. Nettlehip.

4. Jointref pays off a Mortgage was decreed to hold over till she or her Executor be satisfied, and Interest to be allowed her. Chan. Cakes 271. Hill. 27 & 28 Car. 2. Cornith v. Maw.

5. A. and his Wife feited of Lands in the Right of the Wife by Fine and Deed, mortgaged 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 Pinch 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. Pach. 34 Car. 2. Rault on v. Sacheverell.

6. Where the Wife joined in a Fine for conceit of her Jointure, being Hourses 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 Deed of Conusse and part with her Interest; but there is a resulting Trust for her when the Husband, 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. Pach. 34 Car. 2. Brond v. Brond, and ibid. 161. Hill. 35 & 36 Car. 2. Broad v. Broad.

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 estabb'd. The Jointure shall be made good out of the Husband's personal Estate, there being no Creditors in the Cafe, 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 Promiss by the Wife to that Purpose, súbsequent to the first original Agreement, be obliging in that Behall. 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 the Title deserv'd 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 Can. 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. Pach. 1702. Earl of Huntington v. Countess of Huntington.

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
to the Judgment in Dom. Proc. in the Case of Ld. and Lady Hunting- 

11. The Wife joined with her Husband in a Fine to raise 400l. 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 

They died indebted by simple Contract. The Aliens 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 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. Win's Rep Mich. 
1714. S.C.

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

Br. Baron 
1. The Baron may have an Action alone upon 5 R. 2. for en-
tering into the Land of the Feme. 38 H. 6. 3. adjudged.
and Feme, 
pl. 57. cites 
S. C. for nothing is to be recovered but Damages only. — Br. Action for the Statute, pl. 17. cites 
8 H. 6. 4. S. C. & S. P. accordingly; but Brooke says Quare, 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 
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 Patch. 4 E. 4. 14.

2. He shall have a Quare Impedit alone. 38 H. 6. 3. b. agreed. 
Br. Quare 
6. cites S. C. 
that in Qua. Imp. the Plaintiff counted that A. was feied of the Adowson as of Fec, and he took A. 
to Wite, and the Church voided, and he preferred in Jury of A. and had Iffue, and A. died, and the 
Church voided again, and he preferred; and per Cur. because the second Prefentment is not alleg'd 
in Jury Coven, therefore ill; whereupon he amended his Count. Brooke says, Quare Librum. — 
Fitz. Quare Impedit, pl. 85. cites S. C. and Judgment was prayed of the Count, because he did not 
declare that he and his Wife preferred, but only that in Jury Uxor is preferred, whereas the Pref-
entation ought to have been by both; For had the 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 Firthberht says Qua-
re; For that it has been adjudged, that he shall have Action alone &c. — Fitz. Joiner an Action, 
pl. 13. cites S. C. says, he ought to join the Feme in the Action, otherwise the Wife is not good, and 
that so was the Opinion of the whole Court.

The Baron may have Quare Impedit without his Feme; For it is in a Maner Personal. Br. Par-
non &c. pl. 24. cites 4 R. 4. 50.

In Quare Impedit the Feme may join. Hct. 144 Trin. 5 Car. C. B. per Hutton, and yet the Avoid-
9 Jac.

If a next Avoidance be granted to Baron and Feme, the Baron shall have Action alone; Per Hutton 
S. P. Br. Baron and Feme. pl. 25. cites 50 E 3 13. because nothing is to be recovered but the Present-
ment, and not the Adowson: But per Holt, Affice of Darwoun Prefentment shall be brought by both; 
For this is a mixed Action, and the Adowson shall be recovered; but in Quare Impedit, the Preten-
sion 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 Welfinester. 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 Adowson in Right of his 
Feme, and adjudged a good Writ. Thel. Dig. 29. Lib. 2. cap. 5. 12. cites Trin. 50 E 3 13. and 
that so it was adjudged, Mich. 14 H. 4 12. where it was laid by Thirning, that they ought to join in 
Writ of Right of Adowson, and in Affice of Darwoun Prefentment; and that the Opinion of the Court 
was, Trin. 28 H 6. 9. that they ought to join in Quare Impedit also, and says, fee 7 H 3 2. — 
The Husband alone may have Quare Impedit; Per Dyer. Ow. 32. Patch. 4 & 5 P & M. 

3. So
Baron and Feme.

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3. So in Trespafs for taking Charters of the Inheritance of the Feme. * 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. 25. Lib. 2. cap. 5. S. 16. cites S. C. that it was laid, 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 Trespafs alone for a Trespafs upon the Land of his Feme. * 38 H. 6. 3. 7 Ed. 4. 6. well by the Baron alone, of chusing in the Chafe 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. Br. Joiner in Action, pl. 7, cites 45 Eliz. 5. 8. and coticet alone. Br. shall, winder 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. For the Baron may release alone. Br. was adjudged in the same Year, Fol. 16 and 25 de Dono fraud & Marevni inde cava, which he had in Jurie Uxoris, that the Action was well brought by the Baron alone. — Br. Baron and Feme, pl. 16. cites 3. C. accordingly.

Action of Trespafs Quare Clasamr fugit was brought by Baron and Feme, and Felleren 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. Adjournat. 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 Lien of Profits. Her. 1 1 4. by Yelverton, cites 4 Eliz. 2 — Litt. Rep. 253. S. C. cited by Yelverton — In Trespafs they may infer; Per Cur. Bulst. 21. Pauch. 8 Jac. Anon.

Of Trespafs done in the Land of the Feme, the Baron may have Trespafs alone; for if he releases, or recovers, and dies, the Feme shall not have an Action. Per Finch. Br. Baron and Feme, pl. 22. cites 4 Eliz. 5. 9. — Br. Baron and Feme, pl. 50. cites 15 Eliz. 4. 9. S. P. Trespafs may be brought by Baron and Feme, that he broke the Cloce of the Feme dama fata. Br. Baron and Feme, pl. 69. cites 21 H. 6. 50. — The Baron may have Trespafs without his Feme; for it is in a manner Personal. Br. Parnor de Profes, pl. 24. cites 4 Eliz. 2. 50. — In Trespafs Quare Clausam fugit 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. Pauch. 9 Jac. Maynard v. Tow.

7. The Baron alone may have a Decies tantum for taking Money And so he in an Affid brought by him and his Wife. 40 Ed. 3. 33. b. adjudged. Nota. This is a popular Action. But other ways it is e contra.

Quod Noto bene. Br. Joiner in Action, pl. 19. cites 7 H. 4. 2. — Br. Baron and Feme, pl. 30. cites S. C. & S. P. accordingly. — Thel. Dig. 20. Lib. 2. cap. 5. S. 11. cites Trin. 40 Eliz. 3. 33. S. P. and says that such Writ was abated, Pauch. 43 Eliz. 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 Eliz. 3. 16. S. P.

8. Where the Baron himself demises the Land for Years, which he has but where in Right of his Feme, he may maintain Action of Wafe without his Feme; because his Leffee cannot diable the Eitate of his Leffor. Thel. Dig. 30. Lib. 2. cap. 5. S. 31. cites 4 Eliz. 3. It. Darby, Brief 747. the Feme, the Baron alone may have Writ of Debt for the Arreages of the Rent &c. Thel. Dig. 30. Lib. 2. cap. 5. S. 25. cites Pauch. 7 Eliz. 4. 6.

9. For a Battery of the Feme before the Coverture, they shall both join in the Action; but Quere of a Battery after the Coverture. Br. Joiner in Action, pl. 54. cites 22 All. 87.

10. He
Baron and Feme.

10. He who is seized of a Seigniory of Homage, Fealty, Escueage, Rent, and Suit of Court in Jure Uxorius, may avoid the Taking of the Diritels for all these Services, except Homage, in his own Name, without naming his Feme, though he has no litle by her. Br. Diritels, pl. 33, cites 27 Alf. 51.

Br. Petition, pl. 17, cites S. C. accordingly.

Br. Chalwell, pl. 26. S. P. and cites S. C. and says that therefore it is a Chattel vested in the Baron in Jure propria.

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 Alf. 11.

12. Upon a Controil 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. 4^3 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.


15. Where the Baron and Feme had recovered Damages in Writ of Con- nage, 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.

Cafe in Na- 16. The Baron may have Conspiration and the like without his ture of Con- Feme, for it is in a manner Personial. Br. Farnor de Profits, pl. 24, spiracy was cites 4 E. 4. 30. brought by Husband and Wife against J. S. for that he falsely and maliciously impedit 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 Conspiration to indict the Wife, they might join well enough, and three Judges were of that Opinion; but Crooke J. e contra. Jo. 450. pl. 1. Trin. 15 Car. B R.—Cro. C. 553. pl. 8. Dalby v. Dorshall, S. C. Berkley J. held that it was a severall Wrong, and therefore they could not join; but Crooke J. e contra, because it was grounded upon one untrue 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 damned; wherefore ex turris abstinentius, adjutorum.—Mar. 47. pl. 73. Trin. i 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.

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 Uxorius &c, and his Feme shall not be named with him in Action personal; for when the Court commands him to do his Office
Baron and Feme.

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Office &c. they don't say Warden of the Fleet in Jure Uxorix, 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 Br. Joiner the Lord in Right of his Feme; and it was argued that the Baron alone in Action, ought to have the Action, and awarded that the Action is well brought. S. C. in Name or both quod Nata. And per Littleton, it is well brought. P. by also in the Name of the Baron only. Br. Baron and Feme, pl. 50 cites Dier, Patch. 15 E. 4. 9.

—The Husband restrained for Arrears of Rent due to the Wife dam'd fide; 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 dam'd fide, they must both join in the Action. Moor 422. pl. 94. Mach. 57 & 59 Eliz. Fenner v. Plasket. —— Cro. E 459. (his) pl. 2. 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 to her before the Coverture, but it is at his Election.

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

21. Baron brought an Action for the Battery of his Wife, Per quod 4 Le. 88. pl. negoia fta infella remanerunt, and had Judgment to recover. Cro. J. 187. 502. pl. 11. says a Precedent was shewn in 28 Eliz. B. R. Cholmley's C. B. Cholm- Cafe. ley 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 Cafe, that such an Action was adjudged good.

22. Where the Feme is Administratrix, the Suit must be in both their Names, and they shall be named Administrators; for by the Inter- marriage the Husband hath Authority to intermeddle with the Goods as well as the Wife; but in the Declaration all the Special Matter must be Defended, for Goods taken out of them by the Plaintiff. The Wife was Administratrix. Mr. Raymond moved in Arreft 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 Cafe; and cited a Cafe 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 Cafe. Per Povel J in the Cafe 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 owner Dirit, 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 & also 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.

24. In Battery the Plaintiff declared, that on such a Day the Defen- dant assaulted and beat his Wife. This Action was brought by the Hub- band after the Death of his Wife, and it being a personal Wrong, is dead with the Person; and if the had been living, the Husband alone could not have the Action, because Damages must be given for the Tort of- fered to the Body of his Wife. Quod suit concemium. Yelv. 89. Trin. 4 Jac. B. R. Higgins v. Butcher.

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

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 Cafe.

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 not appear. 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. Patch. 14 Jac. B. R. Bret v. Cumberland.

27. Trespass of Assault, and wounding of the Plaintiff, nesc-nos of assaulting and beating the Plaintiff’s Wife, per quod conformatum Uxoris sic aemilit 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 Loses, that he left 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.

28. The Husband brought an Action, for that the Defendant made an Assault on his Wife, & silum verberavit, and her finul cum one Gown &c. abductit &c. & detinnit &c. for five Years, per quod conformatum non conditio &c. et animili in rebus domibus amas, quae habere debuit. The Plaintiff had a Verdict and 500 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 Julices 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 Loses and Injury done to the Husband, in depriving him of the Company and Affiance 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. Scyflor.

29. Cafe
29. Cafe was brought by Baron and Feme, for Words spoke of the Feme; and Judgment was given in C.B. that the Husband and Wife shall have Action for Words spoken of the Wife, for quid the Husband left 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 Cafe which he remember'd. 2 Ed. Raym. Rep. 1072. Hill. 2 Ann. in Cafe of Ruffel v. Corne. — Gould J. said he remember'd the same Cafe, ibid.

Damages. Sid. 246. 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 quid the Husband left 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 Cafe which he remember'd. 2 Ed. Raym. Rep. 1072. Hill. 2 Ann. in Cafe of Ruffel v. Corne. — Gould J. said he remember'd the same Cafe, ibid.

32. If an Award be made, That 71. shall be paid to Feme Covert, and 12 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 alis. Litt. Rep. 13. Hill. 2 Car. B. C.

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. Pach. 26 Car. 2. C. B. Miles's Cafe.


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 Chief Justice, who said he remember'd this as an Authority in old Book. 2 Mod. 217. Pach. 29 Car. 2. C. B.

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 Argument the whole Court gave Judgment for the Plaintiff. 3 Lev. 403. Mich. 6 W. & M. in C. B. Howell v. Maine.

34. Trover brought by the Husband for Money paid by the Plaintiff's Wife to the Defendant, for Land covert'd by the Defendant to the Plaintiff. S. C. "If a Bond be due to the Wife, the Husband may sue alone without joining the Wife; per Cur. Vern. 396. pl. 366. Pach. 1686. — See (T) 43 B. 3. 12.

35. Husband of Feme executrix gives a new Day to a Debtor of Tef. The Wife tator'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, for
Baron and Feme.

The was no Party to the Agreement 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. 465. 3d. C. and as an Authority in Point was cited Yelv. S. Leav. Minns. 12 Mod. 277. 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 Devallavit 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. 4.

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

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.

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

* S. C. cited Arg. Litt. 375. — See (Q.) pl. 3. S. C. — Thel. Dig. 50. 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 Tract 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 58 H. 6. 25.

+ 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 settled in Jure Uxorius make Lease for Years, rendering Rent, they may join in Action of Debt, or the Baron may have Debt alone if he will. Br. Joiner in Action. pl. 83. 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 dam sola, the Baron and Feme must join in Action. Mo. 422. pl. 354. Mich. 57: & 38 Eliz. in Cafe of Femner v. Plasket. — The Husband alone brought Debt on a Bond made to the Feme dam sola, and the Court held it ill; for if Caufe of Action arise before Coverture, the it be but Trespass where Damages only are recoverable, they may join. Keb. 440. pl. 32. Hill. 14 & 15 Car. 2. B. R. Hardy v. Robinson. — Litt. Rep. 375. Arg. cites J. H. 7. as to the Obligation, and 22 R. 2. Brief 955 as to Trespass, accordingly.

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. 34. pl. 7. Powell v. Maine. — 10 Mod. 163. Arg. says, that the Husband cannot sue alone upon a Bond given to the Wife dam sola. — Ow. 82. Patch. 48 & 8 P. & M. Arg. 159, that she shall join; but if a Right of Action accrues after Marriage, she shall not.

4. Where the Baron and Feme are by Default the Land taid to the Feme, they shall have the Quad et devores jointly, notwithstanding, that the Baron had nothing but in Right of his Feme. Thel. Dig. 50. Lib. 2. cap. 5. S. 33. cites Hill 5 E. 3. 175. and that so agrees Mich. 29 E. 3. 61. where the loft by Default before the Coverture. But says the contrary was adjudged 4 E. 3. 155. but contra Legem.

5. After against several, one pleaded jointure with his Feme by Deed &c. not named, to which the other jointed, that he who pleaded jointure...

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ey had nothing the Day of the Writ purchased, but another was Tenant, which the other could not deny, and therefore the Affife was awarded without making the Feme Party; Quod Nota. Br. Jointenaney, pl. 32. cites 12 Att. 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 Wafe. Thel. Dig. 30. Lib. 2. cap. 5. S. 30. cites Hill 17 E. 3. 17.

7. Champerly was brought by the Baron alone, for that the Defendant maintained J. N. against the Plaintiff in Affife, by which the now Plaintiff and his Feme, Tenants in Affife, left the Land, to the Damage of 1000 S. C, accord- Marks, and awarded good for the Baron alone without his Feme. Br.ingly; for nothing is to be reco-

nered but only Damages.—2 Infl. 165. S. P. and cites S. C.

8. Where the Baron and Feme lease the Land of the Feme for Years, ibid. S. 20. they ought to join in Writ of Wafe. Thel. Dig. 32. Lib. 2. cap. 5. S. 32. cites Hill 7 H. 4. 227.

14 H. 5. Brief 282. 10 E. 5. 525. 13 E. 5. 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 Br. Covert, without naming the Baron, notwithstanding that the Fene was le-

ved to her when she was sole; Quod Nota. Br. Coverture, pl. 16. ibid. S. 76. cites S. C.

—Br. Quid juris clamat, pl. 52. cites S. C.


12. One who is Warden of the Fleet in Right of his Feme shall have ingly. Bill of Trespass by the Privilege of the Place, without naming his Feme.

Theil. Dig. 32. Lib. 2. cap. 5. S. 32. cites Mich. 9 E. 4. 43.

13. Action against a Feme covert who appeared to it, because the did if a Feme co-

not know if her Baron (being beyond Sea) was alive or not, and was con-

demned upon Plea. The Baron came back; they shall have Writ of Error, and shew the Matter aforesaid, and it lies well; by all the Jutti-


Br. Baron and Feme, pl. 61. cites 18 E. 4. * 5. This is misprinted, and should be 4. 2. pl. 25. ——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. 5. 24. Error. 10. 22 H. 6. 51. 17 Att. 17. 5 E. 5. Per sua Servitia 16. 20 or 21 E. 3. in Quid Juris clamat, fol. 15.

A Feme covert brings a Writ of Error of a Judgment against herself had during Coverture, and the Judgment was affirmed, because the might have pleaded it to the Action; otherwise if the Husband had joined in the Writ of Error. Cumb. 382. Trin. 7 W. 3. B. R. Strike v. Dikes.

14. And if she be outlawd, they shall join in Writ of Error, other-

wife it cannot be reversed, and if he will not, this is a Divorce of a Shrew. Br. Error, pl. 173. cites 18 E. 4. 4.

15. It was adjudged that Baron and Feme shall join in Ejaculate Aijes in Ejaculate the Feme may join, Hert. 44. Per Hitcham, Trin. 15 Cap.


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

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 & Difficult. Mo. 5. pl. 15. in a Note, cites it as resolved, 5 E. 6. Lane v. Andrews.


18. Writ of Mifpr in baron and Feme, supposing that both were distressed, 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 Difficult 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, and in an Action of Trespass they may sever. Bull. 21. Pach. 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. Bull. 21. Pach. 8 Jac. Anon.

21. If a Lease be made by Husband and Wife, of the Land of the Wife, rendring Rent, in an Action for the Rent, the Baron alone shall have the Action for the Rent against; per Hutton & Yelverton J. of Levele.


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

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 Dodridge J. to which Coke Ch. J. agreed, and said it was true and a good Ground. 3 Bullt. 164. Pach. 14 Jac.


So where the Baron was beyond Sea. Toth. 139. cites 31 and 32 Eliz. Farewell v. Colton. — Ibid. 160. cites 11 Car. Portman v. Popham.

25. Adovisien 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
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but in this Case the Church was full before the Presentation; fed Adjourn-

26. A Feme Covert cannot sue unless there be a Severance. Toth.
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

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. J.
or of Things merely in Aktion belonging to a Wife, as a Bond &c. the
in totodem Verbi, but adds, that if the Husband alone should sue the Bond and be non-suited or dismissed, that
will not conclude the Case; but if he dies before Judgment or Decree, the Wife cannot revive the

29. If Cause of Aktion arises to the Feme before Coverture, tho' it be but
Troopjs, in which Damages only are recoverable, the Baron and Feme
must join, per Cur. obiter. Keb. 442. pl. 32. Hill. 14 and 15 Car. 2.
B. R. in Case of Hardy v. Robinson.

30. Where the Aktion, if not discharged, shall survive to the Wife, in Freem. Rep.
such Case the Baron and Feme must both join. 2 Mod. 269. Mich. 28.

& 5. P. by North Ch. J.

31. By the Rules of the Spiritual Court a Feme Covert may sue alone in per
every one of the following Cases, viz. when she is Executrix or Admi-
nisatrix, or Legatee or Legatory, on designing or designing; per Dr. Pin-
fold. 10 Mod. 64. Mich. 10 Ann. B. R. in Case of D'Aech and
Baux.

Law and the Civil Law is this, that in the Spiritual Court, tho' the Husband be not named, he may
come in pro Interesse sua, and make Defence himself, should the Wife desert the Cause. 10 Mod. 264.

32. Cases of Coverture are not to be extended to the Queen, for the Co.
Litt. is of that Dignity in Law, that the may sue in her own Name; for the 133. a. S. P.
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. Hilt. of
C. E. 198, 199.

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

BARON and FEME assign Auditors to the Receiver of the Feme be-
to 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 Ch. 4. 9.

Cafes they ought to join.]—— Gouldsb. 160. pl. 61. Arg. cites 16 E. 4. S. S. P. and it should be,
 viz. Mich. 16 E. 4. S. a. pl. 4. and the Book of 15 E. 4. 9. is upon a Recusant brought by Baron and
Feme; and the Millake in Roll, as to citing 15 E. 4. may in some measure be owing to the Year-Book

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in pag. 8. of 16 E. 4. being misrepresented 15 E. 4. — Br. Baron and Feme, pl. 60. cites 16 E. 4. S. P. — L. married a Feme, to whom Monies were owing due Eols. 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 Glynn Ch. J. the Nature of the Debt is not charged by the Account, no more than the Accounting with an Executor; but a Special Promise may alter the Debt. Here is a Promiss 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 Subj. Modo, viz. in Jure Usoris. And he said that there is another Point in the Case, and he conceived that here is Castle 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 quashed. *Sty. 472, 473. Mich. 1612. B. R. Conye v. Laws.

2. If a Rent be due to a Feme before Covertage, as Tenant in, pl. 70. cites S. C. accordingly, and so for the Rent due after Covertage; and the same Law of a Conuniance by the Bailiff. — Fitzh. Avowry, pl. 6. cites S. C. — See (R) pl. 2. S. C. — A. seized in Fee granted a Rent-charge to M. his Daughter. The Rent being arrear, M. married P. and afterwards P. discharges, and avow'd for the Rent so arrear, forgiving in the Avowry that the same was arrear, and not paid to the said P. and his Wife. It is moved that it was ill, because it appears it cannot be due to P. but only to M. dam fols fuit; but held to be only Matter of Form and Surplusage; and that he does not say Adjud a retro exilis, it is well enough in Substance; and Judgment affirmed. Cro J. 282. pl. 5. Trin. 9 Jac. B. R. Bowles v. Poor.

3. Where a Man is seiz'd in Jure Usoris in a Seigniory, of Homages, Fealty, Ejezease, Rent, and Suit of Court, and has no Issue by his Feme, yet he may disclaim for all the Services, unless for Homage. Br. Avowry, pl. 85. cites 27. Alis. 51.

4. Where an Arrear 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. Patch. 4 & 5 P. & M. in C. B.

7. Debt was brought by the Husband alone for Debt, Damages, and Cops recovered by him and his Wife now living, and because the Wife was not joined in this Action the Defendant demur'd; but adjudged for the Plaintiff without Argument, that the Action well lay. Cro E. 244. pl. 28. Trin. 43 Eliz. in Cam. Scacc. Butler v. Delt.

8. Affinnsipit by Husband and Wife, on a Promis to the Wife after the Covertage, that in Consideration the Wife would care bins of such a Wound, he would pay her 10l. After Judgment for the Plaintiffs, Error was brought, and aligned that the Husband alone should have brought the Action, it being a personal Duty accrued during the Covertage; fed non allocatur, it being grounded on a Promiss to the Wife, and on a Matter arising on her Skill, and to be performed by her, and fo he is the Caute of the Action, and shall survive to the Feme, and Judgment affirmed. Cro J. 77. pl. 7. Trin. 3 Jac. B. R. Bratford v. Buckingham.

Cro J. 294. pl. 10. Hill. 5. Jac. S. C. and Judgment was adjourn'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. Aff. on a Promiss implied in Laws, as for Persons-makers Work done by the Wife, the Law here implies no Promiss to the Wife; for she is a Servant to the Baron, who is at the Charge of Materials to carry on the Work, and the Law implies the Promiss only to him. Carth. 251. Mich. 4 W & M. in B R. Buckley & Br. v. Collier. — 4 Midd 156. S. C. the Court held the Declaration not good, the Action being brought for
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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 Cafe; but per Cur. Burchet's Cafe 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 Merit; 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 to 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 Trespass Goods. It was found for the Plaintiff as to the Beating, and for the Defendant as to the Refutation. It was moved in Arrest of Judgment, that the Husband was not well brought quoad the Goods, and that the Severance for the Benefit by the Verdict did not cure it; and Judgment was stayed, no one appearing on the other Side. Lev. 3. Mich. 12 Car. 2. B. R. Talbot v. Bacon.

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 Lew. 20. Mich. 25 Car. 2. B. R. Dunwell & Ux. v. Marshal.—2 Keb. 813. pl. 13. 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 Registrator, 105, are express as Words can make a Cafe, 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 Cafe of Baker v. Barber, the Registrator, 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 Herso, and beating and wounding his Wife, and imprisoning her for 5 Hours; and also for detaining the Possession of the House, and for menacing his Wife and Servants, per quod negotia sua infra tenuerunt. Cited by Gould J. 2 Ed. Raym. Rep. 1024. as a Cafe in B. R. Pach. 7 W. 3. who said that he moved in Arrest of Judgment, that for some of those Wrongs, as the Beating and Imprisoning the Wife, the Wife ought to be joined; but Judgment was given for the Plaintiff by Eyre and Boscawen, together with a Non Satis; 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 Beating the Wife was laid only to aggravate Damages, and the Court seemed to be of that Opinion. 8 Mod. 342. Hill. 15 Geo. I. 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 subsistent to the Marriage; but Windham and Twyden 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 dunn sola, she being an Executrix, he promised to pay &c. and farther declared upon an Infinitim Computalet 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 dunn sola. The Judgment was stay'd, because in all Cafes, so long as the first Contract or Specialty made to the Wife dunn 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.

X 12. Cafe
Baron and Feme.

In what Actions they may join.

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.

2. Baron and Feme may join in a Writ of Recourse, where the Baron claims the Seigniory in the Right of the Feme. 15 Ed. 4. 9.

3. If a Stranger cuts Trees upon the Land of the Feme, they may join. 15 Ed. 4. 9. b.

4. They may join in an Action upon 5 R. 2. for the Land of the Feme, admitted. 8 Ed. 4. 2. b.

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 letting 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 Goddale, per Curiam, adjudged upon a Demurrer. Infratur. H. 12 Car. 20. 223.

6. Where
6. Where Defiance 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. 


Briet 37.

8. Prettice good reddet against Baron and Feme; he made Default, and [the] was received, and pleaded, and left 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 All. 5.

9. Writ of Trespass was maintained by the Baron and Feme of the eldest Son of the Feme taken and carried away. 


10. Baron and Feme shall not join in Replevin, because the Feme cannot have Property in Goods during Coverture; Quere of Goods which she has as Executrix; for there it seems that they shall join. 

Br. Baron and Feme, pl. 83. cites 33 E. 3. and Fitzh. Replegiare 43.

S. P. Br. Re; Plevin, pl. 16. cites 7. Fitzh. Return de averes, pl. 51.——The Baron and Feme shall join in Replevin of Goods of the Feme taken durs sola fuict; 

Br. Baron and Feme, pl. 85. cites Fitzh. Reception 51.

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. 39. cites 39 All. 11.

12. Baron and Feme may have Debt upon an Obligation made to them, for being and may join in Action. 

Br. Dette, pl. 224. cites 43 E. 3. 10.

Fitzh. Brief 19. accordingly.——They may join. 

Br. Baron and Feme, pl. 55. cites 39 E. 5. 5.

A Writ of Debt was adjudged good, brought by Baron and Feme, upon an Obligation made to them during the Coverture. 

Thel. Dig. 29. Lib. 2. cap. 5. S. 21. cites Mich. 12 R. 2. Brief 639. And that to agrees Hill. 43 E. 3. 10. and Hill. 59 E. 2. 6. and 5 H. 6. 22. 7. and Mich. 16 E. 4. 8. but ibid. S. 22. says the contrary is held by Finch, 48 E. 3. 12.——Per Cor. they may well join in the Action, by which the Defendant was awarded to answer; and per Bbb. the Baron alone might have brought the Action if he would. 

Quere Inde. 

Br. Baron and Feme, pl. 2. cites 5 H. 6. 57.——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 Deeds to action 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. 1. 16.

So where a Lease was made to Husband and Wife of an ancient 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 Feme. 


14. It was adjudged, that Champerty brought by the Baron alone upon Affise which palled against him and his Feme is good. 

Thel. Dig. 29. Lib. 2. cap. 5. S. 9. cites Mich. 47 E. 3. 9. and 47 Aff. 5. and that it was said, that it should be good the one way or the other. 

Hill. 3 Feme; for it is in a Manner Prohibitable. 

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
Baron and 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 
S. C. & S. F. was awarded to be well brought, for it the Baron die, the Feme shall have 
acordingly, the Term. Br. Covenant, pl. 10. cites 47 E. 3. 12.

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.

17. Baron and Feme sold the Land of the Feme for 20 l. and ley'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 Execu-
tor shall have Action and not the Feme; Quere, for Finch was ab-
25. cites 48 E. 3. 18.

It was held 
that the 
Baron alone 
without his 
Feme, should 
not have 

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. 43 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. 

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.

The Baron and Feme shall join in Writ of Intrenchment of Ward. Thel. Dig. 29. Lib. 2. cap. 5. 

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 other Wife it is in Right of Ward; but it is laid there 
(Quere) and at last it was agreed that the Action should be allowed, but the fairest Way is to have 
both join. Ow. 83. cites 43 E. 1. Statham.

* As Tres-

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.

Waste by the Baron and Feme of a Lease made by them during the 
Coverture. Eyller demanded Judgment of the Writ, because Feme Covert 
cannot make a Lease; and yet because the may receive the Rent after 
the Death of the Baron, and make Avowry and Diftrain &c. there-
fore the said Opinion was, that the Writ lies well; for it shall be paid 
the
the Leafe 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 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 Br. Baron of Land which was de Jure Usoris, and therefore the Feme may join by the bell Opinion, by which the Defendant paffed over, but S. C.—— not by any Award. Br. Baron and Feme, pl. 6. cites H. 6. 1. Br. Joiner in Action, pl. 5. 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 to as the Writ. Thel. Dig. 29. Lib. 2. cap. 5. S. 10. cites Trin. 7 E. 4. 15.


26. In Trespafts by Baron and Feme, of Battery done to them both, Thel. Dig. 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 in S. C. their Damages. Thel. Dig. 238. Lib. 16. cap. 10. S. 53. cites Hill. 9 and that it appears, 22. Aff. 60 & 87; that the Baron and Feme may join in Trespafts 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 Trespafts 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 Miftake. 2 Vent. 29. Pench. 28 Car. 2. C. B. Hocket v. Stegold.——2 Mod. 65. Hocket v. Siddoloph, 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. Trespafts, pl. 190. cites 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. 83. 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. Trespafts, pl. 190. cites E. 4. 51. S. P. Br. Damages, pl. 83. cites E. 4. 51.

27. Where the Feme after the Death of the Baron may have Action, there as where they may join; Quod Nota. Br. Baron and Feme, pl. 50. cites 15 E. 4. 9. per Brooke.

28. 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 Trespafts upon the Land of the Feme, Maintenance, and the like. Ibid.

29. A Writ of Trespafts 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.

31. B. the Wife of A. gave to C. 10l. in Consideration that C. should marry her Daughter. C. promises the Wife that if he did not marry the Daughter, he would repay the 10l. C. did not marry the Daughter. A. and B. brought Action against C. and held good; for the Agreement of A. makes the Promiss 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. Pauch. 31 Eliz. B. R. Arundel v. Short.

33. If the Husband is feised or possessed of a **Reversion 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. Crife.


and all the Justices were of the fame Opinion.

A **Leafe** was made by Husband and Wife, in which the Leaffe covenanted with them to repair. The Husband a lone 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 Arreft 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 to accept her, and bring the Action alone. 2 Mod. 217. Pauch. 29 Car. 2. C. B. Beaver v. Lane.

35. In *Trovier and Conversion of a Deed of a Rent-charge*, granted to the **Wife duum fale fieri**, 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 otherwife 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. 59 Eliz. C. B. Ruffell and his Wife's Case.

36. Baron and Feme cannot bring *Trovier*, 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.

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.

38. A. seised in Fee, and made a Leafe for Years to W. the Defendant, and afterwards conveyed the Reversion to N. the Plaintiff and his Wife in Fee. W. attorn'd, the Leafe 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 Affignees of the Reversion, and where they are Leftors, as to bringing Debt for the Rent;
Baron and Feme.

Rent; and his suing alone, in this Case, is not in regard of his Eftate 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. Neech v. Wyard.

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39. J. S. and his Feme brought Trover and Conversion, and counted S.C. cited that they were the Goods of the Feme dam fola, and that the left them, by Coke Ch. and the Defendant found them; and afterwards they intermarried, and then the Defendant converted them. Adjudged against the Plaintiff, to the use of the Wife, becaufc, notwithstanding the Trover of the Defendant, the Property—S.P. and continued in the Feme; and then by the Intermarriage the Property was after a Verdict for the Plaintiff in the Court of Chancery, without his Feme. Cited by Coke Ch. J. Roll Rep. 45. Trin. 12 Jac. B. R. as Shuttleworth's Cafe.


40. Cafe by Husband and Wife, for presenting them in the Spiritual Cro. J. 355: Court, upon Oath, for making Hay on Midsummer-Day in Time of Divine Service, which was false. The Defendant justified that it 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 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.

whether the Action was maintainable, and therefore it was adjourned.

41. Trefpafs of Affault and Battery of the Plaintiff, nec-non of aSault—2 Roll Replying and beating the Plaintiff's Wife, per quod consortium amittis Vxoris sue. 51. Guy v. Lady, S. C. for 3 Days. After Verdict for the Plaintiff as to both Points, it was adjourned moved in Arreft of Judgment, That the Husband ought not to join in this Action 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 the survice the Husband; but per ter. Cur. the Action not join in is well brought by the Husband alone; for 'tis not only for the Harm Affault and done to his Wife, but for his particular Loss of his 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. Liveley.

Cafe, is the Gift of the Action; per Powell J. 11 Mod. 265. Hill. 8 Ann. B. R. in Cafe of Dodd v. Redford.

Action by the Baron alone, for Battery of the Feme per quod consortium amittis, was held good; and a like Judgment was affirmed in the Exchequer-Chamber. Jo. 440. pl. 7. Trin. 15 Car. B. R. Anon.

42. Aflump-
Baron and Feme.

42. Allumpit 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 answered that it may for Monies due to the Wife dum fola &c. but it was held, that it shall not be so intended, unless it had been shown; and Judgment for the Defendant. Cro. J. 644. pl. 6. Mich. 20 Jac. B. R. Abbot v. Blofield.

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 en Intentione to charge the Prisoner on a Bond made to the Feme dum fola: and held good by 3 Justices, ab reduced the other. 2 Roll Rep. 312. Pauch. 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 Cafe of Felony done by the Feme, the Appeal shall be against the Feme only. Jenk. 28. pl. 53.

45. The Husband covenanted to stand seized &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 Prett, saving that his Wife shall have the Stewards 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 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. Arg. S. C. cited, and says, that the' the Wrong was done to his Possession, and he might have released, yet because there was 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.


46. A promised B. the Wife of C. that if B. would procure C. to ley 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 Cafe 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. Sty. 297. Mich. 1651. B. R. Cotterel 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 entered into by the Husband to 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 Viuealing-House, joined in an Action against the Defendant, for laying to her, That a Barad to thine was Daughter, per quod J. S. who used to come to the House, for bare &c. ad damnum ipsum. After a Verdict for the Plaintiff, the Judgment was stayed, because the Words were not actionable but in respect of the special Lots which is to the Husband only. Lev. 140. Mich. 16 Car. 2. B. R. Coleman & Ux. v. Harecourt.

Hyde, that 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 Twifden agreed, and Judgment was stayed.

So saying of an Inn keeper's Wife that she was a Whore Sc. and had a Ballard by T. per quod he lost his Custom, ad damnum ipsum, 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. 357. 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 damnum ipsum, and 5 Justices held the Conclusion of the Court to be well, which Wrythens J. denied; for he said, if an Inn keeper's Wife be called a Cheat, and the House lothes the Trade, the Husband has an Injury by the Words spoke of his Wife, but the Declaration must not conclude ad damnum ipsum. 5 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 Twifden J. Sid. 224. pl. 14. Mich. 16 Car. 2. B. R. Stanton v. Hobart. Feme, annulling her Grant, and was laid ad damnum ipsum, and therefore Judgment was stayed. Sid. 224. Stanton v. Hobart.

51. In Action of Battery by the Husband and Wife for Imprisonment of the Wife till he had paid 101. Exception was taken that the Husband and Wife could not join; fed 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 Executeur, upon a Promise by his Tetturator after Couverture, in Consideration of the Marriage had at his Request, to pay 8l. per Annum to the Wife during the Couverture. 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 stayed, 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.

53. Trover was brought by Baron and Feme of 100 Load of Wood of the Feme, and the Converson was laid after the Marriage. It was moved, that the 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 Cauze of Action, the might be joined; and Hale said the Husband might bring the Action alone, or jointly with his Wife; and the Plaintiff had Judgment. Vent. 262. 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 th re 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 the hath not Potestate Corporis sui; and Holt said, that the very last Affiles the Ld. Ch. Baron over-ruled him in that very Exce
Baron and Feme.

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 Anne B. R. Wittingham v. Broderick.

56. Case by Husband and Wife for maliciously inditing the Wife of a Riot; the Husband counted that his Wife was of good Reputation, and that this was with Intent to Jeften 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. 3 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 entire Damages, viz. 7 l. 10s. 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. 1202. 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 Chafe on Action which shall survive to the Wife, and the joining of the Husband would be only for Conformity; and that 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 moit certainly was. 10 Mod. 63. Mich. 10 Ann. B. R. D'ath 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. Balingham.

(T. 2.) Actions &c. commenced by or against Feme sole, who marries pending the Action &c.


And so it shall be if it was after the Sevance; 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 Tuit. 59 E. 3. 21. but adds Quere.
4. But Gageoin 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 Hulfey and Brian were clearly of Opinion that she might demand Execution in such Case, notwithstanding the Epoufals. Mich. 21 E. 4. 87.
5. Feme Covert, who was sole the Day of the Writ purchased, vanged Br. Ley her Law of Non-fammon in Formedon, without the Baron. Br. Cover. Dig. 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, Thel. Dig. she is compelld by the Spiritual Court to marry him, yet her Writ shall be abate. Br. Brief. pl. 158. cites 7 H. 6. 14, 15. per Strangeum.
8. Feme Executors made a Letter of Attorney to the Plaintiff, to whom the Teflat was indebted, to recover and receive a Debt due to A. to the Teflat, and then marries; this is not any Countermand or Revocation of the Suit, and the Writ is not abated, but only abatable. Le. 168. pl. 235. Mich. 30 & 31 Eliz. C. B. Lee v. Madox.
9. If a Feme sole brings Trefpafs, 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 abatable 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 Proceeds were taken, and before the Return of the Husband, this shall abate the Writ. Quere. 2 Roll Rep. 53. Mich. 16 Jac. B. R. in Heydon and Miller's Cafe.
11. After Imparctance it was pleaded in Bar, That the Plaintiff took Husband; on which Jflice was taken by the Plaintiff, to which the Defendant demur'd; and by Twifden, that's the bett Way; for if it had been tried, it had been peremptory, but now only Refpondeas Outer, which was agreed, Hyde abente. 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 Continuances, for otherwife the Defendant depends on his first Plea, and waives the Benefit of this new Matter. G. Hist. C. B. 84.
13. If an Action be brought in an inferior Court against a Feme sole, and pending the Suit the Intermaries, and afterwards removes the Cause by Habeas Corpus, and the Plaintiff declares against her as a Feme sole, the Court may plead Covertainment 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 Proceedendo; for movt for the tho' this be a Writ of Right, yet where it is to abate a rightful Suit, the Defendant; Court 11 Mod. 142. pl. 14 Ethel- rington v. Revolvable. S C. The Court was inclined to give Judge-
Baron and Feme.


(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 No unique Accouple &c. and the shall demand Simil cum Vito 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 No 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 Dete 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. Patch. 12 W. 3. Reynolds v. Davis.

(U) Actions
Baron and Feme.

(U) Actions against Baron and Feme. What may be against both.

1. If a Traver 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 presence 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 * Reaues * Cro. J. & Humfrey, adjudged in Action of Judgment. Inquitur, Hill. 7 Car. Rot. 1202. and then was tried one * Nieves's Case, where such a Judgment was reversed in Camera Statuarii for this Error.

and Judgment in B. R. reversed, but says it was shown that this Judgment in B. R. passed Sub Silentio after Verdict without Exception.—Jo. 16. pl. 2. S. C. and Judgment reversed.—Palm. 234. 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, Traver lies against the Baron and Feme, and I may suspend the Conversion in the Feme only vis. the Torr, though they cannot bring Traver, and move the Conversion in both, Quod nulli concedas per tot. Car. Yelv. 126. Mich. 7 Joc. B. R. in Case of Draper v. Fulks.—Mar. 60. pl. 94. Mich. 15 Car. in Case of Hedges v. Sinnamon, 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 Traver was of Barley, if she takes 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 the Husband before the Husband can take by Gift in Law, and therefore as to this Point the Case was adhered.—Jo. 443. pl. 4. S. C. adjudged for the Plaintiff.—The laying the Conversion ad utum iuborum, though naughty, is made good by the Verdict. Mar. 82. pl. 134- Patch. 17 Car. Anon.

An Action of Traver 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 the may convert them &c. Nov. 79. Newman v. Cheney.—Lat. 186. Patch. 2 Car. 3. S. C. Whitlock J. accorded. Crew Ch. J. spoke doubtfully, and Dodridge adhered.


4. An Action upon the Statute of Labourers was maintained against the Thel Dig. Baron and Feme, upon Retainer of a Servant made by the Baron and 116 Lib. 12 Feme. Thel. Dig. 45. Lib. 3. cap. 4. S. 15. cites Patch. 29 E. cap. 26 S. 12. cites S. C. 3. 35.

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. & Patch. 2 H. 4. 19.

6. Detinue of 10 l. of Flux against Baron and Feme, and counted of Baitment to be to abate &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 bienis, pl. 22. cites 38 E. 3. 1.

7. Action of Detinue does not lie upon a Baitment made to the Bar where Baron and Feme. Thel. Dig. 45. Lib. 5. cap. 4. S. 10. cites Hill. 38 E. 3. 1.

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. 45. Lib. 5. cap. 4. S. 10. cites Trim. 39 E. 3. 52.
Baron and Feme.


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.


13. If a Man recovers by Affise against a Feme sole, and after she takes Baron, he shall not have Redissisfen 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. 25.

15. Debt lies of the Rent upon a Lease made to the Baron and Feme, and lies against both; so of Wafe; for the cannot waive the Lease during the Life of her Baron. Br. Dette, pl. 217. cites 17 E. 4. 7.

16 Debt against Husband and Wife for 3 l. 18 s. and counted for 39 s. upon a Contract of the Wife dwn sole, and for 39 s. more upon an indentus made with the Husband. Upon No 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 Declaracion 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 40 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 Note, 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 Receiver or Contract; but says, that perhaps the receiving and keeping him without any Contract is a Trespass, whereas 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.

19. In Debt on Bond against Baron and Feme Executors; the Plaintiff counted of a Deedsettled by them, but adjudged against the Plaintiff; because a Feme covert cannot waive during the Coverture, tho' the Waiting of the Baron shall charge her if she survives. 2 Lev. 145. Trin. 27 Car. 2. B. R. Horsey v. Daniel.

3 Keb. 602. pl. 43. Howy v. Daniel S. C. and agreed that Feme Executrix is not chargeable for Wafe by Baron and Feme. —— Cro. C. 519. pl 20. Mich. 13 Car. B. R. in Case of Monument Baron, it was held, that if a Man marries a Feme Executrix, and wales the Goods, it is a Deedsettled in the Wife.

20. Trespass against Husband and Wife. Upon Not Guilty plead, Verdict for the Plaintiff. It was moved in Arrest, that the Wife could not
Baron and Feme.

not be charged for the Trespa% of the Husband, no more than they can be charged for the Conversion of Goods ad Usum ipforum; but the Court over-ruled the Exception. 4d. Raym. Rep. 443. Patch. 11 W. 3. White v. Eldridge.

21. Covenant was brought against Baron and Feme on a Lease to the Feme demai sole, wherein the covenanted to plant 20 Oaks every year during the Term on the Premises. It was objected, that the Wife ought not to be joined in the Action for Breach since the Coverture; fed non allocatur; and Judgment pro Quef and if the Wife had affigined demai sole, 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. Deft 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. Doubtutur, whether it may be brought against the Feme.

S. P. Br. Baron and Feme, pl. 29, cites 5 H. 2. 1. per Thirn; for she may agree after the Death of her Husband; but Huk 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 Deft for Arrears 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 affidavit that he leased the 14 Acres Medt & Feme &c. Thel. Dig. 172. Lib. 11 cap. 42. 8. 22; cites Hill. 17 E. 4.

Avowry because W. B. held certain Land, out of which &c. of one J. B. as of his Manner of F. by Homage, Fealty, and Esgano, viz. to much &c. and conveyed the Seigniory of the said J. B. to the Defendant, and fenced away, and conveyed the Tenancy to the Plaintiff by Quit Estimate, and for Homage of the Plaintiff he answered &c. The Plaintiff said, that at the Time of the Death, he, nor ever after, he had nothing in the Land, unless jointly with F. his Feme of the Peifan of W. F. to them, and in their Hands, except F. is alive, and is 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 4 E. 4. 27. — Thel. Dig. 82 Lib. 5. cap. 4. S. 14; cites Thirn. 26 B. 2. 64; where it is said, that for Arrears of Rent referred on a Lease for Years made to Baron and Feme, Writ of Deft may be brought against the Baron alone, and also against both.

2. Writ 43 Ed. 3. 11 b. is, that it lies against both; because it is * Br. Deft, for the Benefit of the Feme, and to * 3 H. 4. 1. Br. Baron and Feme, pl. 29; cites S. C. but the Reason is not given there.

3. The fame Law where it is brought upon a Lease for Life made Br. Deft, pl. to them, the Action shall be brought against both. 3 H. 4. 1. 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 Chofoby the Defendant vouched to Warranty, and the Vouchee came and said, that he had nothing in the Ward unless by reftion of his Feme not named &c and demanded good brought Judgment of the Voucher, yet the Voucher was adjudged good. Thel. Dig. 44. Lib. 5. cap. 4. S. 4; cites 50 E. 1. Voucher 299. See a Writ of Dower was not a Writ of Dower vouched to Warranty, and the Vouchee came and said, that he had nothing in the Ward unless by restitution of his Feme not named &c and demanded good brought Judgment of the Voucher, yet the Voucher was adjudged good. Thel. Dig. 45. Lib. 5. cap. 4. S. 4. cites 50 E. 1. Voucher 299. Who left nothing in the Ward but only a joint Estate with his Feme. Thel. Dig. 45. Lib. 5. cap. 4. S. 4. cites Much. 2 E. 5. fol. 43 & 58.
In Formdom against A., who said, that he was seized and interested 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, 5 H. 7. 2. and says see the same Text, Vol. 13. and Quære.

6. Where one where is Guardian in Sogage 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' Kane' Brief 847.

7. Writ of Squer Impedit may be maintain'd against the Baron alone, notwithstanding that he claims the Advoction 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 (Peten-
tis). Fitch. Jointment, pi. 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 contra.—In the like Action the Baron and Feme joined. Hob. 159. pi. 235. But at the End of the Case is a Note, that there was no Mention that the Action was brought by the Husband and Wife both, being only to recover Damages.

In Raisen-
ment of Ward, and Ejection of Ward by Guardian in Sogage, is it 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. 5. 64. Gard. 159.

The Baron alone, without the Feme, may have Writ of Raisenment of Ward; but in * Action against them, Writ of Ward shall be against both, by reason of the Funder. Br. Baron and Feme, pl. 26. cites 48 E. 3. 50. (20.)—Br. Voucher, pl. 145. 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. 22. cites Trin. 5 E. 3. 20.


* S. P. Br. Baron and Feme, pl. 22. cites 47 E. 5. 9.

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. 5. Brief 279.

10. A Writ of Debt for Arrears 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 Arrears incurred after the Coverture; but otherwise it should be for the Arrears before the Marriage. Thel. Dig. 45. Lib. 5. cap. 4. S. 14. cites Trin. 26 E. 3. 64.

11. In Affiz it was found that the Baron and Feme entered 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 All. 5.
12. If a Man bails Goods to a Feme sole, and the takes Baron, Action Of Goods of Detinue lies against both; quod nota. Br. Baron and Feme, pl. 56. cited 39 E. 3. 17. per Cur.

13. In Recordare the Defendant avow'd upon the Baron, in Right of A. his Wife, because Land was given in Zull, rending 20l. Kent, and convey'd the Land to A. Feme of the Plaintiff, and for the Rest avow'd upon the Baron only, and be prey'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 ou'ted of it, and the Feme was ou'ted also, tho' she did not come till now; quod nota. Brooke fays, 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 ffine had, the Avowry for Homage may be made upon the Baron only; but here is no Mention of any llue. 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 Br. Audita a Feme alone, who takes Baron, and the Baron relies all Actions and Executions, Audita Querel'd upon Execution sued by the Baron and S.C. — Feme, shall not be sued against the Baron and Feme, but against the Br. Baron only. Br. Joiner in Action, pl. 92. cites 48 E. 3. 12.

15. If a Man marries a Feme who is in Debt, the Writ of Debt shall Kebl. 238. be brought against both. Thel. Dig. 45. Lib. 5. cap. 4. 8. 19. cites Mich. 49 E. 3. 25.

16. Trophies for not repairing of certain Banks, by reason of certain Thel. Dig. 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; S.C. for they ought to have been joined &c. Br. Baron and Feme, pl. 32. Br. Joiner in Action, cites 7 H. 4. 31.

17. In Detinue of Charters by one, if it appears by the Court 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. Quere; 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 Patch. 33 H. 6. 29.

18. If a Feme sole dislikes me, and makes a Feoffment to her Life, and S.C. Baron takes Baron, I shall have Allisfe against both, as Parmour in Jure Uxoris. Br. Parmour, pl. 22. cites 4 E. 4. 17.

their Life, Allisfe lies against both, and the Permancy is in both in Jure Uxoris. Br. Parmour in 20th, pl. 22. cites 4 E. 4. 17.
19. Where a Lease for Years is made to Baron and Feme, reserving Rent, the Writ of Writhe shall be brought against both. Thel. Dig. 45. Lib. 5. cap. 4. S. 23. cites Hill. 17 E. 4. 7.

20. In every Writ where Inheritance or Frankenement is demanded, and also where Seisin of Inheritance is to be recovered, if the Baron be seized 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.

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 Cafe.

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 forces the House; and after the Husband came there, yet the Ejecutone firme was brought against the Husband only, and well. Noy 48. Clements v. Caiffe.

23. The Husband being seized of a House in Right of his Wife for her Life, they leafted 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 Los or Injury might accrue to him, for no Action might be brought against him by the Lesfor 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 founds in Trespaus and shall be brought against both, and not against the Husband only. Le. 312. pl. 433. Tern. 32 Eliz. C. B. Marth’s Cafe.

25. A Feme Sole being Proprietor of a Parsonage unmarried, and then the Husband alone brought an Action upon the Statute 2 Ed. 6 for retitle Damages against a Parilhinor for taking away his Tithes after he had let 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 faith 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 the ought to join. 2 Brownl. 9. Mich. 8 Jac. Ford v. Pomery.

S. P. Where the Baron was possess’d 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 belonged to the Baron unto, the ought not to be joined; for non aliudcar, for the Feme being Tertot, the Baron is possessed of them in his Right, and the Action is given to the Proprietor or Farmer &c. and to 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. 6. S. pl. 9 & 615. pl. 1 Trin. 45. B. R. Bendle v. Sherman. — 15 Rep. 41. 48. S. C. held accordingly. —— Mo. 91. pl. 128. 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 Ind. 257. —— S. P. Arg. 2. Mod. 270.

It was adjudget per rot. Cor. (abiente Richardson) that where Baron and Feme brought Debt upon the Statute 2 E. 6. for not setting out Tithes, whereas of the Baron and Feme were Proprietors, that the Action well lay; but when they bring other Actions of Tithes (let out from the same) Parts being Tithes arising from Land, in a Rectory which appertains to them; the Feme in such Cases ought not to join with her Baron. Jo. 525. 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 other wife if she had been alive; and Ley laid that if Demurrer had been join'd upon it, it had been ill, but now not after Verdict. Palm. 312, 313. Mich. 12. Jac. B. R. Ridley v. Stafford.

27. Case for negligen keeping the Fire, by which the House of the Plaintiff was burnt, lies only against the Patrem Familia, and not against the Wife by the Custom of the Realm. See Actions (b) pl. 7. Mich. 1. Car. Shelly v. Barr.

28. Case &c. upon an Intimol Computatta, and also upon an Indebitatus Ailumpit for Wares bought by the Defendant; upon non Ailumpit pleaded, the Jury found that the Wife dunn Sole was indebted to the Plaintiff for Wares sold &c. and that after her Marriage with the Defendant, be and his Wife accounted with the Plaintiff for the Money due, and upon the Account 91. 13 s. was found due to the Plaintiff, which the Defendant promised to pay; in arguing this special Verdict, it was inquired 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 Detiner, and that by this Account 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 Account 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 dunn 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. Druc v. Thorn.

29. If Baron be seised of Land in Right of his Wife charged with The Action 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 against him the Profits of the Land. 11 Mod. 169. pl. 6. Patch. 7 Ann. B. R. in Cafe of Billingworth v. Spearman.

and if he lets the Land out again, the under Leasor is chargeable in an Action for his Rent-charge.


(Y) What
(Y) What Things a Woman may make good after the Death of her Husband, and how, and e contra.

If an Obligation be made to Baron and Feme, the Feme may retain it after the Death of her Husband. 4 H. 6. 6. S. 5 Jac. S. adjourned, and by which Waiver this is made an Obligation to the Baron only.

If Baron and Feme join in a Lease 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.

The same Law, if they join in a Lease for Years. 10 H. 6. 24. b. citing S. C. and 13 H. 6. S. P.

Palm, 266. S. C. accordingly.

4. Husband and Wife were Tenants in Special Tail, Remainder to F. S. Remainder over. The Husband made a Feoffment toUses, and died, and after his Death the Widow leased a Fine. Resolved by all the Justices, that the widow had 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 the same never 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. Pash. 21 Jac. B. R. Moor's Case.

(Z) For what Things created during the Coverture, the Feme shall be charged after the Death of her Husband, by her Agreement or Disagreement.

If Baron and Feme accept a Fine rendring Rent, if she agrees to the Estate after the Death of the Baron, the shall be charg'd with the Rent. 50 Ed. 3. 9. b.

If a Lease for Years be made to Baron and Feme rendring Rent, if after the Death of the Baron the Feme agrees to the Lease, Debt lies against her for all the Arrearages incurred in the Life of the Baron. 2 H. 4. 19. b. * 3 H. 4. 1.

3. But after the Death of the Baron she may disagree to the Lease. 2 H. 4. 19. b.

4. If
Baron and Feme.

4. If Baron alienates the Land of his Feme, and dies, and the Feme accepts, if Baron, "Part in Devisor", this is a good Bar in Cui in Vita. Br. Cui in Vita, pl. 15. cites to E. 3.

5. Of all Reservations &c. depending upon the Land leased to Baron and as Reentry, Feme by Indenture, there the Feme shall be bound if she agrees to the Land, &c., doubting the Rent for Non-payment, to bind them in a "Sum in Grofs." Br. Coverp. pl. 11. cites 45 E. 3. 11.

6. Cui in Vita, supposing that the Tenant had not Entry unless by her, or for Cui in Cui, Cui ipa in Vita contradicere non putat. Prat. said the Baron Vita, pl. 20. cites S. C. and this his Feme gave the Land to T. N. in Tal, rending Fealty and a Mate; the Baron died, and the Rente destrain'd him for the same Services, by which T. did to her Fealty, and paid the Mate, which she accepted; Judgment is Aff'tio; and the Opinion of the Court was, that this is a good Bar, by which the took Issue that she did not accept the Rente post mortem Viri, prist, and the others contra. Br. Barre, pl. 27. cites 21 H. 6. 24.

7. If a Man leases Life to Baron and Feme, and the Baron does Waive and dies, if she occupies the Land she shall answer for the Waife of her Baron. Contra if she waives the Poifion, and does not occupy it. Br. Barre, pl. 27. cites 21 H. 6. 24. per Acu. J.

8. If the Baron and Feme make Exchange, he dies, and she enters and S.P. Br. Cui occupies, this is a Bar to her; contra if she waives it, and does not occupy it. Br. Barre, pl. 27. cites 21 H. 6. 24. per Newton.

Feme, feised in Jure Uxorius, makes an Exchange, and the Baron dies, and the Feme agrees to the Exchange, the shall be bound thereby. Br. Exchange, 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, feised in Jure Uxorius, leases for Life, and the Br. Baron and you dies, the Feme shall not have Action of Waife; for he was not Party to the Leafe, per Paifon. And hence it follows, that the Feme by the Accep- tance of the Rent, where she was not Party to the Leafe, shall not be Leafe for bound, if it was upon a Leafe for Years, but may enter; but if it be a Time; for by the Receipt of the Rent after the Death of the Huf- band, the Leafe is annul'd. Br. Receipts, pl. 70. cites 24 E. 3. 18. —— S. P. per Keble. Kelw. 10. a. Hill.
Baron and Feme.

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, the shall be bound; contra where the Baron alone makes a Gift, or Lease referring Rent, and he dies, the Feme accepts the Rent, there this shall not bind her; per Choke. Note a Diversity, quod nullus contradixit. Br. Acceptance, pl. 6. cites 15 E. 4. 18.

11. If the Baron and Feme sell the Land of the Feme, and make a Feoffment, and the convents by the same Indenture convents 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 Reservasion or Rent. Br. Cui in Vita, pl. 1. cites 26 H. 8. 2.

S. P. cited Arg. 2 Roll Rep. 132. It was held per Car. that by the Acceptance of the 2d Baron she is concluded during the Term. D. 159. Marg. pl. 56. cites Pach. 22 Eliz. Rot. 1787.

12. Husband and Wife by Indenture, made a Lease for Years rendring Rent; the Laffee entered, 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 Leafe good; but Brook J. e contra; the Reporter says, Ideo Quare. D. 159. a. pl. 56. Pach. 4 & 5 P. & M. Anon.

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 barrenfiefs against the Bond, she is not bound. Godb. 138. pl. 154. Mich. 27 Eliz. B. R. resolved per tor. Car. in Cafe of Barton v. Edmonds.

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, the no Party to the Bill. 2 Chan. Cafes. 101. Pach. 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. Pach. 1688. Baker v. Child.

16. Baron and Feme agreed to an Inclosure. She was bound by it, even as to her Jointure; per Car. 2 Vern. 225. in pl. 206. Pach. 1691. cites Lady Widdrington's Cafe.

17. Precifion 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. Pach. 1691. cited per Car. as Sir Edward Mofele's Cafe.
Widow, the acts according to such Agreement, she is bound by it. —— S. P. but when her acting, when a Widow, may be indiscriminately apply'd either to her former Interest or to her Agreement, she shall not be bound by it. 2 Chon. Cafes. 16. Patch. 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 imply'd in a Suit MS. Rep. by the Husband and Wife, for a Term of Years in the Right of his Wife, but the Husband died and left no Affets, and the Bill was to have a Satisfaction out of this Term so recovered and enjoy'd at this Time by Hipley, and 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 confessed 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.

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, Deed without Fine, referring a Pepper-Corn Rent. The Baron died, and the 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 Leaf. But the Mather 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 referred, her Acceptance of it would have affirmed the Leaf, but that here is No Acceptance, and the Leaf 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. Patch. 1723. Drybutter v. Bartholomew.

20. Plaintiff prayed Injunction to stay Defendant's Proceedings at MS. Rep. Law upon this Case. Duke Hamilton brought an Ejection in his own Duchefs of and his Wife's Name, for certain Lands that descended to the Duchefs during the Coverture, and employed the new Defendant as his Attorney. The Duke died, pending the Suit, and the Dutchefs continued Ms. Hamilton v. Incledon, in the Exclusion, or for the Money expended in that Suit, as well in the Duke's Time as in the Dutchefs's against the Dutchefs, 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 Dutchefs 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 fame Retainer, but the Retainer is personally to the Duke, and cannot affect the Dutchefs, but is a Charge upon the Administrator. He admits Money received from the Dutchefs, 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 Affets of the Duke's to pay it. As to the Objection whether the Dutchefs 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 intitled upon, and it was denied by the whole Court of Common Pleas. It is objected, that this is Matter of Account.
count, and the same may be laid 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 found 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 Attorneys Bills are Matters of Account, and the proper Method is to have them taxed, 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 Montague 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 the pay for the making before the can have it, yet it was originally the Duke's Debt. He has submitted only to the lating 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.
Baron and Feme.

notwithstanding, that the Feme may have Cui in Vita after the Death of have Cui in her Husband. Br. Cui in Vita, pl. 9. cites 11 Aff. 11.
the Allenation and the Entry; for the Title of Entry is given by the Law for the Allenation only, and the Title of the Feme is by the Demise before. Br. Cui in Vita, pl. 9. cites 11 Aff. 11.

It appears by Judgment in Allen, 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 Allenation 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 Aff. 17.

2. If Feme Tenant for Life takes Baron, who aliens in Fee, in the Reversion enters, and the Baron dies, the Feme shall re-have the Land. Br. Baron and Feme, pl. 86. cites 29 Aff. 43.

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 Allenation.

3. If the Baron claims Fee in Quod juris clamat, or disclaims in Accoly-

This shall bind the Feme in whole Right of the Baron held the Land. Br. Coverture, in pl. 76. cites S.C. by Martin.

4. If a Man incoffs a Fume upon Condition, or leaves to her, rendering it was Rent, with a Condition of Re-entry, and the Baron takes Baron, who breaks the Condition, and the Feme has no Remedy. Br. Baron and Feme, pl. 79. cites 9 H. 6. 52. per Martin.

5. If a Man incoffs a Fume upon Condition, or leaves to her, rendering it was Rent, with a Condition of Re-entry, and the Baron takes Baron, who breaks the Condition, the Feme shall be bound. Br. Coverture, in pl. 5. cites 20 H. 6. 28.

6. If a Man incoffs a Fume upon Condition, or leaves to her, rendering it was Rent, with a Condition of Re-entry, and the Baron takes Baron, who breaks the Condition, the Feme shall be bound. Mo. 92. pl. 229. Trin 20 Eliz. Anon —— It a Feme tenant made, refering a Rent, and if not paid in a Month the Rent to be doubled, and the Feme owner dies, and the Land descends to a Feme covert, and the Rent not paid within the Time, the Foreclosure shall take Place, the other wife in Case of an Infant; for the Statute of Merton, cap. 5. of Nunc current Ufure, &c. does not extend to a Feme covert. Co. Litt. 246 b.

7. If a Man incoffs a Fume upon Condition, or leaves to her, rendering it was Rent, with a Condition of Re-entry, and the Baron takes Baron, who breaks the Condition, the Feme shall be bound. Mo. 92. pl. 229. Trin 20 Eliz. Anon.

8. A. deceased. Land to his Wife during the Minority of his Son, upon Lut 30. cites Condition that she shall not do Waffe during the Minority of his Son, and dies; the Wife takes a Husband; the Husband commits Waffe to his Wife. Per ter. Cur. it is no Breach of the Condition. 2 Le. 35. pl. 46. Hill 33 Eliz. C. B. Cobb v. Prior.
9. A Tenant for Life, Remainder in Fee to M. a Feme Covert. A. left a Fine. The Baron died. M. took a second Baron. A. died. 5 years pafs. The second Baron dies. M. is barr'd, and not remedied by 32 H. S. cap. 28. In this Case a Diversity was taken between a Warranty and Right to Land; as to the Warranty the Feme cannot be conuert thereof to avoid it, and therefore she does not submit her Attent 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 was adjudged, that the Feme shall be bound in this Case. D. 72. b. Marg. pl. 3. cites 43 Eliz. Whetstone v. Wentworth.

10. If a Feme be inofled, either before or after Marriage, reserving a Rent, and for Defaults of Payment a Re-entry; in that Case, the Laches of the Baron shall dilinherit the Wife for ever. Co. Litt. 246 b. 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 Defect; but if the Husband die, then the Wife may well enter upon the Illeue which is in by Defect; 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 Defect is cast during the Coverture. Litt. Sect. 493.

Thefe Words are general, but are particularly to be understood, viz. when the Wrong was done to the Wife during the Coverture; for if a Feme sole be seised of Land in Fee, and is dispossessed, 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 Doffee 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 the herself, when the was sole, might have entered and re-established the Possession, as also it shall be accounted her Folly that she would take such a Husband which would not enter before the Defect. Co. Litt. 246 a —— But there is the Woman came 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 the was within Age when the took Husband, and after Coverture the cannot enter without her Husband, all which is implied in the last &c. Co. Litt. 246 b.

Per Dedridge 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. 2 Roll Rep. 346. S. C. Savin, alias Sabbin v. Smith. —— 2 Roll Rep. 572. S. C. Judgment for the Heir of the Feme Fili &c. —— Palm. 285. S. C. the Forfeiture does not bind the Feme, and Judgment according, nifi &c. —— * Cro. C. 7. S. C. adjudged 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. 544. in pl. 458. S. C. adjournatur.

If the Husband denies to pay the Rent, or to do Suit at Court, there 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. 13. Mich. 51 & 52 Eliz. b. H. Held v. Chaloner. —— Le 136. pl. 204. S. C. but S. P. does not appear. —— * Rep. 27. Clifton v. Molineux —— Said by two Judges to have been adjudged a Forfeiture to bind the Wife. Cro. E. in Cafe of Held v. Chaloner.

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 collaterals 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 Dedridge J. puts the Cafe, that if the Lessr recovers against the Baron in Wife, and Baron dies, the Feme shall not avoid it; but if the Baron makes a Fojand, 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 it is not it is otherwise. 2 Roll Rep. 344. Trin. 21 Jac. B.R. in Cafe of Surn, alias Saben v. Smith.

13. Feme

1. A Man infrs'd Baron and Feme in fec, the Baron was found Guilty Br. Affife, of Felony, and it was agreed that the Feme by surviving of the pl. 114 cites Baron should have the Entitlement, notwithstanding the Attaint of, for upon Purchase during the Coverture, there are no Moieties between the Baron and Feme, and therefore the shall have all by the Survivor. Br. S. C. but Feme, by forfeiture de Terres, pl. 28. cites 4 Aff. 4.

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 s.ied to the Ufe of the said Daughter for her Life, and afterwards to the Heirs of her Body by her Husband begun. 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 Ufe 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 preferred in the Cafe of Murder and Felony, by the Statute of Wm. 2. and for Trefain also in this Cafe; for the Statute of 26 H. 8. cap. 13, which gives a Forfeiture of Estates Tail to the King for Trefain, is where he who commits it has an Estate of Inheritance, but in this Cafe the Husband has no Estate of Inheritance, the Wife alone has; By all the judges of England. Jenk. 225. pl. 27.

3. If the Wife be attainted of Felony, the Lord by Efcheat shall enter and put out the Husband; otherwife it is, if the Felony be committed after Ifline 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 Jointtenants for a Term of Years; the Husband is jelo de fe, 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 forsets his own and his Wife's Term. The fame Law as to the Forfeiture of the Wife concerning her Term. Jenk. 65. pl. 22.

7. Tenant in Tail general makes a Forfeifment to the Ufe of himfelf and his Wife and the Heirs of their two Bodies, he has Ifline by the said Wife. Sheffield v. Sheffield, Raff. After the 27 H. 8. of Ufes in the 28 H. 8. the Husband commits Trefain 29 H. 8. he is attainted and Executed. The Wife forfizes him; she is Je. 69 to 101. 2 Tenant in Tail; for ife 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 Trefain, by the Statute of 26 H. 8. cap. 13. By all the Judges of England. Jenk. 268. pl. 21.


8. If
Baron and Feme.

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.

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 V. 6. 45.

2. The Feme shall have Ravishment of Ward by Survivourship, where the Ward was joint to Baron and Feme. 43 Ed. 3. 10.

3. So the shall have an Ejeffment of Ward by Survivourship. 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 C. 3. 26. b.

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 Waife, if the Baron and Feme, seised in Jure Uxorius, lease for Years, the Baron dies, and the Feme brings Waife, 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.

7. If a Feme Covert buys 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 Releaf of the Baron, who is dead, and a good Plea; for the Action was once extinct. Quere in Detinue of Charters by her. Br. Trespaß, pl. 405. cites 39 H. 6. 15.

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
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Wife shall present, and not the Executors of the Husband; per Stat. 27 of 1844. Owen &. Falch. 4 & 5 P. & M. in C. B. Anon. Church becomes void, and the Husband dies, the Executors shall have the Presentation; per Anderson, Ch. J. Gouldb. 57; in pl. 10. Mich. 29 Etts.

10. Promise was made to a Feme Covert, in Consideration she would care such a Wound, to pay her 10L. If Baron dies, such an Action shall survive to the Wife. Cro. J. 77. pl. 7. Trin. 3 Jac. B. R. Brathford v. Buckingham.


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. Mitch. 24 Car. B. R. White v. Harwood.

13. In Debt upon Bond, condition'd to leave his Wife 80L. at his Salk 65. Death, in case she should survive, so she might peaceably enjoy it to 10L. S. C. her own Use. The Defendant pleaded, that the Husband made his Wife Executrix, and left Goods to the Value of 100L. 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 Executrixhip, 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. Thomalin v. Wood.

14. At Law an interlocutory Judgment Quod Computat, 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 Matter of the Rolls. Gibb. 149. Mitch. 4 Geo. 2. in Can. in Case of Nanney 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 Survivourship. * 43 Ed. 3. 10. + 4 O. 6. 6. 9 O. 5 Jac. 2. 6. adjudged upon Demurrer, Tr. to Car. in Can. Scarcum, between Spark and Farenmann, adjudged in a Writ of Error. Br. Baron and Feme, pl. 14 cites S. C. + Br. Obligation, pl. 55. cites S. C. — Fitchb. Debr. pl. 24. cites S. C.

2. So the Feme shall have a Recognizance by Survivourship. 43 Fitchb. Brief, pl. 491. cites S. C. & S. P. by Fitch.

F i

3. But
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3. But if Goods are given to Baron and Feme, the Feme shall not have them by Surdowment, 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 the shall have Execution, (if the Baron had not made a Releafe) and not the Executor of the Baron. Br. Baron and Feme, pl. 24. cites 48 E. 3. 12.


But if he dies without any Dil- agreement to his Wife’s 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. Rep. 497. Mich. 1728. in Cafe of Copping v. — — —

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.

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 Cafe of Huntley v. Griffith.

And the Baron may either file the Bond in his own Name, or join his Wife with him; said per Cur. to be the better Opinion. Stg. 9. Pach. 25 Car. Hollar’s Cafe.

11. If an F'ray 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.


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.


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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 other- wise by our Law; and a Prohibition was granted. Hutt. 22. Mich.


16. The Portion of an Orphan in the Chamber of London, if the Husband be dead, is not to be altered by the Executors of the Property, shall go to the Feme; decreed accordingly. Rep. 172. pl. 223. S. C. held accordingly.

17. A Bond to the Wife dama 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 hims elf 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 unaltered being a Chofe en Action surviv'd to the Wife, and was not liable to Law to Bond Creditors, nor was the Interests due there on. Cited 2 Vern. 55. as the Cause of Lawrence v. Beverley.

18. A and B, an only Daughter and Child, married to C. A. in 1656. made a nuncupative Will, and bequeathed all his Estates to B and C. The Court was of Opinion that since B. and C. had took out Administrations with the Will annex'd, as universal Legates; that the same was a sufficient Affent to the Bequest, and thereby the whole Estate of A. vested in C. except Debts unsecured and Chothes 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 Chothes 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 C. which did vest in C. by his Bequest, and do not belong to B. but are to be disposed according to A.'s Will, to purchase Lands for the Benefit of D. Fin. Rep. 370. Trin. 39 Car. 2. Gundry v. Brown.

19. Money in Trustless Hands for the Benefit of a Feme Covent 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. Pach. 1683. Twidgen v. Wife.
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 it was 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. Checkley.

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 joint’d, the Interest does vest by the Judgment in the Husband, and will go to his Executors; Per Ld. Ch. Jefieries. Vern. 396. pl. 366. Pach. 1686. in Cafe of Oglander v. Batton.

22. Wife’s Portion, consisting of Chofes 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. Jefieries dismissed the Bill which was brought by the Creditors of the Baron to make them Affite. 2 Vern. 83. pl. 63. Trin. 1688. Lifer v. Lifer & 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 400 l.—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 Chofe in Action survive’d to the Wife, though it was agreed that the Husband during the Covertie might have released or discharged it. 2 Vern. 190. pl. 173. Mich. 1690. Bowman v. Corte.

24. By a Settlement made on the Marriage, the Baron and Feme were made Jointuants for their Lives. The Baron dies, leaving the Land fowin’ with Corn. The Question was, whether the Emblems on the Land settled should go to the Wife, or to the Executors of the Husband, because in the Cafe of Strangers they would survive; but in the Cafe 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 Cafie.

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 by the Matter of the Rolls; and on Appeal to the Ld. Chancellor So-mers, he was of Opinion, that unless there was an Agreement that the Husband should have the other 150 l. it would 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. 65. pl. 58 Mich. 1696. Cleland v. Cleland.

26. Husband alone might bring Debt for Portion promised to his Wife during his Wife, and though Land had been settled by Husband upon Wife en 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 Excri-
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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, the assignor will not bind the Wife if the survives; for the claims of Paramount per Ld. Keeper Wright. Ch. Prec. 121. Trin. 1700. in a Case of Burnet and Kinaiton.

otherwise, but he thought it would not. Ibid. —— S. C. cited a Vern. 392.

28. A Man marries a Woman intituled to a Mortgage in Fee, and after the Wife 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 Choise on Action, and the Wife surviving, it shall go to her Executor, and not to the Executor of her Husband. 2 Vern. 491. pl. 371. Mich. 1705. Burnett v. Kinaiton.

Chin. 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 disinherit his Estate within 6 Months, (within which Time she died) and for every 100 l. to settle 1l. 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 Purchaser for the Agreement, and having made some Progress in discharging the Estate. Ch. Prec. 512. Meredith v. Wynn. —— Abr. Eq. Cases, 70. S. C.

29. A Mortgage for 1300 l. taken in a Trustee’s Name, was decreed to 2 Freemen. the Executors of the Baron; per Wright C. 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 Affirmance 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.

said that this Case was the stronger, because it might be a Question whether this was a Choise en Action; for being once Money in the Guardian’s Hands, the Matter 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 Choise 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, the? standing out upon Bonds and other Securities; for hereby he becomes a Purchaser, especially if such Settlement was made in Confidencation of that Fortune. Arg. said that it had been several Times settled in Chancery. Gilb. Eq. Rep. 106. Trin. 1 Geo. in Case of Parker v. Windham. —— Chin. 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 intituled to this by Survivorship, if there are Affairs sufficient without this Money to pay Debts; for she is in the Nature of a joint-purchaser; per Harcourt. 2 Vern. Rep. 683. pl. 608. Trin. 1712. Chiff’s Hospital v. Budgin & Ux. *

31. An Assignment by the Baron of Choises en Action of the Feme’s is S. C. 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.

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
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Baron's paying the Contribution-Money, the Property was not alter'd, but the Debts remains a Chofe 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.


34. If Truftees pay the Wife's Fortune to the Baron, she can have no Re-medy. Arg. Ch. Prec. 414. Mich. 1715.

35. Feme before Marriage saved 350l. 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 350l. and that it should be placed out for her Benefit; and having also, a little before his Death, laid it down 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 devi'd several Things to the Wife, but took no Notice of the 350l. 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. Courcets of Shaftsbury.

36. A Settlement was made by the Husband in Consideration of a Security, which the Wife had for 3000l. and it was held that it should go to the Husband's Executors, the Wife having survived him, tho' it was objected that no Allignment was made of it to him. L. P. Conv. 395. cites it as decreed by Ld. Cowper, 1716. Stanhope v. Thackher.

37. Husband and Wife, having Issue one Daughter, join in a Convey-ance of the Wife's Lands, and agree that 600l. Part of the Purchase-Money, should be settled in Manner following, viz. 30l. a Year, the Interest there- of 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 Con-consideration of this 600l. 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. Pach. 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 the become intituled, by the Custom of the City, to Part of his Personal Estate, for Payment whereof several specifick Securities of Stocks were transfer'd to him and her jointly. He afterwards increas'd 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 Eftate of the Husband, to be difmif'd. Select Cases in Chan. in Ld. King's Time, 49, 49. 11 Geo. 1. Lannoy v. Lannoy.

29. A.
39. A. Tenant for Life, with Power to make a Jointure of 100l. a Year
for every 1000l. on his Marriage with M. with whom he received
8000l. made a Jointure of 800l. a Year, and covenanted to make a fur-
ther additional Jointure of 100l. a Year, for every 1000l. which he
should receive, or be intituled to by Virtue of M's Father's or Mother's
Will. A. died without Issue, at which Time M. was intituled to one
half of a Moity of the Surplus of her Father's personal Estate. Upon a
Bill by the Creditors of A. to subject M's Share of the Moity to the
Payment of Debts, and upon a Bill by M. that in such Case they 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 Resi-
due of M's Fortune if ever that should be recovered, in regard the cannot
have any Recompense in Consideration thereof, pursuant to the Articles
for parting with it, and therefore decreed that the keep Overplus of her Es-
tate to herself, without having any additional Jointure, the Remainder-
man not being bound or affected by A's Covenant any further than
warranted by the original Power. 2 Wms's. Rep. (648.) pl. 205.

40. A. upon his Marriage with M. gave a Bond to Trynees, reciting,
That by the Marriage he should be greatly advanced in Riches to the Va-
lué of about 500l. agreed to pay M. 10l. a Year to her separate Use, and
that she might dispose of 100l. by Will in his Life-time, and if she survives
him, he is to leave her 200l. and all her wearing Apparel, Plate &c.
Part of her Fortune consisted of a Bond entred into her by J. S. be-
fore 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 Moit of
the Cafes where Chofes 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 Perchoror of her Fortune; and
therefore on the one Hand, as the was to have the Provision made by
the Settlement, so on the other Hand he should have her whole Por-
tion; that in the principal Café the Wife was tied up by the Agree-
ment, and so barr'd herelf of the Chance of Survivorship, which the
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. Cafes in Equs. in Ld. Talbot's Time 168.

41. Legacy of 200l. left to a Feme covert by her Father, to buy In this Case
something to remember him withal was ordered to be paid, after the Hus-
band'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.
him one of the Executors, so that taking all the Circumstances together, it must be intended that the
Teftator 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
Flate, the Defendant put in a Plea, which was overruled, for which
5l. Costs is given to the Plaintiff of Court. 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.

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 Matter of the Rolls said, that in the Case of Parker v. Windham, the Payment which was to a Matter in Chancery was, as to a Special Committee, the Wife being Lunatick, and so veiled 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. decreed 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 she married one Brokherow, who was dead, and the Bill was against the Defendant as Executor of the Testator, who denied Affairs; but it was objected, the Executor or Administrator of the Husband ought to have been a Party, for the Right veiled in the Husband, who might release it; fed non allocatur; for the Husband dying before the Legacy was payable, it was in the Nature of a Chief 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. Comyn’s Rep. 725. pl. 280. Paff. 13 Geo. 2. Brokherow v. Hood in Scacc.

(C. a) [What] Things real [shall survive to the Wife.]

If a Lease for Years he made to Baron and Feme, the Feme shall have it by Survivallship. 43 Ed. 3. 10.

The same Law of a Ward. 43 Ed. 3. 10.

If a Vilein and his Feme purchase jointly, and the Lord enters, and the Vilein 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 Aff. 7. 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.

Tenant in Dover made a Lease for Years, referring Rent, and took Baron. The Rent was arrear. The Baron dies. It was agreed per tor. Cur. that his Executors shall have the Rent. Mo. 7. pl. 25. Mich. 3 E. 6. Anon.

Baron poiffed 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 Cafe.

Baron seizes 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
Baron and Feme.

the Leafe is good for the Term, and after the Leafe is ended the Wife shall have the Residue. Poph. 4. Mich. 34 & 35 Eliz. B. R. Anon. 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 Leafe, to commence after his Death, for 30 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. 355. pl. 514. in a Note there, as adjudged that the Leafe was good.—S. C. cited by Gowy J. as adjudged accordingly. 1 Rep. 155. a.

8. Baron and Feme were jointenants of a Term, and the Baron took a leases infructuous new Leafe, this is a Surrender of the Estate of the Feme but only during the Coverture. Mo. 636. 637. pl. 876. Trin. 43 Eliz. C. B. Mellow v. May.

tot. Cur. the Acceptance of the Feeoment by the Baron was a Surrender of the Term, and it is extinguished; but if the Conveyance had been by Bargain and Sale inviolate, or by Feme, it had been otherwise. Cro. E. 912. pl. 14. Mich. 44 & 45 Eliz. B. R. Downing v. Seymour.

9. Baron seised of a Term in Right of his Wife grants a Rent-charge. Pl. C. 418. b, and dies, the shall avoid the Charge, tho' if he survived it should be 9 H. 6. 52. good during the Term. Co. Litt. 184. b.

10. The Husband seised of a Term for 20 Years in the Right of his Godth. Wife made a Leafe of 10 Years rendering Rent to him, his Executors pl. 376. S. C. and Assigns, and died. Per Crooke J. his Executors shall have the Rent and not the Wife, for 'tis a special Referravion, and the comes in and Crook J. Paramount ; to which Haughton J. agreed, and said that the Rent is (Dodridge incident to him to whom the Reversion, and that is the Executor of J. being absent) held the Husband ; and Hubart Ch. J. of C. B. being demanded his Opinion contra by Montague Ch. J. agreed that the Wife should not have it. Poph. Montague 145. Trin. 16 Jac. B. R. Elaxton v. Heath. 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 Juries delivered no Opinion. Cro. E. 279. pl. 5. Patch. 34 Eliz. B. R. Loffin's Case, 4 Le. 187. pl. 285. Mich. 29 Eliz. by Popham Ch. J. 52. For the Rent is not incident to the Reversion, because fire was no Party to the Lease. Co. Litt. 46 b.—2 Lev. 100. Arg. cites Co. Litt. 46 b. 2 Verm. 63. in a Note at the End of pl. 55. cites Co. Litt. 46. b. S. P.—A Man has a Term in Right of his Wife, and leaves Part of it, referring 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 N. Ch. R. such a real Chattel. 3 Ch. R. 37. Patch. 21 Car. 2. in the Exchequer, cites 133. cites Co. Litt. 69 in Cafe of Attorney General v. Sands.

(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 Arrears incurred during the Coverture. 15 Eliz. 4. 10.

2. If a Feme leaves for Life referring Rent, and after takes Husband; after the Death of the Baron, the Feme shall have the Arrears incurred during the Coverture, and not the Executors of the
the Baron, because this illis out of the Freehold. 11 R. 2. Ac-
count 49.

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. 49.
adjudged.

-Grant, pur
9. J
In adjudged. Aliter

F. N. B. 121.
(C) In the new Notes there (e) cites S. C. that A. was
Leffe for the Life of a Feme Co.

4. [So] If Baron and Feme leaves for Years rendring Rent. If
the Feme after the Death of the Baron agrees to the Leaf, she shall
have the Arrearages incurred during the Coverture. 7 Ed. 4. 7 b.

5. [So] If a Feme leaves for Years rendring 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.

6. [But] If a Feme leaves for Life rendring Rent, and takes
Husband; and during the Coverture, a Receiver receives the
Rent of the Leaf, (it does not appear by whom he was made Re-
ceiver, 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.


7. If the Ward of the Body and Land of another he 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 Butt.

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. Mitch. 22 Jac. B. R. between Carew and
Burgoe, per Curiam, upon a Demurrer, which Interact Ch. 18.

S. P. cited by Popham Ch. J. Cro. E. 580 to have been ad-
judged in 15 Eliz. for it was uncer-
tain in whom it should vel, and was
not yet in Eic, and therefore the Baron could either (neither) release, grant or surrender it; but says,
that if he had made a Feuement, that might perhaps have destroy'd the Possibility.

(F. a) In
Baron and Feme.

(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 D. 6. 30. b.

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 D. 6. 30. b.

3. But otherwise, if a Monk borrows and employs it for the necessary Use of the House, it shall charge the House, Subturator, 11 D. 6. 30. 12 D. 6. 5.

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 D. 6. 21. c. 22.

buys any Thing, and it is found by Special Verdict that it was spent in the Household &c. yet the Baron shall not be chargeable 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, Palch. 15 Car. 2. in Case of Manby v. Scott.

5. So if it comes to the Use of the Husband, if the Contract was Fizth. Deb., not to the Use of the Husband. 20 D. 6. 22., 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 Pott. Ch. 1 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 D. 6. 22., pl. 41. cites S. C. & S. P. by Newton. But Fizth. says, Quere 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. 13 Jac. 5. 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 Divitris, and puts it in the Pound, and the S. C. cited Owner comes to the Pound, and there finds the Wife, the Baron is to be absent, and renders to the Wife Pledges, and prays a Delive- 11. 3. 25.
11. In Affiue the Baron and Feme are Tenants in Tail. The Baron goes out of the Country, and the Feme infuffis f. 8. Per tot. Cur. This is a Diffisum to the Baron, and therefore a void Feoffment. Br. Feoffment de Terre, pl. 23. cites 9 Aff. p. 20.

12. If a Woman seals a Bond in her Husband's Presence, and he stands by and does not gainsey, it shall bind him; per the Matter 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 Inft. 713.

14. The Wife, without her Husband's Affent, bought Vayets 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 offered to demur; but the Jury was charged, and the Plaintiff at their coming back was not satisfied. The Jury affirmed that they would have given their Verdict against the Plaintiff; but Dyer said, that at the Nifi Prius he much doubted thereof. D. 234. b. pl. 17. Mich. 6 & 7 Eliz. at Guildhall. Wheeler v. Poines.

the Payment of the Taylor, whether this amount to a Conten; 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.

15. A Feme Covert was tried with Process as a Witnes, and tender'd her Charges, and she appeared not. After Verdict it was moved in Arreft, that she is not within the Statue 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 10 L. given by the Statue; and that a Feme Covert is within the Statue; for she may be the Iole Witnes; 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. 150. pl. 3. Patch. 31 Eliz. B. R. Havithbury v. Harvey.


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 Trespasses done by her &c. there Action of Debt upon the Cafe, Trespa's &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 Trespa's, 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.

18. If a Feme Covert commits a Riot, the Husband shall not be chargeable for it. Arg. 3 Bullit. 87. Mich. 13 Jac.

19. If the Wife speaks Slanderous Words, the Husband shall answer for them. Arg. 3 Bullit. 87. Mich. 13 Jac.
Baron and Feme.

26. A Contract made with a Feme covert is good. 27 H. 8. 26. in Catam's Case; and it shall be said the Contract of the Husband. 39 E. 3. 9. A Sale by Feme covert is good, and he shall declare that he himself paid this; Perc Coke Ch. J. 3 Buls. 90. Mich. 13 Jac.

27. If a Feme covert commits a Trespass, the Baron shall be punish'd for it; Per Twidten J. said that this is allowed by our Law. Sid. 113. Pach. 15 Car. 2. in Cam. Seacc. Arg.

22. The Defendant's Lady bought several Goods of the Plaintiff, a Mercer, and Defendant paid him for them; afterwards he parts from his 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 rel. Serj. Rawlins. Freem. Rep. 245, 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 wafted 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 150l. 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 it was the Husband should be decreed to pay it. 2 Freem. Rep. 215. pl. 281. Pach. 1697. by the Maiter 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 the 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 Premption of Law the undertaking is well to how to purchase them as her Husband does; at Guildhall. Cumb. 450. Trin. 9 W. 3 Garbrand v. Allen.


27. If Baron and Feme cohabit, and Feme deals separately, her Contract shall charge the Husband; for Cohabitation is sufficient Evidence. 1 Salk. 113. of Notice; Per Holt Ch. J. 6 Mod. 162. Pach. 3 Ann. B. R. Langford v. Tyler.

I i

(E. a. 2)
(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 cellulae Caufa cellabit efficius. Br. Baron and Feme, pl. 27. cites 49 E. 3. 23.

2. Citation was filed 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 filed, and the other pray'd Con\n\n2. 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 the 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.

3. A. married a Feme, Executrix, subject to a Devastavit; if A. have not sufficient to satisfy, himself shall be imprisoned for the Debt. Ca\n\n3. ry's Rep. 34. Trin. 1 Jac.

A. made 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 he took it as a Portion with the Widow, and this is in Favor of the Heir, tho' there were no Creditors concerned, but was only to have the personal Estate applied in case of the Real. 2 Vern. 61. pl. 53.

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 devaftaverunt Bona &c. confiscate poteris, tune 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 wafted during her Widowhood, and that the Husband had not wafted any of them, &c. &c. devaftaverunt 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 was 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.


5. It was admitted on all Sides, that if a Feme sole is indebted and mar\n\n5. ries, 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 Cafe of Obrian v. Ram.

015. cites it as ad\n\n015. judged in the Cafe of Grubb v. Johnson — Feme sole gives Warrant of Attorney, and then marries, you may file a Bill, and enter Judgment against lab. Show 91 Hill. 1 W. & M.
6. A. marries B. an Administrarix; B. had wasted great part of the Estate before the Marriage. After the Marriage a Suit is brought against her, and a Decree is had for that Purpose, and then the Wife dies; Per 118. pl. 17. All Commissioners, the Husband is not to be charged further than what he had to his or her Wife’s Hands before Marriage. 2 Vern. Mich. 1689. Sanderfor v. Crouch.

Chan. Prec. 253, 256. pl. 208. Pach. 1766. Powell v. Bell. And ibid. 255. 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 Purchafor 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 Court, but not after, whatever Fortune he had with her; but in Equity he may if he has any specific Affect of her Estate’s after her Death; so if he has any thing merely in her Right, so far shall he liable for Wallace 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 Purchafor of the Wife’s Fortune for a valuable Consideration, by making a Settlement on her; Per Mr. Vernon, Arg. Chan Prec. 452, 453. Hill 1715.


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 Life of 12000 l. fell the Freeman’s Estate; and tho’ the Wife was dead, and it was urged that the 2d Husband was a Purchafer of her Fortune, yet twas decreed that the Daughters should have a proportionable Recompence out of the 600 l. For where he takes Notice in the Articles that the 600 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 Purchafer thereof, subject and liable to an Account; that is, as to much as upon the Account might be coming to her; and besides having taken collateral Security that her Share should amount to the 600 l. he shall be liable to a Life of 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. Page v. Hoskins.

9. Where a Man marries a Widow Executrix &c. her Evidence shall not be allowed to charge her 2d Husband with more than she can prove to have actually come to her Hands. Agreed per Cur. Abr Equi. Cafes, 227. Hill. 1719.

(E. a. 3) Baron chargeable for what Debts of the Feme contracted before Marriage, after her Death.

WHERE the Feme dies, the Baron shall be discharged of the Debt of the Feme dum sola fuit; for Cestante Causa cessabit Effectus.

Br. Dette, pl. 48. cites 49 E. 3. 25.

(1)
Baron and Feme.

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 he had against a Feme sole, and the marriage; and afterwards dies, the Husband is not chargeable. 3 Mod. 186. Hill. 3 Jac. 2. B. R. in Cause of O'riain v. Ram. Arg. 10. Mod. 163.

If the Feme dunn'g foli gives Bond, and marries, and dies, the Baron is not liable. Arg. 10. Mod. 161.

2. A. beguath' dip l. to the Plaintiff, and made his Wife Executrix, and died. She married the Defendant, who had divers Goods of the Tēsator 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 Promiss 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 in such as 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 chargeable 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. — Bull. 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 reduce them to an 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 Sitter for Life, Remainder over, and made M. Executrix, who married J. S. and died. 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 Represenative 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 Tēsator'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 Case. Green v. Reid.

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 infilt 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. Cales, 60. Trin. 1700. Blackmore v. Ley. But Quere.

4. Judgment was obtained against a Feme sole. She marries; then the Plaintiff sues a Seire Facias against Husband and Wife, and has a Judgment Quod habeat Executionem against them. Then the Wife dies, and the Plaintiff sues a Seire 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 O'riain v. Ram. 2 Ld. Raym. Rep. 1653. Mich. 3 Ann.

5. A. married a Feme sole Trader, and she dies indebted. It was inlisted, 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 Cafe of the Earl of Thomond v. the Earl of Suffolk.

6. M.
Baron and Feme.

6. M. was indebted to A. her Mother in 2000. by Bond, and then A. by Will directed this 2000. to J. S. Afterwards M. married, and survived her Husband, and afterwards married W. R. who had with his several Jewels, and a Rent-charge of 1500. 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. Rep. 461. pl. 132. Trin. 1718. The Earl of Thomond v. Earl of Suffolk.

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. Cales, * See Free, 295. was cited; and that having paid the Interest, was taking the Debtor man v. upon himself. But the Bill was dismissed, tho’ without Costs. Select Cales in Chan. in Ld. King’s Time, 19. Trin. 11 Geo. Jordan v. Foley.

(E. a. 4) Baron chargeable for what Debts &c. of the Feme contracted during Marriage.

1. WIFE of A. receives 10l. 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, If the Wife tho’ he had made Proclamation that no Man could 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 included the debt will be paid as his Servant; and the Judge took this Difference, where particular such a Thing 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 above-foiled; and in this Case it was proved the husband tells her that formerly bought and sold, but not lately. Clayt. 125, 126. pl. 223, he will not allow it, and for bids the Tradefman to give his Wife Credit for it, and afterward the Wife takes up that Thing of the samo Tradefman
Baron and Feme.

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 affluempt. Sid. 127. Patch. 15 Car. 2. in Cam. Seacc in Cafe 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 Refidue of the Special Circumstances, is not fur Matter of Evidence, upon which the Jury should proceed to af-certain the Fact, whether the Baron promised or not. Sid. 127. in Cafe 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 Cafe of Manby v. Scott.

6. The Father devisef 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 pays for Cloaths for Money, and afterwards borrows Money to redeem them, the Husband is not chargeable unless he was con tenting, or that the first Sum came to his Use. 2 Show. 283. pl. 276. Hill. 34 & 35 Car. 2. B.R. Anon.

8. In Cafe brought for Wires sold and delivered by the Plaintiff, to the Wife of the Defendant, Non Affluempt 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 94l. and that Part of them were delivered to a Carrier for the Wife of the Defendant, by the Or-der 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 De-fendant, and that the Wife at that Time lived with the Defendant in the fame House. For the Defendant infilled, that long Time before the De-livery of the Goods, there was a Difference between him and his Wife, and that they for the Space of two or three Years had not lived to-gether, and that the Wife declared to the Defendant that she would charge him with 500l. 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. 50l. per Ann. and no Evidence was given that she had any Occasion to have these Clothes fo as they could appear to be necessary. And the same Day another Action was tried for Velvet and Tiffines of 3l. per Yard, to the Value of 80l. and Treby Ch. J. directed, that if the Jury found the Plaintiff innocent of the De-sign 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 Diffe-rences between the Husband and Wife, and sold them only to enable the Wife to ruin the Husband, then the Defendant would not be charge-ble, and though the Husband be chargeable heretofore, yet after such a solemn
10. While they cohabit the Husband shall answer all Contracts of the Though the Wife for Necessaries; for his Affent shall be presumed to all Necessary Contracts upon the Account of Cohabiting, unless the Contrary appears.

11. If a Wife takes up Clothes, as Silk &c. and Pawns them before The Husband made into Clothes, the Husband shall not pay for them because he 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. Parch. 2 Ann. Etherington for better for v. Parrot.

12. If Baron * turns away his Wife, he gives her Credit wherever she In such Cafe he must go and must pay for Necessaries for her; but if she runs away from her Husband, he shall not be bound by any Contract the makes; Per Holt Ch. J. 1 Salk. 118. pl. 10. Parch. 2 Ann. Etherington v. Parrot.

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 Cafe.
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for her Care 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 Credit

or 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 likewit 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. Acknowledged a Statute and died Intestate, and upon an Extent 'twas returned Mortuus. A new Extent was inflicted, upon which was returned, that the Widow Administratrix had sold the Goods of the Deceased; whereupon the Extent inflicts of the Goods of the second Baron. Mo. 751. 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 he 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 Car. 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 Elponfals, as after
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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, Trepass lies against him; per Rede J. Kelw. 61. Patch. 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 Car. what came in between seven and eight Years after Marriage by the Death of the said M. was not within the Comps of the said Agreement, but was to go to the Benefit of the Husband. Chan. Rep. 26. 3 Car. 1. Fel. 883. Rickmers v. Herne.

3. If a Man marries an Executrix and waives the Goods, 'tis a Devastavit, and tavit in the Wife; per Car. For it was her Folly to take such Hus-band that would make a Devastavit; and by Jones J. if a Recovery appear—against Baron and Feme be in a Devastavit, if the Baron survives S. C. cited the Wife he shall be charged, and if the Feme survives the shall be Arg. Lurw. charged; but if the Recovery be not against Baron and Feme in the Lile of the Feme and the dies, the Baron shall not be charged. Cro. C. 519. pl. 20. Mich. 14 Car. B. R. in Cafe of Mounfam v. Bourn. A Feme Co-vert cannot waive during the Cover-ture, though the Waiving of the Baron shall charge her if she survives; Adjudg'd. 2 Lev. 145. Trin. 2; Car. 2. B. R. Horsey v. Daniel.

4. The Wife when she bought Goods for Money, and after married, S. C. cited and died. The Goods came to the Husband's Hands after her Death, but by Ld. C. the Debt remained unpaid; the Bill was by the Creditor to dicover the Goods. Defendant demurred, but over-ruled by the Lord Chancellor, in Ld. Talbot; Ca-Cases in Equ. who with some Earnestness said he would change the Law in that Case's Time, Point. Chan. Cazes 295. Mich. 28 Car. 2. Freeman v. Goodham. 175. Hill. in Cafe of Heard v. Stanford, who obviated 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 paying 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 Caufe 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, she 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. Comyn's Rep. 31. 32. Mich. 9 W. 5. B. R. Aton.

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 foza gave a Bond, and then married. The Husband Wm.'s Rep. became Bankrupt. The Bond-Debt is discharged by the Bankruptcy of S. C. and the Husband, so that if he dies the shall not be further chargeable; per Ibid. 257. Parker Ch. J. who declared the Judgment of the Court as to the first S. P. Part, and his own Opinion as to the latter Part. 10 Mod. 243. &c. Trin. 13 Ann. B. R. Miles v. Williams.

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 Tenter'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, to be signed Receipts, and executed Leaves &c. but the Money was usually paid to Lady Milman, his Wife. Cowper C. de creed Lady-
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dy M. to account for what Money the 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 Acts as Feme covert shall direct; she may give Direction without Assent of the Baron, and if Baron disaffents, yet the Declaration and Direction of the Wife shall guide the Cafe, and shall be Cautious to forfeit or lose the Bond. And. 182. pl. 217. Pauch. 30 Eliz. Arg. in Cafe of Forfe 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. Subbs. (Quære)

3. Debt upon Obligation conditioned, that if Defendant marry such a Widow, who was possessor of divers Goods of her first Husband's, and his Children's, she could not meddle with them, but that she and her Children might enjoy them without Interruption from him. Upon Performance of Covenants pleaded, Plaintiff alleged 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 known that he disturbed the Wife's Enjoyment of them; and of that Opinion were Hyde and Jones J. but Whitlock and Crooke contra, and that the Breach is well alleged; for by alleging the taking and detaining the Goods, is supposed a taking and detaining them from the Wife, and likewise found for the Plaintiff, the Court intends it an unjust Caption and Detention, contrary to the Agreement. And afterwards Hyde mutatis Opinions upon reading the Books, was of the same Opinion, whereupon, absent 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 Dispofal. 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 Dispofal 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,
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storefayd, she having on her Death-bed declared they belonged to the Baron, and that the Trustees be indemnified observing such Directions. Fin. R. 128. Hill. 25 Car. 2. Blyffe v. Savers, Cherry and Partridge.

5. Fowles upon his Marriage with Countefs of Dorset enters into Articles, that Countefs 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. Countefs of Dorset lays up a considerable Sum of Money out of her separate Estate, and buys Land with it, and makes an Appointment parlant to the Power, and dispoises of the Land so purchased to a Stranger. After her Death Fowles prefers 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 raifed out of the separate Estate of the Wife, which had a Power by the Articles to dispose of. Cited MS. Rep. 1 Geo. in the Case of [Coffin u. Lea, as a Case in Ld. C. Jefferies's Time, Fowles v. the Countefs of Dorset.

6. In such Case the Husband being in Debt, and to discharge his Gilb. Equi. 

Goods going to be taken in Execution, she gave a Note to pay the Debt S. C. reported out of her own separate Estate, and accordingly the Action was discharged. On a Bill against Baron and Feme, the Baron could not be dem Verbs, met with to be served with a Subpoena, but the Wife was inforced by Attachment to ansuer without him, He being made a Party only for Conformity. Ch. Prec. 328. pl. 249. Hill. 1711. Bell v. Hyde.

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


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 dispois of it to the 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 5000l. 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 nor any Right or Interest therein, and altho' at that Time she could not grant or releafe the same; for this being a Covenant shall enure according to the Intent of the Parties, and extend to a Right in future, where 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 Petts] v. Lee.

9. The Feme by such Power confequently 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 confidently to receive the Intereft without any Complaint to either Debtors or Trustees, and about 10 Years after the Marriage the Husband died. Ld. C. MacClessfield decreed the Executors of the Husband to make good any part of the principal Money due on any of the Securities, with Intereft, from his Death; but as to the Intereft 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.
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mitted against the Wife in this Case, and she not having in so long Time made any Complaint, her Content shall be intended and be considered as a Gift, and that any other Contrainption might have put him under great Hardships. 2 Wms's Rep. 82. pl. 18. Mich. 1722. Powell v. Hankey & Cox.

10. The Wife having referred Power over her own Estate, and vested the same in Trustees, consented to fill 101. A Year, part of her Land of Inheritance for 200l. 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 Decasement, for the Benefit of her Executors. Ld. C. Macclesfield held that this should bind the Wife, and was a waiving the Interest of the 200l. for her Life, and if she would avoid this Bond the must prove some Fraud in gaining her Acceptance thereof; that this being her separate Estate, the joint Prima facie to 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 the 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 speciick and other Legacies, and made A. and B. Executors, and like wives the Husband had pífated himself of some of her Money. The Matter 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 of 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 speciick Legacies ought to contribute in Proportion. 2 Wms's Rep. 144. Trin. 1723. Norton v. Turvil.

11. A Bond given by a Feme Covert (having a separate Estate) upon her borrowing Money, was inscribed 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 Matter of the Rolls agreed that the Bond was void; but he said, that in this Café (he 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.


12. A by Will gives 2 Legacies to his Daughter B. of 500l. each, one of them for her sole and separate Use, the 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 500l. and the other 500l. by Consent to be laid out for the separate Use of the Wife. The Husband and Wife, the being 19, join in an Affirmation of the left 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 Affirmation good, and the Residue to be paid to the Assignees. The Wife rehears &c. alleging that she was poor, and not able to produce the Order of Ld. Macclesfield. Objected, That the Affirmation 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 Case 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 fact apart immediately. As to the Affirmation itself, he admitted that if Feme had been sole it had not been good, but void; but the Cafe 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.
13. A Woman having Lands and a personal Estate, before Marriage conveys all her Estate to her separate Ufe, to which the Husband was a Party; and he covenanted that he would not interfere with it. On this Estate foi convey'd, there was a Mortgage for 300l. which, before the Conveyances, he verbally promised to discharge. During the Coverture the Mortgage was assigned over, and be covenanted thus, That I or my Wife shall pay it. The Husband and the 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 Interieu 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 10 much a Year for her Expences, if the out of her own good Houfe-wifry laves 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 Cafe.

2. A Term was created on the Marriage of A. with B. for raising 200l. 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 affeeted for Payment of Debts, it being in Arrear for one Year only; it focus had it been in Arrear for several Years. Chan. Prec. 26. pl. 25. Trin. 1691. Oifley v. Oifley. to be in Arrear; and that between Husband and Wife, who lived well together, 3 Quarters of a Year made but little Difference. Abr. Eqv. Cases, 140. pl. 7. Mich. 1728. Councils 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 Purport; "I am indebted to my Wife 100l. 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 Judge decreed no; 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 Soutantque. But quære, for the Tietior look'd on this as a Debt, and seems to intend to provide for it by his Will. Abr. Equ. Caces, 66. pl. 2.


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 confir'd a Content from her that she should receive it; per Ld. C. Maclesfield. 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 Bithop of Salisbury.

6. So where 50l. a Year was reserved for Clothes and private Expenses, 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 disfallo'd. 2 Wms.'s Rep. 341. pl. 98. Hill. 1725. Thomas v. Bennet.

(E. a. 9) Feme relieved against the Acts of the Baron.

IN Aff'ce, if a Man seised in Jure Usuris leaves the Land to B. for Life, and after grants the Reversion to F. 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 Poffeffion, pl. 15. cites 28 Aff. 6.

2. 32 H. 8. cap. 28. S. 6. No Fine, Possessment, 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 he is Party or Pri- vy, only excepted.
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This Statute; and where the Issue could not have Sur Cui in Vita or Forsemedon, in such Case he shall not enter within the remedy of this Statute; and therefore if the Baron has Issue, and alines, 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. 75. a. Patch. 7 Jac. Greenley's Case. — Mo. 32. pl. 164. Patch. 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 said and of no Effect; but that the said Femeis, after the Death of their Baron, may enter," that thefthf 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 Divorciation; 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. p. 510. in the Time of Q. Eliz. C. B. says, Note by Dyer upon the Words of Stat. 52 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 Abrogation of the Words precedent; for in some Cases such a Feoffment is a Discontinuance; As if, after the Feoffment, they are divorced, the cannot enter, but is put to "her Writ of Cui ante Divorciation."

If the Husband makes a Feoffment in Fee of the Lands of his Wife, and after they are divorced Caussa presentendi, yet the Woman may enter within the Purview of that Statute, and is not driven to her Writ of Cui ante Divorciation, 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 died she cannot be his Wife at the Time of the Entry. Co. Litt. 326. a. — 8 Rep. 75. a. in Greenley's Cafe, S. P. The Feoffment was made during the Couverture 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 Vincolo Matrimonii, or after his Death. —— Mo. 48. pl. 164. Patch. 6 Eliz. says that in such Cafe she is put to her Writ of Cui ante Divorciation.

* Co. Litt. 326. a. S. P.

3. Baron alone levies a Fine of the Land of the Feme with Proclamation. Without Action or Entry the Is barr'd for ever; per

The Baron dies, and 5 Years pafs. The Feme is barr'd. Arg. 2. Roll Rep. 410. cites 5 E. 6. 72.


4. Where the Baron and Feme are joint Purchasers in Tail, the Re. Mo. 28. pl. mander to the Feme in Fee, and the Baron alone by Fines without his Feme, and dies. It was held clearly by the 2 Chief Justices, Stamford and A. 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.


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 adjudged in Braumont's Cafe, and that with this agrees D. 191. b. pl. 22. Mich. 2 & 3 Eliz. Hawtry's Cafe.

6. Baron and Feme are jointy sealed in Tail, Remainder to the Baron Bendl. 259. in Fee. They have Issue. The Baron levies a Fine with Proclamations. pl. 247. S. C. The Heirs of their Bodies are barr'd by the Statute of 32 H. 8. of Fines, in Tail, but not the Feme; for he is not within it. And. 39. pl. 101. Mich. 15 & 16 Eliz. Anon.

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 Fine is barr'd. — Dal. In Kelw. 203. a. b. pl. 7. Does seem'd of Opinion, that if the Feme had entered the Fine had been avoided, but the other Justices contra.


7. If
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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 he 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. Paich. 35. Eliz. B. R. Bullock v. Dibley.

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 preferred. Co. Litt. 326. a.

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 Subsistence this is the Act of the Husband only. Co. Litt. 326. a.

10. If the Husband causes Precise quod Reddat upon a Jaint Title to be brought against him and his Wife, and suffer 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 Contrauction 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.

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 Issue 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 refolved by Way of Admissitance, that if the Remainder in Fee had not been to B. himself, but to a Stranger, the Entry of the Wife had retorted that Remainder to the Stranger, and had left nothing in the Cognifce, but a mere Possibillity; to the half 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 Inheritance might be sold, and all had been in the Cognosce, and the Wife had nothing but a Possibility vice versa. Hob. 257. Hobart Ch. J. cites Husband, as 9 Rep. 146. [138. b. &c. Patch. 10 Jac. in the Court of Wards] Beau- mont’s Case.

nefsical Law to suppress a Wrong, and to give the Party wronge d a speedy Recesy, and that it was in equal Miftie#: it was adjudged to be within this Statute.

13. Twifden faid he had a Café from my Lord Kelinge, where a * S. P. by Feme Covert Infant bey'd a Fine, and her Friends got a Writ of Error in the Husband’s and her Name. That the Court could not suffer the Hill 23 & Husband to release, but Hale faid he could not fee how that could be avoided, but he had known that in fuch Café the Court would not permit the Husband to * diverses the Guardian which they admitted for the Wife. Vent. 209. Patch. 24 Car. 2. B. R. in Café of Freeman v. Bodding-

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 Names, the Husband borrowing agreed by Articles, that as she got it she might dispose of it at Pleasure allowing him a Maintenance, which he always did, and the had no Maintenance from him for 15 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 Eftate to his Daughters Husbands, and made them his Attornies to sue for &c. the fame, 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 Confect of all Parties decreed that the said Eftate should be divided into Moities, one to the Plaintiffs, and one to the Mother, or to whom he 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 Alignment as gives the Plaintiffs all the Eftate of the Father and Mother be discharged, and that the Mother keep and dispose of what she has by Virtue of this Decree or otherwife, and what he shall after acquire by her Industry, either by Gift, or by her Will without any controul of the Plaintiffs or her Husband, as a Feme Sole may do. Fin. Rep. 56. Hill. 25 Car. 2. Ward v. Sumner, 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 Eftate twice more. The Court thought this Agreement fraudulent as against the Subsequent Mortgages, fo 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. 297. Hill. 1684. Dolin v. Colman.

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 Anwser and Depositions; but in Café 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 that the Wife come in as a Creditor on the 500 l. Bond, and what Bond for
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Payment of a sum of money to his Wife in Case of her death, and the husband after becoming a bankrupt; if there be nothing stopped by way of dividend out of the Bankruptcy, to answer his debts or demand when it happens. Mich. 1728. Abr. Equ. Cases 54, 55. Chawell v. Calliford.

(Ea 10) Leafes 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 Leafe before the Statute 32 H. 8. by Parol, referring Rent to them; and afterwards the Feme, when she is sole, receives the Rent of the Ternor, that this shall not bind her from avoiding the Leafe unless it was by Indenture, because her Assent was requisite to the commendation of the Leafe, which ought to have been by Deed. D. 91. b. in a Note of the Reporter, pl. 13. Mich. 1 Mar. in Case of Turney v. Sturges.

There are 9 Things necessarily to be obviated. 1st. The Leafe must be made by Deed Inverted, 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 Leafe in being, it must be surrendered or expired, or ended within a Year of the making of a Leafe, and the Surrender must be absolute, and not conditional. 4thly. There must not be a double Leafe in being at one Time. As if a Leafe for Years be made according to the Statute, he in the Reversion cannot expulse the Leafe and make a Leafe for Life or Lives according to the Statute, nor e converso; for the Words of the Statute be, to make a Leafe 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, or Land and Things necessary to be letten, and where a Rent by Law may be recovered, and not of Things that lie in grant, as Advowsons, Farms, Markets, Franchise, and the like, whereat a Rent cannot be recovered. 7thly. It must be of Lands or Tenements, which have must commonly been letten to Farm, or occupied by the Farmers thereof by the Space of 20 Years next before the Leafe 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 Court, and so it is of a Leafe at Will by the Common Law; but those Lettings to Farm must be made by some feised 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 Leafe there be referred Yearly, during the same Leafe, due and payable to the Leasors their Heirs and Successors &c. so much yearly Farm or Rent, or more, as both have accustomly yielded or paid for the Land &c. within 20 Years next before such Leafe made. 9thly. Nor to any Leafe to be made without Impeachment of Wife; therefore if a Leafe be made to Life, the remainder for Life &c. this is not warranted by the Statute, because it is Dispunishable of Wife. But if a Leafe be made to one during three Lives, this is good; for the Occupant, if any happen, shall be punisht for Waft. Co. Litt. 44. a. b.

Ejectment of a Leafe of A. the Husband. Upon Not Guilty pleaded, a Leafe by Indenture was flown 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. Leafe of A. only, and not in the Wives Name, Exception was taken; and per 3d. the Declaration is good; for the Delivery by the Attorney is a void Warrant as to the Wife, and to it is the Leafe of the Baron only. But if the Leafe had been delivered on the Land by the Baron alone, it had been a good Leafe for both, and the Declaration should have been accordingly; but now it is the Leafe of the Baron only, and not voidable, but void against the Wife. Cro. J. 611. pl. 1. Mich. 19 Jac. B. R. Gardiner v. Norman. The Leafe of them both during the Husband's Life. Cro. C. 193. pl. 10. Mich. 5 Car. B. R. Chawell v. Hopkins.

The Husband after Marriage purchases to him and his Wife and their Heirs, and after without his Wife, makes a Leafe for sixty Years, at more Rent than the same had been let for before, only it was

1. 32 H. 8. LEASES made by him that is seized in Right of the Wife of cap. 28. Inheritance, or jointly with his Wife by Purchase during the Coverture or before, shall be good and effectual. And the Wife shall have such a remedy for the Rent after the Death of her Husband the Leffer against the Leasor, is Executors and Affignees, as the Husband Leffer might have had. Provifo that all Leafes made of Land &c. wherein of the Inheritance is in the Wife, shall be made by Indenture in his and his Wife's Name, and the to fel the same, and the Rent to be referred 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 seized by both.
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leased before in two Parts and now in One. Per 5 J. against Hobart Ch. 3, 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 Reaffernation shall be to them and the Heirs of the Wife which is not intended of a joint Estate; but then the Reaffernation 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 ASt, to avoid The Husband and Wife feiled 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, provided that it shall be lawful for the Husband and Wife at any Time during their Lives, to make Leases for 21 Years or under, or three Lives, whereupon theacciounable yearly Rent for 22 Years before is reserved.

The Leafe made by Baron and Feme. It is not like the Case of such Leafe by an Infant, for the Husband had Power, and the Wife joining in the Leafe it is not void, for the may affirm the Leafe by bringing a Writ of Waife or accepting Fealty; and adjudged accordingly. Hurt. 162. Hill. 4 Car. Anon.—It is the Leafe of the Wife till the disagree. Cro E. 112. pl. 9. Mich. 50 & 51. Eliz. B. R. Jackson v. Mordant.

3. If before the Statute 38 H. 3. the Husband and Wife had made a Baron and parol Leafe rendring Rent to them, and the Husband died, and the Wife, after the Leafe, was not bind her avoiding the Leafe, unless it had been by Indemnity, because her Affent was requisite to bind. The to the Commencement of the Lease, which must have been by Deed. D. Baron died. The Feme entered and died. The Leafe entered and did Wafte. The Wife in Tail brought Action of Waife, and counted of a Leafe made by the Baron and Feme. The Defendant pleaded that the Baron and Feme did not demise; Wife was joined therewith, and the Matter before found, and adjudged against the Plaintiff, because the Feme had Election to agree or disprove to the Leafe; and when she disprove, it was the same Thing as if it never had been the ASt of the Wife, who disprove. And 550. 551. cites it as the Case of Trefeth v. Trefeth.

And 220. pl. 259. Patch. 28 Eliz. S. C. held accordingly. — Sav. 109. pl. 184. S. C and the Court held that this shall never be taken to be the Leafe of the Feme, and this is prop’d by her Disaffirmance after her Baron’s Death, and therefore Judgment was given against the Plaintiff. — Le. 192. pl. 274. Mich. 31 & 32 Eliz. 2. & the S. C. but Reports it to be an Action of Debt; but Anderson held that by the Wife’s Disaffirmance, and her Occupation of the Land after the Death of her Husband, she had made it the Leafe of the Husband only. — 5 Rep. 27. b 28. a. cites S. C. in Action of Waife resolved accordingly.

And 222. says the Plaintiff declared of a Leafe by the Baron and Feme by Deed inted, but the Jury found that not withstanding the Deed, the Baron continued Possession and died; and the Feme after her Baron’s Death would not permit the Leesse to enter. But that after the Death he entered and did the Waife, 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 Leafe by Baron and Feme, yet he did not allege it to be Deed; and then the Question was, If the Verdict, finding that it was by Deed inteded, had supplied that Imperfection. But the Opinion of the Court was, that this shall never be taken to be the Leafe of the Feme, because her Disaffirmance after her Baron’s Death proves it; and for this Point Judgment was given against the Plaintiff. — Le. 192. pl. 275. S. C. it seemed clear to Anderson, that the Jury have found for the Defendant viz. Non demifant; for it is now no Leafe ab initio, because the Plaintiff has not declared upon a Deed — 4. Le. 52. pl. 151. S. C. and S. P. held by Anderson J. accordingly. — but Le. 204. pl. 283. in S. C. Perian J. held that though the Plaintiff declares generally of a Leafe made by the Husband and Wife, yet the Jury having found that it is by Indemnity, it is purfiant enough. — 3 Rep. 27. b. 28. a. cites S. C. and that the Jury found that if it was by the Deed inteded; but adjudged that by the Disaffirmance of the Feme, in Judgment of Law, it was the Leafe of the Baron only.

but in such Case, though the Declaration in an Ejectment did not set forth that such Leafe was made by Deed; yet upon a Precedent of Patch. 25. Eliz. Motley v. Gilbert, where the Plaintiff counted of such Leafe and did not Mention any Deed, yet it was adjudg’d; and the like in another Case of Digs v. Withers. The Plaintiff in the principal Case had Judgment to recover. Cro E. 481. pl. 15. Trin. 38 Eliz. B. R. Childes v. Welcot. — 2 Rep. 60. 61. Hill. 41 Eliz. C. B. Wilcock’s Case. S. C. adjudg’d accordingly.

4. Husband and Wife seifed of Land in the Right of the Wife, the Cro E. 216. Husband alone makes a Leafe by Word for Years; afterwards the Husband adjudg’d deand Wife lev a Fine, and after the Wife and Husband both die. It was cording; holden
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for being helden clearly by the whole Court, that the Converse should avoid the made by the Leafe. Le. 247. pl. 32. Mich. 31 & 32 Eliz. B. R. Harvey v. Thomas. Baron only, 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 Converse — 4 Le. 15. pl. 52. S. C. & S. P. by Wray. Oh. J. is contradicted contra, because the Coombine meddles with the Land itself, and an Estate in the Land is conveyed 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 Leafe, the Leafe is thereby confirmed. — S. C. cited 2 Rep. 77. b. as adjudged that the Leafe was determined by Death of the Baron, and the Converse shall avoid it; for the Baron joined only for Conformity and Necessity. — Roll Rep. 425. Arg. S. C. cited accordingly, because all palled from the Feme. — Bridg. 47. S. C. cited accordingly. — 4 Bulst. 215. Arg. cites S.C. — But Goldsb. 13. pl. 13. Patch. 28 Eliz. It was said by Seri. Shuttleworth, Arg. that if the Husband makes a Leafe of the Wife's Land for 100 Years, the Wife may avoid it after his death, but if after they both Jery a Fine, the Leafe shall be good for ever, and ibid. 14. the fame was agreed by Fenner of the other Side.

S. C. cited

5. Plaintiff declared of a Leafe by Baron and Feme, and *focus it not to be by Deed. It was urged, that without a Deed it could not be paid to be the Leafe of the Feme, and cited Pl. C. 436. and D. 91. and 15 C. B. in Cafe E. 4. 8. but all the Justices held it well enough; for it may be intended of Child v. Wilcot, and in 2 Rep. 61. b. Hill. 31. and cited. Deed it is well enough, at least during the Life of the Baron, and it is a Leafe from them both during that Time. Cro. E. 438. pl. 53. Mich. Eliz. C. B. in 38 & 38 Eliz. B. R. Bateman v. Allen. Wilcot's Cafe, S. C. and upon View of the Judgment given in that Cafe, and of another Precedent, Patch. 53 Eliz. between S. Hojley and Guillart, and of another Judgment in B. R. between Diggs and Wife, in all which Precedents Judgment was given for the Plaintiff on Demand 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 Cafe of Child v. Wilcot, alias Wilcot's Cafe.

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 Leafe 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. Walfal 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 Leafe 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 Leafe for three Lives, but the Court thought it good it should be holpen in Equity. Mich. 15 Car. Toth. 153. Ireland v. Pavy. — 36 & 37 Eliz. Domery v. Weeton, S. P. Ibid.

7. A Woman sole takes a Consideration for making a Leafe for 21 Years, and then marries, and the and her Husband made the promised Leafe. Before the 21 Years End the Leafe surrenders, and takes a new Leafe for 21 Years more. The Husband dies; the Wife outls the Leslee, who sue in Chancery to have the first Leafe continued for the Remainder of the first 21 Years, and not remedied here, the Surrender being voluntary. Cary's Rep. 29. cites 44 Eliz.

8. In Exhibit. Leafe was made by Baron of Land claimed in Right of his Wife. The Baron died before the Action brought. It was therefore inferred, that the Leafe (the Wife not joining) was void, and determined by his Death, and that Defendant cannot be paid to keep him out of Possession, and that now the Leafe has no Cause to have an Hab. Fac. Poll. but the Court held, that since the Feme did not enter after the Baron's Death, the Leafe is not determined, but voidable only. Cro. J. 332. pl. 14. Mich. 11 Jac. B. R. Jordan v. Wilkes.

9. Husband and Wife (in the Right of the Wife) and a third Person, were Jointtenants for the Life of the Wife and the third Person. The Husband and Wife, by Indenture, left the Money for 21 Years. The Wife died. The surviving Jointtenant entered. All the Court held, that it was a good Leafe, and should bind the Survivor, for it is a Leafe made by her till the Coverture the, or one who claims in Privyty of her, avoids
avoids it, which cannot be by the other Jointenant, for he is para-
10. A. and M. are seised of Lands in Fee in the Right of M. the
Wife, and by Indenture, dated 20th Augst, leased the same to B. and C.
his Wife, and D. their Daughter, Habend. to them at supra dictum eff, et
eorum diutius viventi successive, from Mich. following, for their 3
Lives, rendiring yearly, during their 3 Lives, 13's. 4d. at 2 usual
Fees, 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. en-
ter'd upon her. Resolved, that this Leaf made by the Husband and
Wife is good, and shall bind the Wife, for the Livery alone did not make
the Leaf, 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 Con-
venants &c. in the Deed are good, and the Leases and Leoffers 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 to 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 fought 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 Hus-
band, the Baron shall be charged for this during her Life.

2. So if a Man enters into an Obligation, and after enters into Re-
ligion, the Abbey shall be charged for this during the Life of the
Hoff. 20 D. 6. 22 b.

3. The same Law of a Trespass. 20 D. 6. 22 h.

4. If an Action be brought against a Widow, who is found Guilty,
Brownl. 226. and before Judgment married, the Capias shall be awarded against her, S. C. held and not against her Husband. And in this Case of subsequent Marri-
age, 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 fal-
ify'd all the Proceedings. Cro. J. 323. pl. 1. Trin. 11 Jac. B. R. Doi-
ly v. White.


5. Case was brought against Baron and Feme, for that the Feme af-
firmed herself to be sole and unmarried, prevailed upon the Plaintiff to mar-
ry her, whereby the Plaintiff was much troubled in his Mind, and put that Judg-
to great Charges. After Verdiét it was mov'd, that the Feme cannot,
Sides 575 pl. 1. pl. 1. S. C. anteriorment was
S. C. adjourned. —
by any Contract or Agreement, charge the Baron, and if he is charg-
able in this Case, it must be by this Contract of her with the Plaintiff.
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 reversed, the Plaintiff lies against her and her Husband; Per Holt C. J. 2 Salk. 597. pl. 1. Trin. 3 W. & M. in B. R. in Cafe 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.

1. If a Feme, Lees 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 Friuts out of which the Rent ought to issue. 10 H. 6. 11. Curt.

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.

3. If a Feme Leese for Life takes Baron, and dies, the Baron shall not be charged for Waite during the Coverture; for he was never Leeser. Co. 5. Feliambe, contra 11 H. 6. 11.

4. The Baron shall have Trepass after the Death of the Feme, for a Trepass done upon the Land in Lease to the Feme during the Coverture. 10 H. 6. 11. 6.

5. If A. takes B. an Executzer to Wife, against whom an Action of Debt is after brought as Executors, and Judgment given against them to recover Bonis Tertioris, and thereupon a Fieri Factum lies to levy the Debt and Damages, and the Sheriff thereupon returns a Devavit, and after the Feme died; whether Execution upon this Judgment may be sued against the Baron, there being any Judgment upon the Return of the Devavit to recover de Bonis propriis. Mitch. 7 Car. 2 B. R. between Tretman and James, habituatur. Litteraturie E. 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 Tefatoris 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 the Feme dies, adjudged that the Baron is liable to Execution, notwithstanding the Death of the Wife. Sed. 537. pl. 3. Trin. 19 Car. 2. B. R. Eyres v. Coward.—2 Kebl. 228. pl. 15. Ayer v. Coward, & C. adjudged for the Plaintiff.—S. C. in a MS. Rep. of Ld. Ch. J. Kelving, reported thus, viz. Judgment was obtained against the Defendant and Wife as Executrix, and a Devastavit return'd. 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 return'd, the Husband had not been chargeable after the Death of the Wife; but there being a Devastavit return'd, the Husband is charged as for his own Debt; and it was said it had been resolved, that after a Devastavit return'd against the Husband and Wife, Action of Debt will lie against the Husband. Ms. Rep. Patch, 15 Car. 2. B. R. Ayres v. Coward.

6. If a Man takes a Feme seised of Land by Deed at the Time of the Espousals, and the Feme after the Marriage occupies the Land without the Agreement or Affent 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 Marriages, and the Baron in the Right of his Wife re-enters; or if the Baron after the Marriages, and before any Re-entry of him, that Right has, occupies the Lands, and then the Feme dies, in this Case Trepaps lies against him &c. Kelv. 61. a. b. pl. 1. Patch. 20 H. 7. B. R. Anon.

7. Executrix married B. and then A. a Legatee, threatening to sue B. Yelv. 154. for his Legacy, B. promised Payment in Consideration of Forbearance. Smith v. B. pleads that his Wife was dead before his Promise suppos'd to be. Jones v. S. C. made. Adjudged that the Wife being dead, B. is not chargeable; &c. cordings and tho it were alleged that he had Goods in his Hands, yet it is not per tot. Car. 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.

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 mar. Comb. 1294, and then the Plaintiff brought a Seize Facias against the Husband & C. and Wife to have Execution; and after 2 Nihil return'd, Judgment affirmed. was against them to have Execution. A Year and Day expired before any —3 Mod. Execution was executed. The Wife died. The Plaintiff brought a new 186. Hill. Sci. Fa. against the Husband alone, to have Execution of the Judg.-Jac. 2. Court held, that the Judgment on the Sci. Fa. against the S. C. argued, Husband and Wife, made the Husband liable; and to a Judgment given but adjourn'd in C. B. in Ireland, and affirm'd in B. R. there, was affirm'd here, tur; but Carth. 30. Patch. 1 W. & M. in B. R. O'Brien v. Kam. says that it was afterwards in 1 W. & M. affirmed.—S. C. cited by Holt Ch. J. 1 Sulk. 116 pl. 7. Mich. 9 W. 7; and 3 Sulk. 6. 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 Administratoris. The Plaintiff obtains a Decree against him and his Wife for 1500 I. 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 further than the Value of the Fidate which he had with his Wife. 2 Vern. 193. pl. 177. Mich. 1690. In Case of Jackson v. Rawlins.

11. Where there is a Judgment against Feme sole, and afterwards a Chath 50, Sciure Facias, and Judgment thereupon, against the Husband and Wife, and 31. Patch. the 1 W. & M. BARON AND FEME.
Baron and Feme.

in B. R. the dies, the Husband is bound; per Holt Ch. J. Cumb. 311. Hill. 6
judged accordingly in C. B. and affirmed in B. R. in Error.—-5 Mod. 186. S. C. and Judgment

(Fol. 572. (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 P. 6. 12. 11.
2. If the Baron takes a Seignior's to Wife, he shall have, after
the Death of the Feme, Ravelment of Ward, and Ejecution of Ward,
it oultd in the Life of the Feme, of a Ward fallen in the Life of
the Feme. 10 P. 6. 11.
3. So he shall have Debt for Relief fallen in the Life of the Feme.
10 P. 6. 11. D.
Br. Tefla-
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 20l. due
to the Testator, 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.
5. An Action of Battery for beating the Wife was brought by the Hus-
band after her Death. This, being a Personal Wrong, is dead with the
per Cur.
of Yelv.
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, according-
yly, by Holt Ch. J.
——Comb.
455. S. C.
adjudge.
——Carth.
415. S. C.
adjudged. —
And the Judgment
in the Scire
Fa. does not

alter the Nature, yet it changes the Property of the Debt, and Debt may be brought on an Award of Exe-
3 Ann. at the Bottom.

(I. a) Where
(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. QU I D 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 atton, and was not permitted in the Absence of her Baron, but Distraings ad Attornand' awarded. Br. Cowverture, pl. 19. cites 21 E. 3. 1.

2. Trespa against Baron and Feme, be came, and she not, he shall an

swer; and contra if she comes and be not, and she shall not answer till he comes, or till he be outlawed. Br. Refponder, pl. 32. cites 22 Aff. 46.

3. Trespa against Baron and Feme; at the Exigent the Baron came, S. P. For 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.

4. If the Baron be outlawed, and gets Charter of Pardon, and brings

Scire Faecias, 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.

5. The Default of the Feme in Dover against Baron and Feme is the Br. Default, of both, by which the Demandant recovered Seisin of the Land; pl. 5. cites Quod Nota. Br. Baron and Feme, pl. 12. cites 41 E. 3. 24.

6. Deunit against Baron and Feme; the Baron rendered himself at the Exigent, and the Feme not, and the Baron proy'd that the Plaintiff may count against him, and was compelled, notwithstanding the Default of the Feme, became the Procesa is determined against him, and he counted S. C. cited of a Bailment to the Feme when she was sole, and therefore the Baron was 138. pl. 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.

7. And so it was in Precipus quod reddat; Grand Cape shall issue for In a priets such Default of the Feme. Br. Exigent, pl. 52. cites 45 E. 3. 18. 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 Inconvenience to the Wife, for upon Default after Default of the Husband she may be receiv'd to defend her Right. Jenk. 27 in pl. 50. cites 24 H. 6. Default [4].

In Writ of Land against Baron and Feme, he made Default, and she said that she was sole, and not co-

sent, 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. 5; cites Patch. 6 E. 3. 249.
8. Trespass against Baron and Feme; at the Existent the Sheriff returned that he had taken them, and the Baron came in Hard, and the Feme not, and the Baron was compelled to answer without his Feme, and pleaded Not Guilty; Quod Noto; contrary in Debt. Br. Baron and Feme, pl. 18. cites 44 E. 3. 1.

If Feme covert and her Baron, and others, are Defendants, or Administrators, and she comes without her Baron, the shall not be compelled to answer without her Baron, notwithstanding the Statute. Br. Respondent, pl. 10. cites S. C. Fitzh. Respondent, pl. 17. cites S. C.

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. Respondent, pl. 40. cites 11 H. 4. 56.

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 fine Die; by all the Justices. Br. Baron and Feme, pl. 8. cites 4 H. was brought against the Husband and Wife, and Proceeds continued until the Existent, the Husband rendered himself, and the Wife was waived, and Judgment given, Quia videtur Judicariis hie that the Husband shall be pronuntius & rationi diminuunt fit ipsum in Curia hie, cum in eadem judicat, the Respondent non potuit, uterque deterti, ideo eto inde fine 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. Kinnerley & 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. Keis v. Macher.

14. Upon a Latitat against the Husband and Wife, a Cepl 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 freed, 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 ifue without the Baron; for in 42 E. 3. the cannot plead to Outlawry without her Baron; and in 11 H. 4. the cannot plead Pardon of the Outlawry without her Baron. Arg. quod sibi concedi per Curiam. 2 Roll Rep. 90. Patch. 17 Jac. B. R. in Sir Geo. Corson's Cafe.

16. A Wife to answer without her Husband, he being beyond Sea, Toth. 75. cites 11 Car. Portman v. Popham.

17. Wife's Answer is no Answer, being made without the Husband's Answer, and no Proceeds in such Case can be had against the Wife. Arg. 2 Chan. Cales 173. Hill. 1 Jac. 2. in a Cafe of Ed. Ward v. Ed. Meech.

If the Bill against Baron and Feme be for a Demand out of her separate Estate, and the Baron is beyond Sea, and not amenable by the Proceeds of the Court if she be served with a Subpoena, Ed. Cowper held the Proceeds regular, rather than there should be a Failure of Justice, and the must appear and answer. 2 Vern. 613. pl. 531. Trin. 1702. Dabeau v. Hole & Ux.

Gib. Equ. Rep. 85. S. C. reported in 10bdem Ver. Exe. He 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 bis. Abr. and Feme, the Baron could not be met with to be served with a Sub-

pæna; but the Wife was inforced by Attachment without him, he being pl. s. sc. made a Party only for Conformity. Chan. Prec. 128. pl. 249. Hill cites no 1711. Bell v. Hyde.

19. Tho' a separate Answer of a Feme covert ought regularly to have an Order to warrant it, yet it may be put in without an Order, but done deli-

berately by good Advice, and the fully apprized thereof, and done at her Request, and with Content of her Husband, and the Plaintiff ac-

cepts of it, and replies to it, and the Answer being to the Feme covert's very Short, Advantage, neither the in her Life, nor the Husband after her Death, and only or any on her Behalf, can align this which was done in her Favour as an Irregularity; and it was resolved by Ld. C. King to be regularly put in. 2 Wms. s Rep. 371. Trin. 1726. The Duke of Chandos v. by the Wife Talbot & Ux'.

of the Court for that Purpose, is irregular.——The Wife by Order of Court answer'd separately, Cafes 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 2 Wms. s the 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 Abergavenny the Baron against the Husband, or Subpæna served on him, yet he must

say, that a separate 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.

(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 Diffinu with Force, the shall be imprison'd. Arg. 2 Brownl. 96. cites 9 H. 4. 7. b. 8 E. 3. 52. 22 E. 2.

Damages, 26. 27 h. 6. Ward 118.

3. In Affixe against Baron and Feme, the shall be attack'd by the Goods of the Baron; for the is amenable by the Baron. Br. Baron and Feme, pl. 45. cites 7 H. 6. 9. by the best Opinion.


5. The Husband and Wife were outlaw'd; the Wife came in in Ward by Process in Process', and brought a Charter of Pardon. The Court held that the shall be discharged of the Imprisonment; but the Charter cannot be allowed, because the cannot sue Scire Facias against the Plaintiff, to make him declare upon the Original, without his Husband, and the Pardon is the Exigent, with Condition. Ita quod ipsa iterar recta in Curia. D. 271. b. pl. 27.

Hill 10 Eliz. Anon.

When
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Baron and Feme.

When Baron and Feme are taken on a Capias Utlatagam, the Feme shall be discharged; per Holt. Parr. 52. Mich. 1 Ann. B. R. obiter.

Le. 159. pl. 189. S. C. and after the Justices had advised thereof, the Superfedeas was flay'd, without recording the Appearance of the Husband; and Lady Malory's Case was cited, where the Husband appear'd, and put in Superfedeas for himself only; but it was not allow'd, but Process continued till Outlawry.

A Superfedeas 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 redditit se, upon the other Lepi; and as to the Husband (Non eft inventus) may appear, [her Appearance may be entered] and as long as the Proces continues against the Husband, she shall have Idem Dies; but when the Baron is returned Utlatagam, the shall be discharged without Idem Dies, and that stands well, and reconciles all the Books; but whether she shall have a Superfedeas de non Malefando is doubtful; for by the 11 H. 4. 59. and Dy. 271. If the Baron be outlaw'd, and the Wife waived, and the King pardons the Feme, that shall be allowed, and the shall go sine Dies; and see 4 E. 5. 54. and 14 H. 6. 14. 15 H. 4. 1. and it seemed by all to be agreed, that the Baron after he purchaseth his Pardon, or after he comes and reverts the Outlawry, she shall not have Allowance of his Pardon, nor his Appearance received, unless he brings in his Feme, who by Premature of Law is amenable by him; but the Baron is not amenable by the Feme. Hutt St. Hill. 2 Car. Anon. —— Cro. J. 38. pl. 2. Smith v. Agh, S. C. and the Exigent appeared to be filed against both —— Litt. Rep. 18. S. C. accordingly.

7. The Wife was Executrix of her first Baron, and upon a Debaulavit returned, a Ca. Sa. infi'd against both de Bonis propriis. The Baron was in the Fleet, and the Feme was brought into Court by Hab. Corp. and prayed that she be committed also to the Fleet; but Anderson moved that the 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, the should not be charged in Debaulavit, because then it was the Act of the Baron. But she was committed, because it appears that she was Executrix, and that the administer'd when she was sole, and then the Debaulavit 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.

8. In Debt on Bond made by the Wife dum sola iuit, Judgment must be that Baron and Feme capiantur. Mo. 704. pl. 982. Hill. 39 Eliz. Bardolph v. Perry & Ux'.

Noy 13. Ampton v. Stockburn. Per Pepburn, the Capias must be against the Feme only; but cites 9 E. 4. 24. a. contra. —— See Tit. Amercemem, (D. a) pl. 9. and the Notes there.

9. The Defendant and his Wife were committed to Newgate for not performing an Order. Toth. 157. cites 10 Jac. Wefideane v. Frizell & Ux'.


12. Action
12. Action was brought against Baron and Feme, and an Attorney appeared for the Baron alone; per cur. it is the Appearance of Baron and Feme in law. Brownl. 46. Paeh. 12 Jac. Anon. not being received without an Appearance for the Wife too. 6 Med. 86. Mich. 2 Ann. B. R. in case of Wigg v. Rook.

13. The Baron shall never be charged for the Afs 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 publibh'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 dismissed; 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.

Procès of Oustlawy, and so he might have Remedy.

15. Feme sole enters into Bond, and then marries. Debt is brought Dil. 39 pl. against them on the Bond, and they deny the Debt. The Baron shall be taken for the Fine as well as the Wife; for had nothing to pay the Fine with. And so in Trespass against the Baron and Feme, and seems only that both are found guilty, both shall be taken for the Fine, which the 2 Translators Prothnonotaries agreed to. Het. 53. Mich. 3 Car. C. B. Johnson v. of Dal. Williams.

16. Assail 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 capiat 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 D. 577. a. an Attorney and his Wife, he must put in Bail for himself and his Wife, pl. 30. Trin. and therefore the Declaration being against the Wife in Culodia, and the Husband in propria Persona, it was ordered that Querens nil capiat, &c. S. P. per Billam. Sty. 226. Trin. 1650. B. R. Elfy v. Mawditt. where the Husband was Clerk of the Crown in Chancery.—S. C. cited Ven. 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 the cannot put in Bail for herself, being Covert Baron; per Glyn Ch. J. Sty. 475. Mich. 1655. B. R. Atlee v. Lady Baltinglas.

19. In Debt against Husband and Wife for her Debt daw sol, he was outlaw'd, and she was convicted, and taken and imprisoned; but the Husband could not be found. It was moved, that he 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 entered into by the Feme cum sola, which the Q. Q. Court

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 entered into an Obligation for the Debt, and to give Bond for the Defendant. Debt was brought against her, and the being in Prison, and the Plaintiff, after knowing of the Marriage, brought another Writ against the Baron and Feme, and took the Baron alfo, and declared against both in Custodia. The Court on Motion discharged the Feme; for the Baron only is to be imprifon'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.

FemeCourt sealed a Bond, and being arrested and carried to Prison, the Court, upon Affidavit made that she was Covered, and entering her Appearance, discharged her without Bail. Feme, Rep. 210. pl. 216. Trin. 1676. Lady Thornborough's Cafe.

Keb. 198. pl. 194. S. C. it was mov'd to discharge her, it being an Arrest on the Bond for the Process only, and to say she is in Custodia, is no Reason, because when he shall come in he shall find Bail for himself and his Wife, and so the Plaintiff may declare against them Both in Custodia, and per Cur. she was discharged, Nifi. Twifden 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 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.

24. In Debt against Baron and Feme, if upon the Latinis the Feme appears, the shall be accepted; per Cur. But where she is in Execution, the 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 said to be a Feme sole, the shall put in Bail; and by Twifden, it is an unreasonable Courte, that because the cannot appear by Reddixt fe, but in Custodia, therefore she should not be disfmissed as in C. B. elle 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 the shall always be in Prison. Adjournatur. Keb. 189. pl. 171. Mich. 13 Car. 2. B. R. Bars v. Defman.

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. Dethieck v. Yaxley & Ux.

If Feme covert be arrested, let Gaule of Action be what it will, the shall be discharged upon common Bail; but if Husband is arrested, he shall not be discharged by giving Bail for himself without giving it for his Wife likewise. 6 Mod. 17. Mich. 2 Ann. B. R. Cornith v. Mark. — S. P. by Twifden J. Mod. 9. pl. 24. Mich. 21 Car. 2 and Fish, that so it was done in Lady Baltinglas's Cafe, and that where it is said in Crooke, (Cro. 1. 215. pl. 23. Anon,) that the Wife in such Cafe shall be discharged, it is to be understood that she shall be discharged upon common Bail, and so Liveley said the Course was. — If it be clear and notorious that
Baron and Feme.

If it be evident, common Bail ought to have been received, but if it be doubted, the ought to find special bail; Per Car. 6 Mod. 103. Hill. 2 Ann. B. R. Anon.—S. P. if the Cause requires special Bail. Mod. 10. Pacli. 1 Ann. B. R. per Holt Ch. J. Anon.

26. Debt against Husband and Wife, for a Debt supposed to be due by her dower. Special Bail was put in. Judgment was had against them, and they surrendered themselves in Discharge of the Bail. It was Jacob v. Gabry, S.C. 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 motion of the Process before his Husband, the Bail shall be discharged, and when the Husband is taken, he shall give an Appearance for Bail; but it was said, that the Bail cannot be discharged upon an Execution the Wife may be taken first; but dubitatur what should be done; & adjournatur. Sid. 395. pl. 2. Mich. 29 Car. 2. B. R. Gabry v. Gabry.

Let her lie there in a very necelitious 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. 156. pl. 98. S. C. and per Car. 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, the 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 Note, that there was a Case in C. B. 12 Car. 2 as he remembers, between Hunt v. Drake & Gr. 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. 51. Mich. 21 Car. 2. B. R. Anon.

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; W. 3. B. R.

28. A Judgment in a Sci. Fac. was had against a Feme upon a former 3 Keb. 27. Judgment upon two Nihils returned, but before the Sci. Fac. brought the Plaintiff was married to A. and was brought against her as solus 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 Quelea, because her Baron would relate, and the Plaintiff knew of her being married. The Court said, that this Judgment might be set aside for the Middlema- nor of the Plaintiff; but being informed that the Marriage was under it for the Debate in the Ecclesiastical Court, and near to Sentence, they suspend- ed making any Rule till that was determined. Vent. 208. Pacli. 24 Car. 2. B. R. Lady Prettymans Cafe.

29. Plaintiff brought a Bill against the Husband and Wife, who was the Daughter of the Plaintiff. The Husband puts in a Plea and swearers 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. Cafes 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 insulted 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 culpable 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,
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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 Cafe of Carpenter v. Faulkner.


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 Registrar, and paying Costs of the Motion. Ch. Prec. 328. pl. 249. Hill. 1717. Bell v. Hyde & Ux.

(L. a) Where the Baron is banish'd, or an Alien, or beyond Sea.

1. Willand was banish'd 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 Cafes 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 Cafe.

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. 65. cites S. C. accordingly, but Brooke says Quære, and says vide 1 H. 4. 1. — Br. Trinit. 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. Wilmore's Cafe.

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 Square 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, devioid 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 Subpoena be awarded against her to make a better Answer. Cary's Rep. 143, 144. cites 22 Eliz. Castleton v. Alice Fitz-Williams.

5. The Wife may sit in her own Name in her Husband's Absence beyond Sea, as in Cafe of Assault &c. but she cannot be sued before he returns.
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turns again; Per Williams J. and the whole Court. Bulit. 140. Trin. was admitted per Cur. Patch. 44.

3. The Wife shall be accounted as Feme sole in Cafe of Banishment: Bulit. 188. and Abjuration; Per Coke. Roll. Rep. 490. pl. 27. Trin. 14 Jac. in Wilmore's Cafe.

4. The Judge found for the Plaintif; upon which, as a Verdict against Evidence, the moved for a new Trial, but it was denied; for it shall be intended the Verdict against the Feme, as much as if she had abjured or been banished. 1 Salk. 116. Deely v. Dutches of Mazarine.

5. 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 chargable 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 492. S. C. adJoinatur.

6. 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 Proces of the Court; yet if the Feme is served with a Subpoena, the suit appear and answer the Plaintiff's Bill; Per Cowper C. 2 Vern. 613. pl. 551. Trin. 1758. 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 Cause of Land &c. 2 appeared and the others made Defeat, by which influx 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 Cape 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 conciliat. Br. Count. pl. 44. cites 4 H. 6. 26.

2. The Baron in Replevin shall have Aid of his own Feme after-Avowry, Br. Aid pl. and Proceeds by Summons to bring her in. Br. Baron and Feme, pl. 46. 4. cites cites 7 H. 6. 45.

3. Baron and Feme are not one Person to have the Privilege, because the Baron is Servant of the Chancellor, nor Efoign de Serontio Regis, nor R r other
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other Effloign calt by the Baron shall not serve the Feme, but Protection for the Baron shall serve both; not 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.

4. Feme Covert in Case of Felony shall answer not for her Baron, and cites S. C. & S. P. 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.

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.

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 reserved to wage his Law. Cro. E. 919. pl. 12. Hill. 45 Eliz. B. R. Goodrick’s Case.

8. Protection for the Husband, shall serve also for the Wife. Co. Litt. 35. S. P. and 130. b. (e). 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. 88. pl. 57. S. P.


10. A. B. both 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, that for the Legacy here was given in Respeft of the Wife, and not of the Husband also. Skin. 182. in Chancery, pl. 9. Pauch. 36 Car. 2. B. R. Anon.

11. Husband Wife were sued, and afterwards in the Pleadings it was said, Venemunt partes præstiti per Attornatus fuis præstiti; this was held naught upon a Writ of Error, because they are but one Person in Law: 3 Salk. 62. pl. 1. Pauch. 12 W. 3. B. R. Maddox v. Wmne.

(N. a) What Act by the one to the other is good.

1. The Custums of York is, that a Feme Covert may take Land purchased by her Baron, of the Gift of her Baron. Br. Custums, pl. 56, cites 12 H. and Fitzh. Prescription 61.
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2. A Devise by the Baron to his Feme is good, tho' they are one and S. P. Br. De-
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. 1st. Not.

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. Cor-
porations, pl. 45. cites 49 Att. 8.

4. A Feme Covert may be Attorney for her Husband. F. N. B. Br. Attor-
ney, pl. 91. S. P. cites
Pauch. 15 E. 3. Fitzh. Tit. Attorney, 73 — A Feme may be Attorney to deliver Seisin to her Hu-
pband, 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 Co. Lit-
his Wife, which did not immediately pass from him; and therefore if a 187. b. at
Man infeoff 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 but one
is but a Means to convey the Freehold to the Wife, for by this Act he
done no Freehold doth pass from the Person &c. Perk. 5. 196. neither of
them give any Estate or Interest to the other.

6. In Debt, per Filiuer, if a Man be bound to infeoff a Woman by a cer-
tain Day, and before the Day he marries her, he may make Leafe for a
Month to a Stranger, the Remainder to his Feme, and 'tis a good Per-

7. Grant was made to the Queen by the King of certain Land for Term of
Life; and so fee 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.

8. Note that it was adjudged, that a Feme Covert Executrix may make S. P. be-
a Sale of the Land to her own Baron, and this is a good Bargain; and
caue she is not an In-
strument for others, and the Estates
passes from
the Devilor. Co. Litt. 187. b. —— There is a Diversify between a naked Power and a Power that
flour from an Interest. When a bare Power is given to a Feme by Will to sell Lands, the she marry
the may fell, and may sell the Lands to her Husband, because 'twas not created by her. If out of any
Interest of her own; but where a Feme, on a Settlement of her own Estates, receives a Power which
flows from an Interest, that Power ought to be executed by the Feme sole, and if by the Baron and
ingham —— 2 Freem. Rcp. 168. pl. 213. S.C. in much the same Words —— For she on the Mat-
ter nominates the Party, and he takes by the Will; per Winch J. 2 Brownl. 194.

9. Ajax Simplicies A Man may do to his Wife, As to pay Money to If the Ba-
er, and the like. Arg. 2 Bull. 291. in Dockway's Cafe, cites 27 pro be
bound to

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
61. to 7. his Feme on such a Event, and Illue 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 Husband leaves 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 Ufe of his Wife, because it is not done immediately to her, but to the Lord of the Manor to her Ufe, and by his Admittance of the Feme, according to the Surrender. 4 Rep. 29. b. pl. 18. Mich. 27 & 25 Eliz. the 4th Revolution in Cafe of Bunting v. Lepingwell.

She cannot take by an immediate Conveyance from her Baron; but it ought always to compound the Gift and Deemif to be from the Feoffes. Arg. Cro. E. 722. pl. 52. Mich. 41 & 42 Eliz.


By no Conveyance at the Common Law a Man could, during the Custody, either in Possifion, Reversion, or Remainder, limit an Eftate to his Wife; but a Man may by his Deed covenant with others to fland feiled to the Ufe of his Wife, or make a Feoffment or other Conveyance to the Wife of his Wife'; and now the Eftate is executed to such Ufes by the Statute of 27 H. 8. For an Ufe is but a Truft 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 fland feiled to her Ufe, 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 Diffeisores makes a Feflument in Fee to the Ufe of A, for Life, and after of herself in Tail, and the Remainder to the Ufe of B. in Fee, and then takes Husband the Disifeife, and he releases her to 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.

15. If Cefily que Ufe had devises that his Wife should fall his Land, and made her Executrix, and died, and the took another Husband, she might fall the Land to her Husband; for the did it in Aiter Death, and her Husband should be in by the Devifor. Co. Litt. 112 a. at the Bottom.

* She may devise her Copyhold Lands to her Husband with or without his Consent, if the Custom of the Manor be fo. Mo. 123. pl. 268. Pach. 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 Consent of her Husband. Godb. 143. pl. 178. 52 Eliz. C. B. Skipwith v. Sheffield.—And tho' it was urged that the Custum might be good, because the might be examined by the Steward of the Court, as the Maner is upon a Price to be examined by the Judge, yet the Court said nothing to it. Ibid. 144.


18. Leffe is restrained from aliening, but only to his Wife, and if no Wife, then to a younger Brother. If Leffe makes Eflate to his Wife for her Life, and the Remainder 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 otherwife, and good principally to the younger Brother; Per Coke Ch. J. 2 Bull. 212. Mich. 12 Jac. Fox v. Whitechoft.

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. 22. Car. 1. Stoit v. Ayloff.

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 Plaintiffs Bill was to have the Benefit of this Purchase, and to have the Patent delivered to her. The Defendant by answer for both, 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 Cafe B. should survive her, to be a Trustee for the Executor of the Husband, and applied towards the Payment of his Debts. 2 Vern. 67. 68. pl. 62. Trin. 1683. Kingdon v. Bridges.


23. One Jointure made a Deed of Gift to his Wife of his Moiety to a Vern. 55; fever the Jointure and make a Provision for her, he being taken Sick on pl. 552. S. C. 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. 1705. Mayle v. Gyles.

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 Transference of an Interest; after the Husband's Death, she is in Nature of a Stranger, and to the Land will pass to her; Per Trevor Ch. J. 11 Mod. 156. Hill. 6 Ann. C. B. in Cafe of Archer v. Bokenham.

25. Mortgages made M. the Wife of B. Executrix, and Refinament Legatee Wm's Rep for her sole and separater Use; B. gave her a Note under his Hand that he should have Benefit of the Mortgage. The Note gives the Wife good 1719. S. G. 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.

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Gifts being but small in Comparison of the personal Estate, and so was only an Instigate of his Care, he decreed accordingly. Wms's. Rep. 441. Trin. 1718. Lawfon v. Lawfon.

(O. a) Disputes Inter se.

Hawk. pl. C. 1. 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.

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 veiled 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. Sulfolk (Earl) v. Greenvill.

3. In Action on the Cape for scandalous Words brought against the Defendant, the pleaded in Bar by Attorney, that ante Diesin of exhibiting the Bill, viz. 1 Die Julii, 12 Car. 2. The Plaintiff married him 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. Walfal v. Mary Allen.

4. A Motion was made for a Ne exent Regnum, the Wife having sued him in the Ecclesiastical Court for Alimony, and it was suspectted 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 gesto, the Court being informed that he used his Wife very ill. 2 Vent. 345. Trin. 32 Car. 2. in Can. Sir Jerome Smithson's Cafe.

5. Though a Man cannot have a Bill against his Wife for Discovery of his own Estate, yet where before Marriage the 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. Pach. 1691. Sir R. Brooks v. Lady Brooks.

6. A Feme was indicted by her Husband for poisoning his Cows with bruis'd Glafs put into their Grains, and she was admitted in Forma Pauperis, tho' the Court said that the Husband could not convict her. 6 Mod. 83. Mich. 2 Ann. B. R. Anon.

But none can bring a Bill


of a Feme covert as her Prochein Amy without her Consent, and if such Bill be brought, it will be dismissed on her Affidavit. Chan. Prec. 176. pl. 262. Mich. 1713. Andrews v. Gradock — Gilb. Equ. Rep. 56. 8. C. in the same Words. The Cape was, a Bill was brought by Andrews as Prochein Amy to the Wife of the Defendant Gradock, 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 dismissed; 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 Cape of an Infant. There is no Instance of a Suit in this Court by a Wife against her
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her Husband to have a Settlement made by her Husband upon her and her Children, but if a Feme covert is intituled 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 dows 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 the personally appears in Court, and disavows the Suit, this tends to the forming 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 revered, 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 &c.

8. A. bequested the Residue of her personal Estate being about the Value of 2000 L. in 8. 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 the 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 propounded by the Wife's Friends, and to limit the Ufes, 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 defir'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 thinly thro' his Wife, and had made no Settlement upon her, it was reasonable it should be settled upon her; that the Agreement was complete 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 a Widow, 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 Defendant and the Plaintiff against the Defendant and the Infants, in 32 & 33 Eliz. li. B. fo. 430. 454. & 484. Toch. 162. Povy v. Peart. retested by 2 Witnesses after Marriage appoint, and for want of such Appointment, to her Children by the
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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 Estate, 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 in 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 Affirmation 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 Power 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 Cafe. 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 Fincm. Rep. 29. pl. 2. Hill. 1677. in Draper's Cafe.

5. M. a Feme poailed 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 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 Pl. Fa. the Sheriff sold the Residue of the Term; and on a Bill in Chancery it was decreed for the Vendees against the Trusteess of M. because the like Point had been decreed so in Sir Edward Turner's Cafe, 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 Cafe forlook his Wife, and refused Reconciliation, and allowed her Nothing &c. yet decreed ut frustra. 2 Chan. Cales 73. Mich. 33 Car. 2. Pitt v. Hunt.

It was admitted on the other Side, that there had been such a Resolution, but 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 dispone of the Trust of the Term. The Lord Chancellor seemed to wonder at that Resolution, and said he could not amount to an Act of Parliament to change the Law; and although there possibly was no great Reason for those Resolutions, that the Husband could not dispone 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 defended by this new Resolution; so that now it is almost impossible for a Man 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, vis. 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 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 therefore declared 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 dispone of it, there it shall not be in his Power to dispose of it. —— S. C. of Turner cited, and said the Judgment given by the Lord Nottingham to the contrary, was made by himself to have been on a Mistake; for that the Wife having married a former Husband, the 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 Approval, as it seems, in Dom. Proc. 3 Ch. R. 225. Pach 1686. 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 extinguished by the Marriage.

1. In Detinue by Feme it is a good Plot, 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. feals it. A. This Case 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 Obligation Delivery; and tho' C. afterwards marries A. yet the Obligation remaining, is made to and is neither extinguish'd or suspended. Adjudged and affirmed in Er. 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 Celty que Ufe it had been otherwise. Jenk. 222. pl. 75. —— D. 192. b. pl. 26. Mitch. 2 & 3.; Eliz. Parker v. Gibbon, Administrator of Tenant, S. C.

3. In Debr on a Bond for Performance of Covenants in an Indenture Debrupon made by the Baron before Marriage, to pay Legacies given by the Feme in a Bond con- Will made by her before Marriage; tho' it was objected, that the Marriage continuing till her Death, the Will and Devise was void. But the Obliger adjudged for the Plaintiff; for tho' it was not a Will to all Intents, had taken
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A. S. to

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. Patch.


Goods, if he 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 life 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; acquiesced 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. Kinman.

Where an Agreement is between Baron and Feme before Marriage, that the Wife may by Will dispose of part of her Estates, or for a Thing which is future to the Marriage, such an Agreement is not dis-

-posed 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 11s. Mich. 12 Car. 2 in Case of Priggeon v. Priggeon.

Hob. 216. 4. A promised M. a Feme folle, that if she would marry him, he would leave her worth 100 l. Hobart Ch. J. laid, that the Promiss is ex-

-tinguished by the Marriage, but Winch and Hutton J. e contra; for

25. S. C. says, that the Law will not work a Releafe contrary to the Intent of the Par-

Judgment was ties, and that the Marriage which was the Cause does not destroy that ready to be which itself creates. Hurt. 17s. 18. Hill. 15 Jac. Smith v. Stafford.

5. A Feme folle poffessed of a Term, conveyed the same over in Trust for her, and covenanted with f. &c. where she did intend to marry, that he should not meddle with it, and for that Purpofe took a Bond of him. They inter-

married; he may meddle with it, but he shall not have it, and by Equity he cannot affign it, by reaon of the Covenant before Mar-

riage, Mar. 89. pl. 144. Patch. 17 Car. Anon.

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 Perfon 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 to, then the Marriage was a Releafe in Law, and to the Debt extinct; but the Court inclined the Judgment ought to be for the Plaintiff, and ruled it to be moved at another Time. 3 Sid. 58. Hill. 1657. B. R. Luprat v. Hoblin.

7. A before Marriage with M. agrees with M. by Deed in Writing, that she, or such as the should appoint, should during the Coverture re-

ceive and dispose of the Rents of her Jointure, by a former Husband, as
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she pleased. Per Cur. the aforesaid Agreement with the Feme herseil be Letter of fore Marriage, was by the Marriage extinguish'd. Chan. Cases, 21. Attorney made by her before Mar- riage is void. — 1 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 the deed without Issue, without conveying the same; and it being objected that the Bond was suspended, and so extinguisht by the Marriage, Lt. C. Mac- clesfield held it unreaflonable that the Intermarriage, upon which alone the Bond is to take Effect, should itelf 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. Camel v. Buckle.

8. The Baron before Marriage articlecl with the Fene 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 the being the only Party with whom they were made, her Marriage with the other Party before Performance was a Re- lease 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 Intermar- riage. 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. Furfor v. Penton.

10. Lands limited to A. in Trust for a Feme Coyert, and that A. should receive the Rent, and apply them as the Fene, whether Sole or Cover, 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 Fene before Marriage, for her separate Use, with- out the Priuity of the Baron. Lt. Chancellor decreed, that the Husband should have the Possession of the Eatee, and that the Trustees should make a Conveyance of the Lands to the Six Ciers, that it might be subject to the Order of the Court. 2 Vent. 17. pl. 11. Hill. 1686. Carlton & Lady Dayrill his Wife v. Earl of Dorset.

12. A Fene sole, being Executrix and Remainary Legatee of J. S. Ch. Prec, lands 100 l. to A. and B. for which she takes a Note in her own Name; S. C. 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 Extinction of the Bond, as well as if it had been made in her own Name; fed non allocatur. 2 Vern. 290. pl. 280. Pach. 1693. Cotton v. Cotton.

13. Debt on Bond for Performance of Covenants, in certain Articles Skin. 439, made between the Defendant and his Wife before Marriage, (viz. That 410. pl. 1. the Man shoul bring 50 l. and the Woman 25 l. into a Stock, into the Hands of a 3d Person, to be jo and so disposed of.) It was argued, that the Pro- mise was suspended, and consequently extinguisht by the Marriage. the Case of But per Holt Ch. J. tho' the Articles are suspended by the Marriage, Smith v. Stafford, yet it was the Intent of the Parties that the Things should be performed, Hob. 216, tho' the Articles are gone; and the Bond is not void, being made to a was cited, 3d Person. And Eyres J. cited 1 Inf. 206. and they said the Money yet Holt Ch. was to be brought in presently, so that tho' the Marriage had been a Relaxa, yet they should plead Performance to that Time. Judicium pro Quer' nili. Comb. 224. Hill. 5 W. & M. B. R. Gibbons v. — Vern. 429. Davies.

14. 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
Upon a Treaty of Marriage the Man gave a Bond to the Woman, condition’d that if he did permit her to dispose of 100l. 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.

Baron v. Aiton.

Feme Covert devises Goods by her T或将; 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 Affent to the making the Will. Arg. Mo. 192. pl. 341. cites 5 E. 2.

Quere, 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 Aff. 3.

This Devise is void, per Cur. For the Law presumes that this Devise is by Coercion of the Baron. Ibid. pl. 52. cites 6 E. 5. It, Nonginh. —— S. P. Ibid. pl. 54. cites 5 E. 3. It. Not.

Br. T或将. pl. 13. cites S. C.

A Feme hath Feoffees to her Use, and takes Baron, and makes her Will that the Feoffees shall inoff her Baron, and dies. The Baron shall not have a Subpoena against the Feoffees; for the Will of the Feme Covert is void; by all except Tremayle. Br. Confidence &c. pl. 28. cites 18 E. 4. 11.
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4. Marriage is a Countermand of a Will made by a Feme sole. 4 Rep. And. 181, 36. Mich. 30 & 31 Eliz. C. B. Forde v. Hembling. Anon. but S. C adjudged that the Will is void. — Goldsh. 109. pl. 16. Anon. but seems to be S. C. and Anderson. Ch. J. held the Marriage to be a Countermand; but the other 2 Justices contrary, tho' all held the Will void; but the other 2 thought that was by reason of the Disability of the Testatrix at the Time of her Death, when the Will should take Effect and be confirmed.

A Woman's Marriage is alone a Revocation of her Will; per Ld. C. King. 2 Wms's Rep. (624.) 1817. Cotter v. Levy.

But the her Will is revoked, yet if her Husband, before Marriage with her, was bound or contrived to perform her Will, and after her Death he does not perform it, by paying the Legacies therein bequathed, his Bond or Covenant stands good, and is susbtantive against him. Went. Off. Executor, 23. cites it adjudged M. 253, 26 Eliz. Wood's Cafe.

5. Feme by Affent of Baron may make Testament, and Executors to So of Goods for Choises in Action, and to polleis Goods and Chattels which the Feme 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. and then the marriages. 2 And. 92. Sir M. Finch's Cafe, S. C. — Cro C. 146. pl. 7. Hill. 3 Car. S. P. by three Justices. — Mod. 211, 212. pl. 44. Patch. 23 Car. 2. C. B. Anon. S. P. per Cur. and Such a Will by the Husband's Affent 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 Affent. Went. Off. Ex. 200.

7. Debt upon Bond conditioned, that whereas the Defendant was Two agreed about to marry A. S. &c. If he should divorce 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 the ought to have made a Deed in Writing and not a Will, because a Will is ambassadorial 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 (ante A. Jones) held the Declaration good; for though a Feme Covert cannot make a Will without the Affent of her Husband after 'tis made, yet that Declaration in Form of a Will is by a Writing good enough; and Judgment Nil for the Plaintiff. Cro. C. 367. pl. 2. in Nature of a Will, would be a good Disposition or Appointment. 2 Vern. Rep. 352. pl. 315. Mich. 1695. in Cafe of Sawyer v. Bletoe.

8. Bond was given before Marriage, that the Wife might dispose of 500 l. After Marriage the Wife contented to cancel the Bond which was exchanged into a Note, that the should dispose of it, so as be 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 fepare from her Baron and saving Money Chan. Cafe, out of her Alimony, may by Will dispose of Things in or upon a 118. Mich. Trufc, and that without the Affent of her Husband, there having been S. C. cited an Agreement to that Purpose; per Cur. Chan. Rep. 125. 15 Car. 1. accordingly, and said that this was now declared to be a null Order. — Toth. 161. S. C. accordingly, as to disposing by Will, but says nothing of the Agreement.

10. Debt upon Bond, that whereas the Obliger being about to marry M. if he should permit her to make a Will of her Husband's Goods to the U u
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Value of 100l. to be paid within a Year after her Death, 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, let 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.

2. Mod. 170. Hill. 28. &c.

11. An Authority was given to the Wife to devise 300l. the devise'd 50l. to one and 50l. to another, and so on; and the Court held this a good Difproba. Keb. 343. in pl. 31. Mich. 14. Car. 2. B. R. Harris v. Bellie.

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 Teltarrin was Femina viro co-operta, and so disolved 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 palles 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. Patch. 28 Car. 2. C. B. Anon.

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13. Devise of a Power to a Feme 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. Patch. 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, may although be 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 he should do it, and then he will be bound by his Agreement; but all Promises after, may 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 it makes a Will, it...
it hath the Import of a Writing and nothing else. 2 Freem. Rep. 70. pl. 82. Trin. 1681. Chiffwell v. Blackwell.

15. A Man is the Lord of 6 l. per Ann. to the Use of himself for Life, and to his Wife for Life, and agrees that he shall hold the Land until 100 l. shall be paid to his Executors, Administrators or Assignees of the by a Writing purporting a Will, disposeth of this 100 l. and dies in Equity, the Life of her Husband. It is a good Appointment in Equity; per Ld. K. North. Vern. 244. pl. 233. Trin. 36 Car. 2. Bletford v. Sawyer.

B is 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 as her Disposal, then to the Use of A for her 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 disposeth 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, S. P. and so the may disposeth of it as a Feme Sole; per Ld. K. North. Vern. 245. in Case of Bletford v. Sawyer, and said that there had been several Decrees accordingly.

and good Housewife saves Money out of it, the may dispose of such Money so fined by him, or of any Jewels &c. bought by him, by a Writing in Nature of a Will, if she dies before her Husband; and shall have it herself, if the survives him; and such Money, Jewels &c. shall not be Hable to the Husband's Debts; cited by Huchins, Chan. Prec. 44. pl. 44. Parch. 1692. in Case of Herbert v. Herbert, as decreed in Sir Paul Neat's Case —— Abru. 66. cites S. C. but no Book; and says that the Wife was allowed what she had saved out of her Pen-Money, against the Devisee of the real Estate. Mich. 1694. between Mills & Wikes.

17. Where the Has Power given her by her Husband to make a Will, Probate of such Will per Se will be 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.

Bach v. Wilfon.

18. Where a Feme Covert has a Power referred to dispose by last Will or Writing, and she makes her Will and disposeth, and the Husband subscribes his approbation; in such Case the Person to whom the 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. Eq. Cases, 296. pl. 2. Mich. 1709. 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 Content of her Husband. 12 Mod. 306. Mich. 11 W. 3. Richardson v. Seile.

20. Feme by Articles before Marriage, reserves Power to dispose of Though in a Term by Will or otherwife. Two Days before Marriage the Power is not a Feme Covert, 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, and it, yet so as to be proved by Executor, but it amounted to an Appointment in being impowered to make a Writing in pointed the Trust, and not to proceed by Way of Probate. 1 Hill. 1 Ann. B. R. Taylor v. Raines.

will operate as a Will; per Ld. Ch. King. 2 Wms's Rep. (624) Trin 1725 Corner v. Lyver.

21. Where
21. Where a Woman is Executor and marries, there she may make a Will with Consent of her Baron, and cannot without; per Holt Ch. 

22. If a Woman, having Debts due to her, marries, she may make a Will quadro thence, 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 Privy 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 quadro the Goods in this Will, it was allow'd as reasonable. 

23. If a Will is made by Feme Covent 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 Repeal have made the former Will good, yet it is not relievable in Equity; per Ed. K. Wright. 

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 Mortgages &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 possessed 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. 

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 hers, 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 Lt. Cowper taking all this together, decreed that J. S. was well intitled to discharge a Mortgage then on the Premises, and the Devise good. 

26. Where a Power is given to a Woman, at that Time unmarried, to Dispose of a Will, and the afterwards marries, 'twas decreed that the Marriage is a Suspensio of her Power; but if she survives her Husband, the Power revives; but Quare inde; for the Lords sent to have the Opinion of the Judges upon it. 

(S. a) Where
(S. a) Where they take by Moieties.

1. In Formendon, where a Gift in Tail is made to 7. 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 Choic en Affion, shall well lie in Jointure between a Man and his Wife; but otherwise of other personal Things. Noy 149. in Cae of Norton v. Glover, cites 4 H. 6. 6. a.

3. Where the Baron and Feme purchase 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 Divercity; for it appears. Br. Cui in Vita, pl. 8. cites 19 H. 6. 45.

4. Baron and Feme purchased in Fee, and after they leas'd for Years by Indenture, and after the Baron releas'd to the Leafee and his Heirs. This is no Discontinuance, and yet this gives Frankenement to the Leefe during the Life of the Baron; by severall, without Doubt. Br. Releafe, pl. 81. cites 29 H. 8.

5. If the Baron and Feme purchase jointly, and are diffiered, and the Baron releas'd, 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 Feevment in Fee &c. to the Use of himself for Life, A. gives Remainder to his Son and to his Wife who should be, and the Heirs of their Lords to B. 2 Bodies. The Son married M. then W. the Father levied a fine to Lock and make him to King H. 8. and bound himself and his Heirs to Warranty, and died. The Son was attainted of Treazon and executed, leaving Ilfe then living, marry, or then the Queen by Letters Patents granted the Land to another, and as shall after the widow and her Ilfe was restored. The Quetion was, whether she had a Right to the Whole, or only to one Moiety? D. 122.


Advancement of his Son, Name, Blood, and Pottersity, covenant to hand or sell to the Use of himself for Life, and after the Use of his Son and such Woman as he shall marry, and the Heirs Male of his Body, the F. dies, and then the Son takes a Wife; the Wife has a joint Estate with his Baron, to them and the Heirs Male of the Body of the Baron. Jent. 328. pl. 42. Trin. 7 Jac. in the Court of Ward...

1 Rep. 101. a. Arg S. P. says it was so held in Lit. Pawlet's Cale, 17 Eliz. D. 349. D. 350. b. 349. &c. pl. 48, 49, 50. the Judges dier'd in Opinion, and afterwards the Parties accor'd between themselves, and Judgment was given by Default.—2 Le. 17. pl. 25. Brent's Cale. S. C. argued by the Judges. The Case was, Feevment 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 shall after marry for her Jointure, Remainder in Fee to a Stranger. Per Harper J. the Limitation of the Use cannot be purs'd precisely, according to the Words, and therefore the Words shall be construed, after the Death 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. 192. Arg. Mo 377. Arg. cites D. 350. S. C. says it was admitted by all the Judges 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 Feevment, and the Limitation of the Use jointly with him; for there is not any Fraction, and several Vetting by Parcels. See 13 Rep. 59. in Sammes's Cale.

A Fine was levied to the Use of himself and such Woman 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. X.

M.
Paron and Feme.

M. Jointenant with her Husband, because the the Ufæ did not settle in her compleatly till the Marriage, yet it still relate, as to its Commencement, to the first Feme executed. And afterwards the Party, 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. No. 517. cites it as Mutton's Case. ——— See Tit. Ufæ, (L) pl. 1. in the Notes.

7. Copyhold Land was surrend'rd to the Ufæ of the Wife for Life, Remainder to the Ufæ 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 prefently in the Wife, and the Husband of that was feald 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.


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 Ifuæ is reftored by Parliament, and made inheritable to his Father, leaving to the King all Advantages devoted to him by the Attainer of his Father. The Wife dies. Walmley Serj. conceived that the Ifuæ was inheritable; for the Attainer which disturbed the Inheritance is removed, and the Blood refored, and nothing can accrue to the King; for the Father had not any Eftate forfeitable; but all the Eftate survived to the Wife, not impeachable by the said Attainer; and when the Wife dies, then is the Ifuæ capable to inherit the Eftate Tail. Windham and Rhodes J. prima facie, thought the contrary; yet they agreed that if the Wife had suffered a Common Recovery, the fame had bound the King. Le. 157. pl. 221. Mich. 31 Eliz. C.B. Anon.

10. William Ocel and Joan his Wife purchased Lands to them and their Heirs. After William Ocel was attainted of High Treafon 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 Sce. Fa. against the Patentee has Judgment to recover the Lands; but if an Eftate 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. 8 'Trin. 5 & 4 P. & M. Bedel v. Holtock. S. P. but if they had any Tochter, fuch Ifuæ should have a Formeln of the Wife.—— Goldsb. 148 pl. 72. Hill. 4 Eliz. S. P. held accordingly; per tot. Car. without Argument.—— Mo. 92. pl. 228. Trin. 10 Eliz. Symonds's Café, S. P. held accordingly by Welch, Brown & Dyer, but Weldon and Sandiaes, a contra; but all agreed that several Moieties might be of Eftate 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. 52 & 53 Eliz. The Queen v. Savage.

The Confirmation in this Case to the Husband

11. If a Feoffment had been made before 27 H. 8. of Ufæ, to the Ufæ of a Man and a Woman and their Heirs, and they intermarried and then the Statue is made; if the Husband aliens it is good for a Moiety, for the Statue executes the Poeflition according to fuch Quality, Manner, Form and Condition, as they had in the Ufæ, fo as though it vext during the Coverture, yet the Act of Parliament executes severall Moieties in them, seeing they have ferveral Moieties in the Ufæ. Co. Litt. 187. b.

The Conformation in this Case to the Husband

12. If I leave Land to a Feme sole for Term of Years who takes Baron, and afterwards I confirm the Eftate of the Baron and his Wife, to have and to hold the Land for Term of their two Lives, they have joint Eftate
Estate in the Freehold of the Land, because the Wife had not Frank- and Wife

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Estate in the Freehold of the Land, because the Wife had not Frank- and Wife

tenement before. Co. Litt. S. 526. for their Lives makes

them Jointenants for Life; because a Chattel of a Feme Covert may be dower'd, and so Note a Diver-

sity between a Lease for Life, and a Lease for Years made to a Feme Covert; for her Estate of Free

hold 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. 520. a.

13. If a Feoffment be made to a Man and a Woman, and their Heirs Pl. C. 485;

with Warranty, and they Intermary and after are impleaded, and a Mich. 17

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 Nicholls v.

which Time they cannot take by Moieties. Co. Litt. 187. b. S. P. in toto-
dem Verba.

14. If an Estate be made to a Villain 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, the

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, Lesser confirms the And they do

Estate of Baron and Feme, to have and to hold for Term of their Lives; not hold

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 b. The

Baron for Term of his Life if she survives the Wife. Co. Litt. S. 525.

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 settled in the Right of his Wife for her Life; for the

Husband and Wife cannot take by Moieties during the Covernance. Co. Litt. 299. a. b.

16. If a Reversion be granted to a Man and a Woman, they are to Pl. C. 485;

have Moieties in Law, but if they Intermary, and then Attornment is had, Mich. 17 &

in they have no Moieties (and yet by the Purport of the Grant they are to have Moieties) because it is by Aft in Law. Co. Litt. 310. a.

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 to the Time in which the Thing veils, ought to be respected.

17. If a Gift be made to a Man and a Woman not married, though

with an Intention of their Intermary, and afterwards they Intermary,

—And cites it adjudg'd in one Edmunds's Cafe.

18. Articles before Marriage to settle a Term to himself for Life, to his Son for Life, to the Ufe of the Woman the Son was about to marry, and after their Deces of the Ufe of the Issue of their two Bodies to be be-
gotten according to the Defcend of Lands so intailed. After Marriage the Leafe was alligned to those Ufes. The Reporter says, the Articles being before Marriage, the Son and his Wife took by divided Moieties. Chan. Cafes 266. Mich. 27 Car. 2. in Cafe of Bullock v. Knight.


and his Daughter and their Heirs; Per Lord Commissioners, Baron and t. pl. s. S. C.

Feme take one Moiety by Entierties, so as the Baron cannot alien fo as to

bind the Feme, and the other Moiety is well vested in the Daughter;

Per Commissioners. 2 Vern. Rep. 120. pl. 120. Hill. 1693. Back v.

Andrews.

(T. a) Take.
(T. a) Take. In what Cases Feme may take by Grant to herself.

Obligation made to a Feme Covert is good. Br. Obligation, pl. 36. cites 4 H. 6. 31.

1. S. P. br. Nobility, pl. 2. cites 5 H. 6. 33. — 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 Coke J. For she may waive it by the Coverture, and refuse the Survorship; but Welfton Serj contra. Br. Waiver de Chofes, pl. 15. cites 4 H. 6. 5.

2. Trespars upon the Statute of 5 R. 2. Ubi ingreditis 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. Quere 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.

3. Br. Action for le Cafe, pl. 3. cites 8 C.

(U. a) Inter fe. Mis-ufage.

A Tempt to cut the Husband's Throat, is a Caufe for which the Husband may be Drivow'd; per Curiam. Lane 98. Hill. 8 Jac. in the Exchequer, in Cafe of Scot v. Helyar.


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 Seymors Cafe.


B. 80. (P.)

Litt. Rep. 189. Arg. Mich. 4 Car. in Stanlie's Cafe, in C. B. the S. P.— The Court being informed of his ill Ufage of his Wife, a Supplicavit de Bono Genu was granted. 2 Vent. 345. Trin. 32 Car. 2. in Chancery, Sir Jerom Smithson's Cafe.

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 201. per Ann. to his Wife, it is good; per Coke. Roll Rep. 33. pl. 43. Hill. 13 Jac. B. R. Smith v. Watfon.

5. Taking away the Wife's Apparel, and other of her Neceljaries, is good Ground for her to sue a Divorce Caufa Savius. Sid. 118. Pach. 15 Car. in Cafe of Manby v. Scott.


7. In
Earon and Feme.

7. In a Bill to establish an Agreement for a separate Maintenance for the Defendant’s Wife, the Plaintiff prayed a Discovery of several Unkindnesses and Hardships to the Wife, to make her recede from the Agreement. The Defendant demurred, as a Matter not properly examinable or relivable in this Court. Vern. 204. pl. 200. Mich. 1893. Hinks v. Nelthorp.

8. By Articles before Marriage 6000 l. Part of the Wife’s Portion, is Chan. Prec. paid, and a Settlement made of 1000 l. per Ann. and 6000 l. Remainder to be vested in Land, and settled to Baron for Life, to the Defendant and Feme for Life, Remainder as a Provision for younger Children. The Defendant’s 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. Patch 1705. Lady Oxenden, per Prochein Amy, v. Sir James Oxenden & al. Et e contra.

Patch. 1706 S. C. says the Lady had a Decree for 500 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 totem 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, which died intestate. Harcourt Ld. K. decreed the Interest to the Feme for her separate Use for her Life, and alter 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. Patch 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, Coke Ch. 1. ‘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. Lyttel’s Cafe.

the Wife; but Nichols and Warburton J. held the contrary. Godb. 215. in Sir Thomas Seymour’s Cafe.

She cannot either by herself or her Prochein Amy bring a Homicine Replegando 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 Siccitatem. Chan. Prec. 492. Patch 1718. Atwood v. Atwood. — Gilb. Equ. Rep. 149. S. C. in totem 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. 63. 9 Car. 1. Plomer v. Plomer.
2. The Wife prosecuted the Husband for having a 2d Wife; but the same was not proved. But he being in Court on his Recognizance, after the Acquittal, the pray'd to charge him with Actions for Necessaries for herself and Children, and the Court allow'd her to do so, the having proved her own Marriage clearly before. 2 Keb. 583. pl. 129. Mich. 21 Car. 2. B. R. Hume's Cafe.

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 seized 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 Affent, 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 the 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 complaint'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 Allmony, and M. during the Separation had wafted 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 Cafe for Meat, Drink, Walking and Lodging, found for the Wife of the Defendant by the Plaintiff. The Proof was, that the Wife came in a necconitious Condition, and fact to the Plaintiff that she was the Wife of the Defendant, and that he had turned her out of his House, and allowed her 50l. 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.

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 Cafe of Pierce v. Welden.

Husband is not liable. Ld. Raym Rep. 444, 445. says it was so ruled by Holt Ch. J. at Exeter Lex-affises, 10 W. 3. in Cafe of Longworthy v. Hockmore. S. C. cited by Holt Ch. J. 12 Mod. 244. Mich. 10 W. 3. in Cafe of Tod v. Stokes, where he held accordingly, that the Husband in such Cafe should not be liable; and it is sufficient, for the Husband, to give general Notice that Trademen &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 laid 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 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, below e
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before it could have been publicly 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. Proc. 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 Trade-man, the Husband shall be liable to the Trade-man to pay for them. Ld. Raym. Rep. 444, 445. says it was so ruled by Holt Ch. J. at Exeter Lent Assizes, 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.


11. Tho’ the Wife be ever so vicious, if the Husband cohabits with her, he is liable to pay for Necessaries furnished 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 shall once receives her again, or come 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. Pauch. 3 Ann. B. R. Robinson v. Gofhold.

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. Marby.

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. T H E 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 Aline &c. and Bonds then given for the Payment thereof unto H. G. deeded, 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,
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tiff, and hereupon the prays Relief; the Defendant does demurr 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.


The Wife of an impresum Husband had, unknown to him, by her Frugality, raised some Monies for the God of their Children, which she had disposed of for that Purpos, they being otherwise unprovided for, and this Disposition of the Wife was establishe 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. Cafes 117, 118. Arg. cites it as about 1639. Scot v. Brograve.

Litt. Rep. 78. S. C. accordingly.— 6 P. and after

ence there for a Separation proper Saxvital and Alimony allowed there, the Husband moved for a Prohibition on an Oliver of Cohabitation, and to give Caution to use his fity, 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 Cafe.

In a Suit by the Wife against her Husband for Alimony the Court decreed the Defendant to pay the Plaintiff 500 l. a Year, so long as they lived apart. Chan. Rep. 164. Anno 1650. Antho v. Antho.


7. The Spiritual Court never allows any Suit for Alimony but after Divorce, tho' sometimes they have decreed it upon Divorce; Per Twidlen J. who said that the Judges of the Spiritual Court had so informed him. Sid. 116. Patch. 15. Car. 2. in Cafe of Manby v. Scot.

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. Tunv. v. Boteler & al."

9. The Baron covenanted with L. to pay his Wife, or such as the appo int, 50 l. a Year as a separate Maintenance, provided the 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 inferred it was only subfuble, and so become impossible, N. being since dead, and no Place being appointed. Per Car. the Condition is subfuble, the Covenant being, in Pursuance of a former absolute agreement, to pay so much, and it is like an Affent 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 Expenfis Litis can be decreed but by Confect, unless it be there is a Decree for Separation. Chan. Cafes 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 Vern. 53. pl. Truf't to the Feme, Chancery will not bar the Feme from [saying the 53. S. C. Baron in the Truf'tee's Name, and a Surrender of Relaxæ by the Baron shall not be made Use of against the Feme. 2 Chan. Cafes, 102. Patch. 34 Car. 2. Mildmay v. Mildmay.

elo'p'd from her Husband, and the Husband * offering in his Anfwer to take her again, Fitch 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 Houfe of Lords, was adjudg'd 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 Ufage, and the Husband to bring in all Ar-rears of the Alimony into Court in the first Place. Fin. Rep. 152. Mich. 26 Car. 2. Horwood.—Chan. Cafes, 250. Whorewood v. Whorewood, S. C. accordingly. Chan. Rep. 225. 14 Car. 2. S. C. but upon another Point.

13. A Woman living separate from her Husband, and having a separate Maintenance, contradi's 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. Patch. 1695. 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 75l. 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 Quarterly Payment, he brought Action of Covenant. The Defendant pleaded in Bar, that after the said Indenture, and before this Action brought, another Quarterly Payment 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-mentioned Indenture the Plaintiff did covenant with the Defendant, that he should be freed from all Reliefs from the said yearly Payment, so long as he and his Wife should cohabit; and aver's 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 rot. Car. 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
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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. Gwden v. Draper.

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 relieve the Cohabts; 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 relieve the Suit, and also the Cohabts, because he may discharge the Principal; per Holt Ch. J. 5 Mod. 71. Mich. 7 W. 3. Chamberlain v. Hewfon.

16. Tho' a Husband be bound to pay his Wife's Debts for a reasonable Provision, yet if the parts from him, especially by reason of her Misbehaviour, (as in the principal Case it must be presumed the did, the 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. Patch. 3 Ann. at Nafi Prior, 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 Expense the Husband might be put to in defending such Suits, he sent it to a Matter to settle a Security to indemnify the Husband against her Debts. Chan. Proc. 496. Angier v. Augier.—Gilb. Epi. Rep. 152. Angier v. Angier, S. C. in totoem Verbo.

17. Wife having separate Allowance, and being separated, may make a Gift of what forces as a Feme sole. MS. Tab. December 6, 1705. Gage v. Litier.

18. Dutton having more than 3000l. per Ann. married M. the Plaintiff, who had 10,000l. Portion, and settled 1000l. 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 succedively, as usual in Marriage-Settlements. D. ran 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 Wafle, agreed with J. to convey all his Estate to him, and J. covenants to pay all D()'s Debts, and to allow him 500l. per Ann. Rent-charge for his Life; and further (upon which the Quetition arises) that J. shall indemnify D. from all Debts, Charges, and Expenses 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, the ought to have a reasonable Allowance; and ordered her to be allowed 200l. per Ann. Note, in this Case Ld. Chancellor allowed her to keep the Plate &c, which the bought, or was given to her by her Friends, during the Separation. MS. Rep. Trim. 1 Geo. Can. Dutton v. Dutton & al.
19. An Agreement between Husband and Wife to live separate, and S. P. Chan that the should have a separate Maintenance, shall bind them both till they agree to cohabit again. 8 Mod. 22. 7 Geo. 1. Litter's Cafe.

20. In the Case of separate Maintenance, if the Husband maintains August, 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 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 Peron, the Husband being now dead, is subject by Law to pay the Wife's Funeral Expenses. 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 Msw gives a Legacy, and makes his Feme bis Executrix, and dies, and he takes Baron, and after she delivers the Legacy, this is well, notwithstanding the be Covert Baron. Br. Executors, pl. 49. cites 7 H. 4. 13.

anciently it had been a Point whether a Feme Covert might assent to a Legacy, yet since Ruffel's Cafe [8 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-ent 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 the she takes J. S. to Baron, yet it should be in her Power to affirm or destroy this Devise, which would be very mischievous.

2. In Trespasses a Feme Executrix took Baron, and after she baileth the Goods of the Tesfator to J. S. without her Baron; and well, per Vavifor & Brian; for she may deliver Legacies, and receive Debts, and make a Release or Acquittance, and may give the Goods without her Baron; for the alone may do all Matters in Fact. Contra of Matters of Record; for the cannot fume nor be fixed without her Baron. Br. Executors, pl. 175. cites 16 H. 7. 5. 6.

3. Feme Executrix took Baron; there in Debt against them as Exe- Br. Affec- cutors, he may say that the Feme has fully administer'd, and the other may enter Mains, say that the Feme has Assiets &c. without speaking of the Baron, for it is S. C. said there, that the Feme may administer without the Baron. Quare. Br. Executors, pl. 150. cites 18 H. 6. 4.

4. In Trespasses, per Newton, a Feme Covert may be Executrix, and S. P. but she and her Baron may fume for a Debt, and yet she cannot make a Deed without the Baron. Br. Executors, pl. 68. cites 19 H. 6. 25.

Ibid. pl. 75. cites 21 H. 6. 30.

5. If Feme Executrix takes Baron, and after she releases Debt of the Tefs. S. C. cited tator by Deed in her own Name, this is good, for the represents the Tesf. 3 Rep. 27. but the tator ; Per Littleton, but Cook contra without her Baron. Br. Cover-Opinion was utterly de- nied. Hill.

65 Eliz. B. R. in Ruffel's Cafe. For tho' she be Executrix, yet she cannot do any thing to the Pre-
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judice of her Baron. But without Question, the Release of the Baron in such Cafe is good, and so the Doubts in the Books of E. 1. tit. Executors 119. S. 3. 45. Barbor's Cae. 18 H. 6. 4. 10. 18 E. 4. 10. 21 E. 4. 11 & 24. 2 H. 7; 17. 6 H. 7. 6. 5 H. 7. 13 & 14. are well explained.

If Feme Executrix deliver up a Bond instead of an Account during the Coverture, to one that was bound to her Testator, the Baron has no Remedy; Per Keble. Keiw. 122. pl. 74. Caesar certiori temporis. — And she may receive Money without her Baron and give Acquittance for it; and if an Acquittance made by her be a Deceitful, yet it is good, and she and her Husband be bound by it. And 117. pl. 164. Hill. 26 Effiz. Anon. ——Br. Executors, pl. 115. 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. 107. pl. 11. cites 2 H. 7. 15.

9. D. confessed a Judgment to F. who made his Wife, the Plaintiff, Executrix and died; she administered 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.


(Z. a) Power of the Baron of Feme Executrix.

In case of a Feme Covert made, Executrix, the Baron has a great Power. Baron may Administer and bind her though the refusal, 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. 5. in Cafe of Wangford v. Wangford, cites S. C. of 53 H. 6. 51.—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 Conforms 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 Cafe of Yard v. Ellard.

S. P. For Action personal furnished, is extinct for ever. And Brooke says it seems to be a good Bar for ever. Br. Executors, pl. 131. cites S. C.—S. P. If the Baron does not except it in his Release. Ibid. pl. 152. cites 59 H. 6. 15. 16. ——S. P. Br. Extinguishment, pl. 29. cites 9 E. 4. 42.

S. P. But if the Baron did no Act in his Life, the Action remains to the Executrix.

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.

3. If a Feme Executrix takes Baron, and the Baron puts himself in Arbitment for Debt of the Testator, and Award is made, and the Baron dies, the Feme shall be barred; Per tot Cur. Brooke 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
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there he excepted thoshe Debes in his Release, and otherwise they had tor, and it been extinct. Br. Releases, pl. 79. cites 21 H. 7. 29.

Goods which the Feme has as Executrix, the Gift is good; and by this Arbitriment, all the Actions which she has jointly against the Defendant and a Stranger are gone; and the Baron with his Feme may administer those Goods; Quod Nata. Br. Executors, pl. 96. cites 21 H. 7. 29.—Br. Dette, pl.


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. Made his Will, by which he gave divers Legacies, and then Mo. 98. pl. adds. "The Reidue 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 7. S. Exec- cutor and dy'd. J. S. took the Goods, the Widow brought Action against J. S. and Judgment for her, for notwithstanding the Devise of the Reidue &c. he 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 the shall enjoy them as Executrix. And. 22. pl. 45. Mich. 15 & 16 Eliz. Huns v. Alborough.

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 Intereft of his Wife. The Arbitrator awards one Moity to the Claimant, and awards the other Moity to the Baron and Feme. The second Baron dies. The Wife is bound. For if the Baron had granted over the Term, fuch Grant would bind the Feme, and consequently the Submifion in this Case being for the Title and Intereft of the Term is the fame in Effect as if the Baron had granted the Term over, but if the Arbitrators award that the Poftifor shall hold the Term; this it feems does not bind the Right of the other, for fuch Ar- bitrator does not extinguifh the Right as it does in the other Case, where it makes the Poftifee to pafs. D. 183. a. pl. 57. and Marg. Ibid. cites Pafch. 23 Eliz. B. R. Anon.

So where Feme Covert reftoratory Legates the Husband and the Claimant, and awards the other Moity 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 Arbitrator does not extinguish the Right as it does in the other Case, where it makes the Possessor to pass. D. 183. a. pl. 57. and Marg. ibid. cites Pach. 23 Eliz. B. R. Anon.

3. A Feme Administratrix to her former Husband, brought Debt with Cro. C. 277. for then Husband upon an Obligation to the Intestate, and had Judgment pl. 4. Mich. for Debt, Damages and Costs. The Feme died. The Baron after a Year S. C. moved and Day brought Sci. Fa. to have Execution; and all the Court (except an expedition of the Feme) who doubted thereof) conceived that the Sci. Fa. lay not upon her, and

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for the Husband, because being a Debt demanded by the Wife as Administrator, it was in Auer Droit; and though they recover, yet the dying before Execution, the Duty remains to such Perfon 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 ought to have a Sci. Fa. must have Privity and Property to have the Debt, otherwise it is a vain Suit. Cro. C. 238, pl. 2. Hill. 6 Car. B. R. Beamond v. Long.

4. Oblige made his Wife Executors. She married a second Husband, who became Bankrupt, and the Commissioners affigned this Debt. But by Holt Ch. J. they have no Power to affign any thing but what is the Bankrupt’s Estate, and if the Wife dies before Affignment by him, there must be an Administration de Bonis Non. His Power to dispoze of her Estate does not make a Title in him; and tho’ he may dispoze of a Term which he has in Jure Usuris, yet if he becomes a Bankrupt, the Commissioners cannot affign over this Estate; And by Powell 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.

WHERE the Wife has Debts or Duties due to her, she cannot, by making another Perfon 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 fo 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 the claim is 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 possesed 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
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Election marry, the Baron may make the Election. Le. 216. pl. 298.
4. The Wife intituled by the Statute of Distributions dies, before Distribution, intestate, and so does the Husband too soon after. Whether the Intente 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 Deecree. 2 Vern. 502. 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 Cafe of Jones v. Rowe.

Jones.—But where the widow Legatee, it shall be granted to her Husband. 2 Vern. 249. pl. 235. Mich. 1691. Rout. v. Noble.

(C. b) Actions. Writ and Declaration.

1. WRIT of Affise brought by Baron and Feme was abated, because they were not seised after the Elapsed. 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 Waife against Tenant in Dower, and the Writ was Ad Exheredationem eorum. The Defendant challenged the Writ, because the Feme had nothing but for Term of the Baron Life &c. fed non allocat; whereupon he pleaded another Plea. Fizh. make a Lease; the Lease commits Waffe; they bring an Action of Waife, and conclude Ad Exheredationem 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. 343. pl. 444. Trin. 1673. Anon.

Error of a Judgement in Waffe against the Tenant for Years brought by Baron and Feme of a Moiety, being seised in Reversion to them and his Heirs Ad Exheredationem of them. The Court agreed they must join in the Action, but the Conclusion must be Ad Exheredationem 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 Poss against Baron and Feme, supposing that Writ of the Feme had not Entry unless after &c. was held ill. Thel. Dig. 117. Entry in the Poss against Baron and Feme, supposing the Entry of both, was adjudged good, notwithstanding that the Baron found his Feme seised. Thel. Dig. 116. Lib. 10. cap. 26. S. 3. cites Mich. 20 E. 3. Brief 574. 17 E. 3. 50. 39 E. 3. 33. and Mich. 9 E. 2. Brief 812.

4. It is doubted how the Writ of Affise should be where the Baron and Feme are seised of the Land of the Feme, and after the Baron is outlawed of Felony, and afterwards received to the Peace, Utrum differeuit 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 Differeuit 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 disquieted, and Affise of a Refonus is made, and they bring Affise, the Writ shall say, Lund differeit. Rent upon Refonus was
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10. In Confinnuli Causa the Writ suppos'd that the Land, after the Alteration in Fec, 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 & Hereditas of the Feme; and that fgores 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 Feme by which Land was rendered to the Ancestor of the Feme, the Writ was Quaeq. Ser. to the Baron and Feme defendere non debeat, by which it was abated; for nothing can defect 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 Feme, by which the Remainder of the Land was tail'd to the Ancestor of the Feme and his Heirs &e., was abated, because it was Quaeq. to the Baron and Feme, Daughter and Heir of &c. Remainere non debeat. Thel Dig. 117. Lib. 10. cap. 26. S. 29. cites Pach. 6 E. 3. 267.

"Writ by Baron and Feme of Remainder in Juve Court shall lay remanere debit to both; contrary of Formedon in Defender, Receiver, or Exchequ." Br. Baron and Feme, pl. 55. cites 11 H. 4. 15. per Hill.

—Br. Scire Facias, pl. 72. cites S. C.


12. Entry against Baron and Feme, de quibus the Baron diffis'd 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. 53. S. 36. cites Trin. 20 E. 3. Brief 392. 22 E. 3. 17.

13. In Appeal of Maimus by the Baron and Feme against the Baron and Feme, the Writ was Unde la Feme pl' appelleat eam, and was abated, inform as no Tort is suppos'd to the Baron Plaintiff, nor by the Baron Defendant. Thel. Dig. 116. Lib. 10. cap. 26. S. 9. cites Pach. 20 E. 3. Brief 252.

14. In
14. In Trefpafs where a Feme sole does a Battery, and takes Baron, and the Writ Action is brought against them, the Writ shall be that both of them did supposing that the Trefpafs 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 & Arms; 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 for false Charges against the Husband; for there was no other Form in the Receipt. Jenk. 23. pl. 45.

15. But where Battery is done to the Feme sole who takes Baron, they shall have Action Quod percussi Uxorem dam solu sentit; and to 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, p. 70. cites 22 Aff. 87.

16. Affixe by Baron and Feme Quod difjusfivit eam, and no Exception, Entry for, and therefore as it seems. Br. Faux Latin, pl. 73. cites 30 Aff. 4. Difficile in Nature of Affixe by the Baron and Feme against A. quod disjusfivit eos. Chaunt. Perftrapaudo quod non disjusfivit eos, pro placito, that at the Time of the Disjusfivit the Feme was Covert on 11. and after H. died, and for married this Baron; so the Writ shall be Difficile eam, & non eos. Judgment of the Writ; and per June & Cot. J. this is a good Plac. tho' the Writ does not suppose any Time of the Difficile; and where the Feme is disjusfivit, and takes Baron, the Writ shall be Quod * diffusfivit eam, by which Elkerker pass'd over. Br. Faux Latin, pl. 37. cites 14 H. 6. 15. 14.

Where Diffusfiv or Trespass is done to a Feme sole, in Writ to be brought thereof by the Baron and the Feme after the Marriage, he must not put Dam solu sentit but in the Count, Thel. Dig. 111. Lib. 10. cap. 26. S. 24. cites Hill. 21 H. 6. 52. and S. 7 H. 7. 2. and the Registrar, Fol. 56. But the Writ shall be Diffusfivit eam, or Bona ipsius la Feme cedit &c. Cites Nat Brev. 87.


17. Disjusfiv imposed a Feme sole, who took Baron. The Writ against Writ of them shall be, that the Feme entered by the Diffusfiv, and not that both Entry against Baron and Feme, supposing their Entry by such a one, was abated because the Baron found his Feme sejus. Thel. Dig. 116. Lib. 10. cap. 25. S. 4. cites 2 E. 3. Ir. Durb. Brief 744. 59 E. 3. 52. 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 Writ entered by J. N., and not that the Husband and Wife entered by J. N. Br. Cot in Vita, pl. 26. cites 7 H. 7. 1. 2.—Br. Faux Latin, pl. 77. cites 7 H. 7. 2. S. C.

18. In Waife by Baron and Feme, upon a Lease made by the Feme before Writ of marriage, the Writ was Ad Exhberationum of the Feme; and adjudg'd Waife by Baron and Feme the Heritage of the Feme, supposing ad Exhberationum ipsum, was abated. Thel. Dig. 116. Lib. 10. cap. 26. S. 20. cites Mich. 8 H. 6. 9.

19. Trefpafs by Baron and Feme of Assault to the Feme, and Imprison. Thel. Dig. went till the Baron made Fine ad Damnun ipsum, and the Writ and Count awarded good, ad Damnun ipsum &c. Br. Baron and Feme, pl. 21. cites 46 E. 3. 3.

—Br. Count, pl. 29. cites S. C. & S. P.——Br. Trefpafs, pl. 32. cites S. C.——Br. Faux Latin, pl. 112. cites 46 E. 3. 3. 5. S. C.

In Trespass for beating the Wife ad Damnun ipsum, it was moved in Arrrest 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 occur to her alone; but otherwise it would not be. Sid. 58. pl. 22. Mich. 26 Car. 2 B. R. Hort. v. Byles—2 Feb. 522. pl. 73. Hort's Cafe, S. C. and per Cur. and all the Clerks, the Declaration could not be otherwise, because the Action and

Damages
Damages survive, and in all Cases of Survivor the Action may be laid ad Damnum ipforum; and Judgment for the Plaintiff.—3 Sc. c. 13, and S.P. held per Cur. accordingly, and the Plaintiff moved to arrest his own Judgment for Expiritian. 2 Le Rayn. Rep. 1208, 1209, Mich. 5 Ann. Newton v. Hatter.

A Writ of Trefpaʃ was brought by Husband and Wife for Battery of the Wife ad Damnum ipforum, and cites the Regifter 105. But per Cur. that is not Law, and Judgment was arrested for this Exception in the principal Case. Comb. 184. Mich. 5 W. & M. in B. R. Baker v. Barber.—Show 344. Hill, 3 W. & M. in Case of Meacock v. Farmer, S. P. the Regifter 105 was cited, but the Court did not regard it.

20. Where a Feme is Leasee for Years, and does Wafe, and afterwards the Term is expired, and she takes Baron, the Writ of Wafe shall be Quas the Feme tenuit, and not Quas the Baron and Fume tenent. And if it shall be where she holds for Term de Ater Vie, and Cefy 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 est infra Estatem 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 177. And adds Quere; for it may be the Lease was made during the Coverture, by which they entered after the Demise, and there the Entry of both shall be supposed, and cites Trin. 7 H. 4. 17.

22. In Affife by Baron and Feme it was pleaded, that she was espoused to another, and the Eſpoufals continued a long Time after, which other is yet alive; to which it was replied, that she at the Time of the Eſpoufals 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 attended to the first Eſpoufals, and fo is her Feme. Thel. Dig. 119. Lib. 11. cap. 2. S. 11. cites Patch. 49 E. 3. 17. 49 Aff. 7, but nothing was said further at this Time. But afterwards Mich. 50 E. 3. 19, the Affife was awarded to try whose Wife the is.

23. So in Affife by Baron and Feme, or Debt or Trefpaʃ, 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 Næ 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 Raciſſment of his Feme, upon the Statute of R. 2. it was pleaded that the was never accoupled to him in lawful Matrimony, and this Plea was accepted, and Writ to the Bishop to certify. Quere if of Necellity. Thel. Dig. 120. Lib. 11. cap. 2. S. 13. cites Mich. 11 H. 4. 13.

25. A Feme married infra Annum 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.

26. Baron and Feme lease for Years, the Baron may have Debt without counting the Death of his Feme. Br. Count, pl. 83. cites 9 H. 6. 11.

27. In Cui in Vita by Baron and Feme, the Writ was, Quadrellad 70. & 3 A. Usori eʃus que fuit Usor Ro. &c, que clamet tenere fubi & Hereditibus de Corpore dicti Ro. exentibus ex dimifione Wilf qui ipfum A. & præd. Ro. quondam Vivea &c. inde fœco fæcit &c. and held good, notwithstanding that it may be intended that the Baron by the Word (fbr) claimed the Estate to himself for Life with his Feme; but because it appeared that the Ecclifium 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
Baron and Feme.

28. In Trespass the Writ was general by the Baron and Feme, Quod clausum of the Feme freget et Blada ejusdem Feme depauperatus fuit &c. and did not lay dunm foia fuit, where Feme covert cannot have Property without the Baron, and the Declaration was dunm foia fuit, and therefore the Thel. Dig. Writ good; and the Regifter 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.

and 7 H. 7. 2. held contra.—In Trespasses by Baron and Feme, Quod clausum of the Baron and Feme & Bona & Catalla fuit, apud D. cepit &c. and counted that the Trespasses were done to the Feme dunm foia fuit. The Defendant pleaded Not Guilty, and was found Guilty, and pleaded in Arrêt of Judgment because the Court did not warrant the Writ; for there is a Special Writ in the Regifter, Quod Bona & Catalla Uxor is cepit &c. and not Bona & Catalla tua, and Count quod Bona Uxoris dunm foia fuit cepit &c. and it was laid there, that there is a Writ in the Regifter for the Baron and Feme, Quod diffilisvit the Feme dunm foia 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. Cour. 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 he be waived, then the Baron shall go quire; but the one shall not answer without the other, by all. Br. Reponder, pl. 2. cites 34 H. 6. 29.

30. A Feme brought Trespass by Ver Evidence and Charters taken; the Sperti in Defendant said, that after the Trespasses he took Baron, who releaved 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 ipserum, and held good, withoutaying in Manerium Exseris. Thel. Dig. 117. Lib. 10. cap. 26. S. 25. cites Patch. 4 E. 4. 15.

32. A Feme Diffidusress took Baron, the Writ against them shall be quod diffidus venit the Plaintiff, and not Quod Uxor dunm foia fuit diffidus venit. Br. Faux Latin, pl. 107. cites 4 E. 4. 17.

33. It was held, that a Man shall have Writ of Account against Baron and Feme, Quod reddes Comptam ut tempore quo the Feme dunm foia 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 de- lent. Br. Baron and Feme, pl. 71. cites * 9 E. 4. 24.

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 Receipts brought by the Baron and Feme, the Writ was in Una Aera Feme obligata dixitlunt the Baron and Feme &c. and held good, notwithstanding that he had the Rent in Right of his Feme; for during the Coverture the Diffidus shall be to both. Thel. Dig. 117. Lib. 10. cap. 26. S. 27. cites Hill. 15 E. 4. 17.

37. Where
37. Where Debt is due to a Feme who takes Baron, who brings Action, the Writ shall be Debt to both, and shall count specially how it was due to the Feme dum sola futi. Br. General Brief, pl. 77. cites 7 H. 7. 2.

38. Decever by the Baron and Feme, the Tenant said, that the first Baron had nothing after the Esopauls; Prift; and the Demandant did not deny it, by which the Tenant prayed that they should be bar'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 the shall not be examin'd upon a Confession of Action, therefore non recipitur; Note the Di-verity. Br. Baron and Feme, pl. 20. cites 44 E. 3. *10.

39. The Baron shall have Action for Batter of his Feme, without saying Per quod &c. Per Frowike, Kingsmill, and Fither J. Br. Treipafs, pl. 442 citas 20 H. 7. 5.

40. Baron and Feme, and J. S. brought Treipafs Quare Clausum fregit Herbam fsum meftuit & fenum fsum aportaret ad damnun siphis the Baron and Feme, and J. S. and held the Declaration good; for thought it is not good for the Hay, yet Claumum fregit & Herbam meftuit makes it good. Le. 195. pl. 140. Mich. 36 Eliz B. R. Wifkes v. Parfons, and thought 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 Treipafs of Claumum &c. and cutting their Grafs, 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.—5 C. cited. D. 195. b. Marg. pl. 59. as ad-judged accordingly.

41. In Debt against Baron and Feme upon a Bond by the Feme dum sola, the Writ ought to be in the Debt and Damnit; for the Baron has the Goods of the Feme in his own Right; Per Cook; and fo is the Register. 140. 3 Le. 206. pl. 263. Patch. 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 Fultum; for by the Reclusal, the Obligation loses its force and becomes no Deed. 5 Rep. 119. b. Trin. 2 Jac. C. B. in Whelpdale's Cafe.

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 answer'd 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 Treipafs or Diffilibrium; but they cannot bring Trover and suppoze the Possession in themselves, because the Law trans-fers the whole Interest in Point of Ownership to the Husband, according to 21 E. 4. 4. Quod fuit conceffum per tot. Cur. Yelv. 163. Mich. 7 Jac. B. R. Draper v. Fulkes.

44. In Treipafs brought by Husband and Wife for breaking the Close of the Husband, ad damnun coron; after Verdiéit, 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. Marshell v. Doyle.

45. In
45. In Trespass by Baron and Feme. The Declaration was of an Af-
fault and Battery made to the Feme, and also that the Defendant alia
Feme eis intuits; 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 being moved
done to the Baron. But adjudged and affirmed in Error, that these in Arreft of
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. the Wrong
being Peri-

46. Trespass by Husband and Wife for breaking the Clofe of the Hus-
band, and for Battery of the Wife, ad damnum ipsumforum. The Defendant
being the Clofe broken the Plaintiff. It was moved in regard it was found against the Plain-
tiff for the Clofe 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 contra. For that the Declaration being ill in itself in its Substance, the Verdict shall never make it good;
and therefore Adjournatur. Cro. J. 655. pl. 5. Hill. 20 Jac. B. R. Buck-
ley v. Hale.

47. An _Assowry_ 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 Freethold or Inheritance, any more than his Contellation shall. Jenk. 143. pl. 97.

48. In Action on the Case brought by Husband and Wife as Admin-
istratrix, the Declaration was ad respondad to the Husband and Wife, _Cui the Administration of the Goods &c. was granted_; in Error brought this
was alligned 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. Paflch. 3 Car. Walter v. Hays.

49. Trespass &c. against the Defendant, brought by the Husband and If Husband
Wife, for beating the Wife and taking the Goods of the Husband only, ad
Damnum ipsumforum; it was objected against the Declaration, that the Wife
cannot join for a Trespass done to her Husband alone, but he ought to jo-

50. Cafe in Nature of a _Conspiracy_ was brought by Husband and Jo. 340. pl.
Wife, for causing them to be indicted of Felony falsely and malicioufly, and
_2._ Anon. to be kept in Prison till acquitted, ad Damnum ipsumforum &c. After Ver-
dict and Judgment for the Plaintiffs, Error was brought and alligned, held that
because it was Ad Damnum ipsumforum, whereas a Wife cannot join with they could
not join for her Husband for Damages, because it is severa to either of them; and

C c c

of
Baron and Feme.

of that Opinion was Berkley J. but Crooke J. held the Contrary, because the Action is grounded upon one entire Record in which they were both interested, and they may join if they will, or the Husband may have an Action alone for it, that he was damned; Adjournavit, ceteris absentibus. Cro. C. 533. pl. 8. Trin. 15 Car. B. R. Dalby v. Dorthall, might join well enough; but Crooke J. seemed c contra.

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 damu solas, and the Declaration was ad Damnum ipforum. 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.

53. In Trepass by Husband and Wife, for beating her and tearing her Coat, ad Damnum ipforum; 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 Twidlen J. the 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 10l. Exception was taken because the Conclusion was ad Damnum ipforum; Sed non allocatur, and Judgment for the Plaintiff. 2 Keb. 230. pl. 4. Trin. 19 Car. 2. B. R. Brown v. Tripo.

55. Where-ever the Damages do survive the Declaration may be ad Damnum ipforum; Per Cur. 2 Keb. 434. pl. 71. Mich. 20 Car. 2. B. R. in Cafe of Atwood v. Payne.

56. Indebito Status Assumpsit against the Husband pro diversis Mercioniis &c. sold and delivered to the Wife to the Use of her Husband, it being for wearing Apparel. It was moved in Arrêt 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.

57. In Avowry as Bailiff to Baron and Feme for Rent arrear, he being seized in her Right. The Plaintiff demurred specially, because it is not
not averred that the Feme is living; but by Hale, the aterto exiflen’ion, but
is qua! an Averment of the Life of the Wife, and after Verdict, or on a special
General Demurrer it had been good, but doubted if it is ill on special
Demurrer; but Twifden and Wild held it good on a special Demurrer, because the
and Judgment for the Avoant. 2 Lev. 58. Pach. 25 Car. 2. B. R.
Marriage was not averred; fed nonalocatur

58. In Iudicatius by Baron and Feme, as the Administrator of 7. S. on
Account as Administrators, and Arrearages found to Baron and Feme as Admin-
istrators, &c. The Defendant demurred, because this would survive to the Husband,
and it is not paid that the Debt was due to the Wife as Administrator; fed per Cur. this is well enough, and Judgment for the Plaintiff. 3

59. Debt upon a Judgment by Husband and Wife, in which they de-
clared, that C. recovered 90 l. and made the Feme, Plaintiff, Executrix, &c. The Defendant pleaded, that the Plaintiff's never were married, and upon a Demurrer the Declaration was adjudged ill, because Quan-
dam Philippum shall not be intended the Plaintiff Philip, according to Plaintiff had
to Dyer, 70. b. [pl. 39. Trin. 6 E. 6.] 2 Lev. 257. Mich. 29 Car. 2;
leave to dis-
continue. 5a

60. Husband and Wife brought an Action on the Cause for these Words
spoke of the Wife, She is a Whoire, she is my Whoire, and concluded Ad
Damnum ipforum. After a Verdict for the Plaintiff, it was objected in
Arrest of Judgment, that the Words were not actionable without spe-
cial Damages laid, and that the Conclusion Ad Damnum ipforum was ill; but it was answere, that it was good, 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 Withen J. con-
tra. 3 Mod. 120. Hill. 2 & 3 Jac. 2. B. R. Baldwin v. Flower.

61. In Debt upon Bond brought by Husband and Wife, the Defen-
dant pleaded Ne unques Accouple in loyal Matrimony. The Plaintiff de-
scribed, and had Judgment, because it alters the Trial; for instead of
trying per Pais, it puts the Trial on a Certificate from the Ordinary’s Comb. 121.
and also it admits a Marriage but denies the Legality of it, whereas S. c. the Plea
a Marriage de Facto is sufficient, and whether legal or not is not ma-
Grey.

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 Possessione
fuerunt the Defendant converted them, ad Damnum ipforum &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 Conver-
sion cannot be to her Damage. 1 Salk. 114. pl. 1. Mich. 4 W. & M.

63. In Affidavit and Battery by Baron and Feme, the Defendant plead-
ed Ne unques Accouple &c. but held ill; for it cannot be tried at Com-
mon Law, the Jurisdiction whereof ought not to be taken away in Per-

Baron and Feme.
64. **Trespass and false Imprisonment by Baron and Feme**, for Imprisonment of the Feme, *Per quod Negotia Domestica of the Husband remanserunt infelata ad gravis Damnum ipsum*. 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.

65. In an Action of Battery brought by the Husband and Wife for a Battery upon them, *ad Damnum ipsum*, 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.

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 pleaded a Misusus; Adjudged, that whatever a Bail-Bond may do in other Cases, yet in the Case of a Feme covert it shall not stop her to plead a Misusus. 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 Bons & Catala. 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 diversis denari Summas for the Cure &c. & al' enormia iisdem intentius ad gravis Damnum ipsum. 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 Gift of the Action is only beating of the Wife, and the Ratione inde is only in Aggravation of Damages. As to the Alta 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 abfents. 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 Replication 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 Partia. Thel. Dig. 119. lib. 11. cap. 2. S. 1. cites Hill. 4 E. 3. 115.

2. In Assize the Baron pleaded joint tenancy with his Feme, and had Process to bring in his Feme; quod nota, and the came and join'd, and maintain'd the Exception. Br. Proces., pl. 94. cites 16 Afl. 8.

3. Entry against Baron and Feme, supposing the Entry of the Feme only. Thel. Dig. The Tenants said that they both entered by joint purchase &c. and held a cap. 54. S. 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. Hill. 33 E. 3. Brief 914. that it is no Plea to say that the Baron and Feme entered, without traversing that they 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 entered. Thel. Dig. 177. Lib. 11. cap. 54. S. 47. cites Mich. 18 E. 2. Brief 647.

4. Where the Baron is estopp'd to plead Non-tenure, his Feme shall be Br. Journes et opp'd also. Br. Baron and Feme, pl. 52. cites 24 E. 3.

5. The Baron shall plead the Misjoinder of his Feme. Thel. Dig. 193. Lib. 13. cap. 1. S. 7. cites 30 Afl. 16.

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 implored, 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 Patch. 18 E. 4. 4.


10. A Feme may plead to the Writ that she is the Feme of J. not named Br. Brief, Br. Baron and Feme, pl. 7. cites 39 E. 3. 1.

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 her self. Br. Baron and Feme, pl. 13. cites 42 E. 3. 23.

Assumption 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-adjumpt. The Plaintiff signed Judgment, as if there had been no Plea in the Caufe, which was set aside upon hearing Counsel on both Sides. Barnes's Notes in C. B. 169, 170. Eavet, 7 Geo. 2. Amey v. Garlick.

11. Baron and Feme shall not be suffer'd to confess Action in Dowry; for there does not lie Examination. Br. Coverture, pl. 76. cites 44 E. 3. 12.

12. In Quod Juris clamat against the Baron and Feme, they may deny the Deed which binds the Feme. Br. Baron and Feme, pl. 53. cites 44 E. 3. 34. and 45 E. 3. 11. accordingly. And says see Fitzh. Quod Juris clamat 11 & 38, that Quod Juris clamat was maintain'd against Feme Covert. Ibid.
13. In *Quid juris clamant* the Baron and Feme may confess a *Deed* that the *Tenant holds without Impeachment of Wife*. *Contra* of an *Infant* in this *Action*. But in *Per quæ Servititia* a *Feme covert was not suffer'd* to confess an *Acquittal*; for there does not lie Examination, and a *Feme covert* shall not be bound by her *Conuance* but where she is examined, therefore quare of the first *Caue*.* Br. Coverture*, p. 67. cites 45 E. 3. 33 E. 3. and 43 E. 3. in *Nat. Brev.* in the *Addition* of Quid Juris clamant & *Per quæ Servititia*.

14. In *Entry in Nature of Affile against* Baron and Feme, the Baron pleaded *Non-tenure* for his *Feme* and *Jointtenance* for himself with a *Stranger*, and good per *Car.* and not double; for he ought to answer for both. *Br. Baron and Feme*, p. 88. cites 10 H. 6. 22.

15. *Feme covert* shall not be received to *disarrow the Baron's Attorney*; but he may make *Attorney for both*. *Br. Baron and Feme*, p. 7. cites 33 H. 6. 31.

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*, p. 7. cites 33 H. 6. 43.

In *Battery against Baron and Feme*, the Baron pleads one *Plea* and the Feme another, and *Verdict* for the *Plaintiff as to both Injuries, and Damages* entirely given; but *Judgment* was arrested, because *Feme cannot plead by herself*, and because *Damages* entire were given, and *Repleader* awarded. *Cro. J.* 239. pl. 3. *Pasch*. S. *Jac. B. R. Watfon v. Thorp*.

In *Action on an Assumpsit of the Wife demand suit*, the Plea was entered, viz. *Et praedict J. N. & Bridgeta, ven & defend* vim & injuriam &c. & ips Bridgeta dict quod ipsa *Non-assignept* & hoc &c. Et praedict querens familiaris. It was moved that a *Plea of Feme covert* without the *Husband* is no *Plea at all*; and an *Habe* being joined and tried thereupon was ill, and not aided by any *Statute of Jeoffe*; and of that Opinion was all the *Court*, and a *Repleader* awarded. *Cro. J.* 288. pl. 4. *Mich. 9* *Jac. B. R. Tampion v. Newfon._*—*Yadv. 310. C. 3* 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 pled Mad statutes De-

mese, and tried; and alleged in *Arrest* of *Judgment*, because the *Woman pleaded without the *Husband*, and the Judgment was bad, and a *Repleader* alleged. *Browne* 255, 256. *Trin. 14* *Jac. Anon.* And says that this *Case* was confirmed by a *Cafe* 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 justified*, and concluded with *Et hoc paraet eft veri- fi*.

*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 search by Essoyns*, if the *Feme by Covin of the *Plaintiff will appear*; and if both wage their *Cause*, and the *Feme fails at the Day*, the *Baron shall be condemn'd*. *Br. Baron and Feme*, p. 7. cites 33 H. 6. 43.

18. In *Trespases 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 assessed in their Demandes*, as of *Fee*, before and at the *Time of the Trespass*, and the *Defendant entered* and did the *Trespase*; and *Exception* was taken, because he did not say that they were assessed in *SURE Uxoris or jointly*; & *non allocatur* for per *Fineux Ch. 1. it is sufficient for the *Defendant to in-

	title himself to any Part of the Land, in whatsoever manner it be*. *Br. Pleadings*, p. 84. cites 12 H. 7. 24.

*Without Examination, and Examination does not lie* in this *Action*. *Br. Per quæ Servititia*, p. 15. cites *Hill. E 3. S. C.*

*22. A Leaf was granted to B. and F. his Wife, a Term of Years, B. died, and F. married W. and in declaring upon this Leaf W. the Plaintiff, set forth that he and his Wife were assessed, but did not say that they were assessed as in *SURE Uxoris*, as he ought, because it is a *Challent Real*, and the *Feme surviving her Baron shall have it*, and not the *Exe-...*
Baron and Feme.

21. In Debt against Husband and Wife he was outlawd, and his Wife waivered. Afterwards she pleaded the Queen's Pardon. The Court held that the bail must be discharged of her Imprisonment; but the Pardon ought not to be allow'd, because she could not sue out a Scire Facias against the Defendant, to make him declare upon the Original, without her Husband; and there was a Condition in the Pardon, viz. That the Plaintiff might not sue the Defendant, which he did not do without her. D. 271 b. pl. 27. Hill to Eliz. Anon.

22. Debt against Husband and Wife, upon a Bond by the Wife's dim sola. 3 Le. 256. After Verdict it was moved, that the Writ was in the Detinuit only, pl. 265, whereas it should have been in the Debtor & Detinuit; for the Marriage was a Gift in Law of all the personal Goods to the Husband, and to his own Use, and therefore Debtor the Money due on this Bond, as well as is the Re- Detinuit. Quod fuit conceffum per tot. Car. 5 Rep. 36. a. Trin. 30. Eliz. B. R. Walcot's Cafe.

23. Debt against Husband and Wife, for certain Barrels of Beer sold to the Wife dim sola. They both waived 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 vs. 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 Eftoppel. 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, aver'd for Damage searant in his own Name, and that the others are his Servants &c. and this was ruled to be good, without swearing that they were Servants to the Wife also. Nay 107. Hill. 1 Jac. C. B. Harvey v. Gulton.

26. Trespass and Assault against Husband and Wife, supposing that they both met the Mare of the Plaintiff. Upon Not guilty pleaded, the Jury seems only found that the Wife only met the Mare. Williams and Crooke J. and that a Tranfalus is against the Plaintiff, because it appears that his Action is tione of Yelv. false; for the Husband is not joined in such Cause but for Conformity on 19. and that there is a Special Writ in the Register to that Purpose; and the Court and Judgment was given against the Plaintiff. Yelv. 106. Mich. 5 Jac. B. R. Drury v. Dennis.

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. Paich. 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. 205. pl. 5. Hill. 5 Jac. B. R. in Cafe of Hales v. White.

27. A Verdict was against Husband and Wife in Ejectment. After the Nifi 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. 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.
Baron and Feme.

after the last Continuance. The Court doubted: but afterwards held that the Suit is not abated by the Husband's Death, the being the only Toretalor: but otherwise, if she had died; and Judgment accordingly. Hard. 151, 152. Pach 1659. in the Exchequer, Brunrig v. Hanger.

28. Cafe &c. against Husband and Wife, for fraudulent Words spoken by the Wife. The Defendants pleaded that isth non sunt culpabiles, and the Jury found good isth sunt culpabiles. It was moved in Arrest, that the Husband was joined only for Conformity, and therefore they ought not to have said that isth sunt culpabiles, but that isth sunt culpabiles; 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.

29. In Recoverment 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 Judgment against Baron and Feme, where the Baron was acquitted, ought not to be against a Feme Covert by the Stat. Wettm. 2. cap. 35. Cro. J. 413. pl. 2. Hill. 14 Jac. B. R. Huf- fey v. Moor.

30. In Debt against Husband and Wife, upon a Bond of the Wife, the Defendants pleaded Tempore confessionis &c. setting forth the Day, she was Covert Baron &c. The Plaintiff confessed 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 Cafe.

31. Case against Husband and Wife, for slanderous Words spoken by the Wife. The Defendants pleaded Quod isth non sunt culpabiles, and the Jury found Quod isth sunt culpabiles. It was moved in Arrest of Judgment that it should have been Quod isth [spfe] non est culpabiles. Sed non allocat; 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. Pooracree.

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; if she was joined thereupon and found for the Plaintiff, and in Arrest of Judgment, it was awarded that the Feme was ill joined, for the Wife there pleads nothing, so there was nothing done at that Time with the Suit. Het. 10. Padch. 3 Car. C. B. Aylihe's Cafe.

S. P. but by 5 Justices (ablente Coke) if a

33. In Trover against Husband and Wife for certain Goods, the Plaintiff declared that they converted the Goods ad Commodum suum propositum. 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 Cafe.

immediately the Goods of the Baron; yet there was an Infant of Time when, in Priority, they were the Goods of the Feme, and a Possessor the Property shall be devested of her and be vested in the Husband; but they sold they would confer with other Judges; and afterwards it was adjudged by all the Judges for the Plaintiff. Jo. 447. pl. 4. Mich. 15 Car. B. R. Hodges v. Sampson.

But in a Note there at the End of the Cafe, it seems that Rule was given to play the Judgment. —Mar. 60. pl. 94. S. C. deponent. —Ibid. 82. pl. 153. Patch. 17 Car. S. P. and seems to be S. C. says that the Jury found the Feme Not Guilty; and the Court held this plea (Count) made good by the Verdict.

In Feme brought by C. against P. and his Wife. The Declaration was, that the Goods were of the Baron and Feme, and were converted ad ufum suum, whereas it ought to be in the plural Number to wit, ad ufum eorum, or ad ufum of P. and his Wife; for as it was, it supposeth 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. Str. 18. Patch. 25 Car. B. R. Clark v. P.W. -12 Mod. 207. Mich. 18 W. 5; in Cafe of Hyde v. S..... Holt Ch. J. said that though in Declaration in Trover against Husband and Wife laying the Conversion ad ufnm iporum Judgment was arrested; yet it came in Quelion again, it should not be so by his Content.

33. In Trespafs and Afflaut against a Feme the impairs, and afterwards pleads that at the Time of the Bill it was Covert, and concludes in Bar; per Cur. this is only a Plea in Abatement, and a Respondeas ouster was granted, Niti. 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 Afflumnift against the Baron the Plaintiff declared upon several Promises for so many Months Lodging for his Wife at his Requêt, and also for Goods sold to himself. The Defendant pleaded in Bar, that long before the Plaintiff had found Lodging for his Wife, but went from him without his Content, 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 supposeth in the Declaration to be sold to the Defendant, without any Atient 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-assumpt pleading; and that as to the Lodging for the Wife, the Plea amounted to the general fillie; but though it was a Fault, yet it was cured by the Demurrer. But because he did not answer to the Assumption laid for the Goods sold to himself, they were of Opinion to give Judgment for the Plaintiff. The Reporter adds a Note, that as this Pleading is, the Abque hoc amounted to no more than a Protestation. 2 Vent. 155. Patch. 2 W. & M. in C. B. Beaumont v. Welden.

36. Trespafs against Husband and Wife for a Trespafs done by the Wife alone; they both pleaded not Guilty as to part, and as to the rest they pleaded in Bar that the Husband was feised in Fee in Right of his Wife, and being so seised, be demised it to the Plaintiff for a Year, and so from Year to be was feised Year rendering Rent, and for so much in Arrear the Wife entered and dis-trained, & fuit inde Possessionum" utque &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 Tresfllor, and yet they both as to all the Trespafs Prater &c. have pleaded that they are Not Guilty, when it ought to be, Quod Ipla is Not Guilty; and upon these Exceptions the Court gave Judgment for the Plaintiff clearly. 2 Law. 1421. 1425. Trin. 7 W. 3. Catlin v. Milner.

37. Trespafs'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, unjustified in the Declaration to be his Wife, were never joined in lawful Matrimony. The Plaintiff demurs, and upon joinder in Demurrer it was inferred 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 Iflue 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 Matrimony, and not in the Loyalty; and that though after Iflue 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 Iflue 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. Stevenfon.

(E. b) Damages and Costs. Where given for or against Baron and Feme both or against one only.

1. A PPEAL 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.

2. In Affise 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 Sellin of the Land, and Damages of Iflues; 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 Plaintiffs; so where they are Defendants, Judgment shall be given against them both. Quæ coherent Perfonæ, a Perfonæ separati 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 assailed 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 Melherfe.

5. Error of Judgment in Writ against the Tenant for Years brought by Baron and Feme of Moiety being seized in Reversion to them and his Heirs, because the Damages are given to Husband and Wife, which per Curiam
(F. b) Equity. Suits and Proceedings by and against them.


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. Pauch. 8 Jac. Li. B. Rait v. Whittle & al’.


4. A Settlement by the Wife on the Baron was by Consent on a Bill brought by the Baron against the Feme deceased, 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, afflicted by Judges, declared the Decree good. 2 Ch. R. 46. 22 Car. 2. Earl of Catterhavon 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 Diaposal thereof; the Baron was grown poor, and prayed to have 200 l. to buy him an Office for Subsistence, and the Wife being examined apart, and confenting, 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 the 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 Intereit, as the Court should direct, so as it may be preferred 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 secure’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 intituled 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 Favor
Favour of the Court, he could then make him do what was reasonable. Vern. 39. pl. 37. Pauch. 34 Car. 2. Nicco. 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 Lusay & c. but she was in Court, and being thought sensible enough, the Friends moved that the Estate might be so settled, that the might not be wrought upon her Husband to give it to her Children by him or by any After-Husband, which the Court thought fit to order, and it was left to Mr Pollexfen 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 younger 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 Cafe.

9. A Husband as Administratrix 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. Eqs. Cases 392. Pauch. 1700. Wytham v. Crawthorn.

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 Mortgage 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 Interests, has ty’d himself down. But Cowper C. thought, that as to the Surplus, it being devise’d to the Wife, and not to Trustees, when it comes to the Wife it belongs to the Husband, and what he has poss’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. 1712. Harvey v. Harvey. Court will

* A Man stole a Woman, whole 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 659. pl. 585 Trin. 1712. Harvey v. Harvey.


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 cede, 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 Mafter, 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.

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(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, till he should make a competent Jointure. Toth. 179. cites 14 Car. Tanfield v. Davenport.

2. The Wife, an Infant, was intituled 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. 301, 362. Trin. 38 Car. 2. How & Ux. v. Godfrey & White.

3. When a Baron faces her 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. Patch 1705. in the Case of Oxenden v. Oxenden.

4. Bill to have a Satisfaction for their Portions charged upon their Father's Lands by Marriage Settlement, and for a Legacy given them 1767. pl. 238. by their Father's Will &c. The Case was, There was a Trust Term in S. P. does not a Marriage Settlement to raise Portions for Daughters, payable at their respective Ages of 21, or Day of Marriage, with a Provision, 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 Muster, there to remain until her Husband should make a Settlement suitable to her Fortune; Per Harcourt C. MS. Rep. Patch 12 Ann in Canc. Greenhill v. Waldoe.

5. A Feme sole took a Mortgage in Fee for 500 l. and married. The Matter of the Rolls held, that if the Husband had sued in Equity for the Money, or had proved that the Mortgagee might be foreclosed, Equity (probably) would not compel the Mortgagee 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 Mortgagee 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. 453, 459. Trin. 1718. Bolsil v. Brander.

6. A Feme being entitled to 500 l. Portion after her Mother's Death, 12 Mod. and for which no Interest is payable in the mean time, and the having but S. P. married a considerable Tradesman, decreed, by Consent of the Feme, that does not apply, Baron might sell a Money of the Portion, or dispose of it as he thought meet. Per 2 Vern. 762. pl. 662. Trin. 1718. Butler v. Duncomb.
7. A devised 1000l. to B. a Feme sole, Infant, payable after the Death of the Testator’s Wife, and at B.'s Age of 25 Years; it B. should live long live. B. at above 18 Years, without her Father’s Consent, married J. S. who soon after became Bankrupt. The Commissioners adjudged 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 he 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 contended, and submitted to; but pray’d the Arrears of Interest, which was decreed him, deducting the Colts, 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 Lord C. Parker. Wms’s Rep. 382. 386. Mich. 1718. Jacobson v. Williams.

8. If Husband takes 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. The 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. Cafes in Equ. in Ld. Talbot’s Time, 212. Mich. 10 Geo. 2. Hervey v. Afton.

10. Ld. C. King said he thought it extraordinary that Chancery should interpose against the Husband, in Cafes 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. 632. Mich. 1731. in Caise of Milner v. Colmer.

11. And therefore where A. pending an Account for a great Personal Estate, married an Infant intituled to a large Share thereof, viz. 1400l. 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 4000l. Part of the 1400l. 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 300l. a Year of the Family Estate of 1400l. a Year upon her for a Jointure; and alleging that he being in Trade, and a Freeman of the City of London, the Custum of the City was alone a Provision for her. Ld. C. King, after Examination of the Wife in Court as to her Consent, which he gave, and likewise her Reason 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 entering into such Covenant, should be paid the Residue of the Portion beyond the 4000l. 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 4000l. in Trust for the separate Trust of a Feme Court. The Husband and Wife brought a Bill against the Trustees to have the Money paid them; and tho’ the herself was in Court, and contended that the Money should be paid to her Husband, yet the Master of the Rolls would not decree it, but dismissed the Bill. Cited in the Cafe of Penne v. Peacock, Mich. 1734. Cafes in Equ. in Ld. Talbot’s Time, 43. as the Caise of Blackwood v. Norris.

The Reporter adds, N. B. This was the Case only of a Personalty. — The same was obier’d by the Ld. Chancellor, that it was only of a Personalty, and somewhat particular. MS. Rep. in S. C. (H. 1b) Equity.
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(H. b) Equity. In what Cases Equity will order the See (F. b) Husband to inforce or procure the Feme to do an Act.

1. Ordered, that the Baron become bound in a Recognizance that his Wife shall release her Right. Toth. 158. cites 4 & 5 Eliz. 6.

2. The Defendant's Wife would not bring in Evidence 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. Griffith v. Taylor.

4. Husband and Wife did, upon a valuable Consideration, by Lease and The Decrease, 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 specific Performance of the Covenant; and a Precedent was cited where a specific Performance had been decreed in the like Case; but the Chancellor would not decree a specific Performance in this Case, because upon such Decree the Husband could not compel his Wife to levy a Fine, and if he 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. Outram v. Round.

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 Wifedom of the Law, which secures the Wife's Lands from being aliened 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 Cauf of her Husband's laying in Prison all his Days; and said he did not think it proper in this Case to decree a specific 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.

FEME was arraign'd of Felony, and was Covert Baron, and would it was proved confess'd by Command of the Baron, and the Court would not pronounced to take it for Pity, but charged the Inquest, who said that she did it by Coercion of her Baron in spite of her Teeth, by which the went quit; and it was said that the Command of the Baron, without other Coercion, 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 Aff. 49.

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 apposeth the Wife doth it by Coercion 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 Fitz. Corone 162. 27 Aff. pl. 49. Fitz. Corone 199. Poult. de Pace 126. 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.
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The Feme may commit Felony, if it be not by Coercion of the Husband; per Cur. 12 Mod. Mich. 10 W. 5, 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 he commits Trespass. Jenk. 28.

3. The Husband shall not answer for Damages given in a Criminal Matter, as in an Information for supposing a Will; tho' for Civil Offences it is otherwise, as Battery, Slander, or Afflumnity by Feme Covert. Noy 103, 104. Trin. 12 Jac. Brereton v. Townsend.

4. Where Debt was brought against the Husband and Wife for the Receivancy of the Wife, the Husband would have appeared by Superfides alone; but the Court resolved that either both must appear, or both be outlaw'd. Hob. 179. pl. 209. Loveden's Cafe.

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 the pleaded herself to be married to Wharton, on Purpose to be excused, being with her Husband at the Burglary; and the 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.

6. A Feme Covert was indicted alone for buying and ingrossing Fife, 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 it any Profit arifes 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. Patch. 19 Car. 2. B. R. The King v. Fenner.

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. 383. pl. 122. Mich. 21 Car. 2. B. R. Moreton v. Packman.

8. Husband and Wife may be found guilty of Nuisance, 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 Cafe of the Queen v. Williams.

9. Husband and Wife were indicted for keeping a Brandy-house and procuring Lewdness. The Court held the Indictment good, and said, that keeping the Houde, 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. Husband and Wife were indicted for keeping a Brewry-houfe and procuring Lewdness. The Court held the Indictment good, and said, that keeping the Houde, 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.
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10. Husband and Wife were indicted for keeping a common Gaming-
Yole, 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 Purpofe. 10 Mod. 325. Trin. 2

(K.) b. What the Wife shall have in Café of a Divorce.

1. If a Man gives in Tail to Baron and Feme, and they have Issue,
and after Divorce is fixed, 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 Preconradus
of the Feme, they shall
hold jointly for their Lives, and Survivor shall hold all, and therefore it seems it is only a Jointtenency

2. If a Man is bound to a Feme sole, and after marries her, and after Br. Deraign-
they are divorce'd, the Obligation is reviro'd. Br. Couverture, pl. 82. cites
26 H. 8. 7. per Fitzherbert and Norwich.

3. The Feme, after Divorce, shall re-have the Goods which she had but if he
before Marriage. Br. Couverture, pl. 82. cites 26 H. 8. 7. by Fitzherbert
and Norwich.

4. If Land be given in Frank-marriage, and Dones are divorce'd, which PerKeblo,
of them first moves for the Divorce shall lose the Land; Per Shell: the Wife
shall have
But by Fitzherbert the Land shall be divided between them, cited D. 13.; the Land,
because it
was given
in Advancement of her. Kelw 109. b. pl. 12. Caufus incerti Temperis — The Divorce was at the
Suit of the Feme, and the Baron continued always in Possi{fion, and died, and after the Wife died,
and the Feme was adjudged always in Possi{fion, because there never was any Debate [or Contel] by
her [about the fame.] Br. Deraignment & Divorce, pl. 7. cites 12 Aff. 22. — The Year-book of this
Cafe is, that the Land was given in Frank-marriage by the Father of the Wife, and that they had Il-
{lue, and that it was adjudged for the Uge against the Commons and Heirs of the Baron; and that no De-
bate happened between the Baron and Feme about the Tenements, the缝 was adjudged to be always Te-
nant of the Franktenement; whereas had any Debate been, then the Baron had been Dividior, and
the Freethold had descended to his Heirs, of which they would not have been ou{table by any.

And where in Affide it was found that the Father of the Feme gave the Tenements to the Feme and her
Baron in Frank-marriage, when they were infr {Aues Nobles, and at that time the Baron at his
Suit was divorce'd by the Court of the Feme, and after he filed himself in at the Il{lue, and ou{ded the Feme,
G g g
Baron and Feme.

and she brought Affife, and because she was the Caufe 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 All. 2. — Br. Affife, pl. 427. cites Patch 19 E. 3, and Fitch Affife, 8, & 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 the brought Affife, and recovered the Whole, because the Divorce was at the Suit of the Baron. Br. Deraignment &c. pl. 16. cites 8 E. 1, and Fitch Affife, pl. 415. & 85. Patch. 19 E. 3. — Br. Affife, pl. 437. cites 8 E. 3, and Fitch Affife, pl. 415. & P.

5. If the Baron and Feme purchase jointly and are divorced, and the Baron relieves, and after they are divorced, the Feme shall have the Moieties, 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 dower in Fide ante Divorum, 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. 38. pl. 164. Patch. 8 Eliz. Broughton v. Conway.

7. Obligor or Obligee marry with the Party, and after are divorced, such Caufa Precontractus, the Debit is extinxt. D. 140. pl. 39. Hill. 3 & 4 P. & M.

8. After Divorce the Wife shall have such Goods as were hers before Marriage, and are not spent. D. 15. pl. 63. by Fitzherbert, and fay's, that so was the Opinion of the Court about the 26 H. 8. Kelw. 122. b. 


But after Arguments by the Civilians Popham said, that a Confutation shall be granted, (so they in the Spiritual Court admit that Plea) and Dr. Crompton said, then it is clear that the Wife there shall recover. Noy 45. Stephens v. Tuttys & Us. S. C. — 1 Balk. 115. pl. 4. Mo. 665. pl. 910. S. C. fay's, that Confutation was awarded, but fo as that the Ecclesiastical Judge should not disallow the Release.

* 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.

5 Mod. 71. S. C. according.

10. Husband may release Cofts adjudged to the Wife fuing in the Spiritual Court, notwithstanding a Divorce a Mensa & Thoro; but if such Divorce be, and the Wife has Alimony, and the fues there for Defamation &c. the Husband cannot then release the Cofts; for these Cofts 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 Balk. 115. Hill. 7 W. 3. B. R. Chamberlain v. Hewfon.

17. A Divorce was a Mensa & Thoro, and then the Husband dies intestate. The Wife by Bill pray'd Alitance as to Dower and Administration.
\textit{tion}, (it being granted to another) and \textit{Distribution}. The Matter 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 dismis'd the Bill; and as to the Administration, the granting that is in the Ecclesiatical Court; but the Distribution more properly belongs to this Court; but since in that Court she is such a Wife as \textit{is not intitled to Administration}, he dismis'd the Bill as to Distribution too, and said if they could repeal that Sentence, she then would be intitled to Distribution. Ch. Prec. \textit{III.} pl. 99. Pauch. 1700. Shute v. Shute.

\begin{itemize}
\item \textbf{(L. b)} What Alteration a Divorce makes in the Estate.
\item \textbf{1.} A \textit{ND} was given to Baron and \textit{Feme in Frank-marriage, and after Br. Derainment, a Divorce was had between them at the Suit of the \textit{Feme}, and yet it was said that the \textit{Feme} remained Tenant always. Br. Eistate, pl. 55, cites S. C. cites 12 Afl. 22.
\item 2. \textit{Things executed, where Baron is seized in Right of the \textit{Wife, shall not be avoided by Divorce, as Waifte, Receipt of Rent, Seifor of Ward, Pre-fcntment to a Benefice, Gifts of Goods, of the \textit{Wife} \&c. But otherwise 'tis in Matter of Inheritance, as if Baron discontinues or charges Land of his \textit{Wife, releaes or manumits Villeins} \&c. Br. Derainment \&c. pl. 18. cites 32 H. 8.
\item 3. \textit{Feme} sole leafes for Years; \textit{Leafe does Waifte, and after marries the Feme}. They are divorced. Whether the \textit{Action} of \textit{Waifte} shall \textit{revive} to the \textit{Feme}? Kelw. 122. b. pl. 75. Anon. Cafus incerti Temporis.
\item 4. If \textit{Feme} holds of me, and \textit{ceases}, and after I marry her, upon a Divorce the \textit{Action} is \textit{revived}. Arg. Kelw. 122. b. pl. 75. Cafus incerti Temporis.
\item 5. After a Divorce a \textit{Menfa} \& \textit{Thoro}, an \textit{Injuntlion} was moved for to stop the Husband from \textit{felling a Term of the \textit{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 \textit{Wife} as \textit{Wife}. 9 Mod. 43, 44. Trin. 9 Geo. Anon.
\end{itemize}

\begin{itemize}
\item \textbf{(M. b)} \textit{Actions by or against the Baron and \textit{Feme} after Divorce. In respect of the \textit{Feme}.}
\item \textbf{1.} It seems that \textit{Writ} brought \textit{against Baron and \textit{Feme}} shall \textit{abate} by \textit{Divorce} made between them pending the \textit{Writ}. Thel. Dig. 185. Lib. 12. cap. 13. S. i. cites Pauch. 6 E. 3. 249. and that so it is held Pauch. 25 E. 3. 39.
\item 2. Trefpas de Muliere abducta, and ravish'd, cum Bonis viri afor-tatis, \textit{against Baron and \textit{Feme} and others}, and well against the \textit{Feme}; for \textit{a Feme may affent and aid to the Ravishment of another \textit{Feme}}, and may carry away the Goods; and there 'tis agreed, that \textit{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. Trespasses, pl. 43. cites 43 E. 3. 23.

3. N. K. brought Trespasses 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 Raveryment, and the fame of Divorce; for he shall not recover the Feme, but Damages; and it was said that the Divorce was Causa Frigiditatis; and per Knivet, 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 assert, or be aiding, or carry away the Goods, by which he pleaded Not guilty. Br. Rape, pl. 2. cites 44 Aff. pl. 15.


(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.

2. 34 Edw. 3. cap. 1. Justices of Peace shall have Power to restrain the Offenders, Rioters, and all other Barretors. 2 R. 2. cap. 7.

Barretors.
Barretors.

3. A. acquitted of being a common Barretor, threatening the Wit- nesses 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. Patch. 1 Car. Toplins Cafe.


(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 suits for Caufe may be comprehended; but he that suits up Suits among his Neighbours is a Barretor. Rich. 11 Jac. B. R. Some's Cafe, per Cur.

2. A Barretor is a common Mover and Exciter or Maintainer of Suits, 8 Rep. 364 Quarrles, or Parts either in Courts or elsewhere in the Country. In b Patch. 39 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, retry, S. P. in the Disturbance of the Peace. 2dly, in taking or keeping of Possessions of Lands in Controversy, not only by Force, but also by Subtlety and a Deceit, and most commonly in Suppression of Truth and Right. 3dly, by false Inventions, and sewing of Calumniations, Rumours and Reports, whereby Discord and Disquiet may grow between Neighbours. Co. Litt. 386 a. b.

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. 244. cap. 81. S. 4. 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 a little questionable; for since a Feme Covert is as capable of exciting Quarrels, in the frequent Repetition whereof the Notion of Barrettry seems to consist as if she were sole, why should not as properly be indicted for it?

4. Common Barretor is as much, as Twifden 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 Relief 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 Caufe of Action. 3 Mod. 98. Hill. 1 Jac. 2. B. R. Anon.

(B) Pleadings and Proceedings.

1. An Indictment was Contra formam Statuti, to which it was ex- Hawk. Pl. C. 244, cap. 81. S. 4. cites S. C. and says it seems to make it an Offence at Common Law, and the Statute of 34 E. 3.

2. A. acquitted of being a common Barretor, threatening 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. Patch. 1 Car. Toplins Cafe.
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2. A. was indict'd, that at such a Day, and divers Days before and after he was a common Barretor and Purturbator Pacis, but they'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 Cafe.

* No certain Place need be expressed, for it must be intended in several Places. Cro. J. 527. pl. 4. Pach. 17 Jac. B. R. Palfreys Cafe. — As to no Place being alleged, Doderidge said that if he is a Barretor in one Place, he is in all Places; but the Indictment being per Quod he did firr up Jurgia Contentions, and no Place alleged where he did firr them up, it was said that in such Cafe the Place was very material, and for that Reason it was quashed. Godb. 383. pl. 471. Pach. 3 Car. B. R. Man's Cafe. — Paim. 459. S. C. the Indictment was quashed, because no Place was alleged where he was a Barretor, nor where he firr'd up Suits; yet at first Doderidge said it was good, because a Barretor is one that firr'd 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 traverfed, no Venire Facias can be awarded, and therefore it was quashed. — Lat. 194. S. C. in toto his Verbis with Paim. — An Indictment of Barrestry charged the Defendant for the Multiplicity of his own Suits at such a Place, and for railing 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. 32. 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 held, that an Indictment of this kind may be good without alleging 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 &e, 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.

3. An Indictment of Barrestry 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.

4. Indictment for Barrestry omitted the Words Contra Pacem Domeni Regis, vel contra formam Statuti. Exception was taken for the Fault, and it was held to be insufficient, it being an essential Part of the Indictment; and therefore was reversed. Cro. J. 527. pl. 4. Pach. 17 Jac. B. R. Palfrey's Cafe.

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. Cro. J. 340. pl. 4. Hill. 9 Car. B. R. Chapman's Cafe. — Barrestry was an Offence at Common Law, yet it is good to conclude Contra formam diverforum Statutorum; Per Cur. Obiter. 12 Mod. 99. Trin. S W. 3. in Cafe of The King v. Bracy.

5. An Attorney, upon Barrestry being proved against him by divers Affidavits read in Court, had Judgment to be put out of the Roll of Attorneys, and be fined 50 l. and turned over the Bar, and Rand committed. Sty. 483. Trin. 1655. B. R. Alwin's Cafe.

6. An Indictment of Barrestry was brought into this Court and filed. Upon a Motion for a Proceedendo, Twifden 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 Folter & Windham, a Proceedendo was granted. Quere de ceo. Lev. 23. Hill. 14 & 15 Car. 2. B. R. Upham's Cafe.

The Court that it was filed, and therefore could not be remanded; but because it appeared to the Court to be done by Proflite, and the Offence to be great, they awarded a Proceedendo contrary to the Opinion of Twifden, and likewise to the Opinion of the Court. Keb. 24. S. C. says it was filed the lower Day that the Certiorari was returned, which the Court conceived an Irregular Surprise, notwithstanding the Bar and the Clerks affirmed that after filing none could take.

7. Error
Barretors.

7. Error assigned to reverie a Judgment in an Indictment for Barretors, was because it is that he shall be fined 100 l. and be of the good Society, without saying How long, and if uncertain; but the Record was that he should be fined. Ex ulteriori Ordinariet eft, 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.

8. U. was indicted at the Affixes of common Barretors, which being removed into B. R. by Certiorari, he appeared and pleaded Not Guilty, & de hoc petit se super Patriae, & Thomas Fainthorow Miles, Coronator & Attorn Domini Regis &c. and found Guilty de Premiiffis in Indictamento infra specie interius ei indifferent modo & forma prout prae'd T. F. interius versus eum quae'. It was moved in Arrerl that the Verdict was insufficient, because the Defendant is not found Guilty generally, but only that he is Guilty medio & forma prout prae'd T. F. versus eum quae', whereas in Fait 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 Lisise for the King, which if the Indictment had remained in the Country the Clerk of the Affixes 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 Car. advisare voluit; but afterwards the Court over-ruled the Exception, and adjudged the Verdict sufficient, because the Words modulo & forma &c. was meer Surplusage; for the Defendant is found Guilty de Premiiffis in Indictet' infra specificato interius ei impolis', which is a compleat Verdict of Idel' without paying more, and the Subsequent Words are merely 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 Sound. 308. pl. 52. Trin. 17 Car. 2. The King v. Uryn.

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 to, and therefore the Judgment was reveried; but they said that the finding him to be a common Oppressor of his Neighbours, had been good Evidence to find him guilty of Barretory; and therefore they bound H. to his good Behaviour, and will'd that the Country indict him again with the Word (Barrector.) Sid. 282. pl. 13. Patch. 18 Car. 2. B. R. The King v. Hardwicke.

Keb. 755. pl. 57. S. C. lays the Ec ulteriori Ordinariet eft, 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.

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2 Keb. 42. pl. 54. S. C. —The Words (Communis Barrectator) in ancient Indictments were materia' to be inferred where they were of Barretry. 8 Rep. 57. b. Patch.

30 Eliz. The Cafe of Barretory.—Communis Barrectator is a Term which the Law takes Notice of and underlands; Per Twiden J. Mod. 288. pl. 34. Trin. 29 Car. 2. B. R. ——Hawk. Pl. C. 244. cap. 81. S. 9 says it feems 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 Purpofe.

No general Charge is allowable in any Cafe but Barretory, which in its Nature must confift of an Heap and Multitude of Particulars; Per Holt Ch. J. and 6 other Judges. 2 Salk 651. pl. 2 Patch 8 Ann. B. R. ——Dirt. Jul. 72. [publifh'd in 1742] lays it was ruled, that where the Defendant was indicted that he was Speculator Perturbator Partis, the Indictment was held good. Hill. 8 W. 5. The King v. Gregory.—A Common Deceiver is 100 General, and fo is Communis Oppressor, Perturbator &c. and fo of all others (except Barretor and Scold) without adding of particular Inftances; per Cur. 6 Mod. 311. Mich. 5 Ann. B. R. in Cafe of the Queen v. Hamilton.

10. N.
212 Barretors.

2 Keb. 292. pl. 7. S. C. says the Judgment was reversed.

10. N. was indicted of Barretary, and found guilty, and had his Judgment reversed. 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 Assizes, 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 Nuisance.

11. Exception to Indictment of Barretary was, because it is only said Ad Sessum Pacis teret coram Jusficiciarib pro le Woff-riding in Yorkshire, teret per Adjournamentum, 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 Common cumunum dixerum, 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. 53. Mich. 20 Car. 2. B. R. The King v. Clayton.

12. In Information for Barretary 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 Barretary 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 Barretary the Evidence was, that one G. was arrested at the Suit of C. for 4000. & brought before a Judge to give Bail, and that the Defendant, a Barrister at Law, then present, did affirm this Suit, when in Truth, at the same Time G. was indebted to C. in 200. 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 Barretary. 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 tripping, or for no Cause, this is no Barretary, 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 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 Defen say was not to recover his own Right, but only to ruin and oppress his Neighbour, that is Barretary. 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. 257. pl. 1. S. C. the Party was fined 100l. and levied by the Sheriff, and by him paid into the Hands of the Collectors. Holt Ch. J. held that a Writ of Reification lay not to the Collectors, because not Parties to the Record; and he also doubted whether a special S. C. Fa. and to make them Parties, would be sufficient.

In Indicts of Barretary, the Party 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.

15. Judgment on Indictment of Barretary was reversed on Error, and held per Cur. on Motion, that no Writ of Reification 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.

16. In an Indictment of Barretary 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.

In Indicts of Barretary, the Indictment is general, because it consists of Multiplicity of Facts; but the Court in Justice will compel the Procurator to assign some particular Infamies, and if he proves them, he shall be admitted 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.
H. was indicted for Barrettry, in which Case, the Defendant ought to have a Copy of the Articles to be infin’d 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 adjured 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 Prosecution ought not to be admitted at the Trial to give any Evidence, and then the Defendant is of course acquitted. 12 Mod. 316, 517. Paish. 15 W. 5. The King v. Ward. —— 2 Hawk. Pl. C. 227, cap. 23. S. 61. S. P. —— And 1 Hawk. Pl. C. 244. cap. 81. S. 12. 3ays, it seems to be settled Practice, not to suffer the Prosecution 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.


17. In Case of Barrettry the Defendant, upon Motion, may have a Rule 1 Sail. 21. to have Articles deliver’d him of the Instances, and the Prosecution shall 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.


For more of Barretors in General, see other proper Titles.

Bastard.

(A) Bastard. [Who, in respect of the Time of his Birth.]

1. If a Man dies, and his Wife hath Issue born 40 Weeks and 3 Days * Cre. J. 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. * Bih. 17 Court declare’d their Opinion to the Jury, that the Bast. B. R. between upon Evidence at the Bar, which concerned the Birth of one Andrews, resolved per Cuir. in which Case Dr. Daddy and Dr. Sonsford, two Physicians, being called, 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. Inferted, 9 Months and 12 Days after the Conception, accounting it per Menz’s Squares, leaseter, 30 Days to each Month; but it is natural also, if the Hyp and the Birth be at any Time within 10 Months, Inferted, within 40 Weeks, for by strict 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 80 Days, S. C. 11 i 1
that a record of 18 R. 2 was, vouched, where the Baron died, and the Feme took another Baron, and 20 Weeks and 71 Days pa'd after the Death of the first Baron, and then the Feme had issue, and it was adjudged the issue of the first 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 Baffard, whereas in that other Case it is legitimate either way; and adjudged in the principal Case, that the Child is legitimate. — Godl. 251. pl. 420. Anon. S. C. — S. C. cited Arg. Lit. Rep. 178, and cites several other Cases to the like Purposes of earlier and later Births. — Sy. 277. It was said by the Court to have been adjudged in Case of Thacker v. Duncombe, that a Woman may have a Child in 58 Weeks, and that, by cold and hard Ulage she may go with Child above 40 Weeks.

2. Bratton, Lib. 5. Fol. 417. b. Si partus non est post mortem Patris (qui dicitur posthumus) per tantum tempus quod non est veriti- mibile quod potest esse defuncti Filius, & hoc probato, nullis dicunt potest Baffardus.

S. C. cited G. j. 541, pl. 1. in the Case of Alsop v. Bow- trell. * But says, Note it is not there shown what was Ultimum tempus Mulieribus pariendo constituendum. — Co. Litt. 123, cites S. C. and says that

Baffard.

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 perfecuted 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 deliv'red, but that it was interrupted by the said Ulage of her Fa- ther-in-Law, and that she was deliver'd within 24 Hours after she was received in a House and well used, which was good Proof of the Legitimation; that it was proved of the other Part, that the Woman was a lawful Woman of her Bovv; and upon Evidence the Jury found him legitimate. Note, 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 af- ter of another; and the Doctors said the Birth is sooner or later, ac- cording to the Nutriment that the Mother hath for it.

1 P. 6, 3. Rolf said a Woman might be enfeint for seven Years.

3. 18 C. 1. Rot. 13, in B. R, with Mr. Bradsall, Johannes de Radweell brought an Issue versus Radulphum & Henricum, coram Johanne de Vallibus, Willichino de Halain, & Sociis suis iterantibus apud Bedfordiam. This Issue was brought there the 15 C. 1, and after in 18 C. 1, the Parties and Recognizance of the Issue came coram Rege, and the Issue 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) & predicta Beatrice præ- sens in Curia qualita una effe pregans necne, juramento afferebat se non esse pregantem, & ut hoc omnibus liqueret, vetes suas uexat ad tunicam exuabet, & in plena Curia sic se Videri permitit, & dicunt quod per aspectum corporis non apparebat esse tunc pregantes; upon which Evidence the said * Radulph, the Lord, took the said John for his heir. Et quia inuenit per veredictum juratorum Assise capta coram praefatis Jutchtaribus itinerantibus quod pred Henricus natus fuerit per undecim dies post ultimum tempus legitimum mulieribus pariendi constitutum, ita quod praed Henricus dicit non debet Filius praed Roberti secundum legem & confuetudinem Anglicae usitata, uno dico debet fecundum ut praed Beatricis si forte se nepulserit aliquum infra unde dicem dies post mortem primi partiti fuit, ut sit extra matrimonium bastardus; & quia per veredictum juratorum inventur quod pred Robertus non habuit accipiens ad predictam Beatricem per unum mens- sem ante mortem suam, per quod magis praemittum contra praedivitium Henricum, & plane inventur in Recordo, quod predictus Johannes in tesiua ut frater & heres praed Roberti per unum annum & amplius, & per voluntatem, & assentium praed Radulphi capitalis Domini & confuetudinem est quod pred Johannes recuperet siti- num suum de praed tenementis per unum juratores, & praed Radulphi & Henrici in mifericordia. Vide 8 Ed. 2, quod vide Rotulo
Bastard.

Rotulo Parliamenti 6 Ed. 3. Membrana 4. Nota, the Jury found the Husband languishing a Fever long before his Death.

4 Britton, Fol. 166. the manner is shown 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 the hath not a Child within 40 Weeks after the Death of her Husband, or if she be not found to be so strong as either her husband or the Child, let her be punished by Fine and Imprisonment, and the Lords of the Fees, as soon as may be without Delay, may take the Possession of the Heirs; and if the hath a Child within the 40 Weeks, then let this Infant be restored to the Inheritance, if another Heir cannot over this Child to be another's than her Husband's, or as Vice versa.

3. 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 pri- vation en- 
sein with a Son, and an- other 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 confirmit; but said that he heard Ber. 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, pt. 18, cites 21 E. 5. 39. — The Reason is, that in hoc Causi filiatio non potest probari, and says that fo the Book (21 E. 5. 39) is to be intended; and says that for avoiding such Question, and other Inconveniences, the Law before the Conquest was, Sir omnis vidua fine marito duodecim mensibus, & si maritaverit, perdat domen.

(A. 2) Whom shall be said to be a Bastard, [tho' born in Marriage, and in respect thereof.]

1. If a Man, having one Wife, takes another Wife and hath Issue by her, living the first Wife, this Issue is a Bastard. * Finn's Re- plication, pl. 18 D. 6. 31. + 18 Ed. 4. 30. b. Co. 7. Lemm. 44. For the second Mar- riage is void, & 38. * 4. + 24. adjudged.


4. 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 be- tween them is no Bastard, till a Divorce comes; for the Marriage is not void. 18 D. 6. 34. b.

23. S. P. — See (H) infra, S. P.


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. b.

43. S. C. — After the Stat. 52 H. 8. cap. 28. 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, Canis Comparamentisti & Commastrumatis (which in the Act of 1 & 2 P. & M. is called Compara Spiritualis) are by this Act taken away. 2 Inf. 634.

5. If
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. 4. 54. 15 Ed. 4. 30. 59 Ed. 4. 31. b. 38 All. 24.

6. And so is he a Bastard by the Common Law of Scotland. Ene Regnum Dialectaten, Lib. 2. Cap. 5. Per. 2. 3.

7. In this Act the Statute may confess to a Marriage, and his Issue shall be legitimate. Tit. 3 Jac. 2. R. between Style and Wilt, adjudged, upon a special Verdict, put in per pecun. 

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 also be a Bastard, tho' it was begotten within Marriage, because it is apparent that it cannot be legitimate. Bull. 14 Jac. in Camera Scala, between Done and Lagerton Pianists, and two Hints and Starky Defendants, so held by the Chancellor and Stewarts, but Hobert contra.

Bastard.


(B) Who shall be said a Bastard, and who a Muller.

*Firth. Bafardy, pl. 9. cites S. C.

1. By the Law of the Land, a Man can not be a Bastard who is born after Espoufals, unless it be by special Matter. 49 Ed. 3. 10. b. 49 Ed. 3. 39. 439 Ed. 3. 31. 51 All. 10. 2. C. 3. 29.

2. If a Woman is grossly enceint by A. and after A. marries her, and the Issue is born during the Marriage, this is a Muller, and not a Bastard. 44 Ed. 3. 12. b. 45 Ed. 3. 28.

3. So if a Woman be grossly enceint by one Man, and after another marries her, and after the Issue is born, this is a Muller, because it...
Baftard.

is born during the Marriage, and no Issue can be taken by whom cites S. C. the was conduit, because that cannot be known. * i V. 6. 3. Contra Fizth. Baftardy, pl. 1. 44 Ed. 3. 12 b. 45 Ed. 3. 28. Contra 15 V. 9. 3. 11 be the Issue be born within three Days after the Marriage. 18 Ed. 4. 3. cites S. C. * Br. Baftardy, pl. 5.
cites S. C. —— Fizth Baftardy, pl. 12. cites S. C. ——— In such Case by the Common Law such Issue is a Mulier, and by the Spiritual Law a Baftard. Br. Baftardy, pl. 43. cites 18 E. 4. 23.

4. If a Feme covert hath Issue in Adultery, yet if her Husband be able to begot Children, and is within the four Seas, this is no Baftard. Hill. 14 Jac. in Camera Stellata, between Doee and Edgerton Plaintiffs, and two Huntos and Starly Defendants, agreed by the Judges and Chancellor. * 39 Ed. 3. 14.

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 entered, and the Defendant oufted her. The Plaintiff replied, that the Tenant was Baftard. The Defendant rejoined, that he was Muller. Whereupon the Bishop was called to, who certified Baftard, and the Manner How, viz. That J. took to Feme K. who eloped, and lived in Adultery with F. S. who begot of her the Tenant, and so Baftard. Thereupon the Tenant complained to the Parliament, because the Certificate was Contra Legem Terra, and this it seems, for that it is not certificated whether the Baron was Infra Quo auor Maria or not. But afterwards Judgment was given for the Plaintiff according to the Certificate; and so fee that the Judges have no Regard to the Manner or Cause of the Certificate, but only to the Effect thereof, which was, that the Tenant was a Baftard; Quod Nota. ——— Fizth. Baftardy, pl. 8. S. C. says, that by his being adjudged a Baftard by the Law of Holy Church, the Judges took the Affile in Right of Damages, and awarded that the Plaintiff recover Seifin 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 Baftard; for in that Case Palliatio non potest probat unbis the Husband had an apparent Impollibility of Procreation. Co. Litt. 244 a.

5. If a Wife elopes, and lives in Adultery with another, and dur. Ring this, Issue is born in Adultery, yet this is a Muller by our Law. * Br. Baftardy, pl. 36 cites S. C. * 1 V. 6. 3. 43 E. 3. 18. b. 20. 18 E. 4. 30. Hill. 14 Jac. in Camera Stellata, agreed per Curtian, in the Case of Edgerton before cit. Fizth. Baftardy. 43 E. 3. 14. 39 All. 14. Contra 49 E. 3. 16 b. 39 All. 14. 39 All. c. 8. 39 All. 14. Fizth. Baftardy. 8. S. C. says, that the Baron ought to be within the four Seas, to that by Interment he may come to his Wife, otherwise the Issue is a Baftard. 49 [43 ] E. 3. 20. 33 All. 8. 19 [and it should be 19. 20.] S. P. by Kirtton contra, but by Belk. according to Rolle, if the Husband be within the 4 Seas, and can come to her, Quod non fut negatum ! Lido Quare in Case the Baron was imprisoned at the Time. 7 See pl. 4. and the Notes. || Br. Baftardy. 57 S. c. that he was certified a Baftard, 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. || Fizth. Baftardy, pl. 16. cites S. C.

6. So if a Feme covert goes into another Country, and takes Hus. Br. Baftardy, and hath Issue by him, the first Husband being within the Seas, 18 s. 8. the Issue is a Muller. 7 V. 9. b. cites S. C. ——— Fizth. Baftardy, pl. 4. cites S. C. ——— One that is born of a Man's Wife while the Husband at and from the Time of the begotten to the Birth is Extra Tempus Marias, is a Baftard within 18 Ed. 7; which is a residual Law; Per Hol. 2 Saluk. 484. pl. 59 Mich. 10 W. 5. B. R. The King v. Albertton. ——— S. P. but if he were here all at during the Time of the Wife's going with Child, it is legitime, and no Baftard. 1 Saluk. 122. pl. 5. Mich. 3 Ann. B. R. The Queen v. Murrey.

7. But otherwise it is it the Baron be over the Seas. 7 V. 9. b. Br. Baftardy, pl. 8. cites S. C. ——— Fizth. Baftardy, pl. 4. cites S. C.

8. If the Feme hath Issue, the Baron being over the Seas for Years before the Birth, the Issue is a Baftard by our Law. 19 V. 6. 9. b. cites S. C. & S. P. admitted.

K k k 9. [So]
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 P. 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 P. 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. Plit. 14. Act. Cameron Stellarta, between Dene & Edgerton Plantif{s}, and two Hannons & Darky Defendants, resolved by the Judges and Chancellor.
12. Contra 13. Co. 2. Bastardy 25. where it was found the Father was in Ireland when the Son was begetten, yet the Plantif{s} was nonnull, which is, that he is no Bastard.

If Feme be in Ireland for a Year, and Feme in England 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 Seas takes away all Contumacy, that Baron privately, and secretely may be with his Wife as he may if he be in England, though his Wife had eloped and lived with the Adulterer. 6 Text. 10. pl. 18.

13. If a Woman hath Issue, her Husband being within the Age of 14, the Issue is a Bastard. 1 P. 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 P. 6. 31. because it appears he cannot have Issue at this Age. So if the Issue, the Husband being but 6 Years of Age at the Birth. 18 P. 6. 34. Br. Bastardy, pl. 26 cites S. C.

15. So if the Issue, the Husband being but 7 Years of Age at the Birth, this Issue is a Bastard. 38 Aff. 24. Per Tainke.

Br. Bastardy, pl. 32. cites S. C.; 7 Br. Bastardy, pl. 57. cites S. C.—S. P. accordingly, and so if he be under the Age of Procreation. Co. Lit. 244. a.

16. So if the Issue, the Baron being only of the Age of eight Years at the Birth; for it cannot be intended by Law that it was begetten by the Baron. 38 Aff. 24. Per Tainke, 29 Aff. 34. adjourn'd.

Br. Bastardy, pl. 32. cites S. C. but S. P. expressly does not appear.—But Br. ibid. pl. 36 cites 28 Aff. 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. Quad non negatur.

Seire Facias upon a Fine; the Tenant said that he held for Life, the Reversion regardant to A. and prayed Add of him, and the other said that the Master of A. was falsely enfeigned of A. by H. and so enfeigned H. Father of A. in his Maltace espoused her, and died the 15th Day after, and so A. a Bastard, and the other said, that she was enfeigned by H. and not by H. and so at Issue; Quad mirum! that this Issue was suffered. Br. Bastardy, pl. 3. cites 44 E. 5. 10.

18. P. 10. Co. 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 Chapell, not with the Celebration of any Hales, 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 Her.

Br. Verdict. 19. In Affluence at Warwick, 19 II. 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.
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Heir entered upon him, and they were adjourned for Difficulty; and it was debated in the Exchequer Chamber, whether the Tenant should be a Baftard; and it was adjudged by Advice that he should not be a Baftard. Quod Nota. And Frowyke Ch. J. said that he was a Counsel in this Matter, and that it was adjudged ut supra, quod Vavifor concef. Br. Baftardy, pl. 25, cites 21 H. 7, 39.

20. And Frowyke said that if a Priest takes a Feme and has Issue, and dies, his Issue shall inherit; for the Esfoufals are not void, but voidable. Ibid.

21. If a Man takes a Nun to Wife, these Esfoufals are void; Per Vavifor. Quod Nota bene, for none denied it. Ibid.

(C) *Who shall be said a Baftard, who not. Writ. [How considered in Law.]*

1. A Baftard is Nullius Filius, neither of Father nor Mother. 41 Br. Baftardy, pl. 26. cites 1 H. 6, 54.

S. P. by Strange: for a Baftard is Filius Populi, and has no Father certain.— S. P. for Qui ex damnam Cotum nascitur iter Liberis non computatur. Co. Litt. 3, b. & 78. a.

(D) Baftard by our Law, and Mulier by the Civil Law.

1. If a hath Issue by E. and after they inter-marry, yet the Issue is a Baftard by our Law. *47 C. 3, 14 b. † 11 D. 4, 84 but a Mulier by the Civil Law. 11 D. 4, 84. Bracton, Lib. 5. Fol. 416, 417.


2. If the Parents are divorced, Caufa Conflaguinitatis, they not hav-ing Notice thereof at the Marriage, the Children, had before, are Bas-tards by our Law, and Muliier by the Civil Law. 18 C. 4, 24. b. Br. Baftardy, pl. 45. cites 18 E. 4, 28. but it should be 18 E. 4, 29, a, b. pl. 30, a. pl. 283 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 Baftard, and by the Spiritual Law a Mulier. 18 C. 4. 39.

By the Statute of Merton, 20 H. 3, cap 9, it is enacted that a Child born before Marriage is a Baftard, albeit the common Order of the Church be otherwise.

4. Such Issue is a Baftard 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 C. 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) Paraphrased from the Latin

(E) Paraphrased by the Speaker of the Law, and Mother by our
2. So Causa Confusantiquitas. 47 Eliz. 3. pl. 78. Contra 29 E. 1. S. P. Br. Determinament, pl. 10. cites 8 E. 4. 38.—See pl. 1. and the Notes there.—Where a Marriage has been had, and the Parties are afterwards divorced for Confusantiquity, or Affinity, such Sentence of Divorce will be conclusive Evidence to baftardize the Children born in Wedlock before the Divorce; Per Lud. Chan. 8 Mod. 152. Tria. 9 Geo. in Cafe of Hillard v. Phaley.

3. So Causa Affinitatis. 47 Eliz. 3. pl. 78.

4. So Causa Frigiditatis. 47 Eliz. 3. pl. 78.

Husband and Wife are divorced Causa Frigiditatis in the Husband; the Husband marries another Wife, and has Issue by her; the Husband dies; the Issue is legitimate. The said Divorce dissolves Vindulcam 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 would be a Bastard; so adjudged and affirmed in Error. Jenk. 268, 269. pl. 84. 40 Eliz. Bury's Cafe—4 Rep. 98 b. S. C. adjudged and affirmed accordingly, and a Man may be Habiles & Inhabiles diversi Temporibus, and therefore, notwithstanding the Depositories whereupon Sentence was given in the Spiritual Court, by which a natural and perpetual Imbecility ad Generandum were depo'd, the Issue was adjudged lawful. —And. 185. pl. 228, 228 & 29 Eliz. Morris v. Webber, S. C. says, the Cafe was argued by the Serjeants, but little to the Purporte; 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. 596. S. C. adjudged for the Plaintiff, that the Issue were not Bastards, because the Divorce was not annul'd by sentence declaratory of the Church in the Lives of the Parties, and our Law is not to enquire the Causa of the Divorce, but to take the Sentence for good till repealed; and says the same Cafe came in Question again in Ejection, Hill. 40 Eliz. between Webber and Bury, where the Special Matter was found, and upon several Arguments adjudged again as before.—2 Le. 169. pl. 207. 8 C. Trin. 29 Eliz. C. B. adjudged for the Plaintiff accordingly; for tho' in the Examinations and Depositories taken in the Ecclesiastical Court no Matter appears upon which such perpetuity 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 entered of Record,) and that appears within the Sentence, viz. Habito femine cum Matronis & Medicis, which Speech not extant of Record, (Causa supra supra) might be the Cause that induc'd the Ecclesiastical Judges to give Sentence of Divorce, tho' the Matter within the Record be too general to prove, Naturalem Frigiditatem Generandi, but rather Maleficium; and says, that upon Error Brought by Bury's Cafe, the Issue was about a Year after, where the Opinion of the Doctors was, that they should be compuls'd to cohabit as Man and Wife, because Ecclesia decepta fuit in priori Judicat, and therefore
great Suit was made to pay a Fine, whereby the Feme gave all her Inherit-anee to her second Husband; but after staying it six Term, it was ingross’d by Command of the Judges, contra Mandatum Cullus Magni Sigillii.——And ibid. Marg cites Hill. 37 Eliz. Bia ford b. Swanger, in Cafe of Baltardy, Feme sued Divorce for Frippiditas, and after the Baron married another Feme, by whom he had Issue, and adjudged that the Second Marriage was void, and there the Civilians gave a Rule, that Qui apus efl ad unam apus efl ad aliam, and Quando Potentia reductur ad Actum, debet reduct ad primit Nupcias. Ex Libro Mr. Tho. Templet.———But ibid. cites Harrison’s Reading, Lent 1652, that Impotential Frigiditas quoad hanc is Caufe sufficient of Divorce after Exploration and Trial for 5 Years, and other Ceremonies imposed by the Canons, and that the Second Marriage of both is good, notwithstanding the Party imponant have Children.———Roll. Rep. 272. Trim. 13: Jac. B. R. cites Berrie’s Cafe.

See Tit. Baron and Feme (A) pl. 9, 10, 11, and the Notes there.
2 Inf. 68; cites S. C. that Caufa Impotentialis & Confus Motus facer Dura ex declinare, declare the Marriage to be void; these Marriages are said to be prohibited by God’s Law, otherwise the Stat. 52 H. 8. would extend to them. 2 Inf. 68.

(H) At what Time the Divorce being made, it shall baftrardize the Issue. [And what the Ecclesiastical Court may inquire after the Death of the Man and Woman, or either of them.]

* Br. Baftary, pl. 23:
1. If Baron and Feme continue Baron and Feme for all their Lives, the Issue cannot be a Baftard 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 disinherit. 31 Aff. pl. 19.
2. As the Issue cannot be a Baftard after the Death of the Baron and Feme, by a Divorce for Caufe of Spiritual Affinity, for the Cause aforefaid. 39 E. 3. 31 b. 32. 31 Aff. pl. 10.

† Br. Baf tary, pl. 23, cites 39 E. 3. 32.
7 Rep. (44) 3. If A. takes B. to Wife, and hath Issue by her, and after they are divorced, because they were within the Age of Content at the Time of their Marriage, and after didgree, and after A. takes C. to his Wife, who dies, and after takes D. to his Wife, by whom he hath Il-
4. [58] If A. takes B. to his Wife within the Age of Consent, and after the Age of Consent they dissemble, 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 Dissemble, because they cannot bastardize the Issue after their Death. Englefield's Case, by all the Justices resolved, and a Prohibition granted in Chancery thereupon, cited Trin. 11 Jac. 2. Louter's Case.

5. If Administration he committed to the Use of the Wife of the Tenant, and after a Libel is preferred in the Ecclesiastical Court, surmising that she was not the Wife of the Tenant, because they were married within the Age of Consent, and that at the Age of Consent they did dissemble, a Prohibition shall be granted, because they died, and the Issue shall not bastardize the Issue. Trin. 11 Jac. 2. Louter's Case.

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 Esportals continued; for it cannot be after the Esportals determined by a Divorce, viz. to bastardize the Heir. Br. Bauradry, pl. 23. cited 39 El. 3. 32.

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 Barards. See Trial (B. a) pl. 5. cited 43 El. 43.

8. Where a Man marries his next Cousin, and they have Issue, and he dies, the Issue shall not be a Baurard; for the Esportals are not void without Divorce; per Norton. And it seems by him, that when the Esportals are determined by the Death of the one of them, a Divorce cannot be sued; for they cannot defeat the Esportals which were determined before. Br. Bauradry, pl. 9. cites 11 H. 4. 78.

9. Per Coningsby it was adjudged, in the Case of Corbett, that if Baron and Feme had Issue, and after were divorced, and after the Baron took another Feme and bad 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 Defect were comprized in the Libel, and otherwise he had not had it, as it seems. Br. Deraignment, pl. 14. cited 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 baftardize the Issue of the second Feme, tho' the Baron who was divorced is dead. Br. Baftardy, pl. 47. cites 12 H. 7. 42.

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 Elfouls are avoided, and the Issue is a Baftard; and contra if the one dies before a Divorce, there a Divorce had after shall not make the Issue a Baftard; for the Elfouls are determined by the Death before, and not by the Divorce, and a dead Perfon 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 Iniurandum de Pesceatis; for a dead Perfon cannot be cited nor summonsed to it. Br. Baftardy, pl. 44. cites 24 H. 8.

12. In Trefpafs the Cafe was; B. contracted binulf to A. and afterwards A. was married to T. and cohabitad with him. B. sued A. in the Court of Audience, and proved the Contract, and Sentence was pronounced that B. should marry the said B. and cohabit with him, which B. 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. Patch. 23 Eliz. B. R. Bunting's Cafe.

If a Marriage de Facto is avoided by Divorce, in respect of Confangui
ty, Prenuptia, or such like, whereby the Marriage might have been dissolved, and the Parties freed a Vinculo Matrimonii, yet if the Husband died before any Divorce, then, for that it cannot be avoided, this Wife de Facto shall be endow'd; for this is Legitimam Matrimonium quod dat. Co. Litt. 53. 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 baftardized; and if the Wife had been Inheritrix a. c. the Husband should have been Tenant by the Curtesy; and vowed 7 H. 4. Noy 29. Hill. 15 Jac. C. B. Rennington v. Cole.

14. The Court Christian having proceeded to annul an Incestuous Marri

age, (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 baftardize the Issue, tho' they may punifh the Incest. Comb. 200. Patch. 5 W. & M. in B. R. Hicks v. Harris.
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either Parties, as in Case of Confanguinity, 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 Conunence, 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 affirmed; but on an Appeal to the Delagates in Ireland, the fame was disallow'd, and the 2d Marriage adjudged good. By the 2d Marriage there was Issue, but none by deed, Trin. the first. 2 Wms's Rep. 299. pl. 82. Trin. 1725. Franklin's Case. 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 the 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 the 2 Ed. 6. is repealed by 1 F. & M. yet it is recited by 1 Eliz. cap. 7. 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 discretionarv; 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.
4. Affis by J. M. Son of N. M. against W. M. and K. M. K. pleaded Nul tort, and W. said quod Allis non. For he not confessing that f. the Plaintiff is Son of N. M., but N. M. Father of the Tenant was seised of the Land in Feu, and took K. to Feue, of whom he bega W. new Tenant within the Esponsals; 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 Esponsals abated, and we ousted him, Judgment if Affis; 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 Esponsals, and you have acknowledged us to be elder than you, by which he prayed the Affis; to which the Tenant said that the Father married K. Mother of the Tenant, between whom the Tenant was begotten within the Esponsals, Absque hoc, that E. was ever the Feeme of N. the Father, Prist by Affis; 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 refrain to this Affis. Quod Nota. Br. Baitardy, pl. 31. cites 28 Aff. 46.

5. In Affis it was found that E. was seised, and took a Feeme at eight Years, and that his Feeme had ISSUE f. the Tenant at 8 Years by a Chaplain, and after had ISSUE N. and died, and N. entered as Heir and enfeoffed the Plaintiff, who was seised till J. the Baitard diffied him, by which the Plaintiff recovered; and there it is taken, if the youngest Son enters upon the Eldeft, and enfeoffed A. who continues Years and Days, that the Eldeft cannot enter, which is not Law, therefore Quae the Cause of the Judgment, whether for this Cause, or for the Baitardy; and it seems for the Baitardy. Br. Baitardy, pl. 32. cites 29 Aff. 54.

6. In Detinue of Charters by J. Son of T. of W. it is no Plea that the Plaintiff is a Baitard; for he demands only Chattels of which he was in Possession by which his Challenge was entered, and he was compell'd to answer. Br. Charters de Terre, pl. 24. cites 38 E. 3. 22.

7. In Affis the Tenants made himself Heir to H. and that the Plaintiff is a Baitard. The Plaintiff replied that H. took to Feeme A. at D. between whom the Esponsals was the Plaintiff born and begotten; Judgment if he may baftardize 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 Esponsals that he is a Mulier, without special Matter shown to the Contrary. Br. Baitardy, pl. 37. cites 39 Aff. 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 enfeign of A. by H. and so enfeign H. Father of A. in his Malady esponsed her, and died the 15th Day after, and so A. is a Baitard; and the other said that she was enfeign by W. and not by H. and so at Issue; Quod Mirum! that this Issue was suffered; for in Anno 11 E. 3. Fo. 7. Thorp would not suffer the Issue to be taken, whether she was enfeign by her Baron the Day of his Death or not, but whether she was enfeign the Day of his Death or not; Quod Nota. Br. Baitardy, pl. 5. cites 44 E. 3. 10.

9. Issue was tendered that f. N. was born out of any Esponsals; and the other said that he was born in Esponsals between f. his Father and A. his Mother, prist &c. and the other e contra. Br. Baitardy, pl. 6. cites 47 E. 3. 14.

10. Scire Facias to execute a Fine. The Case was, that the Feeme to whomsoever the Plaintiff made herself Heir, took Baron and had ISSUE a Daughter, the Plaintiff's; and after took other Baron, living the first Baron, and had ISSUE a Son now Tenant; Per Ricstili, if the first Baron was within the Seas the Son is a Mulier, and so fee that the second Esponsals are void, and
Baffard.

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 Muller, prit; and the other demurred, because he did not answer the special Matter; Quere. Br. Baffard, pl. 8. cites 7 H. 4. 9.

11. No uniqes Accesse in lawful Matrimony, is no Plea but in Dower or Appeal, and not to baultize any Man; but he shall plead Baffardy expressly, generally, or specially. Br. Baffard, pl. 9. cites 11 H. 4. 78.

12. Note, per Hull, Baffard 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. Baffard, pl. 14. cites 14 H. 4. 37.

13. Seire Facias to execute a Fine of Remaindered 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 those Espoufals K. was grossly enfeint by J. with this Plaintiff, and after J. espoused K. and after K. espoused herself from her Baron with the said J. in Adultery, within which Time the Plaintiff was born. Per Rolf, it does not lie in Conuance of any by whom she was enfeint, and though the remains in Adultery, yet when the Infant is born he shall be the Son of the Baron. Per Strange, a Baffard is Nulius Filius, and this Matter is only argumentative to prove him a Baffard, for he ought to conclude, And so Baffard; for a Baffard is Filius Populi, and has no Father certain. Br. Baffard, pl. 26. cites 1 H. 6. 3.

14. Note, by the best Opinion, that where Espoufals are pleaded between a Man and a Woman, and that they had Issue R. within the Espoufals, the other shall not say that he is Baffard generally; Per Marten & Paton J. clearly. Br. Baffard, pl. 45. cites 10 H. 6. 23.

15. In Trespass the Defendant pleaded Villeinage in the Plaintiff, and he said that he was a Baffard; Per Markham, to this he shall not be received; for Espoufals were had between the Father and Mother at D. which continued all their Lives, within which Time the Plaintiff was born; fed 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 Muller; & non allocatur, without saying further and Not Baffard; Quod Nuci, and nothing was entered but Muller, and not Baffard. Br. Baffard, pl. 20. cites 19 H. 6. 17.

16. Where Baffard was pleaded in the Plaintiff in whom the Defendant had pleaded Villeinage, and the Defendant said that the Espoufals 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 Muller, and not Baffard, and prayed that all be entered; & non allocatur; for nothing was entered but Muller, and not Baffard. Br. General Ilifie, 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 Time, which Espoufals continued all their Lives, and after the said T. espoused the said A. at B. who had Issue the Plaintiff, and after the said T. died, living the said K. and demanded Judgment of Action; and per Ashton and Moyle, it is a good Plea to plead this special Baffard in this Perfonal Action; for he intituled himself as Heir in Tail, and therefore a good Plea, and shall not say generally Baffard, for

*In this Action it is no Plea that the Plaintiff is a Baffard, but it he shall be entered, and he shall be entred, and he shall be entred.
Battard.

for then he shall not have the Vifne of both Counties, but here he shall have it of both Counties; but the Plaintiff demurr’d, & adjournatur.


18. Where in Precipe quod reddat against two, the one pleads that the Demendant is a Battard, and the other pleads a Release in Bar, if the Battardy be found, and the Release not, the Plea of Battardy does not go to all, but the other shall lose his Moiety, and he who pleaded Battardy shall have his Moiety; for in Plea Real each may lose his Part, or have his Part, Per Prior; but per Moile, the Battardy found shall serve both; Quere inde. Br. Battardy, pl. 24. cites 37 H. 6. 37.

19. In Trempas the Pleading was, that the Defendant was a Battard, 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 Confanguinitatis makes the Issue, had before the Divorce, a Battard, and the Divorce was pleaded without showing How they were Cousins, and in what Degree, and did not plead the Record certain, but Quod diversabant Causa Confanguinu prout patet de Recordo, and yet well. Br. Derangement, pl. 10. cites 8 E. 4. 28.

See Tit.

Trial (P)

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 Legitimation of Dionise the Son Willelmi de Monte Ca-

nus; upon Oyer of the Bull it is there laid, Quod Bulla illa fin-
viter tendit ad jus Successionis Hereditatis terminandum, cum de Successione Hereditaria nemo debet cognoscere nisi Curia Regis, vel Curia Ecclesiastica ad Banda rium Curii Dominii Regis, & etiam si Bulla procederet, manifeste effer contra conventumien

habetur in Regno ustitatum, & quia Dominus Rex nuper prodi-
dit quod appellantiones non sunt vel Caues agentur in Curia Christi-

tianitas de iis, quae a Curia Regis ibi sunt demandata, propter

multa inconveniencia que erunde sequentur, & etiam quia Placita
de Successione ita ordinata se habent, quod primo per brevia Domi-
ni Regis in eiperre dehant in Curia Regis, & de Curia illa, si necesi-

fe fuerit, mitri ad Curiam Christianitanits, & non e converso, &
quae multa Placita & innumerabilia, Temporibus retroactis in Cur-

ria Regis plactatia, & etiam judicia super eisdem, reddita irritaen-

te, & reverterentur si Bulla illa procederit se. therefore disallow’d.

(K) How it shall be tried; and how not; and by whom.

But special 1. General Battardy ought to be tried by the Bishop, and not per

Battardy shall be


In Battardy it was in Issue if he was born before the Espousals, or not, and it was tried per Pais, and see
2. The Ordinary cannot try Bastardy, without a Command by the King's Writ, upon a Suit in a temporal Court. Da. i. Bastardy, 55. 39 E. 3. 31. b. per Thorpe.

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 to special Bastardy shall be tried per Pains, and general Bastardy by the Bishop; Per Scroope. Br. Bastardy, pl. 29. cites 11 Aff. 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 D. 6. cap. 11.

4. If the Bishop certifies Bastardy, unless this comes in at the Mise * So it is in the Year-Book. 7 D. 6. 32. b.

5. In Affife it was agreed, that the Affife 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, Divinity. Br. Bastardy, pl. 28. cites 8 Aff. 5.

6. Mor'dancefor, 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 Muller, and born in another Diocese; for he may bring his Proofs there. Br. Bastardy, pl. 33. cites 25 Aff. 7.

7. Every Bastardy, General or Special, in Affise alleged, shall be tried by Affise by the Law; Per Tank. Br. Bastardy, pl. 36. cites 28 Aff. 24.

where Issue did not join of Bastardy, but the Affise awarded at large, there they shall not write to the Bishop to certify it, but it shall be tried by the Affise. Br. Bastardy, pl. 38. cites 39 Aff. 4.

8. In Affise, they were at Issue upon special Bastardy, and it was try'd by the Affise; and per Tank. every Bastardy pleaded in Affise shall be try'd per Pains, and because the Court faw 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 Affise was taken at large, and first inquired of the Bar, and further of the Seisin and Diffeis'in, and found for the Plaintiff, and he recovered. Br. Affise, pl. 351. cites 38 Aff. 24.

9. Where Writ is to the Bishop to certify whether Bastard or Muller, the Parr 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. ii. Affise 30.

10. In Affise, 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 Spirituals to certify it; Quod Nota. Br. Bastardy, pl. 39. cites 41 E. 3. 29.

11. In Formedon, Bastardy was alleged in one who was Mysfe in the Conveyance, by which the Demandant claimed, and because he was dead, and was no Party to the Writ, it was tried per Pains, and not by Certificate of the Bishop. Br. Bastardy, pl. 3. cites 42 E. 3. 8.
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Bastard.

12. In Affise the Tenant was alleged to be born at S. in the same County, out of any Esonfals, where he intitled himself as Heir; and the Tenant said that he was born within the Esonfals at D. in a Foreign County, and it was tried by the Affise. Br. Battardy, pl. 40. cites 46 E. 3. 3.

13. In Cui in Vite by the Heir the Tenant pleaded Bastardy; and the Demandant alleged special Esonfals in another County; Judgment if he shall be received to allege Battardy; and the other alleged that this amounted to Mulier, prist quod non, and Writ was awarded to the Bishop where the Land was, and not where the Esonfals were alleged. Br. Battardy, pl. 7. cites 7 H. 4. 7.

(L) In what Actions it may be tried. [And how it must be certified.] pl. 3.

* Br. Battary - 1. It may be tried by the Bishop in an Action of Trespafs, or other dy, pl. 14. cites 14 H. 4. 27. but it should be (36) as in Roll S. C. says Note by Hull, that Bastardy is no Plea in Trespafs, 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 Trespafs; quod non negatur. — But ibid. pl. 41. cites 5 E. 4. 11. that in Trespafs they were at Issue upon Battardy, 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 Battardy 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. Battardy, pl. 42. cites 4 E. 4. 33. || Fitzh. Trial, pl. 6. cites S. C. — See Tit. Trial (P) pl. 30 & 31. S. C. and the Notes there.

* Br. Battardy - 2. It may be tried in an Affise as well as in a Precipe quod reddat, or other Writ in the Right. 35 C. 3. 27. adjudged, * 38 Aff. 14. adjudged, 27 C. 3. 82. b.


3. Battardy ought to be certified under the Seal of the Ordinary; for it is not sufficient to be certified under the Seal of the Commitr. 20 D. 6. 1. 4. Battardy was certified in a Replevin, and therefore it seems that the Action is in the Reality, and the Certificate of Mulier between the Plaintiff in the Affise and a Stranger in the Replevin was a good Eitoppel between the Tenant in the Affise, who was a Stranger, and the Plaintiff in the Affise. Br. Battardy, pl. 19. cites 7 H. 6. 37.

5. Where a Man is a Mulier, there must be a special Battardy certified; for that the Bishops own such a one to be legitimate; Per Holt Ch. J. 5 Mod. 420. Mich. 10 W. 3.

(M) Who shall take Advantage of the Trial of Battardy. And of what Trial, and e contra.

* Br. Battary - 1. If a Man be certified a Mulier by the Ordinary, this is not any Eitoppel, because he may be a Battard 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, *18 E. 4. 38. but a Muller. *18 E. 4. 29. b. 30. *11 H. 4. 84. 18 E. 3. 33. b. printed for 34. abolished. 30 E. 3. 8. b. 26 A. 64. *7 H. 6. 37. But Judge- ment 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. ad- judged. 18 E. 3. 34. admitted, and 34. thereafter au- judged. Contra § 7 H. 6. 37. b.

- Br. Baffardy, pl. 2. cites 40 E. 3. 39. S. C.
- Br. Etoppel, pl. 73. cites S. C. - Br. Certificare de Eveque, pl. 9. cites S. C. - Br. Baff-ardy, pl. 19. cites S. C. - Fitzh. Etoppel, pl. 21. cites S. C. - Br. Baffardy, pl. 12. cites S. C. accordingly per Tirwhit, and therefore a Stranger to this Record may bazzardiz him. - Contra if he had been certified Baffardy by the Bishop; this shall after Privies and Strangers; for he who is Baffardy by the Ecclesiastical Law is Baffardy by our Law. Ibid. - But Brooke says Stuer of this Opinion of Mullerr- ty; for Brooke says it forms that the Ordinary shall not certify at the Common Law by the Law of the Church, but by the Law of England. And Roff relinequish'd the Etoppel, and pleaded that he was born within the Etropolas at D. and fo Iffae. Ibid. - In Affic Baffardy was certified in a Replevin. The Certificate of Mullerry between the Plaintiff in the Affic and a Stranger in the Replevin, was a good Etoppel between the Tenant in the Affic, who was a Stranger, and the Plaintiff in the Affic; and Brooke says thence that the Opinion of Tirwhit is not Law; for here it was adjudged a good Etoppel. Br. baffardy, pl. 19. cites 7 H. 6. 37.

Writ of Entry for Diffic in by the Heir. The Tenant said that he was a Baffardy, and the other said that Muller, and not Baffardy, by which it was sent to the Bishop to certify, and Day given to the Parties till now, and the Bishop certified that Muller, and the Demandant as'd Seifn of the Land, and had it, notwithstanding that Pennot alleged that the Usage had been in all Actions, except Dower, that the Parish shall be pur without Day, where it is sent to the Bishop to certify &c. and the Plea to be revived again by Re-fum'mon; and yet non allocatur, but Judgment ut supra. Br. Baffardy, pl. 2. cites 40 E. 2. 39.

In Mortdancefor the Tenant said that the Demandant was born out of any Etropatal. The Demandant said that this is Tantamount as Baffardy, whereas he has here Certificate of the Bishop that he is Muller, and yet the Tenant had the Plea. Quere. Br. Baffardy, pl. 29. cites 11 A. 20.

2. If between Strangers another be tried a Baffardy per Pais, this Br. Trial, 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.

* unpinted, 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 otherwise it is of him that is privy to the Attaint. Docto & Student 68. b.

4. If a Man be certified a Baffardy by the Ordinary, he shall be per- * Fitzh. penally bound against all the World to avoid [have] a contrary Certi- tification, and because it is the highest Trial thereof. Doctor & Student 68, and shall continue of Record. * 40 E. 3. 38. + 11 P. 4. 84.


5. And so if the Party, who is certified a Baffardy, is a Stranger to the Suit. * 11 P. 4. 84.

- Br. Baffardy, pl. 12. cites S. C.

6. [So] If a Man be certified a Baffardy by the Ordinary in a Per- * Fitzh. sonal Action, he shall be bound perpetually, as well as in Actions Legal. 19 H. 6. 18. b.

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. D. this shall not bind Strangers thereto; but they may lay that he is a Baffard. 23 Ann. 5. adjudged. 27 E. 5. * 82. d. adjudged.

(N) At what Time the Trial shall bind.

1. If a Man be certified a Baffard, yet this shall not bind before Judgment given thereupon, in an Action between him and the other. 18 E. 3. 34.

2. If the Defendant be certified a Baffard 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.

In Trespass, they were at Issue upon Baffardy, 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 nonsuit; and then per Moile J. this Certificate is no Conclusion at all of the Baffardy, no more than after Discontinuance. Br. Baffardy, pl. 41. cites 3 E. 4. 11.

3. But after Certificate of Baffardy in the Tenant, if the Tenant dies, by which the Writ abates, yet the Certificate shall stand in Force. 18 E. 3. 34.

(O) Baffardy proved. When.

For by the Law of England, by Continuance of Nuptialion, and dying peaceably sashed, he is adjudged Heir to his Father; and by his dying without Issue, the Mulier shall have the Land. Ibid. cites S. C.


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 Defcent were comprized 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 Baffard Eigne and Mulier Paifue, viz. such a Baffard as is born before the Epfouals 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 his Deed, 313 b. 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 Gray's Case, Dyer J. 3 Le. 49. pl. 69.

2. H. the 8th seised of certain Lands, by Letters Parents 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 Cafe of the King as of a common Periön, 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. he is known by such Name.

3. L. made a Feoffment to his own Use, and after devised that his D. 223. pl. Feoffees should be feised 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 so Possibility they can be feised to her Use; cited by Doderidge. Pop. 188. as the Case of 15 Eliz. D. 323.

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. Worsley. 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. 92. ——D. 574. pl. 16. S. C.

5. If A. has Iffue a Bastard and Mulier both named John, and he gives to his Son called John, the Bastard shall take; but if to his Son and if the Iffue of a Bastard purchase Land, and dies without Iffue. 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 Cafe of the King v. Boraston & Adams.

6. If the Iffue of a Bastard purchase Land, and dies without Iffue, it may be bought by A. whether lawful or unlawful; and held by all but Pop. by Croke, the heir, that it is a good Remainder limited to a Bastard; for a Son in Rem. Limitation suffices to make him a Purchaser, cites 14 Eliz. D. 313. and was to him ——D. 313. though self for Life;
then of such
Illeue &c. who
by common
Supposition
or Intend-?ment 
should be reputed to be begotten. &c. no Illeue being born till afterwards; Gawdy thought the Limita-
tion good, though the Illeue was not in Elle at the Time. Popham agreed that such a Remainder to
a Baftard in Elle might be good, because he is a Person known, and may be in Time reported the Son of
another, but thought it could not be good to a Baftard before he is born, and he cannot gain the Re-
putation or Name at the Infant 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 Illeues of his Body, is always to be in-
tended lawful Illeue; 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 Re-
mainder to his first reputed Son or Baftard is not good; for the Law favours not such a Generation, nor
will suffer such Limitation for the Inconveniences that might arise thereupon. Cro R. 509. pl. 34.
A Woman might give Lands in Frank marriage with her Baftard. Noy, 35. cites Blodwell.

8. If an Obligation be made to J. S. Filio & Hevredi G. S. where
indeed he is a Baftard; yet this Obligation is good. Bacon's Ele-
ments, 91.

9. Devise to a Son who is a reputed Son is good; Per Newdigate J.
2 Sid. 149. cites a Cafe in 1655. Sir Jo. Mitchel v. Sayers.

10. Illegitimate Son may take by the Name of the reputed Father af-
ter he has acquired a certain Name by Reputation; Per Raymond J.

11. In Cafe of a Baftard the reputation Name must be shown to make
the Grant good. Arg. Parl. Cafes 222. in Cafe of the King v. Bishop of
Chefter and Pierce.

12. A devise of 3000 l. to all the natural Children of B his Son by J. S.
Some were born before, and some after. Lt. 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 Illeue of J. S. legitimate or illegitimate,
the Duke of Devon.

For more of Baftard in General, See Descent, Grants, Heir, Trial,
and other proper Titles.

(A) Berwick.
Beyond Sea.

3. **Covenant** to repair Houses in Berwick was **tried** in Northumberland. S. C. revolv-

Lev. 252. Mich. 20 Car. 2. B. R. Cripe v. the Mayor &c. of Berwick 8. S. C. adjudg-

upon Tweed. 365. Trin. 36 Car. 2. B. R. the Mayor of Berwick's Cafe.

For more of Berwick in General, See **Trial**, and other proper Titles.

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**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 **Defent** that tolls **kis** Entry; so from a **Non-clain on a Fine** by the Common Law; Per 4 Justices against one. Cro. J. 226. pl. 1. Mich. 7 Jac. B. R. Underhill v. Kellet.

It was agreed by the Counfel for the Defendant, that if the going beyond Sea had been after the De-

fent, it would have bound the Heir. Cro. J. 101. pl. 52. in S. C. of Whiston v. Williams. So it's a Man be difticated, and afterwards goes beyond Sea, and a Difent is call 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 Kit, 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,
Beyond Sea.


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 Jeffries C. Vern. 487. pl. 473. Mich. 1687. in a Note at the End of the Cafe of Waley 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. 241. Mich. 3 W. & M. Cheyney v. Bond. — But now 2 & 3 Ann. cap. 16. alters the Law in this Case of the Defendant's being beyond Sea. — And see 3 Geo. 2. cap. 25. as to Proceedings in Chancery in such Cases.

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 Commision 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 Commisions 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 bears Date at Case in Normandy, the Obligee may bring Action in England, and declare in Case in the County of S. in Place called Normandy. Quod nota bene. Br. Obligation, pl. 87, cites it was made 48 E. 3. 2.

Out of Merre, 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 alleged 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 made at Paris in France in England; but where it is dated at Paris in France, within the Kingdom of France, it is not triable at all; and that to it had been held by good Opinion. 2 Keb. 315. pl. 26. Hill. 19 & 20 Car. 2. B. R. in Cafes of Freeman v. King.

S. P. and the Defendant Gild 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
Beyond Sea.

was to serve in the War in France, the Party may sue how he served there, and the other may allege Payment without ensuing Acquisition. Brooke says, Quare 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. Er. Dette, pl. 45. cites 8. C.—Br. Lieu. pl. 16. cites 48 E. 5. 2. 5. S. C.

3. A Bond made in France is suingable 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.

England. Jenk. 10. pl. 18. cites 6 Rep. Dowdall's Cafe.—Where the Plaintiff declared on a Bond, and set forth that it was made at Bordeaux in France, this Court of B. R. never had any Jurisdiction, because the Matter did arise in a Foreign Nation. Carr 12. in Cafe of Jennings. v. Hankyn.—Jenk. 31. pl. 65. makes the Difference between Amiens in France and Amiens in Regno Francia; and that in the left Cafe it cannot be sued in England.

Upon a Bond which bears Date in Normandy a Man shall not have Action here; but in Cafe of Will dated there and proved here, it is good. Arg. Godd. 387. 388. cites Tertament 16. per Pole.

Generally speaking the Deed, upon the Oyer of it, must be consistent with the Declaration; but in the Cases proper Necessitatem, if the Inconsistency be as little as possible, it is not to be regarded. As where a Certificate 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.


4. In Debt upon an Obligation, that the Defendant should get 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 impart'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 other like, beyond Sea, the Deed is jingle, 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 Cafe was brought in London by A. B. that whereas he was polled'd of certain Wine, and other Stuff, and faced't certain in such Ship at Valentia &c. and did not prove Place certain where he was thereof polled'd, and yet well; and alleged 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 10 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 Cafe upon Alumphin &c. which is not local, the Place is not material no more than in Debt; for he alleged that the said Goods in the Parth of St. Dunstan in the East, London, before they were put to Land or discharged, were carried away by Perfons unknown &c. and the Action lies well in London, tho' they were lost upon the High Sea. Br. Action for le Cafe, pl. 107. cites 34 H. 8.


9. A Fine was levied and acknowledged at Orchans 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 Cafe.
Bills of Exchange, Notes &c.

(A) What are Bills of Exchange.

1. Deb't 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. Pierfon v. Pounteys.

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. Salk. 125. Hill. 5 W. & M. in B. R. Hill v. Lewis.

4. Cate upon the Custom of Merchants, and declares that the Defendant per Notam five Bill foundam confudendum, promiss 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 Custoim, 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.
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. Talfwell & 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 Bronwich v. Lloyd.

8. 1 promise to pay the Bearer 20 l on Demand. Holt Ch. J. seems to think that this was not a Bill of Exchange; Adornatur. 12 Mod. 380. Pacch. 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 Bills may be negotiated and assigned by Custum, and the Contract of the Parties; and an Action may be grounded on it, though it is no Specialty. 3 Salk. 67. pl. 2. Pacch. 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 Custum of Merchants, and laid a general Indebitatus; and on the general Illue entire Damages were given. The Court held that this is not with the Custum 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; that if a Merchant signed a Note promising to pay T. S. or Order so much &c. that he becomes bound by the Custum to pay it; this Judgment was by Nil dict, and Error being brought in B. R. the Counsel would have distinguished this from the Case of Clerk & Martin, which was laid generally between all Merchants, whereas this is laid as a special Custum in London, and that confessed by the Judgment by Nil dict; but per Holt Ch. J. this Custum to oblige one to pay by Note without any Consideration, is void and against Law; and Judgment was reversed. 1 Salk. 129. pl. 12. Pacch. 1 Ann. B. R. Clerk v. Martin.

11. A Note was drawn thus: 1 promise to pay to J. S. or Order, the Sum of 100 l. on Account of Wine bought from him; J. S. indorses the Note to B. who brought an Action against the Drawer, and declared on the Custum of Merchants, as a Bill of Exchange. It was moved in Arreft of Judgment upon the Authority of Clerk & Martin's Cafe; but it was answered, that in that Cafe the Drawer brought the Action, whereas here it is by the Indorser; 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 Baying 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. Ra-ym. Rep. 757. S. C adjudged per tot. Car. for the Plaintiff.

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 be paid Money or other Goods or Labour; and any Person, &c. or Agent, or Corporation may be sued on such Notes; or any Person, &c. or Agent may be sued for the Payment of the Money or other Goods or Labour, purposely sign'd by another Person &c. or Agent, or Corporation.

3. Exempt from this Rule a Bill of Exchange drawn in Ireland or Scotland, and accepted there on the mature date; but a Bill drawn payable to the drawer may be so declared, and be good for the Money so declared against the Banker or Drawee, or the other party, in whom the Instrument is originally held.
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by the Defendant, is a Note made and signed by the Defendant within this Act; for the signing or subcribing the Lien, and the Writing or Making is only the mechanical Part of it. 3 New. Ab. 656, cites Trin. 6 Ann. B. R. Alth v. Baron.

It was a Question whether on this Statute the Want of Confederation of a promissory Note can be given in Evidence. Two Judges were of Opinion that it could not, but the two Senior Judges and 1d. King were of a contrary Opinion, and that this Act only turned the Proof upon the Defendant, to show that no Confederation was given for such Note, which by the Statute is made Evidence, but not conclusive Evidence of the Confederation. G. Equ. R. 114. Mich. 8 Geo. 1. Brown v. Marsh.


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 furnrder 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 De- murrer 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.

15. Bill drawn on a Cobtler of a certain Company, and for him to pay out of the Cauth of such a Company, is not a Bill of Exchange, and is not payable out of a particular Fund; and so a Judgment in C. B. was reversed. 8 Mod. 265. 1 Trin. 10 Geo. 1. Jenny v. Heale.

was reversed in B. R. — S. C. cited Arg. 2 Ld. Raym. Rep. 1532. — 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. 516. Panch.


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 reversed, because the Drawer was not the original Debtor, but might be a Debtor on Contingency. Arg. 8 Mod. 363. Panch. 11 Geo. 1. cites it as the Cafe 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 Raff. 338. and says that Deliver such a Sum of Money, makes a good Bill of Exchange.

2 Ld. Raym. Rep. 1536. 8. C. Powis J. relied much upon the Verdict in this Case; but Fortescue J. Reyn- olds J. and Raynold Ch. J. were of Opinion, that it the Note was to pay to any Person &c. his &c. Order or Bearer, any Sum mentioned in such Note shall be deemed to be by Virtue thereof due and payable to any such Person &c. to whom the same is made payable.

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 Eafe 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 Trufj, and nothing appears in the Note to make it a Trufj, therefore it must be a Debt. As to the Objection that
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, at by Account, as it is usual between Merchant and Factor, or Lord and Steward, and it would be dangerous to the Credit of those Noses, if this should not be good; therefore Judgment was given for the Plaintiff. 8 Mod. 363. 364. Pauch. 11 Geo. Norris v. Lea.


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 Proof of Evidence of Money lent, there being no Consideration either appearing on the Note, or offered to be proved, 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 Westminister, before Ed. 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 Circum- stances of particular Cæses; Per Holt Ch. J. 1 Salk. 132. pl. 19. pl. 6. Hill. 3 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 immedi- ately, 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 Draw- er 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. Ed. Raym. Rep. 744. Trin. 7 W. 3. at Guildhall, Taffel v. Lewia.

But Note, if the Party to whom the Note is de- livered, de- mands the Money of the Goldsmith in reas- onable 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. Gariy.

Q. Q. 3. There
3. There is no Custom for the Proof of Inland Bills of Exchange, nor any certain Time assign'd 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. Taffell v. Lewis.

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 wherein the Bill was framed, 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. 250. Mich. 9 W. 3.

Bellasis v. Heffer.


S. C. cited 7 Frem. Rep. 349. pl. 344. Trin. 1702. in Cafe of Crawley v. Crowther, in which Cafe 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 Loos to fall upon the Receiver; but if the Goldsmith breaks in 3 Days time, the Loos shall fall upon him who gave the Bill for Payment; for although taking a Goldsmith's Bill is Payment Prima Facie, yet it is subject to that Contingency, that the Bill may be bad if it be demanded in 3 Days time, and that the Ed. Keeper fact was the Practice in Guildhall, when he practised there; but in this Cafe 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 Loos 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.

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. Pach. 11 W. 3. at Nifi 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 Cafe as well as the other; upon which the Ch. J. said, that he would not alter it; tho' he observed, that he remembered two Cafes, one in Ld. Ch. J. Kelvynge's Time, the other in Ed. 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
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(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
   Adjudged Order, it is due to B. himself, and Judgment accordingly.

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. Pach. 9 W. 3.
   Filler v. Pomfret.

pl. 49.

(D) Where there is a Cessy que Ufe.

1. BILL by A. payable to B. to the Ufe of C.—C. has only an equitable
   Right to the Money after it is paid to B. and C. cannot main-
   tain an Action againt A. for this Money, and to B. may indorse and af-
   sign the Bill to any one, and such Indorsee may bring Action against the
   Drawer. Carth. 5. Trin. 5 Jac. 2. B. R. Evans v. Cramlington.

2. judged accordingly, per rot. Cur.—Skinn. 264. S. C. Curia advise vult.—2 Vent. 256. 307. Cram-

(E) Of Bills payable to Bearer.

1. A. By a Note under Seal, promised to pay to the Bearer thereof, up-
   on the Delivery of the Note, 100 l. and averas, that it was
delivered to A. by the Bearer thereof, and that the Plaintiff was io.
The Court said, that the Person seems sufficiently decried at the Time
that 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. Adjournatur. 2 Show. 162, 161. Pach. 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, it 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 show the Drawer's Consent. 3 Salk. 67.

3. Bellamy gave a Bill of Exchange payable to N. or Bearer; N. went Comyn's
and negotiated with the Bank at the usual Rate of Interest. After this Rep. 37.
the Bank received 100 l. of Bellamy, and after that demanded the Mon. Pach. 11.
ney 3. S. C.
Bills of Exchange, Notes &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 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 whomever the Bill is given, that let what Accounts or Conditions ever 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 A ction must be brought for the Money, and not for the Watches. And 117 pl. 145. Hill. 26 Eliz. Anon.

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.

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 Indorsement against the Drawer, on the 3 & 4 Ann. 9. 8 Mod. 362. Pach. 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 Cafe of Dathwood 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. Patch. 1 W. & M. in Cafe of Cramlington v. Evans.

3. Bill of Exchange was indorsed, yet if it be not paid, the Drawer Carth. 82. is liable, and that tho' he be a Gentleman, and no Merchant. Cumb. 152. Mich. 1 W. & M. at Serjeant's-Inn, Sarlefield v. Witherly.

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 faccied 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. Patch. 2 W. & M. Darʿach v. Savage.


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 bad 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 anwer'd 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 re-

7. If the Party, to whose Hands a Bill of Exchange comes, neglects to receive the Money from the Acceptor, there he shall not refor the first Drawer, because he hath relied on the Acceptor, the first Drawer being only chargeable by Custum 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 Accounts may have been adjusted between them. 1 Salk. 127. pl. 7. Mich. 10 W. 3: at Guildhall. Allen v. Dockwray.

10. It was agreed that an Acceptance or Negotiation in England, after a Bill becomes payable, shall bind the Acceptor or Indorser, tho' not perhaps the original Drawer. 12 Mod. 410. Trin. 12 W. 3. in Cafe 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. Patch. 13 W. 3. coram Holt Ch. J. at Guildhall. Anon.

12. The Defendant being a Captain of a Ship, took several Goods for the Ufe 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. Patch. 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 udes 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. Patch. 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. Patch. 3 Ann. B. R. Popley v. Ashley.

15. If a Bill of Exchange be not paid by the Indorser, the Drawee must give Notice of Non-payment to the Drawer before he brings an Action against him. 8 Mod. 43. Patch. 7 Geo. 1. Lawrence v. Jacob.


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. 893. b. 1 Jac. 2, in Cam. Scacc. Death v. Serwonters.
2. Recovery by Indorsee against the Drawer, without Satisfaction, was 5 Mod. 86. adjudged in B. R. to be a Bar to an Action brought by him against S. C. as an Indorsee, but this Judgment was afterwards reversed in the Exchequer-Chamber. Cumb. 4 Mich. 1 Jac. 2. and ibid. 32 Mich. 2 Jac. 2. Clayton v. Swift.

J. e contra. — 2 Show. 441. pl. 474. S. C. adjourn.— Ibid. 492. pl. 462. S. C. adjudged by 3 Judges for the Defendant, but reversed afterwards in Com. Sew. — Skin. 255. pl. 3. Mich. 2 Jac. 2. B. R. for the S. C. and the Plea ruled good by 3 Judges. — But Latw. 78. 882. S. C. says the Judgment was now reversed, because there was not any Satisfaction; for the Court were of Opinion that this Caff differs from the Caff of 2 Treasurers, and is rather to be reckoned to 2 Debtors by a joint and several Obligation, because by the Custom the first Drawer of the Bill, and every Indorsee thereof, is liable to the Payment of a Sum certain to the last Indorsee, 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 Indorsee that accordingly, the Money shall be paid. 3 Salk. 68. pl. 3. 5 W. 3. B. R. Williams v. Field.

4. M. a Goldsmith drew 2 Bills on J. S. payable to L. the Defendant, who on the 16th 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 B. R. S. C. Holt 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 Indorsee, is liable? Holt Ch. J. held, that by the Acceptance of this Bill by the Plaintiff, the Indorsee was not discharged; for while the Bill is in Agitation, every Indorsee 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 Custum the Indorsee 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 Indorsee is discharged. 1 Salk. 132. pl. 19. Hill v. Lewis. 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 Indorsee. Tho’ a Bill ment of such Bill is good, or of the fame Effect between the Indorsee and Indorsee, to make the Indorsee chargeable to the Indorsee; per Holt Ch. J. 1 Salk. 133. in Cafe of Hill v. Lewis.


8. If
8. If a Man indorses his Name on the Back of a Bill Blank, he puts it in the Power of the Indorfee to make what Use of it he will; and he may use it as an Acquittance to discharge the Bill, or as an Allignment to charge the Indorfer. 1 Salk. 127. pl. 9. Paish. 11 W. 3. at Nili Prius, per Holt Ch. J. Lambert v. Pack.

9. In Cases of Bills purcachfed at a Discount, this is the Difference; if it be a Bill payable to A. or Beaver, 'tis an abolute Purchase; but if to A. * or Order, and 'tis indorsed Blank, and fill’d up with an Allignment, the Indorfor must warrant it as much as if there had been no Discount. 1 Salk. 127. Paish. 11 W. 3. per Holt Ch. J. Lambert v. Pack.

* The Allignment, tho’ upon Discount, will subject the Indorfor to an Action, because it is a conditional Warrant of the Bill, and makes a new Contract in cafe the Perfon, on whom it was drawn, does not pay. 12 Mod. 244. Lambert v. Oke.—Ld. Raym. Rep. 443. Paish. 11 W. 3. &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 Indorfor, tho’ not perhaps the original Drawer; and for this was quoted Pigot and Jackson’s Cafe in B. R. Hill. 9 W. 3. 12 Mod. 410. Trin. 12 W. 3. in Cafe of Mitford v. Walcot.

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 Indorfe; & Per Holt Ch. J. 7 Mod. 87. Mich. 1. Ann. B. R. in Cafe of Eait v. Ellington.

12. A draws a Bill upon B. who had Effects enough in his Hands to answer the Bill, which some time after is pressed, whereupon the Bill is indorsed to A. the Drawer, who brings an Action as Indorfer; Per Parker Ch. J. at Nili Prius, there being Effects, the Acceptance was not upon the Honour of the Drawer, and fo 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 Perfon, who may bring his Action; fo this is a Payment, as may be let 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 Fune sole, or Order, and the afterwards marries, her Husband is the proper Perfon to indorse this Note; Per Parker Ch. J. 10 Mod. 246. Trin. 13 Ann. B. R.

14. A gave a promiffory Note, payable to B. or Order, B. alights it to C. and C. alights it to D. without paying to him, or Order. Resolved per tot. Cur. that this is good; for if the original Bill was allignable, (as it will be if payable to one, or his Order) then to whomsoever it is alighted, he has all the Intered in the Bill, and may alight it as he pleafes; for the Allignment to C. is an abolute Allignment to him, which comprehends his Alights, and therefore nothing is done when the Bill is alighted but indorning the Name of the Indorfer, upon which the Indorfer may write what he will, and at a Trial when the Bill is given in Evidence, the Party may fill up the Blankes as he pleafes. Coynys’s Rep. 311. pl. 160. Mich. 5 Geo. 1. C. B. Moor v. Manning.

The Question was, whether such Indorfe ment by C. to D. will amount to a new Bill to charge the Indorfer with the Indorfe ment by B. & Addornatur, Comb. 1768. Mich. 5 W & M. in B. R. Duckmannee v. Keckwith.
Bills of Exchange Notes &c. 249

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 pay it, but only to demand the Money; and the Servant accordingly offered the Note to the Cashier of the Drawer, who cancelled 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 cancelled, so that he had no Remedy, he procured 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 Indorsee is still liable. 9 Mod. 60. Mich. 10 Geo. 1. Mead v. Cawthell.

16. 6 & 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 Anne 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 Indorsee, and recover Damages &c., and therefore it was inferred, 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. 3 Mod. 373. Trin. 11 Geo. 1. Welsh v. Creagh.

17. Action was brought against the Indorsee of a Promissory Note, and the Plaintiff had Judgment. 8 Mod. 307. Mich. 11 Geo. 1. Elliott v. Cowper.

(I) Acceptance. What is a good Acceptance.

1. If a Bill of Exchange be tendered, and the Party subscribes Accept- ed, 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. 29.

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 Lt. 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 him- self if he makes no Order, and if the Party underrites the Bill viz. Pre- sented such a Day, or only the Day of the Month, it is such an Acknow- ledgment of the Bill as amounts to an Acceptance; Per Holt Ch. J. and J. C. B. R. Fre- derick v. 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. S 5. A.
5. Acceptance of Bill upon two by one Partner, binds both if it concerns the joint Trade; but otherwife 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.

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 fame Liberty of charging the first Drawer as before he had. Camb. 452. Trin. 9 W. 3. B. R. Petit v. Benfon.

7. Acceptance after the Time of Payment elapsed, and a Promife then to pay the Money fcendunt Tenorem Billae praed’ is good, and amounts to a Promife to pay the Money generally. 1 Salk. 129. pl. 11. 12 W. 3. B. R. Mitford v. Wulicott.

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 acquire it; but if he does, the Party here is bound; Per Cur. 12 Mod. 411. Trin. 12 W. 3. in Cafe of Mitford v. Walicott.

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 Tellator, Holt Ch. J. held it necessary to prove that the Acceptance was in the Tellator’s Life-time. 12 Mod. 447. Pach. 13 W. 3. Anon.

10. Bill of Exchange may be accepted by Parol, but not transferred otherwife than by Writing on the Back, and that transfers the Property by the Custom of Merchants. 7 Mod. 87. Mich. 1 Ann. B. R. Ealt v. Ealfington.

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 Nifi Prius, Wilkinson v. Lutwick.

(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. Hufley v. Jacob.*

   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 Indorfor, 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 Indorfor.

1. In Cafe upon a Bill of Exchange, the Plaintiff set forth a Cifon 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 Indorfor, for the Honour of the Indorfor, then the first Drawer is chargeable to him; that F. the Defendant drew a Bill upon J. S. for 100l. 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 Indorfor, 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 Cifon was laid too general; for it extended not only to Merchants, but to all other Persons whatsoever. *Laww. 89t. a. 892. b. Mich. 2 Jac. 2. in Cam. Scacc. Fairly v. Roch.*


   a. 899. a. 

   *Lewin v. Brunetti, in the Exchequer Chamber, S. C. and after several Arguments Judgment was affirm'd; Pollux fiber Ch. J. 12. 34. 1594. *
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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 Twifden 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. 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 Cafe 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 after Indorsement before 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 Cafe of Dehers v. Harriott.

6. All the Merchants agreed that if a Bill is lost, and the Drawer might be referred 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 in fact 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 Cafe of Dehers v. Harriott.

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.

8. Indorsee of Foreign Bills need not demand Payment till the three Days allowed’r are expired, and after the 3 Days the Indorsee may protest it; and it seems the same Time of 3 Days ought to be allowed for Inland Bills; per Holt Ch. J. 1 Salk. 132. Hill & al’ v. Lewis.

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.

9. The
9. The Custom of Merchants is, that if B. upon whom a Bill of Exchange is drawn, abounds 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 abounding of B. and after the Time of Payment is incur'd, then it ought to be protested for Non-payment the same Day of Payment, or after it; but no Protef 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 non-suited, because he had declared upon a Custom to protest for Non-payment before the Day of Payment. Ex Relatione in'ri Place. Ld. Raym. Rep. 743. Anon.

10. In Cafe 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 laft 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 laft 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 reckoned his Folly that he did not protest &c. but if it happens that the left Day of the said 3 Days is a Sunday or great Holiday, as Christmas-Day &c. upon which no Money is 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. Taflall & Lee v. Lewis.

11. If a Foreign Bill be drawn on an English Merchant, payable at so many Days Sight, tho' the Days incur without any Notice given to the Party on whom it is drawn, yet that Bill, according to the Custom of Merchants, may be protested, and thereby Recover'd 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. Camb. 451. Trin. 9 W. 3. B. R. Anon.

12. If a Bill be drawn for like Value received, and this is protested, an Inhabitatus Affinitatis lies against the Drawer; per Shower. Camb. 431. Trin. 9 W. 3. B. R. Anon.

13. 9 & 10 W. 3. cap 17. S. 1. All Inland Bills of Exchange of 5l. 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 Protest; for which Protest there shall not be paid above 6d. 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 left, and Action brought against the Drawer; and it was proved that the Defendant had occasion'd 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 T t t time.
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.

16. If a Bill be accepted at Amsterdam, and no Heife 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 Car. 12 Mod. 410. Trin. 12 W. 3. in Case of Mitford v. Wallot.

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 Bulter v. Grips.

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 recover’d, 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,
Bills of Exchange, Notes &c.

(N) Actions. What Actions lie.

1. An Action of Debt will not lie upon a Bill of Exchange accepted, but a special Action of the Cafe must be brought against him; because the Acceptance does not create a Duty no Milton's 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 the Hale makes the Acceptor Onerabils 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. Hardr. 485, 487. Hill 29 & 27 Car. 2. in the Exchequer, Anon. [but seems to be Milton's Cafe.]

Exchange accepted &c. was indeed a good Ground for a special Action upon the Cafe, 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 Onerabils does not imply Debt. 3dly, Because the Cafe is Prime Impreditions, and there is no Precedent for it. Mod. 286. pl. 3. Trin. 29 Car. 2. B. R. in Cafe of Brown v. London.

In Cafe 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 paid, and likewise upon an Indebitus, for that the Defendant had accepted it. It was infituted in Arrett of Judgment, that an Indebitus Affumpfit would not lie, but an Action on the Cafe only, and of that Opinion were Hale and Rainsford, who said it was to adjudged in the Exchequer since the King's Restoration, and so Judgment was they'd, hesitante Twidten; for he conceived that the Custom made it a Debt by him that accepted the bill. Vent. 152. Mich. 25 Car. 2. B. R. Brown v. London.— Freem. Rep. 14. pl. 13. S. C. accordingly.— Mod. 285, 286. pl. 52. S. C. adjournatur.— 2 Latw. 1594. in Cafe of Bellas- tyle v. Helter, it was said by Powell J. that an Indebitus Affumpfit does not lie upon a Bill of Exchange, and the Reporter observes, that at this Time it was not denied by the other Judges, and cites the Cafe of Brown v. London, wherein Judgment in like Cafe 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. 489.


A Bill of Exchange, as it has been ruled in divers Cafes, 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 Indebitus Affumpfit does not lie on a Bill of Exchange, and cites 6 but the Party ought to declare specially on the Custom of Merchants. Show. 9. pl. 5. in a Note there, Trin. 30 Car. 2. B. R. Frederick v. Cotton.

4. A General Indebitus Affumpfit will not lie upon a Bill of Exchange, for want of Consideration, but Bill is but Evidence of a Promise, and to pl. 2. S. C. held accordingly. But Nudum Pactum, and therefore he ought to bring a special Action upon the Cafe, upon the Bill and Custom of Merchants, or else a general Indebitus Affumpfit for Money received to his Use; Per Holt Ch. J. 12 S. C. fays, that S. P. was often times said in this Cafe.— Comb. 204. S. C. fays, 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 Affignee of the Finder, by reason of the Court of Trade, which creates a Property in the Affignee 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 Debts will lie against him. 1 Salk. 23. pl. 3. Hill. 8 W. 3. B. R. Hard's Cafe.

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. Cogg's Cafe.

(O) Pleadings.

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. Hct. 167. Patch. 7 Car. C. B. Eaglechild's Cafe.

2. In Assumpsit the Plaintiff declared that the Cusfom of Merchants is, if one, for Wires delivered to him or his Factor, makes a Bill of Exchange directed to a Merchant, and to whom 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 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 assigned for Error that this Action is grounded upon the Cusfom of Merchants, and it is not show'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. Patch. 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 Cusfom; 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 Car. 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. Dalrymple v. Lee.

4. In Case on Cusfom of Merchants, on accepting Bill of Exchange from Paris; the Defendant demurred after Illue offered on Payment, and excepted, that no Time appears when the Bill was payable, being only on Double Ufance, and no particular Cusfom alleged that Double Ufance signifies two Months; sed non allocatur, it being a known Term among Merchants that Ufance 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 Twifden J. had it been on Demurrer to the Declaration, the Plaintiff should over a particular Cusfom that Ufance signifies a Month &c. 3 Keb. 643. pl. 65. 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 flown 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 Drawer was ready to pay the Money according to the Tenor of the Bill had it been tender'd to him. 2 Show. 179. Hill. 33 & 34. Car. 2. B. R. Mercer v. Southwell.

6. Case on a Bill on 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 U. 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 Bill 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 to. 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 Courrier v. Bellamy.

8. In Debu upon a Bill of Exchange by an Indorsee, the Plaintiff had Judgment. It was affirmed for Error, that the Plaintiff had not aver'd in his Declaration that the Value was received by the Drawers of the Bill; fed non allocutus; for it lies not in his Mouth to say fo, and it is not material to him whether it was paid to them or not, and therefore Judgment was affirmed. Lutw. 885. b. 89. a. 1 Jac. 2. in Cam. Scacc. Death v. Serwonters.

9. Action for the Lease on a Bill of Exchange brought against the Acceptee by the Plaintiff as Administrator to the Party to whom the Bill was payable, on the Custom of Merchants; and Breach was alledged pr'd tamen the Defendant ad vel post pr'd. Diem, viz. the Day of Payment non solvit nec aliquaeter pro eisdem bucolique 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 bucolique non &c. Judgment pro Quer. 2 Show. 437. pl. 420. 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. Buckle.

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 alledged in Non-payment. The Defendant pleaded that the Plaintiff, seconundum Legem Mercatoriam, did assign the Money to be paid to A. who assigned it to B. to whom the Defendant paid 100l. 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 to take 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.

Law of the Land, and especially of this Custom concerning Bills of Exchange, because it is the most general among all their Customs, and the Judgment was reversed —— Show. 137. S. C. In Error in the Exchequer-Chamber, the Court held the Plea good, and Judgment was revoked.

U u u

12. Cafe
12. Cafe &c. upon a Bill of Exchange, wherein the Plaintiff set forth
the Custom in London among Merchants and others dwelling there, that
it 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 Accepta-
tionem prad' that one King drew a Bill at Sandwich upon the Defen-
dant 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 Ac-
ceptor is to pay secundum Acceptationem prad', and no Time is men-
tioned in the Bill itself when the Money was to be paid, nor has the Plaintiff fee
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 Con-
sent the Plaintiff was to amend his Count. Luw. 231. 253. 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 90 Days after Sight,
and upon the 14th of August the King of Portugal offered the Value of
the Mille Rees 20 l. per Cent. so that it was impolimbu to have Notice.
The Bill was prestented 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 Proeect 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 Pro-
pery of a Subject of England, and therefore this Case differs from the
Cafe 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 Cotta
v. Cole.

14. In Assumpst upon a Bill of Exchange the Plaintiff aver'd that
the Defendant drew the Bill, and that the same was refuted, and that he
protestavit five protestari causavit at such a Time &c. It was objected
that this was uncertain; fed non allocatir; for if he had pleaded Quod
protestavit, he might have given in Evidence that the Publiek Notary
did it. Comb. 152, 153. Mich. 1 W. & M. at Serjeant's-Inn in Fleet-
street. Sarfield 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 Banker
to have this Action; to which the Defendant demurred, without traversing
the Custom; so that he confes'd it, whereas in Truth there was no such
Custom; and the Court was of Opinion that, for this Reason, Judg-
ment should be given for the Plaintiff; for tho' the Court is to take No-
tice 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
confes'd, he has admitted Judgment against himself. 1 Sak.

17. In
17. In Cafe on a Bill of Exchange the Plaintiff set forth the Custom of Merchants, but brought not his Cafe within it; yet if by the Law of Merchants he has a Right to his Action, the fettlement for the Cufom shall be rejected as Surplusage. Show. 318. Mich. 3 W. & M. Mogadara vs. Holt.

and held that it is not necessary to fhew the Cufom of Merchants; but it is necessary to fhew how the Cufom shall be intended, because it varies as Places do.

If it is fufficient to fay that fhuch a Person, fecondum Ufum & Confequentiam Mercatorum, drew a Bill; and the fettlement for the Cufom is Surplusage; for this Cufom of Merchants, concerning Bills of Exchange, is Part of the Common Law, of which the Judges will take Notice ex Officio. Carth. 272. Patch. 5 W. & M. in B. R. Williams v. Williams.

18. Action fur Le Cafe by an Indorfe against the firft Drawer of a Bill of Exchange. The Defendant pleaded that the Indorfer, at the Time of the Indorfeinent, was a Bankrupt. Demurrer. Per Cur. this is a good Plea in Bar; for a Bankrupt is disabled to affign a Bill; but then he ought to have pleaded a Commiffion taken out, wherefore Jud’ pro Quer. 12 Mod. 50. Hill. 5 W. & M. Batterfon v. Goodwin.

19. In Action upon a Bill of Exchange there is no need to allege any &c. 2 Lutw. Cuftom; per Treby Ch. J. & non negotiar by any of the other Justices. 194. Trin. 2 Lutw. 1585. Hill. 8 W. 3. in Cafe of Bromwich v. Loyd.

Heffer, the Reporter says Nota, that in the Declaration in the principal Cafe no Cufom at large for Bills of Exchange is alleged, but only that the Defendant negotiating &c. fecondum Ufum Mercatorum feit Billum &c.; and no Exception was taken to it.

20. Bills of Exchange are of fo general Ufe and Benefit, that upon an Indebitatus Afiumpfit 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 Afiumpfit, for Moynes received to the Ufe 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 Cafe of Bromwich v. Loyd.

21. In Cafe on a Bill of Exchange the Plaintiff set forth the Cufom of Merchants &c. and that one J. P. drew a Bill upon the Defendant, payable to the Plaintiff; that the Bill was prefented 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 Conferderation thereof, promised to pay the Money in a Bank-Bill, which fhould be of good and old Date, and aligns 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 Intereft, fo that the Plaintiff could not, nor can as yet receive the Money. After Verdict it was moved in Arreit, that the Breach was not well align’d; for it ought to be affigned in the fame manner as the Pronom was made, viz. that he did not pay the Money in a Bank-Bill of good and old Date; and alfo for want of averring that the Bill made by P. &c. was made according to the Cufom of Merchants, pursuant to the Cufom alleged in the Declaration to this Purpofe. Sed non allocatur; for it fhall be fo intended. Lutw. 277. Hill. 8 W. 3. Mannin v. Cary.

22. A Bill accepted for Money soon 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 Conferderation; and if this Plea fhould not be good, the Statute would be cluded. Indeed if the Plaintiff had indorfed — — Carth. the Bill over Bona Fide to another, who was ignorant of the Iniquity, the Statute could not have been pleaded againft fhuch an Indorfer; but fure it may againft him who is Party to the Wrong. Jud’ pro Defendant. S. C. adjudged accordingly.

23. An
23. An Action on the Cafe 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 New-affirmant; and to have given the Bond in Evidence; and the Court seemed of that Opinion, but by confent the Defendant did plead the general Issue. 5 Mod. 314. Mich. 8 W. 3. Hackliffe v. Clerke.

24. In Cafe 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 confuetudinem Anglie &c. and therefore ill, because the Custom of England is the Law of England, of which the Judges ought to take Notice without pleading, fed 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 confuetudinem Anglie &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, fed 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 it specially upon the Custom, it shall be intended this was for Merchantizing, especially since the Defendant has demurred to it. And if the Cafe had been otherwize, 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 billum predilatum solubilem to the Plaintiff which is nonsense, for it ought to be that he indorsed the Bill, that the Defendant should pay &c. fed non allocatur; and Judgment given for the Plaintiff. Ld. Raym. Rep. 176. Hill 8 & 9 W. 3. Pinkney v. Hall.

28. Affirmpt upon a Bill of Exchange. The Plaintiff declares that secundum confuetudinem 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 Affirmpt 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 refiding 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, abique 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 aforefaid, residen & commercia habent &c. &c. and therefore all must be intended the same Place; and the Plaintiff had Judgment by the Opinion
Bills of Exchange, Notes &c.

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nion of the whole Court. 2 Lutw. 1582, 1583. Hill. 9 & 10 W. 3. Bromwich v. Lloyd.


Part of the Bill to be paid to Plaintiff 12 Mod. 217. Hawkins v. Gardiner, S. C. — Ld. Raym. a — Ld. Raym. Rep. 360. S. C. adjudged per ton. Cur. that the Declaration is ill; for a Man cannot apportion a per- Rep. 264. R. W. 3. S. C. vention 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 entered for the Defendant; but upon Importunity, leave was given to the Plaintiff to discontinue upon Non-payment of Costs.

32. Assumpsit on a Bill of Exchange against the Accepter, 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 pro- cessed to pay facendum tenorem & effeçum Bills. On Non-assumpsit pleaded and Verdict pro Quer' it was moved in Arreft of Judgment that the Assumpsit was impossible, because made 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 facendum tenorem & effeçum, must be understood to pay the Bill presently; but it appeared on the Declaration, that the Acceptance was before the Day of Payment by the Bill, thereupon the Evidence, an Acceptance after would have maintained the Action. 12 Mod. 212. Mich. 10 W. 3. Jackson v. Pigor.

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 entire Damages; and now it was moved in Arreft 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 Bills prædicta mentionat was not paid, did supply the Want of that Aver- ment, because the Sum was the fame in all the Bills; and Judgment was for the Plaintiff. Carth. 510. Hill. 11 W. 3. B. R. Starke v. Cheesman.

34. In Cafe upon a Bill of Exchange, the Plaintiff had Judgment by Default, it was moved in Arreft that to inteilde the Plaintiff to a Pro- teft, the Declaration only said that the Person upon whom the Bill was drawn non fuit inventus in fo long a Time, without shewing that they had made Inquiry after bins; but it was answered, that it was according to the Custom among Merchants, and according to the common Form in such Cafes; and the Plaintiff had Judgment. Carth. 509, 510. Hill. 11 W. 3. B. R. Starke v. Cheesman.

35. An Indeb' Assumps' upon a Bill of Exchange by Domino Franca; it appeared upon the Declaration that there were several Indorsements, and the Action was brought by the first Indorser, 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 Cafbon, in this Cafe the Way had been for the Plaintiff to get the last Indorse to indufe it to bins, for him to bring Action as Indorfer; 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. Ancen.

X x x

36. Then
36. Then it was argued that the Declaration is 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. 43. Mich. 11 W. 3. Anon.

37. In an Action against the Drawer, the Plaintiff declared on the Custom of Merchants, and set forth that the Drawer refused to pay, per quod Onerabilis deveniti &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. 

any Notice of the Protest; but adjudged for the Plaintiff.—Ld. Raym. Rep. 358. S. C. adjudged for the Plaintiff; because the Drawing the Bill was an actual Promise.

38. The 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 elected, yet it is a Breach not to have paid the Money within the Ufance, 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 known of the other Side; Per Sir Barth. Shower, Arg. and Holt Ch. J. and Northey, agreed the fame to be so. Ld. Raym. Rep. 574. 375. Trin 12 W. 3. Murfords v. Walcos.

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 the 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. Walcos.

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. Pach. 13 W. 3. Anon.

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] inndorvisit super Billam illum Content' Billie illius solvend' to the Plaintiff, without letting forth that the Bill was subscribed. It was moved in Arrest of Judgment, that there was no Assertment, 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 Assertum. 1 Salk. 130. pl. 14. Mich. 1 Ann. B. R. Eatt v. Eltington.


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 Cafe of Borough v. Perkins. 43. An
Bills of Exchange Notes &c.

43. An *Affirmative* 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 Ufances, *viz.* at Amsterdam, but it did not appear what the Time of those Ufances was. Holt Ch. J. said, he would take Notice for the Court cannot take Notice of the Custom of Merchants, but not of that at Amsterdam or Venice &c. In such Cases, you *must set forth* the *Custom* in your Declaration. 11 Mod. 92. pl. 18. Trin. 5 Ann. B. R. Buckley v. Cambden.

being longer in one Place than in another. 1 Salk. 151. 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 *Promiss* *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* *Affirmavit* *lies* on the Acceptance; and Judgment for the Plaintiff, Nii, by 3 Judges, abente Holt. 11 Mod. 190. pl. 5. Mich. 7 Ann. B. R. Walker v. Atwood.

45. In *Action* against the 2d *Indorfor* of a Promissory Note, the Plain- *tiff* declared *without* any *Averment*, that the *Money* was *demanded* of the *Drawer* or the 1st *Indorfor*. This was moved in Arreit of *Judgment*, but held good, because the *Indorfor* charges himself in the same Man- ner as if he had originally drawn the Bill. 1 Salk. 133. pl. 20. Trin. 5 by Holt Ch. J. at Guildhall, and that the *Indorfor* cannot sue the *Indorfor*, unless he first endeavours to find out the *Drawer*, to de- mand it of him, and such *Endeavour* must be *set forth* in the Declaration. Anon.

46. An *Action* was brought against the *Indorfor* 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* in doror this Note to the *Plaintiff*, and that he *received* the *Money* de *codem 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 *anwered*, that the Declaration *sets* *forth*, that the *Note* was made by one Coates, and that the Plaintiff *dem-anded* the *Money de codem 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 a *Law*, *enacts*, that all *Notes* signed by any *Person* &c. and it does not ap- pear by this Declaration, that Coates *signed* this *Note*. To which it *cited* the *Teates* as if it was *anwered*, that the Plaintiff *set* *forth* that *Coates fecit Notam*, which he *cites* as *implying* *signing* it. The Plaintiff had *Judgment*. 8 Mod. 307. Mich. 11 Geo. Elliott v. Cowper.

Point, wherein, notwithstanding this very Exception, the Plaintiff had *Judgment*, because it *was* *signed* *Notam* *in* *Writing*, and *promises* *folvere*, which implied, that it was *signed* by the *Defendant*, which *Cafe* 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 sub- *scribed* it with his own *Hand*, whereby the *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 Ed. Raym. *Rep.* 1494 Trin 13 Geo 1. and 1 Geo 2. *Smith* v. *Jarves*.

48. A
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.

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, 200l. pro Valore in Manus iupius E. de Denariis accommodatis de eodem M. that E. accepted the Bill, and promised to pay &c. Plaintiff had Judgment by Nil dicti, 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, elle he could not requet, and the paying he made the Bill in Writing, imports, that he, or somebody by his Authority, wrote, which is all one, and imports affinging, if it be necessary in Cafe of Inland Bills of Exchange; and such a Way of declaring was held sufficient in Cafe 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 Nonente, and should be (per eundem M.) But the Court held, that Pro Valore in Manus iupius 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 siqu in Scriptis vocavant a Promissory Note, & eundem Notam autem & ibdem eum Manus fuit propria &c. jointly or separately, promised to pay 1100l. for Value received. There was Verdict and Judgment for the Plaintiff. It was affigned 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 M. 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.

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. 10 W. & M. at Guildhall, S. C. & S. P. J. at Guildhall, 3 W. & M. Clark v. Mundal.
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. proved 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 Non-suited. 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. Carrerono.
3. Indorsee need not prove the Drawer's Hand, because tho' it be a forged Bill, the Indorsee is bound to pay it. 1 Salk. 127. pl. 9. PaLch. 12 W. 3. coram Holt at Guildhall. Lambert v. Pack.
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 fought him, and could not find him; for otherwise he cannot refer to the Indorsee. 1 Salk. 127. pl. 9. PaLch. 11 W. 3. coram Holt at Guildhall. Lambert v. Pack.

5. The Demand must be proved subsequent to the Indorsement; for if it 12 Mod. was precedent, he could only act as Servant to the Indorsee, and so the Demand insufficient to charge the Indorsee. 1 Salk. 127. pl. 9. PaLch. 12 W. 3. coram Holt Ch. J. at Guildhall. Lambert v. Pack.

6. If the Action be brought against the Indorsee, it is not necessary to prove the Hand of the Drawer; for though it be forged, the Indorsee is liable; per Holt Ch. J. at Guildhall. Ld. Raym. Rep. 443, 444. PaLch. 11 W. 3. Lambert v. Oakes.
7. Plaintiff to shew a Protest, produced an Instrument attested by a Notary Publick; and tho' it was infinited 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 Nili 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 Nili Prius. Anon.
9. Action on a Bill of Exchange, being by an Executor; and upon a Debt laid to be due to Ttator, he held it necessary to prove the Acceptance was in the Ttator's Time; per Holt Ch. J. 12 Mod. 447. at Nili Prius, coram Holt, PaLch. 13 W. 3. Anon.
10. If a Man gives a Note for Money payable on Demand, he needs not prove any Confederation. 2 Freem. Rep. 247. 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 Defendant to get it accepted. J. S. left it with him; and it was afterwards lost; thereupon the Plaintiff brought Trower. The Court were all of Opinion, that the bare Indorsement, without any other Words purporting an Indorsement, does not make an Alteration of the Property; for it may still be filled up either with a Receipt or an Indorsement, and consequently J. S. is a good Indorser. 1 Salk. 130. pl. 15. Pach. 2 Ann. B. R. Lucas v. Haines.


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 Poll-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 Caufe was brought down by Privilege; 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.

1. Interest on a Bill of Exchange commences from Demand made, and therefore, it there was no Demand made till Action brought, the Defendant may plead Tender and Refusal, and Uncore Priti, and to 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. Pach. 3 Ann. B. R. Anon.

Drawee ac-
cepts the
Bill, and
some time
after protes-
tes it, and there-
one the
Bill is in-
dorsed to the
Drawer, who brought Action as Indorsee, and held well, and Interest was ruled to be paid from the Time of the
Protest. 10 Mod. 56. Trin. 10 Ann. B. R. Louviere & Laubay.

Since this
Statute it
has been
adjudged
that an In-
dorsee of an
Inland Bill
of Exchange
may main-
tain an Ac-
tion against
the Accep-
tor, on a Pa-
rol Accept-
tance, as to
the principal Sum, tho' not as to Interest and Costs; for the Act being made to give a further Remedy for
(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 confest'd by the Anwer, it was objected that it did not appear by the Plaintiff's Affidavit that he had not affign'd the Bill to another; but decreed that Defendant pay the Money, the Plaintiff giving Security to indemnify the Defendant, as the Matter shall think reasonable, against any Person that may hereafter demand the same. Fin. Rep. 301. Patch. 29 Car. 2. Tertele 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, draw payable at a certain Number of Days &c. after the Date thereof, be lost or miscarried 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 affign'd, by reason of the Course of Trade, which creates a Property in the Assigne 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 20 l. and another for 30 l. payable at 20 Days Sight, which the Drawee accepted. On B's Return, Drawee in the Country refused to pay As 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. Patch. 30 Car. 2. Hill and Penfior v. Baker.

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 Dures is 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 Parsip and such Things in the Record, this the Judges cannot amend; for its out of their Knowledge. Arg. Savil. 87. 88. pl. 165. Passch. 28 Eliz.


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. Passch. 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. Pager v. Pager.

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 univeri &c. me J. S. teneri & firmiter obligari Richardo de Woodfreet &c. Solvent' eodem Richardo Bifhop. 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 Indorfor, upon which the Indorsee may write what he pleafe; 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. r. C. B. Moor v. Manning.

Blood Corrupted.

(A) In what Cases.

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
Blood Corrupted.

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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. Dis. cit. 107. pl. 5. and Fitzh. Aff. 421.


4. By an Attainder of Piracy on Stat. 28 H. 8. cap. 15. there is no No Attainder of Piracy of Blood. 3init. 112.

corruption of Blood at the Common Law. 1 Salk. 83. pl. 1. at the Old Baily 1666. in Case of the King v. Morphoe. —— Attainder for Piracy corrupts not the Blood, insomuch 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. 57. S. 8. —— Where the Proceedings are by the Civil Law, a Condemnation for a capital Offence cauieth neither Forfeiture of Lands nor Corruption of Blood; for Corruption of Blood can be caused only by a Judgment by Coire 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. 334, 331. cap. 27. but says if there be an Attainder of Treason or Felony done upon the Sea, upon this Statute of 23 H. 8. by Juries, according to the Course of the Common Law, it seems that the Judgment thereupon works a Corruption of Blood, because the Communion 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 Commision 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. 591. 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 & Arnis & 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 ran only according to the Stile of the Civil Law, viz. Piracy depraedavit, then the Attainder thereupon, upon the Statute of 28 H. 8. the it gives the Forfeiture of Lands and Goods, corrupts not the Blood; and if to are those 2 Books of the same Author, Co. P. C. cap. 49. and Co. Litt. S. 745. to be reconciled, which, without this Diverfity, would be contradictory; & cites Hill. 13 Car. E. R. Hilliar v. Moore.

5. 1 Jac. 1. No Attainder for Bigamy shall work any Corruption of Blood, Loss of Dower, or Disinheritance 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; because this Offence shall not corrupt the Blood.


8. An Attainder of Treason works Corruption in all Cases wherever the Treason be done, except only Attainders before the Court of General, 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 Commision on 28 H. 8. 15.) 1 Salk. 83. pl. 1. at the Old Baily 1696. The King v. Morphes.

Z. Z. (B) Who
Blood Corrupted.

(B) Who shall be barr'd.

1. **W**HERE 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 Elcheat, supposing that the Tenant died without Heir, per Newton. Br. Defcent, pl. 12. cites 22 H. 6. 58.

At the Parliament 18. H. 4. Numb. 132. Petition of the Commons, that the Attainer of the eldest Son in the Life of his Father, should not be a Bar to the youngest, and answer'd currat Communit Lex. Ex Lib. Mr. Hackworth, D. 48. pl. 16. Marg.—Pryn's Abr. of Cotton's Records, 356 cites the same Petition and Answer. S. P. of CollateralDescents 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 eldest 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 37 H. 8. But says that otherwise it is in case the eldest Son had been an Alien born; for then, notwithstanding such Alien were born, 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 is seised of Lands in Fee. If the Land shall elcheat or not was the Question; and 'twas held by Brown, Coningham, 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 inheitable by the Law, if 'twas not for the Attainer) the Land shall elcheat 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 inso'd severall 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 Treacon Anno 29 H. 8. and the Wife died; and it was held that the Son shall have Outter Le Main, as a Purchaser by the Name of Heir Male, and not as Heir. Quere. Br. Defcent, pl. 1. cites 37 H. 8.

Hale's Hist. Pl. C. 357. cites S. C.
Br. Defcent. pl. 23 S. C. cites 29 Aff. 61.

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 Innt. 241. Courtenay's Cafe.

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.

6. The younger Brother hath Issue, and is attaint of Treacon, 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 loit 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 Descendent is obstructed. Vent. 425. per Hale Ch. B. cites 10 Eliz. D. 274. Graves's Cafe.

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 Treacon, 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 Attainer of the Son, he being executed in the Life of the Grandmother, who only as long as the lived was Tenant.
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nant in Tail, and the Land descended to the Grandson as Cousin and his Right Heir of the Body of the Feme the Grandmother. Cro. E. 28. pl. 12. to the Land, because the Issue cannot claim as Heir to them both; for by the Father he is barr'd. Arg. Godb. 512. 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 Disablement by Corruption of Blood for any of his Posterity to claim any Heridament in Fee-simple, or as Heir to him or to any other Ancestor paramount him. 11 Rep. 1. b. 39 Eliz. Ld. Delaware's Cafe. Where the Person under whom another ought to make his Covenant, is barr'd, in such Cafe such other is barr'd. Arg. Lat. 73. cites 3 E. 3. Fitzh. Defcent, 17. and Bar 15.

10. But the Heir in Tail, in Case of Treason 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. not corrupted. Arg. Godb. 205. cites 3 Rep. 10 Lulmey's Cafe, and says, that the Statute 53 H. 8. 20. is the first Statute which vells Lands forfeited for Treason in the King without Office found, fo as according to the Ld. Lulmey's Cafe, 3 Rep. 10, before this Statute of 53 H. 8. 20. the Land did descend to the Issue in Tail. Godb. 205. in Cafe of Sheffield v. Rasciff.

The Statutes of 26 and 27 H. 8. subject Estates Tail to the Forfeiture by Attainder of Treason, and so the Law stands at this Date, 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 otherwife it would have been in Case of a Fee Simple, Hale's Hill. Pl. C. 356. cites 3 Co. Rep. 10. b. Dawte's Cafe.— 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. Jenk. 202. 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.


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 the claims by the Father, and not by the Brother. Arg. Godb. 311. cites Lit. 719.

14. If there be Grandfather, Father, and Son, and the Grandfather in all Cases, and Father have divers other Sons, and the Father is attainted of Felony, and pardoned, yet the Blood remains corrupted, not only above him, (tail) Attainder and about him, but also to all his Children born at the Time of the Attainder. Co. Litt. 392. a.

the Blood upward and downward, so that no Person that must make his Derivation of Defect to or through
Blood Corrupted.

through the Party attain, can inherit; As if there be Grandfather, Father, and Son, and the Father is attained, and dies in the Life of the Grandfather, the Son cannot inherit the Grandfather. Hale's
Hill. Pl. C. 356.

Mo. 815, pl. 110; in the
Star-Chamber. S. C.

14. Resolved by the two Chief Judges, and the Chief Baron, that whereas P. had connivedat by Indenture for natural Affection, to stand feised to hisSelf for Life, the Remainder for Life to the eldest Son of his Brother, the Remainder to the first Son of the said F. and to the 5th 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 152. Trin. 9 Jac. Sir Tho. Palmer's Cafe.

Deed, the Deed was censur'd and damn'd, but no Perfon censur'd.

15. Husband and Wife, Tenants in Tait, if one is attainted 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. [Pauch. 10 Jac. in the Court of Wards, in Beaumont's Cafe.]

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 Perfon 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 Defcent 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 Cafe of Sheffield v. Ratcliffe.

H. seised of Lands for 3 Lives was attainted on the Statute 3 & 4 W. 3 of Treason, for counterfeiting the Coin, by which Statue Corruption of Blood is enacted.

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 Defetia Tentantis, but in Treason the Land is given to the King as an immediate Forfeiture, which was a distinct Penalty from Corruption of Blood, for the Corruption may be stayed, and the Forfeiture still remain, &c Vice Versa, and therefore the Lands forfeited in the principal Cafe. 1 Salk. 87. pl. 2. Hill. 3 Ann. in Dom. Proc. Sir Selkhiel Lovel's Cafe.

17. If the Mother had been attainted, the Uncle could not inherit the Son's Land, &c 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 Cafe of Boraffon v. Adams, [alias, Hobby's Cafe.]


And
Blood Corrupted.

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 prejudice the legal Blood between the Brother and Sitter, I answer, That that would not serve, admitting the Disability of the Parents were not still considerable; for if it disable the Blood of the Father which is derived to the Son, it would infallibly destroy the Disability of the Sitter, for it 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 Elle; but otherwise it is in Case of an Alien, for if the Son purchase Land, and hath the 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 Sitter, yet if she were disabled in the Blood of her Father by his Attainder, she could never inherit herself by the Blood of her Mother. Vent. 426. in Case of Collingwood v. Pace.

19. A. devises that the Heir of B. shall fail his Land; B. is attainted of Felony in the Life-time of A. — A. dies. The eldest Son of B. cannot fell 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 Ballards. Jenk. 293. pl. 27.

20. Duplicate Successions are not necessary in Difcents or Purchases; As where a Man is seized in Right of his Wife, an Heir, and has Issue, and the Husband is attainted, and the Wife dies, and the Husband dies, this Son shall have the Land. Jenk. 293. pl. 27.

An attainted Person marries an Heirress, 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 seized of Lands of Inheritance, such Issue may inherit the Mother, tho’ he had never any inheritable Blood from the Father. — And dub. Marg. (1) cites several modern Books, and then says, That this appears from 15 H. 7. cited S. P. C. 196, and abridged. But 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 Parson, 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. 599. Litt. Rep. 28. 1 Lev. 59, 60; but says, that the contrary was assently 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; be a Tenant in Tail, and the Father shall have been attainted 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 been attainted in the Life of the Father, and died without Issue in his Father’s Life, the younger Brother should not inherit; Per Berkley J. Cro. C. 435. in pl. 4. Hill. 11 Car. B. R.

But if the Grandfather dies, the Issue of the Son must make his Deed by the Father, which he cannot; but if the eldest Son had been attainted 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.

Land shall descend to the Grandson, notwithstanding the 26 H. 8. 15; which gives a Forfeiture of the Lands of the Person attainted. See 8 Rep. 166. Digby’s Case. — Jenk. 287. — Hob. 345. in Case of Sheffield v. Larciff.

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 answered, Coram Commons Lec. D. 43. Marg. pl. 16. cites Mr. Hackwell. * The Corruption of Blood upon this Statute is only where the Tenant has Estate Tail in the Land. Jenk. 82. pl. 60. says it was so adjudged in Ld. Laintey’s Case.

22. The Impediment of an Acestor that is not Medius Acestor between the Persons from whom, and to whom, will not impede the Descent; Per Hale Ch. J. Vent. 416. in Case of Collingwood v. Pace.

23. In immediate Descents there can be no Impediment but what arises see Hale’s in the Parties themselves; As, the Father seized of Lands, the Impediment Hitt Pl. C. that hinders the Descendent must be either in the Father or the Son; as if the 516 317. Father or the Son be attainted, or an Alien. In immediate Descents, a tho’ the Disability of being an Alien, or Attain’d in him that is called a Medius Father is Acestor, will disable a Person to take by Descent, tho’ he himself has a Disability in his Sitter, yet he is not the
Blood Corrupted.

Medium different Hec.

Alien, and hath Issue a Denizen born, and dies in the Life of the Grandfather, and the Grandfather dies seized, 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 different of this Descent) was incapable; Per Hale Ch. B. 1 Vent. 415, 416. in Case of Collingwood v. Puce.

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. 376. pl. 1. Patch. 6 W. & M. in B. R. Corbet v. Tichbourn.

(C) Blood Corrupted. Restored. And Restitution of what on Reversal of Attainders.

Br. Difcent, 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. Difcent, pl. 44. cites S. E. 1.

2. He who is a Clerk Convicted in the Life of his Father, and after gets a Pardon, he may inherit after the death of his Father. Br. Difcent, 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 Afcue 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 briefly charged the Jury to find if the Pardon was in the Life of the Ancestor or after; for it after, then the King shall have the Land during his Life, as it seems. Br. Difcent, pl. 23. cites 29 Aft. 61.

4. Land was attainted to S. by Aft of Parliament, viz. a Manor, and after a Tenant held of it in Chivalry died, and after S. was attainted of Treason, and the Aft reversed by Parliament in all Points, saving the Titles of those who did not claim by the first Aft, which is now reversed by this late Aft; 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 Equity he shall have it, because the first Aft is reversed in all Points; notwithstanding it be only a Chattel vested, and that all the meane 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.

5. In Trepass a Man was attainted of Treason by Aft of Parliament, and after he was restored by another Parliament, and the Attainer annulled, 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 Trepass upon the Land since between the Attainer and the Restitution; and the Patentee who had Patent of the Land after the Attainer.
Blood Corrupted.

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tainer, brought Trepsfs, and the other pleaded the Act of Restitution. are veiled, Per Keble, the Action lies well; for where Judgment is reversed by Er- or, the Party shall not punish me his Trepsfs, or have the meine Pro- fits, 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 Leave for Years, which is determin’d after, or Pecuniarts upon Con- dition, and the Entry for the Condition broken &c. those affirm the Poffesion, contra of Reversals of Judgments by Error, or by Parliament, or Entry by elder Title, and yet it seems that the meine Acts executed shall not be reformed. Per Filler, if Trepsfs is done against the Heir, and after the elder Brother is deraign’d, yet Trepsfs lies for the firft Heir; for it is an Action veiled; Per Vavior, those Words in the Act, that all shall be void and as it no Attainder had been, shall be in- tended from this Time forth, from the making of the Act of Restitution, and shall not have Relation to meine Acts executed or veiled before; and Davers & Hales accorded. Br. Parliament, pl. 41. cites 4 H. 7, 10.

6. And if a Villain had purchased, and the Patentee entered before the Restitution, he who is reformed after shall not have his Perquisite which is veiled; Per Davers & Hales. Ibid.

7. So of Words veiled, and of Prenominuts of Clerks who are inducted, and shall not extend to meine Acts veiled; and 5 were with the Action, and 6 against it, and so it was relinquished. But Brooke says it seems to him that the bel Opinion in Reafon is with the Plaintiff, because it was an Action veiled in him before. Ibid.

8. Lord and Tenant; the Tenant is attainted of Treafon by Parliament, and after the King by Parliament refures him or his Heir, as if no Attain- der had been; there the Seigniory which was extinct is revived; Quod not. Br. Extinguishment, pl. 47. cites 31 H. 8.

9. If a Man is attainted of Treafon, the King may reftore 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 reformed to it without Parliament. Note the Dif- ference; for it is in Prejudice of others. Br. Restitution, pl. 37. cites 3 E. 6.

10. If a Man be attainted of Felony, being veiled of Land, and after get a Pardon and purchases after Land, the Heir shall inherit the latd Land, for the Wife shall be endowcd. Br. Difcent, pl. 54. cites N. B.

11. Note, that the Corruption of Blood cannot be purged by Grant; nor; Ind. 242, Pardon of the King over others, unless by Act of Parliament; for the King cannot make an Heir who is not inheritable by the Law of the Realme; Quod not. 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 Action in his Echeate; and so all Restitutions to the Name of Heir are by Parliament. Br. Difcent, pl. 57. cites Dr. & Stud. Lib. 1.

12. Note, by Bromely & Portman, if a Man be attainted of Treafon or Felony, and the King pardons him, and after he purchaseth 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 the Attain- der, by it enabled to purchase, and need not to this Purpose have Restitu- tion; and this Reason serves for the Issue had before the Attainer and Par- don. Dal. 14. pl. 3. Anno 1 Mar. cites Stanford, Fol. 196. Trin. 9 H. 5. 9.

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 His. Pl. C. 55. cap. 27 cites Litt. S. 74. 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 & Porman. Anno 1 Mar. Quod nota. Dal. 14. pl. 3. cites Stamford, Fol. 196. Trin. 9. H. 5. 9.

S. C. cited by Jones J. Avg. Jo. 492. and says that the Judges certified the Queen, that it was great Equity and Confidence to relieve the Son. — S. C. as to the first Point, cited by the Name of Gray's al. Graves's Cafe, by Hale Ch. B. Vent. 416. 415. — S. C. cited by Berkley J. Cro. C. 543. pl. 8. as to the S. P. — S. C. cited 3 Inst. 240. cap. 106.

Tho' such Pardon does not restore the Blood, yet as to Issue born after, it has the Force of a Reinstatement. 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 Proper Delimitum; for that by his Attainder his Blood is corrupted, and this Corruption of Blood is so high, as it cannot absolutely be falsed and restored but by Act of Parliament; for tho' the Perfon 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. 513. cap. 27. S. P. and that a Reinstatement in Blood may be special and qualified, but that generally a Reinstatement in Blood is construed liberally and extensively. — As where King H. 3. was initiated &c. to the Lands of William de Albino Monasterio by his Attainder, and granted the same to Robert de Mares and his Heirs, donea eas reidibit relibus作者本人's note, per voluntatem fium, 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; yet because it was to make Reinstatement, it had a most benign Interpretation. 3 Inst. 241. cap. 106.

In Reinstatment the Party is favour'd, and not the King, and his Prerogative has no Exception; per Dyer Ch. J. Pl. C. 252. a. Trin. 4 Eliz. Cafe of Wilton v. Ld. Berkley. — 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 control the Treasury, and what is once paid into the Treasury cannot be got out again; per Treby Ch. 5 Mod. 49. Trin. 7 W. 3. in Case of the King v. Hornby.—Per Holt Ch. J. ibid. 61. S. P.


20. A has Issue B. a Son, and is attainted of Treason, and dies. B. pur- And it is chased 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 restored and B. shall descend to the Sisters of A. as Aunts and Collateral Heirs of B., and that the Corruption of Blood by the Attainder is removed by the Restitution. adly, altho’ the Words of the Act of Restitution be to his Ps. to restore B. only as Heir to A. &c. yet this doth not only remove the ther; and Corruption of Blood, and restore him and his Lineal Heirs in Blood, that thereby he and his Heirs, as well Collateral as Lineal, ought to make their Deferit 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 Ind. 242. cap. 106. Courtenay’s Cafe.

For more of Blood Corrupted in General, see Forfeitures, and other Proper Titles.

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(A) Blunders.

1. If a Man releases to me all Actions which I have against him, where ‘Tis a good man, 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 Place. Otherwife of a Solicitud. Arg. Roll Rep. 367. cites 14 are void.

E. 4. 2.

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. Adjudget 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 re-

4 B
Books and Authors.

1. 8 Ann. cap. 19. T H E 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 4l. for every Sheet found in his Custody, either printed or printing, one Majesty 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 entered 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 entered, paying 6d. 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 6d.

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 Nili 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
**Bottomry-Bonds.**

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. allowed the Cause, and dissolved the Injunction, Trin. 2 Geo. 2. Gilliver v. Snaggs. Afterwards in the same Term, an injunction was granted in the Cafe 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.

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(A) **Bottomry-Bonds.**

1. A Ship going in the Fisbing-Trade to Newfoundland, (which Voyage S. C cited 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 he should not return in 8 Months, then pay the principal Money, viz. 50 l. only; and if he never returned, then he should pay nothing. All the Court held that this is no Usury within the Statute; for if the Ship had lay’d at Newfoundland 2 or 3 Years, he was to pay but 60 l. upon the Return of the Ship, and if he never returned, then no thing; 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.

to virtual his Ship; and if he return’d with the Ship, he was to have so many 1000 of Fith, 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 failed 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 Bond, and tolerable by the Us of Merchants, and allowable for the great Perils of the Sea; and Judgment for the Plaintiff, that this Contract is not usurious. Sid. 27. pl. 8. Hill. 12 Car. 2. B. R. Sayer v. Gleon, S. C. refolv’d a good Bottomry Bond, 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 to Cur. for the Plaintiff, that this Contract is not usurious.

3. Debt upon Bond, conditioned to pay so much if the Ship W. return within 6 Months from Offend to London, (which was more than the lawful Interest of the Money) and if she did not return &c. then the Bond
Bottomry-Bonds.

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 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 Refult 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 Perfon 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 naughted. Hard. 418. pl. 4. Pach. 17 Car. 2. in the Exchequer, Joy v. Kent.

4. The Plaintiff entered into a penal Bond of Bottomry to pay 400l. per Month for 50l. The Ship was to sail from Holland to the Spanish Islands, and so to return for England; if she perished, the Plaintiff lost his 50l. She went accordingly to the Spanish Islands, took in Moors at Africa, 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 dismiiffed saving as to the Penalty. 2 Chan. Cafes, 130. Mich. 34 Car. 2. Anon.

5. The Plaintiff was bound in Consideration of 400l. as well to perform the Voyage within 6 Months, as at the 6 Months End to pay the 400l. and 40l. Premium, in cafe 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 reliev’d; 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 40l. 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. Deguildier v. Depeleiter.

6. The Plaintiff went 500l. upon the Hull of a Ship, and Defendant con- ventioned to pay, if the Ship went from London to Bantam, and returned from thence directly to London within 12 Months, 550l. if from London to Bantam, and from thence to China or Formosa, and returned to London within 24 Months, 650l. and if he returned not within 24 Months, then to pay 5l. per Month above 650l. till 36 Months; and if the return not within 36 Months, then to pay 7l. per Month, 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 Siam, 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 advifare vult, and afterwards Mich. 36 Car. 2. B. R. adjudged accordingly. Skin. 152. pl. 1. Hill. 35 & 36 Car. 2. B. R. Westen v. Wildy.

7. Café 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; Pr 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. Wolliford.

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 he 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 Oblige brought his Bill to have his proportionable Satisfaction out of the Money recovered; but his Bill was disannulled, 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. 1791. Dandy v. Turner.

9. Bill to be relieved against a Bottomry Bond &c. with Condition that if the Ship Suratannah 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 elapsed, 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 Matter, and the Voyage delayed by inevitable Accident, (viz.) by Embargo by the Great Mogul, the Bill prayed 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 injured 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 dissolved without Costs. MS. Rep. Pach. 12 Ann. in Canc. Ingledew v. Foster.

10. Hallhead had injured for Hutchinson and Plaintiffs his Aignees 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, left or not left. 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 Cafe was, that before the Insurance made the Ship was left 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 500L as a Loif &c. and founded the Equity that the Policy was not made agreeable to the Label, according to which the Rifque 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 Delegation, and the Loifs, being during that Time, was within the Intent of Contract for the Incurring. Lord Chancellor said, this is not proper to determine here. 113. 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 to London, which excludes the Rifque whilst the Ship laid there; and this seems an Inconvenience in the Policy, first to describe the Voyage, At and from &c. and then to exclude the Rifque, 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 deemed the Words to be added in the Policy, for the Adventure to commence, it

4 C
Bridges.


For more of Bottomry Bonds in General, See Politics of Insurance, and other Proper Titles.

(A) Bridges. [How repaired.]

Cro C. 366, 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. Talm. 10 Car. in an Information against the Inhabitants of Middle-Bridge, S. C. for Longford Bridge; agreed per Curiam. * 10 Ed. 3. 28. adjudged.

* S. C. cited 2d Rep. 52. Parch: 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 common Right the whole County must repair it, because it is for the common Good and Ease of the whole County.

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 Now-Bridge and Channel-Bridge, against the Prior of Stratford, and it is now repaired by London, who have the Mill.

3. It was presented that the Abbot of T. ought to repair the Bridge of T. who said that at another Time he repaired such Prefentment, where it was found that he ought to make but 2 Arches in the Middle; and per Knivet, it is no Bridge without the Redidue, 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. Prefentments in Courts, pl. 22. cites 43 Afl. 37.

4. If a Prior and his Predecessors, Time out of Mind, have made a Bridge of Arches, they shall be bound to repair it for ever. Br. Nuance, pl. 5, cites 44 E. 3. 31. Per Knivet Ch. J.

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 whole 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, by reason that they, and those whole 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,
Bridges,

other, or both, are not bound of common Right to repair the same. 2
Init. 700.

7. But as to Ratione Prescriptionis tantum, there is a Diversity be-
tween Bodies Politick or Corporate, Spiritual or Temporal, and Natural Per-
sons; for Bodies Politick or Corporate, Spiritual or Temporal, may be
bound by Usance 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 Afflicts. 2 Init.
700.

8. If a Bridge be within a Franchise, those of the Franchise are to re-
pair 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 mu-
tandis. 2 Init. 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 Tenure, or Prescription.
2 Init. 701.

10. It is 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 Pretentment 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).

11. The King seized 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 pur-
chased from him, and then he said he would repair it. But it was an-
swered, 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
be determined. Jo. 273. 8 Car. in Itiner. Windsor. The Café of Lod-
don Bridge.

12. Where a Lord of a Manor was chargeable with the Repair of a
Bridge Ratione Tenure, the ancient Freehold and Copyhold Tenants are not
able to contribute, because nothing is Part of the Manor but the De-
mefines and Services, and not the Lands of the Tenants; and tho' the
Copyholders were infranchised, yet they are not chargeable; for the
Infranchisement only alters the Manner of their Tenure; but all who
have any Part of the Deemfe Lands by Purchase are liable; and if Cef-
ty que Truit of the Demefines 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

13. Corporations are rateable with the County towards the Repairs of
public Bridge; 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 Evenholm.

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
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,
Bridges.

There were duties and regulations concerning bridges, such as the right to 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 enlarging, or more convenient rebuilding 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. intituled, an Act for the more easy affenting, collecting, and laying of County Rates; the Treasurer 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 enlarging or rebuilding such Bridges.

(B) Actions, Indictments, and Informations. In what Cases; and Pleadings.

Br. Nuisance, 1. pl. 24. cites & C.

This extends only to Common Bridges in the King's Highways, where all the King's Liege People have, or may have, Passage, and not to Private Bridges to Mills, or the like; and therefore the Indictment upon this Statute fault, Quod possit Publicus & Communis situs in alta Regio Via super flumina, fictum Aquae &c. 1 Inf. 701.

In every Shire is to be understood, Redendo singula singulis, that is to say, 1. In every Shire or County where there be 4 or more Justices of the Peace, whereof one or more is of the Quorum, dily, Franchise, where be 4 or more Justices of the Peace, and one or more of the Quorum. 2. In all City, where there be 4 or more Justices of the Peace, and one or more of the Quorum. 3. In all 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 Proses they are to make upon every Premisement 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 French use commonly to do, or it shall be seen by their Discretions to be necessary and convenient for the speedy Amendment of such Bridges. 2. Inf. 701, 702.

* See Tit.

Inhabitants (A) pl. 1.

4. S. c. & 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
Bridges.

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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 within such Bridges as lie within their several Limits.

5. S. 4. And where it cannot be known what Persons, Lands &c. are the Inhabitants, the Justices of Peace within the Shires or Ridings &c. are to take and the Justices of Peace within every City or Town Corporate, or of the Parish of the said Bridges at the last, whereof one to be of the Quorum, shall call before they are assembled, the Constables of every Town &c. being within the Shire &c. wherein such Bridges, or any Part thereof shall happen to be, or else two of the most convenient Inhabitants of such every Town &c. by the Direction of the said Justices of Peace, or 4 of them at the least, whereof one to be of the Quorum; and 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. 705. Marg.

6. And the said Justices of Peace, or 4 of them, whereof one to be of the Quorum, with the Affent 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, nor the Constables or Inhabitants without the Justices, can make any Taxation by this Act. 2 Inst. 704.

7. And the said 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 decayed Bridges repaired from Time to Time, and the said Justices shall have Power to make Proceedings 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.

Lewising is by Diffreys in his Lands, Goods, and Chattels in any Place within that Hundred, and to fell such Diffreys; and this the Collectors of such Hundred may do by Force of this Act. and if upon Demand the Sum be not paid, albeit the Inhabitant do not expressly refuse, it is a Refusal in Law, 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 Diffreys and Sale of them. 2 Inst. 724, 725.
9. If a Bridge be a private Bridge, as to a Mill which A. was bound to maintain, over which B. had a Palfage &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 Commiission, 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 Town or Lect. 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 Surname made by any Perfon thereof in Chancery, that certain Persons ought to repair the same, he shall have a Writ unto the Sheriff to dirain such Persons to repair the same; but it appears by the Register, that the King shall fend his Commission to the Sheriff to inquire who ought to make such Bridge, and that he dirain 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 fende unto the Sheriff to dirain those Persons who ought to make or repair such a Way, or Causeway, or Pavement, and upon it an Alias &c. if it be not done, and an Attachment upon the fame; and if the Bridge or Way be in the Confines of the County, he shall have several Writs unto every Sheriff to dirain thei. in their Balliwicks, 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 Debenet & folent 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; adly, it did not appear in the Indictment that at the Time of the Indictment the said Bridge was ruinous and decay'd; adly, the Indictment is, that B. and N. debent & folent reparare Pontem, and it is not forc'd that their Charge of repairing of the same is ratiome Tenure, cites 21 E. 4. 38. where it is said that a Prefcription cannot be that a common Perfon ought to repair a Bridge, unless it be said to be by reafon of his Tenure; but it is otherwise in Cafe 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 show that the Bridge is in the Highway; but to this Roll it is said 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 show 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 quashed. 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 ratiune Manerii, which cannot be good; but it should be ratiune Tenure 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 ratiune Manerii fut, that is but Implication that he is to repair, and makes it not appear that he is possed of the Manor, and upon this Exception was this Indictment quashed. 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 quashed. Sty. 109. Trin. 24 Car. The King v. Spiller.

19. By 22 Car. 2. cap. 12. § 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.

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, pled that L. and other Persons, Owners of Lands called Bridglands, ought to repair ratiune Tenure, and traverse that the Inhabitants had and ought to be found guilty, but that another ought to repair, and traversed that L. &c. ought. The Defendants rejoined that L. &c. ought; upon which they were at Iflue; and Ex allergius 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.

ought in this Case of a Bridge to do, so that if they ought not to do it, it might appear to the Court who else ought. 2dly, note a Traverse upon a Traverse, and the iflue bind'd upon the 1st Traverse who ought to repair it; and yet the Defendants were found Guilty upon this Iflue, joining it to the 2d Traverse that they ought not to repair, and all this by Direction of Hale Ch. J. the rest of the Justices confining. 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 Perfons that are to repair it; but they must consent to it themselthes. 2 Mod. 8. Hill. 26 & 27 Car. 2. C. B. obiter, in Case of Curtis v. Devonant.

22. A. and others were indicted for not repairing a Bridge, which it was alleged they were bound to repair, Ratione Tenure of such Lands. A. pleaded, that he was not bound to repair Ratione Tenure, and found that he was. In Arrêt 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 Tenure, and the Verdict is, that A. Ratione Tenure &c. reparare debet Partiensem predicti? Modo & Forma, prout per Indictamentum predicti 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 Onere pro Rata Portione, 2dly. It was said, that it is Ratione Tenure, and not said suae, 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. Fanthaw.

23. Information against the Inhabitants of Efleex 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, Juries of Oyer and Terminer, it was presented, that a certain Bridge, commonly called D. Bridge, lying &c. in Percehine de D. &c. was then in Decay, and that Sir T. F. ought to repair it Ratione Tenure; who pleaded, that he ought not to repair the said Bridge Ratione Tenure, 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 Parts, which lies in H. and Judgment was given for the King. Raym. 384. Trin. 32 Car. 2. B. R. the King v. Inhabitants of Effex.

24. In an Indictment (for not repairing a Bridge) against the County, one of the County may be a Witnes. Arg. and per Dolben J. it was fo in the Cafe 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 professing such Certiorari shall find 2. Manucaptors to be bound in a Recognizance, with Condition to try it at the next Assizes &c.

26. Indictment against Defendant for not repairing of a certain Bridge &c. which he was bound to repair, Eo quod he was Dominus Maneri 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; if that he held the Manor by the Service of repairing the Bridge &c. that is, Ratione Tenure, 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 has, did ufe, 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 said; Per Cur. 7 Mod. 54. Mich. 1 Ann. B. R. the Queen v. Bucknell.

He was Lord of the Manor of Le More in Hertfordshire, which Manor was held by the Service of repairing a Publick Bridge, and th'o' all the Demesnes of the Manor, except the Copyholds were alienated, yet it was held per Cur. that all the Aliences were chargeable in Proportion, yet the Queen might charge any of them with the whole, and let him have Contribution against the others; and th'o' 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. Bucknell.—2d. Raym. 792. Trin. 1 Ann. S. C. says, this Causes was tried at Hertford Summer Affiess, 1 Ann. before Holt Ch. J. who then held, that a Precaution that the Lords of the Manor ought to repair the Bridge, without paying Ratione Tenure, or Ratione Terra, 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 S. he will be obliged to contribute to the Repair, but the Information or Indictment may be against any of them, and that it appears upon the Evidence that another is obliged also, yet the Defendant must be convicted; and so he was, th'o' 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. Mututa Opinion one said, that th'o' 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 shown, as Ratione Tenure, or by Prescription. And that in such Case, where a Man is obliged to repair a Bridge, his Tenant for Years, being
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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 affix upon every Place within their Commissions, as they usually have affixed 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 affix, collect, or pay the Money, shall forfeit 40s. and every Treasurer that shall pay Money, except by Order of Sessions, shall forfeit 5l.

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. Cardiff Bridge shall be reputed a Common Bridge, and be repaired by the County of Glamorgan.

33. S. 15. 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 Tenure, to be so much out of Repair, that it was ready to fall on the Queen’s Subject’s 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 Tenure; 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 Lind. Raym. Rep. 836. Paich. 2 Ann. the Queen v. Water.

35. In an Information for sufferings a common Bridge to be ruinous, which the Defendants by Tenure were bound to repair, it was resolved, 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 Alliences, 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 Allocations, 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 Allocations 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 continues,
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. Paich. 3 Ann. B. R. The Queen v. Buckligh (Dutches 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 there was no Evidence; for the Justices might indit, 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.

37. Indictment was for not repairing quemdam communem Pontem situ
in quoadam communem femita Pedestri &c. Per Holt Ch. J. the Word Communis does not, ex Vi Termin, 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 univerfal to charge a Man's Freehold; nor will the Conclusion of ad Nocumentum communis Ligerum Domini Regis illac tranfent' help it, if so much be not expressly charged in the Premisses; and not being laid 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.

38. The Court was moved for a Mandamus to the Justices of Peace for the County of Wilts, to make an Affesement upon the Inhabitants of an Hundred in the County for the Reimburseing 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 draftr'd to appear and defend the said Indictment, and upon that Account were near 30l. out of Pocket. The Court refused to grant a Mandamus, because the Justices had not a Power to make an Affesement for that Purpose, and said it was an hard Cafe; but that no Remedy was provided therein. MS. Cafes, 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 repairing 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.
Bringing Money into Court.

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. Deb't upon Bond. The Defendant pleaded a Tender at the Day, and Tont temps Priff. 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 fine Die, no Issue shall be taken. Cro. J. 126. pl. 13. Trin. 4 Jac. B. R. Harrold v. Clotworthy.

temps priff, 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 Ed. Raym. Rep. 774. Trin. 1 Ann. in the Case of Burton v. Clotworthy, in Assumpsit, it was infin'd, 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. desir'd 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 Hogheads 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 reft; and the Court ordered the Plaintiff to shew Cause why the Rundlet should not be struck out, or he go on for the reft at his Peril; to 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
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 the 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.

A. decided Lands to B. subject to a Prouice for Payment of 2000L 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.

Covenant on. 3. defined Co-venants, several Breaches were assign'd; one was for Non-payment of Rent. Motion was 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 paid a Sum for Rent for one Thing, they will not put him to try the rent at Peril of Clothes. 12 Mod. 95. Trin. 8 W. 3. Pawlet v. Hestfield.

Northey moved to bring Money into Court upon a Covenant, and was refused. 12 Mod. 243. Mich. 10 W. 3. Lively 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. 3 R. Anon.—In Covenant for Non-payment of Rent, the Practice is to allow the bringing Money into Court. Barnet's Notes in C. B. 178. Mich. 2 Geo. 2. in a Note.

Rule of bringing Money into Court was deny'd in Covenant; otherwise if Debts had been brought upon the Charter-Party. Cumb. 158. Mich. 1 W. & M. in B. R. Anon.

8. A Scire Facias had issue out against the Tertenants on a Judgment, and they had pleaded No annex Suas, and Issue found against them, and Judgment for the Plaintiff. It was moved that the Elegit might be stopped 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. Cumb. 169. Mich. 1 W. & M. in B. R. Anon.

But was allow'd on accepting a new Lease, and sealing a Counterpart.

S. P. But the Way is to confess the Employing, and that he delivered but so much, and to plead a Tender thereof; for then the Plaintiff may reply that he delivered more, and so come to Issue, but because in most Declarations there are quantum Meruit, even in an Indebitatus Affirmavit and Quantum Meruit, the Court said he might do it as to the Indebitatus Affirmavit, but not as to the Quantum Meruit. Cumb. 264. Trin. 6 W. & M. B. R. Anon.

10. Levens 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 Affirmavit and Quantum Meruit, the Court said he might do it as to the Indebitatus Affirmavit, but not as to the Quantum Meruit. Cumb. 264. Trin. 6 W. & M. B. R. Anon.
11. In Accusement brought on Forfeiture of a Lease for Non-payment of Rent, if the Leeslee will make Oath that his Lease is not expired, and bring all Arrears into Court, the Court will not compel 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 a Bill of Exchange for a false Action, as Non-affirming. It may be allowed in Tresor where you bring the Goods in Specie into Court, but rarely where only Part of the Goods are brought in. Cumb. 357. Hill. 8 W. 3. B. R. Burman v. Shepherd.

Upon bringing 50 l into Court it might be struck out of the Declaration. Holt, This Practice in Affirming has been brought in within few Years, and has been only allowed, because Payment goes to the Libe; but in Tresor it goes only to the Damages. It may be the Plaintiff has good Cause of Action for Part, and a probable Cause for the Rejoinder; 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. 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 Plura 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 Patch. 9 W. 3. B. R.

15. A Rent-charge was granted to J. S. out of Lands which were demised to several Under-tenants. The Grantee of the Rent distrained upon them all for one half Year's Rent-arrear. The Tenants bring Several Replications. The Avoyant makes the same Avoyant against them all. The Plaintiffs in Bar of the Avoynt, plead a Tender with Prefert in Curia. And now it was moved, that the Bringing in one Sum should serve for all the 3 Avoynts, they being for the same Rent-arrear; and the Motion was granted. Ex Relatione m't Jacob. Ld. Raym. Rep. 429. Hill. 10 W. 3. Anon.

16. In Replevin, Defendant avowes 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 fo much Money into Court; and Holt Ch. J. thought it hard, and said he remembered the Beginning of these Motions; the first was to bring in Principal and Interest on a Bond; after that it came to an Indebitatus Affirmpt. It has been done in Debt for Rent, but not fo freely; we do it in Ejufdement on a Special Reason, viz. because that Action falsifies entirely upon the Rules of the Court. 2 Salk. 597. cites it as by Holt Ch. J. Patch. 10 W. 3. B. R.


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
Bringing Money into Court.

such a Day. After the Rules for pleading were out, it was moved, that upon the Bringing in of t.001. 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 Cafe in the Damages. Ruled, that the Defendant should shew Caufe &c. Ld. Raym. Rep. 398, 399. Mich. 10 W. 3. Medena v. Kilder.

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 Proiet 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 juf- tify the taking the Cattle; and whether the Money is paid or not, is not the Question. But if the Distrefs was rightfully taken, the Avowant must have a Return; if wrongfully, he must answer the Plaintiff's Dam- ages. 2 Salk. 584. Hill. 12 W. 3. B. R. Horn v. Lewin.

In Replevin, the bringing the Money into Court is superfluous in Cafe of an Avowry; for the Money is not demanded, but the Replevin is for the Goods. 12 Mod 312. Horn v. Luines.——Ld. Raym. Rep. 619. S. C. and Ibid. 643. 644. S. P. per tot Cur. And they all hold that the Bar to the Avowry was ill pleaded, 181, because it is pleaded with a Paratus, where it ought to be pleaded with an Obstruir &c. 2tly, 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 chafed the Avowant to shew a Demand, to intitle him to the Distrefs. 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 Return Harbendo; and Judgment was given for the Avowant accordingly.

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 for a Value upon the Plaintiff's Goods; Saw. 397. Patch. 12 W. 3. Parrel's Seri. Darnell declared he had moved for and obtained a Rule to bring into Court 2 Fowls in one Term, and the next Term a Share of Pake, or Money in lieu there; Mr. Secondary Thomfon remembered a Motion to bring in a Beif in Trover, and several other Influences 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 Affumpfit, and made a Rule accordingly. Rep. of Pract. in C. B. 59. Mich. 4 Geo. 2. Tuney v. Clarke.

21. It was moved to bring so much Money into Court, to have it struck out of the Declaration. Now the Court 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 out him of that Benefit, would reply a Special Capias reflex 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 lay Proceedings upon a Bond, when the Suit is upon a Counter-bond, or when there is any Pretense of a collateral Agree- ment. 12 Mod. 598. Mich. 13 W. 3. Coke v. Heathcor.

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 Debt 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 Mutuarius off; Per Holt Ch. J. who said that the first Motion ever made for bringing Money into Court upon a Mutuarius was made by Levins in Keeling's Time. 7 Mod. 141. Hill. 1 Ann. B. R. obiter.
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. Pele.

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 Wilcock 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 Prift; Per Cur. faid to be settled here on Debate. 6 Mod. 29. Mic. 2 Ann. B. R. Anon.

29. In Debts on a Judgment, the Court will not stay Proceedings on Motion upon Payment of Principal, Interest, and Costs, as they will upon Debts 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. Patch. 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 for 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 Diversitie was taken between Covenant for a Sum certain, and a Thing uncertain; Per Holt Ch. J. Hill 5 W. 3. B. R. saying it did not differ from an Indebitatus Assumpsit. And Trim. 12 W. 3. B. R. fame Rule. 2 Salk. 596. in pl. 3. Patch. 5 Ann. B. R. Gregg's Cafe.

33. In an Action brought upon a Policy of Insurance, it was moved for Leave to bring 15l. into Court, being as much as they thought their Average of the Damage came to, (the Goods not being left, but only damaged) and fo 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 mu cell 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 Tenant, and might not know whether the Teller 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
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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. 3 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. Pauch. 10 Geo. 1. Anon.

37. In Replication Defendant justified the taking the Cattle Damage in Suit, 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 Replication 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. 395. Mich. 11 Geo 1. Savill 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 Leafe, contrary to the Custom of a Manor, and therefore he proposed to bring in the 100 l. to answer the Fine, and that the Leßlor of the Plaintiff should proceed at his Peril for the Forfeiture in respect to the Leafe 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 Leßlor 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 Leßlors, who have brought this Ejectment for a jilt Caufe, as may do them Injustice. Rep. of Præct. in C. B. 42. Hill. 1 Geo. 2. Rocks v. Atеafe, ex Dimift? Dom. Brifcoe vid. &c al'.

40. On a Rule to shew Caufe 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 Chaife bid'd of another, &c; 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, in Time, to allow of them in Battery and Trespafs &c. It is true indeed, it was answered, that in general Quantum Meruits for the Hire of a Chaife &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 Reaon of it he said was, for the Difficulty of pleasing 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. 2d. Half-penny for Rent, and 97 s. upon a Mututatus. It was moved, that there was no Colour, that any more was due than the 3 s. 2d. Half-penny, and the 97 s. was only added to make a Caufe of it in this Court; and that if this Practice was allowed,
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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
Coeffs, 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

42. An Action of Assaults and battery taken away 15. moved to bring the
Shilling into Court, and Plaintiff to proceed at his Peril for the Refu-
due; and a Rule made to shew Cause. But Quere, whether it was
ever made absolute, or opposed? Rep. of Præct. 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 preferred only 2 par-
ticular 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 Pro-
cceeding, and accordingly refused the Motion. Barnard. Rep. in B. R.

44. In Debt upon an Emissary for Goods bought, where the Party had
declared according to the Customs of the City of London, and which was re-
moved 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
2. Lepage v. Pomplion.

45. In an Action of Trespass brought for the mean Profits; after a Re-
covery 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.

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 uncer-
tain, and therefore never allowed in Covenant for Want of Repairs; he
said too, that formerly these Motions he has known refuted even in
Quantum Meruit. Accordingly (the Ch. J. absent) the Court thought
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

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. Plain-
tiff did not proceed further, but moved to have the Money out of Court,
with Costs at the Time of bringing the Money into 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. 195. Hill. 8 Geo.
2. Anon.

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50. In
50. In *Troyer*, 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 content to accept the Goods and Costs. Barnes's Notes in C. B. 197. *Trin. 10. G. 2. Cooke v. Holgate.*

51. A Rule to pay 1l. 1s. 6d. 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.*


(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 always been ready to pay, and yet is, and brought the Money into Court, and to the Right pleaded in Bar; the Plaintiff pleaded in Efoppell to the saying that he has always been ready &c. for he interposed the left Term. Judgment if he shall be received to pay, 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 Prior, he may have Judgment of his Debt of this Parcel, and his Damages, and suffer Execution; for those may be well asseized 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 Efoppell above, the Defendant prays to re-have his Money again. And per Prior, he shall re-have it, Quod non futurum concedit; for he has confessed of this Part. And, by him, if the Plaintiff will relinquish the Efoppell, he shall have Livery of the Money without Damages and Costs; and the Plaintiff after relinquished the Efoppell, by which the Money was delivered to him. Br. Touts temps &c. pl. 22. cites 36 H. 6. 13.

2. Debt upon an Obligation of 10l. to pay 40s. such a Day. *The Defendant pleaded Payment of 20s. at the Day, and that he offered 20s. Redimine 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 order that he did not tender the 20s. 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. Touts temps &c. pl. 32. cites 21 E. 4. 25.*

*Note: The text continues with more detailed legal arguments and case references.*
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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 uncourc Prifl, and pays the Money into Court, and the Plaintiff takes Ilue 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, cited Syl. 338.

3. Money being brought into Court on the common Rule, and the Plaintiff non-suited, 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 Præct. in C. B. 36. Trin. 13 Geo. 1. Lane & al v. Wilkin. 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 Præct. in C. B. 54. Trin. 2 & 3 Geo. 2. Rathbone v. Steedman. 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. Knpton v. Drew.

7. The Plaintiff being dead, the Defendant moved to have 10 l. out of and the 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 Præct. in C. B. 129. Parc. 9 Geo. 2. Crock. 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 non-suited 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. Eater, 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 rendered the same to B. which B. refused to accept, but till 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 affixed 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 Consequence of the Costs in Chancery, and therefore granted A. his Motion. Comb. 387. Mich. 8 W. 3. B. R. Anon.
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, Parch. 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 demurr to one of the Promises, a Rule Nihil 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 the praecipue. Rep. of Præfl. in C. B. 48. Mich. 2 Geo. 2. Tames v. Gofey.

4. On Motion that 20l. 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 the 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. abstained. 2 Barnard. Rep. in B. R. 186, 187. Mich. 6 Geo. 2. Jenner v. Paddington.

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(D) The Effect of accepting the Money brought into Court.

1. **DEBT upon an Obligation conditioned for the Payment of a less Sum.** The Defendant pleaded Tender at the Day & Tous Temps Pris; 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 demurred and adjudged 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 est inde fine 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 5l. into Court, the Money had been tendered, but was refused, and on that Refusal brought into Court, and Costs taxed. The Defendant intituled, that no Costs ought to be paid, the Plaintiff having refused the Money. The Counsel for the Defendant intituled, 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 Præfl. 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 Wallie Membrana 3. pro Burgensibus de Carnarvan, de Libertatibus suis sc. it begins with the King's Grant, Quod sit liber Burges & Homines liberi Burgensis sc. Membrana 4. pro Burgenibus de Aberconwey de Libertatibus suis sc. in such Man-
ner as the other sc.


4. 18 Ed. 1. Rot. Cartarum Membrana 2. Grant to the Town of Bafenweck, Nuod sit liber Burges, & quod Inhabitantes liber Burgensis, cum omnibus Libertatibus, & confirmaciobus ad Bur-
gumi sc.


For more of Burrough in General, See other Proper Titles.

By-Laws.

(A) By-Laws. Who may make them.

1. 15 H. 6. I Tis enacted, That no Masters, Wardens, or People of cap. 6. 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 sc. 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 Peo-
ple, unless they are examined and approved by the Chancellor, Treas-
er of England, Chief Justices of either Bench, or 3 of them, or both Justices of Assize, in their Circuit where the Ordinance is sc. nor shall diltrain any to use to the King against such Ordinances.

4 II
2. 3 H. 7. cap. 9. [recites that] an Ordinance [was] made in Lon-
don, 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 Barts &c. to sell or batter, to the Intent that all Buyers and Mer-
chants should return 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 Barts
within the Dominions of the Duke of Burgundy, before Compo-
sition made by Fine with the said Merchant-Adventurers, contrary to
the Liberty of every Englishman, and to the Liberty of the said
Marts, 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 Cauton 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.)

5. By-Laws made have a Foundation on Patent, Cauton, or Content.
Arg. Cart. 178. Hill f 18 & 19 Car. 2. C. B. in Cafe of the Earl of
Exeter v. Smith.

6. The making By-Laws is incident to every Corporation aggregate;
for that Power is included in the Incorporation; per Holt Ch. J. 12 Mod. 683.

Of common
Right every
Corporation
may make a
By-Law con-
cerning any
Franchise
granted to
them, be-
cause it is
for the Wel-
fare of the
Body Poli-
tick, and in-
cluded in
the very Aét
of Incorporation. 12 Mod. 370. The City of London v. Vanacree—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 Lt. C. Macclesfield. 2 Wms's Rep. 299. Hill 1723. Child v. the Hudson's Bay
Company.

8. Every By-Law is a Law, and as obligatory to all Persons bound by
it, that is, within its Jurisdiction, as any Aét of Parliament, only with
this Difference, that a By-Law is liable to have its Validity brought in
Questioun, but an Aét of Parliament is not; but when a By-Law is once
attudged to be a good and reasonable Law, it is to all Intents as bind-
ing to those that it extends to, as an Aét of Parliament can be; per Holt
Ch. J. 12 Mod. 673. Hill 13 W. 3. in Cafe of the City of London v.
Wood.
By-Laws.

(A. 2) What shall be said a good By-Law.

1. E. D. 6. incorporated the Town of St. Alban's by the Name of S. Rep. 64.

Mayor &c., and granted to them Power to make Ordinances; S. Trin. 58.

and after, when the Term was appointed to be there, by the Agent of Clark's Cafe,

A. and other Burgesses, they affixed a Sum upon every Inhabitant for all Clark v.

the Charges in Erection of Courts there, and ordained that if any re-

fuse to pay, they shall be imprisoned. This is not a good Ordin-

ance to imprison Deo if they do not pay, because it is against the

Statute of Magna Charta, nullis Liber Dono &c. but they might have

initiated a reasonable Penalty, but not Imprisonment, which had Judg-

ment.—

S. C. cited 2 Inf. 32.

S. C. cited


— Mo. 580. Arg. cites Trin. 38 Eliz. C. B. and seems to intend S. C. that the Point is somewhat dif-

ferent, viz. That a By-Law was made at St. Alban's for every Inhabitant to pay a Sum of Money cer-

tain, in Contribution for making the Vill clean and serviceable for the Term to be kept there, and

rul'd good; but because they affix'd Corporal Punishment of Imprisonment upon the Offender, it was

ill, and adjudged void in Action of Palfie Imprisonment, because contrary to Magna Charta.——See

(C) pl. 1. and the Notes there.—Jo. 162. pl. 2. Trin. 5 Car. B. R. in Cafe of the King v. the Corpo-

ration of Bolton, S. P.

2. King Charles made the Sourcemakers of London a Corpora-

tion, 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. Mill. 14 Car. B. R. Harcastle's Cafe, per Curiam;

resolved upon an Indebas Corpus, and be delivered accordingly.

3. A By-Law by a Corporation of Weavers in a Town, to re-

strain Apprentices educated in the same Trade within the same Town

for years after the making of the By-Law, is utterly void. Hob-

bar's Reports, 285.

Hunt. 5. 6. S. C. agreed that the Ordinance was against Law, and Judgement against the Plaintiff.

Brownl. 48. 49. S. C. adjudged for the Defendant.——Mo. 869. pl. 1225. S. C. says that the Ordi-

nance, that none should exercise the Trade within the Town, unless that he had been an Appren-

tice 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. fill'd was absurd.——See Freem. Rep. 35. 37. pl. 44.


4. A new Corporation, not having any Prescription to appropriate

to themselves and exclude others, cannot make a By-Law to exclude S. C. and

Hobart Ch. 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 Appren-

tices to it in another Place. Hobart's Reports, 285. between

Norris and Stapes.

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 referred till some other Action

should require it——Mo. 869. pl. 1225. S. C. and adjudged that the Action did not lie, because they

were incorporated within the Time of Memory, and after the Statue of 3 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 Cafe of Broad v. Jale-

lyce, 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 Cafe, where, after many Arguments, a Diffe-

rence
By-Laws.

By-Laws made by virtue of a Charter, and where they are made by virtue of a Charter; and that is Crel. 4. 1507 Broad's Café, that a Charter is stronger than a Charter.—S. P. Arg. Cart. 59 and ibid. 118. 105. that a By-Law can never be altered by any Court, except a Man to exercise a Trade any where, yet a Charter may remain it, per Tilrell J. cites 43 E. 3. 52. and if such a By-Law had been by a new Corporation, it is a Dispute whether it has been good, and such a Law is not against any Statute, it being good by Charter and Prescription, and cites S. Rep. 124. where this Difference is taken. And ibid. 120. Bridgeam Ch. J. held that a Charter, in such a Café, will warrant that which a Grant cannot do; and as to what was said that the Refrain 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 there should be no more than 420 Carts to live in London, and if more are used, then the owners should forfeit 45 s. It was objected this was not a good By-Law, because it was a Refrain to Trade; but the Court held the By-Law good; for if the Number of Carts be not restrained, they might be a great Nuisance in filling up the Streets, and hindring Passage. Sd. 824. pl. 18. Pisch. 18 Car. 2. B. R. Player v. Jenkins.—2 Keb. 27. pl. 17. S. C. and a Proceedendo was awarded. Nisi—vent. 21. Pisch. 21 Car. 2. B. R. Player v. Jones, S. P. cited the by-Laws in London, whereby the Number of Carts were restrained, is a good By-Law.—2 Keb. 290. pl. 59. S. C. and agreed the By-Law to be good.—Ibid. 501. pl. 64. S. C. and a Proceedendo was awarded.—S. C. cited by Hoat Ch. J. in delivering the Opinion of the Court. 5 Mod. 441. Trin. 11 W. 3.

At a Common Council held April 2d, 1677. it was enacted, That a former By-Law concerning the ordering of Carts and Carmens, 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 17s. 6d. and no more, shall be paid yearly for every Cart; and 20s. and no more, for a Fine upon any Admittance or Attention of a Cart, which shall be applied towards the Relief of the poor Orphans in Christ's Hospital; and that if any Wholesale or Retailer in Fishes, shall keep or work a Cart not licensed by the President and Governors of the said Hospital, be shall forfeit 17s. 6d. 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 Charter 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 consorti. Now it may properly be said to be Ad Utilitatem Populi, when the Advantages are mutual, or in such, wherein the Public is equivalent to the Profit; so is the Cart of the whole Hall, 5 Rep. 62. where the Penny for Hallage is equivalent to the Labour of the Searcher; but here, by this By-Law, there is 17s. 6d. per Ann. Rent, and 20s. Fine, to be paid by the Carmier, not in respect to any Thing for Overseigning and ordering their Carts, but for the Use of the Poor of Christ's Hospital; so that 'tis a more Imposition, without any regard to the Thing in Question. Adjudged by the whole Court, nomine 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 Proceedendo was granted. Raym. 289. 234. Mich. 51 Car. 2. in the Exchequer-Chamber, Player v. Vere.

Mo. 376. pl. 796. Daventry v. Harris. S. C. lays 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. 36. per Cur. accordingly, and that the Power they had by Charter to make Ordinances, was with an tua quod they be conformable to Law and

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 confirmed by Act of Parliament; and after a By-Law was 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 should forfeit 15 s. for every Time. This is a void By-Law, because it is in Refrain of the Liberty of the Trade of a Carman, and to 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.

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 Cloth worker's of their Company, this is a void By-Law; for it is against Reason, and the general Liberty of the Subjects, to be restrained from putting his Work to whom he pleases. Trin. 42 Eliz. B. R. adjudged.
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, who non fuerit allocatus per legale Warrantum vel Authoritatem datam by the said Corporation, or 3 of the Matters and Wardens, nor shall let up any Shop for this Art, nor shall exercise it until such time as they have presented themselves to the Matter 3. 3 of them, or * proved that they have served in this Trade as an Apprentice for 7 Years; and it any does contrary, that he shall forfeit 31. to the said Corporation; this is a void By-Law, because by this none shall exercise the 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.

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.

† Deldeneg 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 Godd 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 Writs, 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 bar'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 hath Power by Custom, which is, among other Customs confirmed by Act of Parliament by general Words) that if any Free- men, Citizen, or Stranger, within the City, shall put any Broad-cloth, to Sale within the City of London, before it be brought to Blackwell, shall be viewed and searched, so that it may appear to be false, and that Hallage be paid for it, 7d. for every Cloth, that he shall forfeit for every Cloth 6s. 8d. this is a good Ordinance, as well to bind Strangers as Freeman, because it is made to prevent Fraud and Falsity in Cloth, and for the better Execution of the Statutes without Deceit, and the 1d. for Hallage is but a reasonable Expenditure for the Benefit which the Subject hath by it.


9. If a By-Law be made in London, that none shall make a Hat, pref, 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, unmanly as this makes Cloths and Skuffs better to the Eye than they are in Truth. Ill. 13 Jac. B. R. Edwards's Case, adjudged upon a Habens Corpus.

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 Deciet of them, and likewise on reading the Statute of S. 5. [cap. 6.] the By-Law was held good, and a Proceedendo granted.

10. If there hath been a Court (which is called Curia legalis) held Gro C. 497. by the Lord of a Manor, Time out of Mind, in a great Moor, Part Pl. 2. James
By-Laws.

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 Penalty of forfeiting 4d. 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 Affent. Curia advisare vult. Dal. 95. pl. 23. Anno 15 Eliz. Franklin v. Cromwell.

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 5l. for the 1st, and 10l. for the 2d Offence, and held not good. Godsb. 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. 535.

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.

14. At
By-Laws.

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 hinder 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. Larton v. Erbury.

Common for all his Cattle Commonable to refrain 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 Jutilication was not good, that the By-Law was not lawful, but a By-Law to disfance the Offender is good, and that the Words were not opprobrious Words. Mo. 411. pl. 562. Hill. 33 Eliz. Bab v. Clerk.


17. King H. 6. granted to the Corporation of Dyers in London, Power to seareh &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 Concelso. 8 Rep. 125. a. per Cur. cites Trim. 41 Eliz. C. B. Walcham v. Auten.

18. The Custom of London was, that no Person, not free of the City, sell keep all Shop, inward or outward, for putting to Sale any Wares &c. Goods foreign 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 fuch El. forfeit 5 l. 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 by the Mayor, or, Sheriffs, and Citizens, and in the Precription they shew that they were Mayor, Bailiffs, and Citizens in the City Time out of Mind, till the time they were confirmed Mayor, Sheriffs, and Citizens, and held good. D. 279. b. pl. 10. Mich. 12 & 11 Eliz.—Bendel. 21. pl 56. 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 Cafe.

20. The
By-Laws.

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, feemed 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 Quafi 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 Craffla, but upon the Reasons given in the Exception, they would advise. 2 Jo. 144. 145. Pasch. 33 Car. 2. B. R. Trinity-Houle v. Crifpin.

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 Affiffants on such a Day, under the Penalty of 10l. or other left Sum, to be levied by Diffref, 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 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 conceivis; 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 advanced, 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.

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 Car. they may make a By-Law that none but Freemen shall be Porters, but
By-Laws.

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 unloading 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 loing of the Goods. It was argued by Mr. Peer Williams, that it was a void By-Law; but nothing more is reported. to Mod. 338. Mich. 3 Geo. i. B. R. Fazakerly (Chamberlain of London) v. Wiltshire.

28. The Bailiffs &c. of Chipping Camden 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 Vintners 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. Comyn's Rep. 269. pl. 148. Mich. 4 Geo. i. 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 it is sufficient for that Purpose, shall refuse or neglect to take it in that Company, he may be fined for exercising such Trade and disdained. 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. to Geo. i. 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 pay whole Cattle, tiller, 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 Sover to make By-Laws, pro meliore ordine tenentium, that none shall put his Cattle in Common le Shack antequam frit-
By-Laws.

Arg':. Mo. 474. — S. C cited Cart. 178.

marius Rector [Regiotm] of the Manor, pulliflet Campanum in Cam-
pante Ecclesie ibidem, upon the Pain of 10s. (for it seems the Rea-
tion is, that he is not Lord, but hath Common there with the other
Tenants, or no Common, and for its indeßerue) D.' 15. El. 321.

2. By the C Sutton, Commoners may make a By-Law, that they
may not do in their Cattle before such a Day, and if they do, that they
may be distrain'd; and though all the Neighbours shall not come,
yet if Proclamation be made to do it, they who make Default, shall
be bound as well as those that appear. Dubitât. 44 E. 3.

3. Tenants of a Manor may make a By-Law to bind themselves,
but not Strangers. 21 H. 7. 40. (It items to be intende by Cul-
ton.)

4. By-Laws for Payments and other Works necessary for the making of
Highways, Canfays and the like publick Things, shall bind without Cufl-
tom; but they ought always to be made by the major Part; Arg'.
Mo. 579. cites 43 E. 3. Per Finchden.

5. Where a Parish is compellable to make a Bridge, a By-Law may ad-
just 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. 5.

6. Corporations cannot make Ordinances or Constitutions without Cutton
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'.

This Statute
does not corre-
borate of any
the Ord-
ances
made by any
Corporation,
which are so
allowed and
approved as
the Statute
speaks, but
leaves them to be affirmed 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 40l. mentioned in the AG, if they
should put in Use any Ordinances which are against the King's Prerogative,
or the
By-Laws.


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 Severalities 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 Tankield, of Council in the Cafe, 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 thereupon. 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.

11. Where Cities, Boroughs &c. are incorporated by the Name of Jenk. 277. Mayor and Commonalty, Mayor and Burgesses, Bailiffs and Burgesses &c. and in the Charters it is prescribed that the Mayors, Bailiffs &c. shall all 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, be made of for the better Government and Ordering of their Cities &c. by virtue whereof, and for avoiding popular Confusion, they, by their common Affront, ordained &c. that the Election should be by such a select Number, and tho' such Election cannot be shewn now, yet it shall be presumed that such an Ordinance was made. 4 Rep. 77. b. Mich. 40 & 41 Eliz. at Serjeants-Inn in Fleet-street. The Cafe of Corporations.

of Parliament are pro Bono Publico, and not to be compared to other Cae of Elections of Mayors; Bailiffs &c. of Corporations &c. 4 Inf. 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 fell 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 Breaeh of this Law, and so judiely 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. Buhl. II. Hill. 7 Jac. Franklin v. Green.

13. By
By-Laws.

13. By an Act of the Common Council in London, for the Ordering of 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 40s. 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 Distraction, 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.

14. A By-Law was made in London, that every Foreigner who sells Goods usually sold by Weight, without bringing them to be weighed by a Beam there called the King's Beam, shall forfeit 13 s. 4d. for every 500 Weight, to be recovered by the Chamberlain in the Sheriff's Court, and not elsewhere, and that no Effions, Proteciton &c. shall be allowed. It was objected, 1st. That it was unreasonable to compel the Subject to bring every thing fold by Weight to this Beam; for they are frequently fold by the Lump, and then no need of weighing; but it was anwered that this By-Law is founded on the Custum 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. 4d. the 500 Weight, and some of 500 Weight may be worth 500l. 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 Elisions &c. Sed non allocatur; for it is generally to in all By-Laws. 4thly, that it restrains the Actions to their own Courts; sed non allocatur; for the Facts and the Persons are bel 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, Nifi &c. Lev. 14. Hill. 12 & 13 Car. 2. B. R. London (Mayor &c.) v. Bernardilton.


The Recorder certificated the Custum of London, as to erecting Taverns; and a Person was imprisoned by the Mayor and Commonalty for erecting one in Birchins Lane, contrary to their Order. Mar. 15. pl. 34. Pach. 15 Car. Anon.

As to setting up a Butcher's Shop or a Tallow chandler's Shop in Cleriepide, it ought not to be for the great Annoyance that would ensue. Mar. 15. pl. 34. Pach. 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 Twidde. J. Vent. 26. Pach. 21 Car. 2. B. R.
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. Freeman 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 allowed 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 infifted 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 Judicilium, Privileges, and Statutes are confirm'd; but whether this By-Law, which was made subsequent to that Statute, viz. 9 Jac. was warranted by it or not, the Court would not determine upon a Motion; therefore propofed 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. Pach. 32 Car. 2. C. B. University of Oxford v. Dodwell.

S. C. cited Arg. 5 Mod. 159 Mich. 5 W. 3. in Clarke's Half, who refused to take upon him the Office of a Libraryman of Oxford, and therefore 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, espcecially that of the City of London; and if the Mayor and Aldermen should not have Power to punish Offenders in a summary Way, then fall all the Government of the City. But the Exception which thickens 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 confefs 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 decharged per rem. Curiam, tho' all the Court declared their Opinion that the Cottoon was a good Cotton, and was for the Advquisite of the good Government of the City, and therefore they would always support it.

20. A By-Law made by the Mafter, Wardens, and Brotherhodd of Taylors in the City of Litchfield, that every Year, within one Month after Midsummer, they should chufe a Mafter and 2 Wardens to continue for a Year; and that upon every Day of Election there should be a convenient Dinner for the Mafter 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 Mafter paid for his own Dinner, upon Pain of forfeiting 3s. 4d. That Anno 18 Eliz. thefe By-Laws were approved by Sir Ed. Saunders, then Ch. Baron, according to the Stat. 19 H. 7. and to
By-Laws.

brings the Café within this By-Law; and upon Denun-ration this was ad-
judged a good By-Law upon the Authority of 
Malvis’s Tale, Cro. J. 555. [pl. 17. Mich. 17 Jac. B. R.] but that the Breach of this By-Law was not well ad
n’d; for no Notice was given, nor precise Demand made of the same Sum as the Mafter paid; and without failing in this Pay-
ment the Defendant was not to incur the Penalty, tho’ absent from the 
Café; and Judgment for the Plaintiff. 2 Lutw. 1320, 1324. Patch. 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 
these two Men so appointed, under such a Penalty &c. After Judgment 
by Default it was moved, that this being a Company incorporated with 
in London, they have not Jurifediction 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 fame Reafon, they 
may enlarge it all over England, and fo make it as binding as an Act of 
Parliament; and for this Reafon it was adjudged no good By-Law. 
3 Mod. 158. Hill. 3 Jac. 2. B. R. The Company of Horners v. Bar-

low.

Debt upon a 
By-Law, 
(viz.) That 
if any Perfons 
should be duly 
elected to be 
Chamberlain 
of the City of 
Oxford, and 
should refuse 
to undertake 
that Office, 
he should for-
fait 10 l. to the Mayor &c and then fets forth, that the 30th of Sept. &c. the Defendant was duly elected 
into the faid Office, he being a Citizen and Freeman of the faid City, and that he refufed to accept it, 
whereby the Action accrued for the faid 10 l. The Declaration was adjudged ill per orb. Cur, be-
cause a By-Law to elect any Person is void; for by this they may elect a Stranger, and the affuming 
that he was duly elected will not cure it, because tho’ Words extend only to the Manner of Electing, 
but not to the Perfons to be elected, and though it is faid that they elected the Defendant being a 
Citizen and Freeman, this is only the Execution of the By-Law, and fhall not make the By-Law good, 
which is void in itself; and it ought to be, if any Citizen or Burgess fhall be elected, and refufe &c. and not 

S. C. cited 
Arg’ 3 
Mod. 259. 
and says that 
this By-Law 
exceeds the 
Cafion, and 
that Rea-
fon it was 
held void; 
and Ibid. 
270. the 
Cafion 
that in this 
Café of 
Robinson v. 
Grofcourt, 
there was 
no Company 
of Dancing- 
Masters, of which the Defendant might be made free,

22. A By-Law by the Mayor &c. of Guildford was, that if any Inha-
bitant of the faid Town fhould be chosen to the Office of Bailiff, and should 
refufe to take it upon him, he fhould forfeit and pay to the Corporation 201. 
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 incura-
ble; and fo in Debt brought on the By-Law, Judgment was given 
Mayor & Probi Homines of Guildford v. Clarke.

23. Debt for 10 l. upon a Forfeiture for Breach of a By-Law, which 
was, that every Perfons u*ing the Occupation of Musik and Dancing in the 
City of London, shall have a Privilege to be made free by Patrimony, &c.

at the next Court of Affiffants of the Company of Musicians, after Notice ac-
cpt and take the Freedom of the faid Company; and that every Perfons who 
fhall serve an Apprenticeship to fuch Myfies, and not made free, and yet 
fhall exercise bis Trade, fhall forfeit 10 l. for every Olience. This was ad-
judged a void By-Law; for though the Cafion is, that whoever is free 
of the City must be free of some Company, yet that Caffon does not oblige a Man to be free of any particular Company; for if it shou’d, then 
though the Defendant be intituled by Birth to be free of fuch Company, 
yet he muft alfo be free of this, otherwise he cannot exercise this Art, 
which is unreafonable. They may make him take his Freedom, but 
cannot direct in what Company. 5 Mod. 105. Trin. 7 W. 3. Robinson 
v. Grofcourt.

24. The
By-Laws.

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 5l. per Day, to be paid to the Chamberlain to the Use of the Corporation, to be levied by Dittores &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 Covenant to the Effect of the said By-Law would have been good. Lutw. 626, 624. Hill 9 W. 3. Bedford (Mayor) v. Fox.

25. Anno 7 Car. I. 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 1000l. and bring 6 approved Comparators; and that upon Proclamation made at Guildhall of the Choice, and be being called to come and take upon him the Office at the next Court, and enter into a Bond of 1000l. for that Purpose, upon Default he shall forfeit 400l. and if not paid within 3 Months, shall forfeit 400l. [100l.] more &c. It was infin'd 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; fed 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.

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. 2 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 400l. whereof 100l. to be paid to "the next Sheriff that shall hold, and the Reit 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 wherever 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 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 Mayor Lord Mayor and Aldermen, but is like the Power given by the Stat. 25 H. 8. cap. 5 to Commissioners of Sewers to do several Things according to their Discretion; but that must be underhand of a Legal Discretion ——La Raym. Rep. 406. 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 tried 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, 1 Salk. 193; 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 Company; for Trade, or other Affairs of the Company; but great Cities and Towns, as a Company London, Bristol, York &c. can make By-Laws for the better Ordering and Managing such Towns, and that Law will bind Strangers to the Freedom of the Towns, while within such Towns, and they are bound to take Notice of such Government.
By-Laws.

such Laws at their Peril; and this Diversity was agreed to by the Court.


27. The Hudson's Bay Company are made a Corporation by Charter, and are thereby empowered 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 Reflections 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 strictio, 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.


(C) How it may be made for the Recovery of the Penalty.

See (A 3) 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, this is good. Co. 5. Clark's Cafel 64.

2. 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.

4. If an Ordinance be made by the Common-Council in London, that a certain Thing shall not be done upon Pain of foriture 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 reduc'd. 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 recovered 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's 64, admit D. 15 El. 321. 23.

Foi. 367. A By-Law was made by the Homage of a Court Baron, that every Inhabitant within the Manor should be chosen annually by the Homage to serve as Field-Rovers within the Manor, and that if any so chosen should refuse, he should forfeit 10 l. which should be levied by Distress. In Trepass 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
By-Laws.

be well enough; because the prescription being for the By-Law, and the By-Law itself ordaining a Diuers, it is the same Thing as if the prescription had appointed the Diuers; 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 forrefted to themselves, because there is no way to inforce Obedience but by Punishment, which must necessarily be either by London, Extraneous or Corporal, as Imprisionment, which is not legal, unless Wood, S. C. there be a Custom to warrant it; and the direct End the Law seeks, is at Guildhall, no more than Obedience, and they might sue for the Penalty in the Court of the Mayor and Aldermen if the Mayor could be fevered 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 legibly; with he would be both Plaintiff and Judge; refolved by Holt Ch. J. Ward Ch. B. &c. 1 Salk. 397. pl. 3. at Guildhall, Mart. 2. 1701. Wood v. the Mayor and Commonalty of London.

(D) Pleadings.

1. In 2d. Deliverance, a Custom of a Manor was 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 S. C. ad-_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 Conuenance, because he pleaded, that it was presented coram Selatoribus, and does not shew their Names. 2dly, The Penalty because that appointed by the By-Law, was 20s. and he shews that it was abridged is not alleged that the By-Law 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 fame in Matter in Fact, that he did keep &c. 3 Le. 7. pl. 21. Mich. 7. Eliz. C. B. Scarning v. Cryer.

2. Where there is a Custom in a Manor for the Homage to make By-Laws when Necessity requires, whether it ought to be 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 Cafe.

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 as Lufted by the Master and Wardens &c. not exceeding 40s. and if he shall refuse to pay the same, upon Prooen 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 33s. 4d. 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
the Custom was, to make By-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 Laitts, which are to be made by the Lait-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 expressèd, 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 dismissed 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 Leatherfellers, who had not been Guardian of the Company before, should pay to the Use of the Society 25l. And in Debt the Plaintiffs shew the Election of the Defendant to be one of the Livery, with particular 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 demurred, and they'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. Patch. 33 Car. 2. B. R. Leatherfellers 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. Car. 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 restrain for the Penalty. The Plaintiff replied, De Injuria sua propria absque tali Canse &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. Cotterell.

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; Godlb. 165; 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 Cafe.

2. 25 H. 8. cap. 19. S. 1. Enacts, that the clergy shall not presume to claim, or put in use, any Constitutions or Canons; nor shall enact, promulge, or execute any such Canons or Ordinances in their Convocations, (which alway shall be assentable by Authority of the King’s Writ) unless the Clergy may have the King’s royal Affent and Licence to make, promulge, and execute such Canons and Ordinances, upon Pain of every one of the Clergy doing contrary, and being thereof convicted, 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 Commons, 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.

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, Archbishops 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. 1683. Trin. 4 Jac. in Canc. with the Affiance of the 2 Ch. Justices and Chief Baron. Bird v. Smith. The Convocation, with the Licence and Affent of the King, may make Canons for Regulation of the Church, and that as well concerning Lacks as Ecclesiastics; Per Vaughan Ch. J. 2 Vent. 44. in Canc of Grove v. Dr. Elliot. — And says, that so is Lindow; 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 selling Churchwardens, Jo. 459. pl. the Canons (viz. that the Parson shall have the Election of one) cannot 4. Trin. 15 alter it, especially in London, where the Parson and Churchwardens are a Corporation to purchase Lands and demeine their Lands. Cro. J. 532. pl. 15. Pasch, 17 Jac. B. R. Warner’s Cafe.

Mar. 22. pl. 50. Anon but is S. C. —Noy 159. 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 Cafe, it was held...
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. 160. Trin. 3 Car. B. R.
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 Ecclesiastics might make Canons
without the King, but are by that Statute restrained, but since that
Statute they may make Canons with the Consent 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.

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. 154. Pach. 11 W. 3. B. R. the Bishop of St. David's

12 Mod 223.
13. No Canons, since 1603, can Proprio Vigore bind Laymen; per
Holt Ch. 6 Mod. 193. Trin. 3 Ann. B. R. in Cafe of Britton v.
Standish.

14. Declaration in Prohibition, which sets forth the Statute 7 & 8
W. 3. cap. 35. and further, that Lay-People are not punishable by Can-
ons; that the Plaintiffs, at the Promotion of the Defendant, were ar-
ticated against in Court-Christian, for that the Plaintiffs were clandest-
inely married without publishing Banns or Licence, and between the
Hours of 7 and 8 in the Morning, contrary to the Canons. Then al-
leges 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 de-
nies 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. pro-
nounces the Resolution of the Court. The Questions that have been
made in this Case were, first, whether by the Canons of 1603, Lay-
Perfons
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 Parth-Church or Chapell 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 mixt'd Assembly, consisting partly of Lay and partly of Ecclesiastical Persons; but it is uncertain how they were convened, whether by Election or otherwife; 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 Init. 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 Sanétion 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 vetius Provincie, which imports that the Clergy are assembled together, and only the Clergy of either Province are either present in Person or by Representation. 4 Init. 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 Legislativo Power was vested in the Emperor, who
Canons.

*Sup. pl. 12.*

Reasoning in the Case of * Matthew v. 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 instituted 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 Perfon with any Burthens or Impotitions 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 Kites and Ceremonies to be observed in the Reformed Religion. All these Alterations were establisht 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 Affiidence of the whole Legislature of the Realm. It was instituted at the Bar, that the Reason of their Acts of Parliament was to enforce 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 mott minute, were establisht by Act of Parliament. It was ascertained 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 Meafures 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 Confanguinity, 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 recourse to Parliament to have the Battard Eigne legitimate according to the Canon Law, when Elpoufals were had afterwards, but by their own Authority they might have done it; and that memorable Saying of the Lords, Nolumus Leges Anglicae mutari, would have been unnecessary, 2 Roll Abr. 586. pl. 35. The Case in Roll Abr. 909. pl. 5. Letter (1) seems a strong Case for the Validity of these Canons; but yet, when considere, 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; infomuch that the Grant of Administrition 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 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

Par. 1. S. 2.
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 abro- gating 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 Par- liament. As to judicial Opinions, the Cate 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 Fastening-Days, and to make Constitutions Provincial to bind the Clergy, but not to bind the Temporality; 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 Con- vocation. The Cate of the Privy of Lords, before, is not mistaken by Brooke. The old Edition is in Temporal. Newton J. gives his Opin- ion 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 de- prive them. This is the ancient Prerogative of the Crown, as appears by those books; therefore the Convocation, which is by the Affent and Confirmation of the King, may make Canons to bind the Clergy; and fo is the Cate of the Bishop of St. David's b. Lucy, 1 Salk. 134. Carth. 485. where it is said by Holt, that all the Clergy are bound by the Canons confirmed only by the King; but they must be confirmed by the Parliament to bind the Laity; and the Notes of Raymond and Eyr Ch. J. agrees with the Report in Carth. In the Cate of Briton b. Stubb, * Mo. Ca. 190. Holt, agreeable to his former Opinion, held that no Canon, unleas accused received, tho' in full Convocation, can Proprio Vigore bind Laymen; and of the like Opinion was the Court of C. B. in the Cate of Dalby, Mich. Term. 5 Geo. 1. which was upon teaching School without Licence in Prohibition. In Opposition to this Opinion has been cited the Cate of t Bird b. 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 Cate in itself is of a very extra- ordinary Nature, and such as no Relief would be given to in Chancery at this Time; besides, it is said in the Cate, that every Bishop in his Di- ocefe, Archbishop in his Province, may make Canons to bind within their Limits. Now there is no Colour for this. But further it is not ex- pressedly said that the Canons will bind Laymen; Upon the whole, it is not of very great Authority. The next Opinion is * Vaughan 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 Cate is * Grove and Elliot, 2 Vent. 41. where Vaughan says, * At Tit. that the Canons of 1603 are of Force, tho' never confirmed by Act of Prohibition Parliament; that the Convocation, with the Licence and Affent of the (C) pl. 5. King, under the Great Seal, may make Canons for the Regulation of the Church, and that as well concerning Laicks as Ecclesiastical Per- sons; and fo is Linwood. This was upon a Motion without much Consideration, and Tyrrell J. was of a contrary Opinion, the other two Judges
Canons.

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 anteient 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 the People have taken at their free Liberty, by their own Consent, to be used among them, and have bound themselves, by long Ufe and Custom, to the Observance of the fame; 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 Supension per Trifanium. In the Case of Hattingley v. Barem, Sir Will. Jones, 259. it was expressly determined in the 3d 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 Cenfures 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 this gave the Statute of Uniformity 13 Car. 2. which gives a Penalty of 5l. in such Case. * Carth. 464 is contrary to Corey and Pepper; and in Matthews and Burden no Resolution; but in the Case of teaching School without a Licence, the 5l. is inflicted as a Punishment for the same Offence; but in the present Case the 10l. 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 puniti pro uno delicto; for the Prosecution upon the Statute is as the Statute de Articulis Cleri mentions it, diverso Intuito ventilar, in which Case the Ecclesiastical Jurisdiction is not taken away; and even in Acts of Parliament a double Punishment is inflicted Diverfo Intitu, as in the Statute of 18 Eliz. concerning the reputed Fathers of Battards, 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 not taken away, is, that their Proceedings are Pro salute Anima; but those are mere 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 (E) pl. 67.

* Chedwick v. Hughes. See Schoolmaster (A) pl. 4.
Certainty in Pleadings.

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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 enjoined by the Canons of 1603; and that a Confutation is awarded as to the Restidue. It is necessary to grant a Prohibition as to that; for the Ecclesiastical Judge may make it a clandestine Marriage singly upon that Point, viz. not marrying between the Hours of 8 & 12.

For more of Canons in General, see Prerogative (Y. c) Prohib ition, 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, 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 & Gafoign. 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 Affife, the Tenant said that J. N. was seised and invested him, and after dispossessed him, and invested 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 Dispossession of the Feoffment; and held only Argument to prove that the Tenant dispossessed the Demandant; whereupon he said that the Fine was levied as above, by which he was seised till the Tenant dispossessed, abique loco that the Tenant had nothing of the Feoffment of J. N. before the Fine. Yelverton said J. N. infeffed him before the Fine, prit, and so to Issue. Br. Traversee per &c. pl. 86. cites 21 H. 6. 12.

4. In Affife of Rent the Plaintiff made Title to the Rent by Agreement made to F. by which the Party granted the Rent out of the Manor of B. to be paid at S. dated the Day, Year, and Place aforesaid, where three Places were named; and by the said Opinion the Pleading is not good, for

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 Write, and he was put to answer over; for it is only Argument. Br. Traverfe per &c. pl. 23. cites 33 H. 6. 27.

6. In Precipio quod reddat the Tenant pleaded a Release of the Demandant by Name, of all the Land which he had by 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.? there he need not plead such Assignment; for he has given the Land a Name, and therefore there the Release is good, tho' the Land was never H. 1; and so a Diversity between Generality and Specialty. Ibid.

8. If in Affite 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 3 E. 4. 22.

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 inffeft A. of all my Lands which were J. N. 3, there I must shew how much the Lands were. Per Velvertor, 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 Trespasses he who pleads Deposition of an Abbott 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 compelled to shew before whom, who said before his own Commiffary; for the Abbot the Archbishop of Canterbury, and then well. Br. Pleadings, pl. 37. cites 9 E. 4. 24 & 33.

11. Debt upon an Obligation, upon Condition that if the Defendant does release, let over and avoid the Wages of a * Speere of Callice of 18 d. per Day, 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 let 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 Peace or the Manor of D. and pleads that he made the Peace, he shall shew where the Manor is; for it cannot be made but upon the Land. Br. Pleadings, pl. 31. cites 4 E. 4. 14.

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 be released by reason of the Vifne. Br. Pleadings, pl. 31. cites 15 E. 4. 14.

13. And if I am bound to make a Lease of the Manor, or grant the Office of Parkerhip, 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. Trespofes of 10 Acres of Wheat; Per Pigot, it should be 10 Acres, with Wheat; Per Catesby, it is called 10 Acres of Wheat vulgarly, and so well; to which it was not answered; Quere. 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 debit Argumentatively. Br. Traverfe 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* S. P. Br. to every Intent, and therefore because he returned Returns made at B. by M. by Command of N. and did not *flow the Place of the Command*, the Return is ill, and the Sheriff was anered; but it is said elsewhere, that a Bar is good if it be good to a common Intent; note the Diver-
ty. Br Count, pl. 58. cites 3 H. 7. 11.

17. In Trefpa's of Goods the Defendant pleaded, that the Place was *His Free-
bold*, and that he took the Goods there Damage seafant; the Defendant was forced to *sit down the Land in certain*, because he made Title to the Goods; so if he makes Title to the Land by Formment; but otherwise if he pleads merely *His Freebold*. Heath's Max. 64. cites 5 H. 7. 28.

18. Note, where a Man pleads, that the Intestate had Goods movable in several Dioceses, he ought to *flow in what Place*, and *what Goods they are*, so that the Court may adjudge whether they are Goods movable or not, and shall not stay till the Matter be traversed, and then to *flow it in the Rejoinder, Per Rede, Fineux, and Brian, but Keble, Serjeant, contra.* Br. Pleadings, pl. 165. cites 10 H. 7. 19.

19. In Trefpa's, 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 flowing the Cause of the Debt.* Br. Pleadings, pl. 44. cites 21 H. 7. 13.

20. Error was aligned, because it was pleaded that the Defendant, at the Vill of Welfminter, in the County of Middlesex, released &c. and after *flowed at another Time another Thing to be in the Vill of Welfminter,* and did not *say affairsaid, nor in what County,* and the Juftices held, that it shall be intended in the fame Vill and County, because it was mentioned in the Record before. Br. Pleadings, pl. 49. cites 21 H. 7. 30.

21. A *lets a Houfe 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 *flow 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 iluces only out of the Houfe. Jenk. 196. pl. 3.

22. General Pleading, tho' in Matters of Fact, is disallowed; as a *Covenant to make an Effect by the Advice of J. S. he must flow what Advice be given.* Hob. 292. 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 Iffue, and therefore need not *flow every thing certain, for, peradventure, an Iffue may not be joined thereupon, but upon the Replication.* Arg. Pl. C. 28. a. b. Pach. 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 Eitop-

25. Debr upon Bond-conditioned, that the Obligee, on the 19th Day of August, 4 Jac. should go from Aldgate in London, to the Parish Church of Stee-Market in Suffolk, within 24 Hours. The Plaintiff *flowed, that he went from Aldgate to the said Place, [within the Time,] but because he did not *flow in his Declaration, in what Ward Aldgate was,* it was held not good. Godb. 162. pl. 223. Mich. 7 Jac. B. R. Crofle v. Cafon.

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 *flow the Effect of them,* and the enjoying accordingly. Hob. 295. per Hobart Ch. J. Arg. Mich. 15 Jac.

27 An
Certainty in Pleadings.

27. An Affirmavit to pay a Sum pro diversis Mercioninis venditis is good without mentioning the particular Wares in the Declaration; but an Indebitatus Affirmavit 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 known by him, who in Intendment of Law, has the most certain Knowledge of it. Jenk. 305. pl. 79.

29. Treffpaes &c. for taking Diversa Genera Apparatum in Cifra præd. existens. After a Verdict on a Motion in Arrest of Judgment, it was agreed, that Diversa Genera Apparatum were too uncertain of themselves; but being referred to a Chet wherein they lay, they were reduced to sufficient Certainty; but because 2 Chets were mentioned before, and the Apparel was alleged to be in Cifra prædita (in the singular Number) so that it appears not in which they were, Judgment was given against the Plaintiff. All. 9. Pach. 23 Car. B. R. Vincent v. Furly.

30. Treffpaes for breaking his Clofe and eating his Grafs cum avertis &c. After Verdict, Error was brought and aligned, that the Declaration was uncertain; 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. 172. Mich. 1649. Brook v. Brook.

31. Treffpaes Quare clausum fregit, & Arboræ fuccidit ad Valentiam &c. Upon Demurrer, the Plaintiff pray'd Judgment as to the breaking his Clofe, 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. Treffpaes for entering his Houte and taking several Things, & inter alia unam parceliam penfarum laurarium Anglice, a Quantity of Woollen Yarn; after Verdict for the Plaintiff, and intire Damages; Judgment was itaid for the Uncertainty of what Quantity Una Parcella is. 2 Lev. 195. Trin. 29 Car. 2. B. R. Wade v. Hatchet.

33. Debt against an Administratrix upon a Bond given by the Intestate for Performance of Covenans, reciting, that the Plaintiff was poffeffed of a Leafe &c. and that he aligned his Intereit 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 Fagots 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. Lucw. 334. 338. Pach. 4 Jac. 2. Tuckerman v. Tuckerman.

34. In Affidavit and Treffpaes 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 Affirmation; but the Use of it is to enforce the Plaintiff to make his Charge certain, and it is only a favourable Plea; for the Plaintiff may have a Title, of Leafe suppos'd, 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 et, that it is the Defendant's Liberum Tenementum, and shew his special Cause of Action; so where the Defendant pleads
Certainty in Pleadings.

pleads Liberum Tenementum, he gives a Plea traversable; Per Powell J. 12 Mod. 508. Pach. 13 W. 3. in Cafe of Pell v. Garlick.

35. Cafe for these Words, you are a Where and a perjur'd Where; per Quod the life her Marriage. The Words being not Actionable, but in Respect of special Lofs, therefore that ought to be proved certainly, for it is issuable. For where the laying of particular Damage is the Gift 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 Cafe where the laying of particular Damage is necessary to the Maintenance of the Action, but it must be laid certainly, and the Opinion in Hextle 8. is long since exploded; hence, where the particular Damages are not the Gift of the Action, but only an Aggravation. Et Quer' nihil Capiat per Billam. 12 Mod. 597. Mich. 13 W. 3. Wetherell v. Clerkson.

36. In Covenant, a Breach aligned 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 aligned 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 futurum eas in Decauin in diversis partibus pro Dejedus Reparationem, and bad for the Uncertainty; and that he should shew a Breach directly within the Words of the Covenant, was cited Lev. 246. Sed adjournatur. Comyns's Rep. 146. Pach. 5 Ann. C. B. Dummer v. Birch.


(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 Persona of Q. and alleged seizin 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 Precipe quod reddat in B. it is not usual to say in B. in the County aforesaid, or in Trefpafs in B. for it shall be intended in the same County. Ibid.

County is expressd before in the Writ directed to the Sheriff, but certe in a Plea; for there no County is expressd before, and therefore it ought to be expressd 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 Br. Lieu. [Defendant] was charged, was made by Duties at B. he need not say that &c. pl. 44. 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.

5. Trefpafs upon the Cafe for stopping of a Gutter. The Defendant intituled himself by Lease for Years of a Mill, and prescribed in his Lettir, and his Ancestors to stop for a Time to repair the Mill, and did not

4 P
Certiorari.

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 Exchequer; 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).

Br. Failure de Record, pl. 5 cites S. C.—*Plur. Record, pl. 17 cites 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 Nulli 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, till. 14 Jac. Banco, Pie and Trill, adjudged, that it was objected that it ought to issue out of Chancery, and came by Minimus in Banco. Dobart's Reports, 182. the same Case; and there afterwards awarded to the Justices of Gaol Delivery.

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 to the Certiorari and all was vold; but a Certiorari was awarded De Novo to the Justices of Gaol-Delivery. —See Trial (E) r. S. C.
5. Where the Sheriff returns *Mandavit 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.

8. Certiorari issued to a *Judicte of Peace who had taken Recognition*, to make him certify it to the King. Br. Certiorari, pl. 10, cites 2 H. 7, 1, pl. 11, cites S. C. And if he dies, having a Recognition 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 *Nulli trec 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; fed adjornatur. Cro. C. 297. pl. 7. Hill. 8 Car. B. R. Lutterel v. Lea.

10. In *Debt brought in Bristol upon a Bond*, the Defendant pleads *in Lev. 222.* But a *Judgment in B. R. upon the same Bond*, and the Plaintiff replies *S. C. & S. P. Nulli trec Record*, and thereupon Issue is joined, quod habetur tale Rec. by the Report. cordum.
Certiorari.

8. A Fine was imposed on the Sheriffs of London and Middlesex, by the Justices of Peace of the County, and directed 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 imposed, 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 J. 169. Mich. 33. Car. 2. B. R. The Cafe of the Sheriffs of London and Middle-

fex.

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 Aliifu, and by him into the Exchequer, according to the Statute 7 & 8 W. 3. cap. 27. A Cerifiorari 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 Parry cannot be proceeded against here; and said that the Cafe 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 Caufe wherein it ever was done. 1 Salk. 145. pl. 5. Patch. 10 W. 3. B. R. Dr. Sand's Cafe.

(B) To what Court it may be granted.

1. If Indictments are taken in Pembroke-shire, or Breconshire in Wales, before the Justices of the Great Sessions there, a Cer-

fiorari may be granted out of the King's Bench, to the said Justices to remove those Indictments, because these are not the Declarations of the King, which he may remove where he pleases. 2 H. 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. (Query how the Court of King's Bench may proceed upon these Indictments.)

To that Purpose, as the Clerk of the Crown informed the Court—2 Hawk. Pl. C. 257. cap. 27. S. 25. five. 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 Matter B. R. shall proceed on...
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 Attorney, is given to the Justices there ; but notwithstanding this, per rotam 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. 13th. 3. 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 Maircheys.

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 Cafe.

3. Mich. 9 Car. B. R. A Certiorari was granted to remove the Indictments of one Cheadle and others, of petit Tresfon, for the Murder of Sir Richard Bulkley, 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 v. Price, 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 (as) quash them if they are not good, and if they are good, to remand them back again by Certiorari, by Force of a Statute made tempore H. 8. and Justice Jones said, that in the 34 & 32 Eliz. upon the same Reason a Certiorari was granted in Sanced Regis, to remove an Indictment taken in Carmarthen, 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.

in either of Appeals; and for this Reason Certioraries have been granted to remove Indictments out of the Grand Sessions, but never Writs of Appeal. — Cer. C. 331. pl. 16. S. C. Dubitatus, and appointed to be argued, whether a Certiorari was grantable. — S. C. of Chedley, and also of Soutley v. Price, cited Vent. 95. Trin. 22 Car. 2. B. R. Anon. Where a Certiorari was granted to remove an Indictment of Maulderout of Wales; and ordered that the Procurator 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 thereon in an English County, and that might be tried by 26 H. 8 cap 6. - — Same Cases cited Vent. 146. Trin. 22 Car. 2. B. R. in Morris’s Cafe, and says that in Chedley’s Cafe, a Certiorari was granted, as was likewise in the principal Cafe 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 Cafe 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. Rich. 10 Car. B. R. Clark’s Cafe, where they returned that it was a County Palatine by Preceptum, and the Court added thereupon.

5. [So] 11 Car. B. R. in one Simpson's Case, a Certiorari with a 
Pain was granted to Durbain, to remove an Indictment of Barrettry 
there taken before the Justices of the Peace; for they were made 
Justices by Statute.

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 Jula there, 
without a Charter of late Time. Trin. 8 Car. B. R. Hosieff. 
Tiden's Case resolved; and the Indictment taken in Sandwich re-
moved 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.

It was said by one of the Clerks of the Crown, that a Certiorari had 
many times been return'd from Durbain. 
Lanc. 166. 
Trin. 2 Car. in Jobison's Cafe.

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 Dur-
ham, and that the Defendant sues his Father for those Lands before the 
Chancellor of Durbain; and for that it was informed that the Plaintiff 
dwells in Ratcliffe in the County of Middlesex, and that the Plaintiff's Fa-
ther is an old diseased Man, and not able to follow his Suit; therefore a 
Certiorari is granted, directed to the Chancellor of Durbain, to certify 
into this Court the whole Matter depending before him. 

8. The Register makes mention of a Certiorari to remove a Record 
taken at Calice. 
Croc. 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 have Execution; for that is not Placitum. 2 
Init. 23. ad finem.

10. If there be an Indictment for a Foreible 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 subjed 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 Seifions for chasing 
one Contable, 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 Ahtie; but a Writ was granted to compel the Contable to 

12. By the Statue 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 Confideration of the Statute, it was resolved, that no 
'Certiorari shall be granted, and if any be, there shall be a Proceedendo; 
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, Ex 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. Partridge.

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 inflit for them. 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 Council 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 have some Jurisdiction, to which the Party, if injured, might appeal, otherwise the Corporation will be Party and Judges, and tax the Land of the Foreign to what Value they please; and laid 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; fed Curia advisare vuln. Freem. Rep. 99, pl. 111. Patch. 1673. B. R. Winchelsea Port's Cafe.

14. A Rule of Court was made that no Certiorari should go to the Certiorari 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 Note. Franchise which hath Confluence of Pleas, and which is more than a bare Franchise tenure Placita; per Cur. 1 Salk. 148, pl. 13. Hill. 1 Ann. B. R. Croft v. Smith.—12 Mod. 643. Hill. 13 W. 3. S. C. & S. P. accordingly.—2 Salk. 29, pl. 4 S. C. & S. P.—13 Mod. 13 S. C. & S. P. admitted.—2 Id. Raym. Rep. 83, S. C. & S. P. accordingly, and to 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 Quere how B. R. can legally take Confluence of Proceedings there without a Certiorari, the Old Baily being another Court, and potles'd of their own Records till removed by Certiorari &c. Cumb. 319. Hill. 6 W. 3. B. R. Monger's Cafe.

16. A Motion was made for a Certiorari to remove an Indictment of Barrety found at the Sessions of Gaol-Delivery; and one Mistle's Cafe 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 fugitif should afterwards appear false, a Proceedendo should be awarded. 1 Salk. 144, pl. 2. Patch. 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 Superfideas 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 Durs 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.
Certiorari.

18. Indictment being found against the Defendants in London for printing and publishing a Paper intituled 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 mal'd; and Certiorari was moved for by Montague, intimating that it would be hard to be tried at the Old Bailey, 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 Bailey, 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 Filing and Return; and tho' by Consent it may be returned immediately, yet 'till there must be 15 Days between the Filing of the Writ and Return of the Jury, which could not be within this Term. 12 Mod. 250. Mich. 16 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. Pach. 11 W. 3. B. R. in Cafe of Dr. Groenvelt v. Dr. Burnell.

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 Cafes there mentioned, shall certify their Proceedings into Chancery; afterwards by 13 Eliz. cap. 9. it is enacted that hereafter the Commissioners should not be compelled to certify or return their Proceedings, which they interpreted to extend to a Certiorari, and therefore 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. 249. Pach. 11 W. 3. in Cafe of Groenvelt v. Burwell.

Their Orders are removable here by Certiorari.

21. Certain Orders of Justices, made purporting to a private Act of Parliament for repairing Cardiff-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 skipped over and render'd useless. Sed non allocutur. "Tis the constant Prætice to send them into the Counties Palatine, and yet they have original Jurisdiction, and the same Courts within themselves. The Council for the Welsh 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. Cardiff-Bridge's Cafe.

It was objected that a Certiorari would not lie; and cited the Cafe of Ball v. Perthridge, 7 Salk. 295. Sed non allocutur; for this Court will examine the Proceedings of all Jurisdictions created by Acts of Parliament; and if they, under Pretence of such Act, proceed to exceed 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 Cafe in Quelton, Whether the Act of Q. Eliz impowers the Justices to raise Money to mend Weares, and to determine the Doubt upon the Act. As to the Cafe of Orders made by the Commissioners of Sewers, and of the Pens, 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.
Certiorari.

Commissioners are suspended by the Certiorari; but that is only a discretionary Execution of the Power of the Court.—Comyn'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 Aét 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 jurisdiction; per Holt Ch. J. in delin- 12 Mod 644. vering the Opinion of the Court. 1 Salk. 148. pl. 13. Hill. 1 Ann. 3 Salk. —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 Ball below, he may sue a Certiorari, and upon putting in Ball in the inferior Court, the Cause will proceed there, and all the Proceedings below upon the Attachment are dissolved; 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 intitled to 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 S. C. cited Term to remove all Indictments of forcible Entry against certain Arg 2 Ld. Persons, where they are not indicted at the Time of the Award of the Raym. Rep. 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. Dib. 37 & 38 Eliz. B. R. Cheyne's Case, per Curiam.

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. Dib. 37, 38 Eliz. B. R. Cheyne, per Curiam.

3. If Certiorari issues to Justices of the Peace to send the Indictment of J. N. and in the same Indictment 25 others are indicted, yet this is a good Certificate of the Record, and the Justices of the Peace shall not mention any thing of the others in their Certificate: Per Markham Ch. J. Br. Record, pl. 57. cites 6 E. 4. 5.


5. A Certiorari was brought to remove an Indictment of Force against S. C. cited L. and T. unde indictati sunt. An Attachment was pray'd for not remov- Arg 2 Ld.oving an Indictment against L. only. The Court held this Writ joint Raym. Rep. and several, but that a Writ of Error will not remove a Several Indict- 1199. 1203. ment. 3 Keb. 102. pl. 2. Hill. 24 Car. 2. B. R. The King v. Levet. 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 4 R Keb.
Certiorari.

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.

6. B. W. and F. were jointly indicted at the Seiffions, 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 alius et eorum Indictatns exigit. 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 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 if it be Vel per quod alius eorum Indictatns exigit, it had been otherwise. 5 Salk. 78. pl. 2. S. C. and S. & S.——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 that, if not removed, as to A. only. 2 Ed. 4. Am. Arg. cites it as the Case of the King b. Foffebruck; 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 Foflebruck was as it is cited, but that it was resolved by the three Judges, abience Holt Ch. J.——Ibid. 1203. Pellell J. asked the Counsel, how they answer the Case of the King v. Foflebruck.

2 Hale's Hist. Pl. C. 212. cites Mich. 42 Car. 2. B. R. Adjudged, 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. 5. 4. b and 16 H. 7. 16. a.

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 Indictment may deliver the Indictment per Manuel Propria. Mich. 57 & 58 El. B. R. Woodard’s Case contra 6 E. 4. 5. a. 2 Hale’s Hist. Pl. C. 215. 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 Hostels, a Certiorari to remove this Indictment against A. and B. removes not the Indictment as to C. and D. for tho’ they are all comprised in one Bill, yet they are several Offences, and several Indictments, and to 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 Manuelius proprius 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 Manuelius proprius; but otherwise it is where the Offences are several, and the Indictment against A. and B. is removed by Writ, and by a Re-Adjudged, that if a Certiorari be delivered upon the Writ, for then that single Indictment that concerns A. and B. is removed, and not the others, where the Offences are severally, 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 fame Perons 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 the 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. 13 Car. 3. B. R. Anon.—A. and B. were indicted of Murder. B. flies, and A. brought Certiorari to remove the Indictment into which 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, entering into Recognizance to carry it down to Trial; and it was resolved, that the Indictment was removed qual boc, and that the Defendant who removed it faces his Recognizance by trying it at his own; for that the Accquittal of one is not an Accquittal of the other, nor vice verfa; 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 he did not come in above Gratia. Proces of Outlawry shall go against bis; and for this Cause it was, that before the Statute the Courfe 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 whole 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 Oppression.
Certiari.

tion; and if 2 be indicted jointly, and join in Plea, there shall go but be a Tran-
one Venire Facias; secus if they ferv. 12 Mod. 601. Mich. 15 W. 3. crip this
in this
cafe, because
the Writ is
Recordum
& Processum cum omnibus etc. tangentialibus, but the Chief Justice doubted of it, and said, that the Op-
nion of Markham, in one of our Books, is against it, and that it would be mischievous should it be fo,
because in such Case B. might be attained 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
saying, 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 isfued to the Court of Ely, to certify all Pleas now in the Court of Ely, to certify all Pleas now
in循其
the Jefte, and before the Jefte, and before the Return. Per Cur. it was well removed; for a Certiorari, as well as a
Certiorari, as well as a S. C. & S. P. S. C. & S. P. Recordare, shall remove all Pleas pending at the Time of the Return. 7
Recordare, shall remove all Pleas pending at the Time of the Return. 7 accordingly.

9. A Certiorari was to remove omnes Ordines against A. and B. nuper levat. Fadav; the Order removed was against B. only, and this Order appeared to be made after the Jefte of the Writ. The Quetion 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 quail'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.

(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 of a Precedent, he is able to find of Certioraries for the Removal of
either of Indictments or Recognizances from Suffions, are directed to the
justices of Peace for the County generally, or to some of them in particu-
lar by Name, and not to the Cufts Rotulorum; and, according to Lamb-
bard, 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 Cufts 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 Cufts 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 Cufts Rotulorum, there can be no Doubt but that
a Return by him as such will be good.

2. An Affidavit is taken before one of the Justices of Affidavit only, and the Clerk
of Affidat does not wait the coming of the other Justice of Affidavit, yet the
other Justice by Certiorari may certify the same Record. Br. Record &c. pl. 27. S. P. 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 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 Case, but has only a Counter-Roll. 2 Inf. 176.

4. If one of the Justices of Assize 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 Assize 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 Inf. 424.

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. St. 371. 3653. B. R. Anon.

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.

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.

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, rescinded.

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. & 83. 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 Dominique, or before Justices of Assize, 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 Ataint is before filed 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 fend in the Record itself, but a Certiorari to the Chamberlain and Treasurier, and a Mittimus of the Tenor of the Record. See the Cafe 39 H. 6. 4. per Prifon. And if the Tenor of the Record be before the Certiorari filed in Chancery, they will not fend the Certiorari into the Receipt (Treaury), nor fend in the Tenor which is there filed, but only Tenore Tenoris; and it feems that is fufficient. 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 Treaury, there the Party who would have Execution may fue Certiorari out of the Chancery to the Chamberlain and Treasurier, to certify the Record in Chancery, and when it comes there, they may fend it by Mittimus into B. R. if it came thence, and into C. B. if it came thence, and there to fue Execution; And per Moyle J. the Chancery do not ufe to write for the Record and Procesfs, but for the Tenor of the Record and Procesfs, but the Justices of Affile ufe to write for the Record and Procesfs, and the fame is faid elfewhere for a Fine levied; Note a Diverify. Br. Certiorari, pl. 1. cites 37 H. 6. 16.

6. If a Man be convicted before the Sheriff upon a Re-difcharge, and Post-difcharge, then he fhall not be delivered out of Prison without the King's special Command, and then he ought to fue 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 Caflfs Brezium of C. B. to remove a Record of a Fine leved 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 cancelled in B. R. and upon Precedents viewed, the Certiorari was granted. D. 274. b. pl. 44. Pafch. 10 Eliz. Bourne v. Ruffell.

8. But where a Certiorari illed to the Chief Justice of C. B. to remove a Record, a Verdict was given by Nii Prius, and an Attaint was brought againft them in B. R. this Certiorari was not allowed, no Precedent being to be found of such Writ; for the Entry of the Clerk of the Treaury in C. B. does not lay Quod Recordum præd' removetur in B. R. virtute Brevis de Certiorando, but only virtute Brevis de Errore corrigeendo sub Magno Sigillo Angliae; whereupon the Party parpaths a new Certiorari out of Chancery pro Tenore Recordi only, which was certified to the Chancery accordingly, and fent thence into B. R. by Mittimus. D. 274. b. 275. a. pl. 44. 45. Pafch. 10 Eliz. Bourne v. Ruffell.

9. A. and B. were infidled for a Murder. B. fled, and A. brings a Certiorari to remove the Indictment into B. R. It was infidled that the whole Record fhould be removed, and that there could be no Transcript of it, becaufe the Writ was to certify Recordum & Proceffum cum omnibus ea tantenitus; but the Chief Justice doubted, and faid that the Opinion of Markham in one of his Books is againft it, and faid it might be mifchievous; for fo other the might be attaint here by Oulawry, 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 Character certify only Tenorem Recordi; fo that the Record itself remains with them. Agreed. Sid. 115. pl. 5. Mich. 15 Car. 2. B. R.——Holc Ch J. faid 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 fo it is in Judgment of Law. 2 Bilk. 56. pl. 2. Hill. 8 W. 5. 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 fend up the Transcript; Per Foretus J. Quod non fuit negorum. Barnard. Rep. in B. R. Mich. 15 Geo. 1. Anon
11. On a Certiorari to return an Order, it was returned thus, viz. *Cajus quidem Tenor sequitur in hæc Verba;* and because it was not *Qua* quidem Orden sequitur in hæc Verba, it was quafi'd. 1 Salk. 147, pl. 10. Pach. 1 Ann. B. R. The Queen v. the Parth of St. Mary’s in the Devises.

(D) Certiorari. Lies in what Cases.

1. *If Affíse pas in Pais, and be adjourn’d into Bank, and Judgment given there,* the Defendant cannot have Certification of Affíse, nor Attain there; but shall remove the Record before the Justices of Affíse again, and there he may have Certification or Attain. *Quod nota et* it feems that the Removing shall be by Certiorari. *But Quære inde of the Manner thereof.* Br. Caule 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 Surmefe, but upon Matter of Record; and shall be removed into the Chancery by Certiorari, and sent into B. R. by Mittimus. Br. Corone, pl. 192. cites 41 Aff. 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 Nulli ciel 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 reverfed; 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.

5. Writ is directed to the Sheriff, and mesise between the *Tæde* and Return the King died; and also it was a peremptory Affision which ought to be taken within the Year, As Appeal of Death, or Formedon against Perno, and the Tæde was within the Year, but the Return after the Year; yet such Writs in these Cases were brought into Bank by Certiorari, and Refummons or Re-attachment awarded, which will save the Year. *Quod nota bene.* Br. Certiorari, pl. 12. cites 10 E. 4. 13.

6. A Man disfain’d by 20 Sheep. The Owner brought *Replevin,* and the Defendant affirmed Plain against him in a Base Court by Cowin to have the Sheep attacked, so that Replevin should not be made; by which the Sheriff returned this Matter, and the Plaintiff pray’d Superfedsas for him and his Goods, because this Court has the ancient Seis; 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 illud 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 Innotecimus, and the Protection was repealed, and Refummons awarded immediately. Br. Certiorari, pl. 14. cites 21 E. 4. 20.

8. Cer-
Certiorari.

3. Certiorari lies to remove Redissitus, and pass Dissitu, 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 Affid. 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 Attornies to have Execution upon it; for the Justices of Bank cannot award Execution, if they have not the Record before them. Ibid.

II. And where Death 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 Tenorum Recordi, and in some Cases Tenores Tenoris.

And to remove Record out of a Franchise into another Court. And to certify Outlaxury. 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 Marshall to have thereof Attaint. And it lies to remove Record of just Force. And it lies to the Caufes Brevia 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 Preseimitens &c. And it lies to certify whether J. N. against whom Exigent is awarded, be Peer of the Realm to have Superfedeas. Quod Nota. And it lies to the Esquire 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 Benefit. And of the Value of such Fees and Advowsons &c. Br. Certiorari, pl. 18. cites F. N. B.

be considered whether it ought to be effeoted or not. 2 Hawk. Pl. C. 288. cap. 27. S. 33.

12. A. was indicted of Murder in Essex, and outlaw'd, and the Outlawery certified in B. R. but as certified it is erroneous, because the Exactus is Ad Comitatam, without paying Meum. The Attorney General shews that the King had seized the Lands, and for affarring the King's Estate, and to prevent the Reversal of the Outlawery, prayed a Certiorari to the Coroners, whether the Exactus was Ad Comitatam (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 Cafe.

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; and adjournment to hear Counsel of Both Sides. Sty. 211. Patich. 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 Fall was the stabbing of a Man, and stabbing in its Nature is but Felo-
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. Syd. 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 Eafe 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. Syd. 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.

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 to the Matter goes unpunished. Sid. 54. pl. 19. Mich. 13 Car. 2. B. R. Anon.

But by 5 W. 18. 22 Car. 2. cap. 12. S. 4. All Defects of Repairs of Caufeways, Pavements, Highways, or Bridges, shall be presented in the County, and no such Presentment or Indictment shall be removed by Certiorari, or otherwise against any out of the County, till such Indictment or Presentment be traversed, and Perso'n for not repairing Highways, Caufeways, 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 presenting such Certiorari shall find 2 Mau'f'frators to be bound in a Recognizance, with Condition as aforesaid.

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 assign'd, that no Time is mentioned when the Caption was taken, nor any Commissi'ners 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 Informandum Conscientiam. Comb. 26. Trin. 2 Jac. 2. B. R. Okey v. Hardiley.

21. 3 & 4 W. & M. cap. 12. S. 23. Enacts, that all Matters concerning Highways, Caufeways, 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.

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.
Certiiorari.

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 Trade &c. the Order may be removed within the Intent of the Statute; and in the Marg. there cites Hill 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 it be removed hither, it must be sent down again by Proceedendo, 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. 168. Pach. 10 W. 3. the King v. Haggard.


25. The Caufers of the College of Physicians having Power by their Charter, confirm'd by Act of Parliament, to fine and imprison for ill Practice in Phyllick, 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 Opinion of the Court 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. 5. E. R. Dr. Groenvelt v. Barwell.

26. 'Tis unusual to send a Certiorari without Special Cause. 7 Mod. 118. Mich. 1 Ann. Anon.

27. N. borrowed 600 l. of a Feare Covert, and promised to send her fine Cloth and Gold Duff as a Pledge. He sent her some coarse Cloth worth little or nothing, but no Gold Duff. There was an Indictment against N. at the Old Baily for a Covert. A Certiorari was granted, because it was not a criminal Matter, but it was the Prosecutors 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 Court of the Old Baily, could not try it so soon. 1 Salk. 151. Pach. 4 Ann. B. R. Nehuif's Cafe.

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 Difcretion; so that it is not always a Writ of Right. 8 Mod. 331. Mich. II Geo. Arthur v. the Commissioners of Sewers in York-shire.

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 Julitiae, because he hath no other Remedy, being bound by the Judgment of the inferior Judicature. 8 Mod. 331. Mich. II Geo. Arthur v. the Commissioners of Sewers in York-shire.

30. It was moved for a Certiorari to remove an Indictment found against the Defendant for a Felony, in feeding 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 Cafe between the King and Powell, where a Cer- tiiorari

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Certiorari.

Indictment 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 Defendant to shew Cause, which was afterwards made absolute. 2 Ld. Raym. Rep. 1452. Mich. 13 Geo. The King v. Pawle.

31. The Defendant was indicted at the Old Bailey, and Motion was made for a Certiorari to remove the Indictment here; for that he was a Person of Discretion. But the Court said they would never do it upon that Account; for that would occasion great Confusion. They laid 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 Humphry Backworth, who was indicted at the Old Bailey 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. Pufey.

(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. 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.

3. Several Judges in their Circuits took several Verdicts, and dying in the Vacation before the Return of the Postes, these Verdicts shall be received by the Hands of the Clerk of the Assizes; 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 Assizes was a sworn Officer. Also the Entry shall in the common Form, viz. Postes ad quem dicit venerate partes &c. Juc- ticiarii ad Alfias capiendas coram quibus &c. hic misertum Recordum suum; and against this Entry of Record no Averment can be received that the Judges were dead before the Delivery of the Postes; for this would be contrary to the Record; By all the Judges of England. Jenk. 216. pl. 59.

D. 153. 2. pl. 54. Trin. 4 & 5 Pe. & M. Anon.—The Clerk of the Assizes may bring in the Indictment properis Ma- ritorum, if he pleases, without a Certiorari; per Brum. 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.
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. Patch. 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 R. 3. 4.

2. So of Certiorari to remove Indictments, which Indictment bore Date on a Motion after the Certiorari. Ibid. and cites Fitzh. Recordare, pl. 6.

3. It was moved for a Certiorari to remove an Indictment of forcible Entry, that was once before removed bithere, and after sent down by a Proceeding, because the Justices below will not grant Restitution. Roll Ch. J. answered, there is a Plea put in, and in such Cafe 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. Syr. 300. Mich. 1651. B. R. Anon.—Vern. 65. Lampereve & al' S. C.

4. A Certiorari to remove an Indictment of Perjury at the Seissions, was delivered to the Justices after the same was returnable. The Court inclined 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 inquadrable and punishable by the Regards 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. Norfolke (Duke) v. Newcastle (Duke.) in order to give the Party, the Right of whose Freedom is concerned therein, an Opportunity to try 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 S. P. held good; for it cannot be delivered after the Jury is sworn. 1 Salk. 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. 397. Mich. 8 W. 3. B. R. Anon.

7. Certiorari
6 Mod. 85. Mich. 2 Ann. Morley v. Stacke. 3 P. & S. [and as I remember was the S. C. and that Naft was the Conflable, and Morley the.Profector, and Stacke the Deer Stealer.] 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 lat. Ibid. cites Mich. 4 Ann. B. R. the Cafe of the Inhabitants of Shellungen.

8. After a Warrant awarded to dtrain, and Diitref made, upon a Conviction for Deer-stealing, a Certiorari was brought to remove the Conviction; and after the Record was removed the Conftable fold the Goods, but would not part with the Money, nor return his Warrant. The Court held that the Conftable might proceed in the Execution after the Certiorari, because it was begun before; for a Certiorari is no more a Superfedeas than a Writ of Error on a Judgment in C. B. to lay the Execution on a Fi. Fa. already begun; that B. R. have no Power over this Warrant, because it was granted before the Certiorari suffed, therefore they re- fused to make a Rule on the Conftable to return it, but faid, that the Juflices might fine him if he did not return it, or pay the Money to the Professor. 1 Salk. 147. pl. 12. Mich. 1 Ann. B. R. The Queen v. Naft.

9. A Rule was made that no Certiorari shall be granted to remove any Orders of Juflices, from which the Law has given an Appeal to the Siftions, before the Matter is determined on the Appeal; and if an Order should be removed before Appeal, it should be fent down again; but if the Time of Appeal be expired, that Cafe is not within that Rule; Per Holt Ch. J. Ann. 1 Salk. 147. pl. 12. Pach. 1 Ann. B. R. for that after it is filed, it is too lat. Ibid. cites Mich. 4 Ann. B. R. the Cafe of the Inhabitants of Shellungen.

10. It is a Rule of Court that no Order of Juflices, 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 fent back by Proceedendo; 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. Pach. 1 B. R. Anon.

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 Proceedendo, it was infifted that a Certiorari was not proper after Conviction, and before Judgment; because the Juflices 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 proper in this Court to set the Fine, a Proceedendo was granted. 1 Salk. 149. pl. 15. Mich. 2 Ann. B. R. The Queen v. Porter.

2 Hawk. Pl. 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 was doubtful what Judgment is proper; for unless there be some fuch 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
(G) One or more Writs.

1. The Cognisance 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 Cognissee 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. Pauch. 2 Eliz. Anon.

2. A Certiorari was awarded and returned, that there was not any Warrant in Error of Attorney entered for the Plaintiff in that Term wherein the Action was commenced, and Judgment given. It was summons to the Court by the Defendant in Error as Amicus Curiae, that there was Warrant of Attorney found, and for another Term, and prayed a new Certiorari; and all the Court held that Return was, that none was filed of that Term; but after wards the Defendant in Error filed it as of that Term, and took 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 Certiorari to have prevented its being filed; but however made a Rule to show Cause. Barnard. Rep. in B. R. 12. Pauch. 13. Geo. 1. Shipman v. Letherall.—Ibid. 14. S. C. says, the Certiorari taken out by the Defendant, was before In Nullo errata pleaded; and the Court said that as there are 2 insufficient Returns, they would certainly take that which was made in Assurance of the Judgment. And the Court agreed that the Parties may take out as many Certioraries as they please before In Nullo errata pleaded, but after that they cannot take any out but upon Motion; and that the Court will grant those ad interimnum Consentiam Curiae.

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 Null error 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. Saltingtall v. Garraway.

5. Upon Error brought of a Judgment upon non sum Informatum 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 Propter perfell face. 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 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'.
Certiorari.

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 sihias Brevis the Matter was certified. Vent. 75. Paich. 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 lo a Proceeding went. The Court was moved for a new Certiorari, and that in the Thafaurus 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 quashed 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. 332. 333. 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. NO Writ of Certiorari shall be granted to remove any Prisoner out of any Goal, 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 5l. to be paid by any one that writeth such Writ not being so signed.

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 one Quarter-Sessions in open Court; and the Parties indicted shall, before Allowance of such Certiorari, become bound unto the Proctors in 10l. with such Sureties as the Justices shall think fit, with Condition to pay to the Proctors, 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.

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, and that the Parties did not put in Sureties, as Twifden 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. 58. Hill. 15 Car. 2. B. R. The King v. Macklow.

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. S. says they ought not to be certified without Bail first taken, no the Party shall not have Bail according to the Statute, yet the Justices cannot make a Return of the Certiorari. Sid. 70. pl. 1. Hill. 14 Car. 2. B. R. a Nota there. —2 Hawk. Pl. C. 292. cap. 27. S. 51. S. P. says the Justices will b in Contempt if they make no Return to it; for all Writs must be obey'd, unless good Cause be shown to the contrary, and the proper Way of showing it is to return it.
Certiiorari.

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 Judge. Mar. 27. pl. 63. Trin. 15 Car. Anon.


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 Mals. 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 Cafe.

Robbery. Twidfen 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 prior Special Caufe, As where there is full Reason to apprehend that the Court below may be unreasonably prejudiced against the Defendant; or where there is so much Difficulty in the Cafe, that the Judge below defers 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 Twidfen & Costr; and Sir Humphrey Mildmay was fined for not returning such. The Record 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 51. yet it must be returned that it is under 5l. Keb. 231. pl. 51. Hill. 13 Car. 2. B. R. The King v. Mucklow.

Ibid. 213. cites Trin. 15 Car. 1. Hancock's Cafe, S. P. resolved.

7. Twidfen 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. Pach. 15 Car. 2. B. R. Stamford (Earl of) v. Gordan.

8. & 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 His &c. and try the Cause the next Allfies. Recognizance to be returned with the Certiorari into the Court of B. R.

9. 3. 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 procureing 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 professing any Certiorari to remove an Indictment from the Quarter-Sessions, may find 2 Manuceptors 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 Writ, that the Party shall appear from Day to Day in B. R. and not depart till discharged by the Court.

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 Over was entered in hoc 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 Superfedeas; yet whether it be or no, it is still good as a Recognizance at Common Law.


The 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 Recognizances 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 the Statutes had not been made; but it is said that the Certiorari, if procured by the Defendant, will not in such Case be a Superfedeas to the Proceedings below, as it would have been at the Common Law; for the Statutes seem to express that the Sessions may proceed, notwithstanding any Certiorari procured by a Defendant, whereas such Recognizance is not given as is expressly prescribed.

2 Hawk. Pl. C. 292. cap. 27. S. 53.

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.


An Act that without giving Bail to try it according to the Statute, it is no Superfedeas.

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 Eighdon-Day; but a Fiat signed this Term cannot warrant a Certiorari to the last Day of last Term.


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.


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 Suresties 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 willful 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-
Certiorari.

Conditions aforesaid, it shall be lawful for the Justices to proceed and make further Orders, as if no Certiorari had been granted.

17. S. 4. 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 Contempts, 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 the 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 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 show Cause, if be or they shall think fit, against the granting such Certiorari.

1. Recipe quod reddat is brought in London &c. The Tenant vouch'd 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 Convenance of the Plea, and fails the Party of Right in their Franchise by Forfeiture, or otherw, the Re-summons lies to reduce it into Bank; for there it never shall be remanded into the Franchise; Per Hill and Hank. For Convenance is granted upon Condition, Quod coloris fiat Jutititia, aequum reedit. Ibid.

3. The Records of Affixe may be removed into Chancery upon Change of the Justices, and to be sent to the new Justices by Mitimus. 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 Surmisus, and then to be sent into Bank by Mitimus, which Matter was agreed in the Chancery. Br. Certiorari, pl. 20. cites 36 H. 8. & F. N. B. 242.

6. Scire Facias; Note, that where the Plaintiff in Affexe 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 Mitimus into C. B. and there had Scire Facias to have Execution upon it; Quod Nota; and so fee, 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. illued
Certiorari.

ifiled 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 \textit{scire facias}, when it ought to be \textit{scire alius}, but the Exception was disallowed, and the Plaintiff had Judgment. Sty. 9. Pach. 23 Car. Rook v. Knight.

3. An \textit{Indictment of Battery} was found at the Sessions Billa vera, and the Party entered into a \textit{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 \textit{Recognizance also may be removed by the Certiorari, and thought there could be no Hurt if the Indictment be removed}, and the Trial had at the Alizes, 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 Alizes at his own Charge. Sty. 328. Pach. 1652. B. R. Anon.

9. After a \textit{Writ of Error} upon a Judgment in C. B. and the \textit{Judgment affirmed}, the Plaintiff in the original \textit{Alias 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, and therefore may be removed by Certiorari: tho’ the Record itself cannot, and it was granted accordingly. 4 Mod. 104. Pach. 4 W. & M. in B. R. Barstaffe v. Drew.

10. A Certiorari after \textit{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 \textit{Party takes it out before Conviction, but will not use it till after, he ought to lose the Benefit of it}. 1 Salk. not use it till 150. pl. 17. Hill. 2 Ann. B. R. the Queen v. Dixon. after the Ju

11. On a Certiorari to remove an \textit{Indictment after Conviction} by Verdict, a \textit{Day in Court ought to be given to the Party}. 6 Mod. 61. Mich. 2 Ann. B. R. the Queen v. Dixon.

12. A Certiorari was quashed, because it was directed \textit{Judiciarius ad Pacem affiliatis}, omitting the Words \textit{ad conservandum}. 11 Mod. 172. pl. 10. Pach. 7 Ann. B. R. The Queen v. Jay.

(K) Returned
(K) Returned or certified. By whom and How. And falsé 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. Nich. I Mar. The Duke of Norfolk's Cafe.

4. Debt on a Recovery in Briflow; it was traversed and certified under the Seal of Briflow; it was moved that it should have been certified under the Great Seal, but the Court held that it was well enough; for s. p. and says such is the Course upon Certiorari directed to inferior Courts. Cro. E. 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. Paftch. 24 Car. B. R. Thin v. Thin. But if it be directed to a Recorder who is a Custos Brevarium, or to a Recorder and his Deputy, then it is good. Ibid.


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 these 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, Tranfgrifiones &c. and thusly assign. And the Court agreed fo 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 Cafe. 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.
Certiorari.

turned *Quod ante adventum ipsius brevis*, the Matter was certified. Vent. 73. Patch. 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 Altyr. Cumb. 25. Trin. 2 Jac. B. R. Anon.

8 Mod. 149.

10. Where a Certiorari issues to Justices of Peace to return an Order, Hill. 7 W. 3 they can only return it in use Verba, and whatever they return more, the Court can take no Notice of. 2 Salk. 493. pl. 59. The Inhabitants of Welton Rivers v. St. Peters in Marlborough.

Rivers, S. C. — 2 Hawk. Pl. C. 295. cap. 27. S. 71. says that whatsoever Matters are put into the Return of a Certiorari by Way of Explanation or otherwise, beside 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 Cafe.

(L) Variance and the Effect thereof, and false Returns.

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 Aff. 3.

2. In Althie 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, feliciter, 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 Aff. 52.

3. A Certiorari was to remove a Record cujusdam Inquisitionis capit &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 removed. 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 Forceble Detainer; so that there being no such Indictment before them as the Certiorari mentions, it was inferred that it was no Contemp 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. St. 89. Hill. 23 Car. Chambers v. Floyd.

5. Upon a Certiorari brought to remove an Indictment for Barrettry 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 Records, 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. Alecock.

6. A
6. A Certiorari was directed to a Justice of Chester, or his Deputy, Sid. 64, pl. and it was returned and subscribed by such a one Chief Justice. It was 15 S. C. and objected that the Return was ill, it not being by the same Person and the Court thought it after divers Motions the Court held it good. Lev. 50. Mich. 15 Car. 2. a good Ret-
turn, because the

Direction of the Writ implies the Superior, inasmuch as it mentions the Deputy; and the Statute of  * H. S. cap. 2. 2.  &c. (High) and (Chief) are all one, and the Court will not intend that is another Justice beside him who made the Return; and Judgment Nifi &c.—
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 Case 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. 1614.

* It seems that this, according to Keb. 187. should be 2 & 5 6. cap. 28.

7. A Certiorari was to remove an Order against T. S. concerning For-reign 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. 146. 8 W. 3. B. R. Anon.

The Difference of the Year, and held accordingly; for a special Certiorari cannot remove general Or-
ders, tho' a general Certiorari will remove special ones.

8. When a Prenament in a Leet is removed by Certiorari, the Style of the Court must be set out exactly; but there needs no such Nicety in Pleading; per Holt Ch. J 11 Mod. 223. Trin. 9 Ann. B. R. in Case of the Queen v. Jennings.

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(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 F 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 there-
of; 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. Syl. 155. Hill. 1650. Allen's Café.

3. Indictment upon the Statute 5 Eliz. for exercising a Trade in a Comb. 262. Borough, not being bound Apprentice to it; and upon a Certiorari to re-move it into B. R. the Mayor made this Return, viz. Hamburgh certiorari was taken that fico quod ad Sessions pace &c. per Juratores praesentationem exstit quod Billa; it is only sequens of vera. Viz. Quod prædicto. Berry did exercise &c. omitting the an Historical Juratores pro Domino Rege præsentatur quod &c. The first Excep-
tion was, that Billa sequens of vera is naught; fed non allocatur, as to seem'd to

4 Y
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 Write 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 bonum certifico, is not good. Carth. 223. Pafch. 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 hoc Verba, and not quidem Ordo sequitur in hoc Verba, and it was quashed for that Reason. 1 Salk. 147. pl. 10. Pafch. 1 Ann. B. R. The Queen v. St. Mary's Parish in the Divelis.

6. Certiorari to remove a Conviction for selling Cyber 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 allowed 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 Cusody 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 Proofs of Distress awarded against the Jury, and therefore he was remanded to Newgate, because the Appeal shall not be disconcluded. 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 Superfedeas 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.

3. After Certiorari returned and filed, no Procedendo can go; per Cur. 6 Mod. 43. Mich. 2 Ann. 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. 

(O) The

1. A F T E R an Indictment upon the Stat. 8 H. 6. before the Justices of Peace in Elyx, they awarded Restitution; but before it was made, there was a Certiorari delivered to the Caftos 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 held to be open, because a Certiorari was taken between an Ali! Judicial and Ministerial; the Act of the Justices of Peace is injudicial, and their Negligence in not sending a Superfedeas shall not prejudice; but where a Minifter 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. Utterius terminari cornovi Certiorari, notulmus, and to every Act done by their Authority after its Delivery is void. — Yth. 52. S. C. and Re-restitution was granted upon great Deliberation, and the Caftos Rotulorum was much check'd by the Court for a Misdemeanor. — Hawk. Pl. C. 144. cap. 64. S. 61. says it is certain that a Certiorari from B. R. is a Superfedeas 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 Telle; 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, also the Record is not removable. The 21 Jac. 1. cap. 8. does not extend to Indictments of Felony, but only to letter Acts against the Peace, as Riots, Trespas, Verible Entry, and the like, they may proceed in these Cases, notwithstanding such Certiorari, if he that files such Certiorari does not enter into a Recognizance with Sureties to prosecute it with Effect, and to pay Costs to him against whom the Trespas was committed, it the Defendant does not prevail. Jenk. 181. pl. 64.

Words for the Stay thereof, viz. Eo quod Rex non vult Feloniam illam terminari alibi quam coram fe superflito &c. D 248. a. pl. 63. Mich. 7 & 8 Eliz. — 2 Hawk. Pl. C. 253. cap. 27. S. 64. S. F. 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.

4. If an Indictment is removed by Certiorari, and no Bail is put in, you may proceed below without any Proceedendo; Per Roll Ch. J. Scy. 321. Hill. 1651. B. R. Anon.

5. A Certiorari is no Superfedeas if it be not delivered before the Return is expired. 2 Hawk. Pl. C. 294. cap. 27. S. 64.

Car. 2. B. R. the King v. Rhodes.


S. P. says it is agreed by all the Books.
Certiorari

8. Certiorari to remove Indictments is no Stat. per
M. cap. 11. unless Recognizance be entered into in 20 I. 2 Salk. 564.
pl. 3. Parch. 1 Ann. B. R. the Queen v. Ever.

1 Salk. 147; pl. 12. Mich. 1 Ann. B. R. the Queen v. Naff, S. C. held
per Cur. accordingly.

1 Salk. 147. the Queen v. Naff, S. C.
9. After a Warrant issued out upon the Act against Deer-dealing to be
by Distress, a Certiorari was brought, and the Record thereby re-
moved up in B. R. but that could not hinder the Execution. 6 Mod. 83.

1. Salk. 147. the Queen v. Naff, 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 Court to account upon the Warrant; but if the War-
rant was not made returnable, the Officer is not bound to return it. 6

2. Hawk Pl. C. 295. cap. 27. S. 74. says, that the
Perfon to whom a Cer-
tiorari is di-
rected may
make what
Return to it
he pleas, 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
Cafe 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 Cafe 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 Process 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. Cow-
per’s Cafe.

13. If the Party, that removes Indictment, does not enter into Recogni-
zezrance to try it next Assizes, or Term, or the Sitting within the Term,
the Certiorari is no Supercedes; and Failure of Trying is a Forfeiture of
Recognizeznce, after which they will not hear a Motion in Arrest of
Judgment. 6 Mod. 43. Mich. 2 Ann. B. R.

14. The Court made it a Rule, that the Defendant shall never carry to
Trial an Indictment removed in B. R. by the Prosecuter, without Leave
of the Court. 6 Mod. 245. Mich. 3 Ann. B. R. in Cafe of the Queen
v. Sir Jacob Banks.

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 De-
tainer, the Justices might have recorded the Force, but all Proceedings
upon such Inquisition are stopp’d. 1 Salk. 151. pl. 22. Patch. 5 Ann.
B. R. Kneller’s Cafe.

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 com-
plete their Judgment, and it will be no Contemt; but the Justices hav-
ing committed the Defendants to Goal to lie there till they should pay a Fine
Certiiorari.

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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) Cofts. In what Cases.

1. 5 & 6 W. & M. IF the Defendant procuring such Certiorari be con-

victed, B. R. shall give reasonable Cofts to the

Prosecutor, if he be the Party injured, or if he be a Justice of Peace, Mayor,

Confident or other Civil Officer, who prosecuted upon any Fact committed that

concerned him, or them, as Officers to prosecute or present.

2. And Cofts shall be taxed according to the Course of the said Court, and

the Prosecutor, for Recovery of the said Cofts, 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 Cofts are paid.

3. No more Cofts shall be taxed upon a Certiorari, than the Prosecutor has

been at the Certiorari, and upon it; and the Matter is not to

consider the Cofts below. 1 Salk. 55. pl. 5. Pauch. 1 Ann. B. R. The

Queen v. Sumner.

4. In Scire Facias upon a Recognizance removed by Certiorari, and upon

Oyer entered in how Verba, the Condition of the Recognizance recited in the Scire Facias was, that the Defendant should give Notice of

Trial, Prosecuti Et ejus Clerico, whereas the Recognizance itself was

Prosecutor Aut ejus Clerico; and per Curiam, this is a Variance and quite different; so the Defendant had Judgment. 3 Salk. 369. pl. 7.

Pauch. 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 indicted to his

Cofts by the Statute; Arg. 10 Mod. 193. Mich. 12 Ann. B. R.

(Q) Of the Proceedings of the Superior or Inferior

Court after Certiorari isslued.

1. Presentments in Courts may be removed into Chancery, and be sent to Prefen-

tence into B. R. and the Proofs shall be made to and by the Na-

tance, or to repair the Bridge &c. Quod major, and this it seems by Cer-

tiorari and Mitiimus. Br. Certiorari, pl. 7. cites 38 Alit. 15.

2. Where Orders of Commissioners of Sewers are removed into B. R. by Set per Cur.

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 Pro-

cedendo, which they cannot do after they are filed. 1 Salk. 145. pl. 6. them in any

Caufe where

Hill. 11 W. 3. B. R. Anon.

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 fir-

her the Return of a Certiorari for the Removal of the Orders of such Commissioners to be filed, to hear Affidavits concerning the Facts wherein they are grounded; and if the Matter shall still appear doubt-

ful, to direct the Trial of said Affidavits, and either to file the Return, or supersede the Certiorari, and grant a Proceedendo as shall appear to be most reasonable for the Trial of such Affidavits, and to give

Cofts against the Prosecutor of the Certiorari, if it appear to have been groundless. 2 Hawk. Pl. C.

288. cap. 27. S. 94.

4 Z. 3. If
Certiorari.

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 filed are void; Per Cur. 12 Mod. 384. Patch. 12 W. 3. Anon.

4. 'Twas moved for an Attachment against an Officer for executing by Distraint 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 Distraint 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. Patch. 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 quail it. 6 Mod. 220. Mich. 3 Ann. B. R. Anon.

7. The Defendant was indicted at the Sessions for a Nuisance, 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 Prosecuto 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 Earth. 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.

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 Proceeding, 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 Proceeding 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. Cafes, 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 Involvement, 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 allowed 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 Leaf 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. Verm. 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 mis-cited.]

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 passed, and a Summons served to hear Judgment, and before the Hearing. 2 Vern. 491. pl. 443. Hill. 1704. Stephen's v. Houlditch &c.

For more of Certiorari in General, see Mist, Habeas Corpus, Record, Sewers, Supercedas, and other Proper Titles.

Cessavit.

(A) By Statute. And of one where it shall be of another.

1. 6 E. I. cap. 4. If a Man lets his Land to Farm, or to find Easows in, or in Meat or in Cloth, amounting to the 4th Part of the Value of the Land, and be, which holdeth the Land so charged, kith or let it lie shrift, so that the Party can find no Disrefers there by the Space of 2 or 3 Years to compel the Farmer to render, or to do as it contained in the Writing or Lease. 2dly, It is established that, the 2 Years being past, the Leffer shall have an Action to demand the Land in Demean by a Writ, which he shall have out of the Chancery. 3dly, And if be against whom the Land is demanded, come before Judgment and pay the Arrears and the Damages, and find Surety (such as the Court shall think sufficient) to pay from henceforth, as it contained in the Writing of his Lease, he shall keep the Land. 4thly,
Ceflavit.

4thly, And if he tarry until it be recovered by Judgment, he shall be bar'd for ever.

2. Wescm. 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 4th Part of the Land, or any, the Lessor or his Heir, after the Payment both ceased by 2 Years, shall have an Action to demand the Land so leased in Deemsn. 3dly, 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 Deemsn by such a Writ. 3dly, Precipe A. quod jussu &c. reddat B. tale Tenementum quod A. de eo tenet per tale Servitium, & quod ad predittum B. reverti debet eo quod predittus A. in faciendo predittum servitium per biennium Ceflavit, ut dicitur. 2. And not only in this Cufe, but also in the Case foregoing mention is made in the said Statute of Gloucester, Writs of Entry shall be made for the Heir of the Defendant against the Heir of the Tenant, and again against them to whom such Land shall be alien'd.

3. If there be Lord, Mesne, and Tenant, and the Tenant caese for 2 Years, the Lord shall have a Ceflavit against the Tenant Paravain, supposing that the Mesne in doing his Services per Biennium jam Ceflavit; for the Lessor of the Tenant is a Lessor as to all the Mesnes; Per Fitzherbert and diverser Serjeants, and several, c contra; and it seems that it cannot be Law; for then the Act of the Tenant shall prejudice the Mesne of his Mefnalty. Br. Ceflavit, pl. 2. cites 27 H. 8. 28.


5. The Iven Law seems to be of a Bishop, and Parson of a Church. Ibid.

6. But if Baron and Feme, seised in Iure Usoris, lose by Ceflavit, it shall bind the Feme. Ibid.

( B ) Lies of what.

Kelw. 105. I F Lands held lie in several Counties, the Lord may distrain; but Adfide nor Ceflavit does not lie; per Hill J. Br. Ceflavit, pl. 21. cites 18 Aff. 1.

Br. Quare Impedit, pl. 30. cites 43. that Ceflavit lies of an * Adwowfon; for this lies in Tenure, and so it is adjudged about 22 E. 3. Per Vavifor & Davers. But it does not lie in Tenure; per Townsend & Brian. Br. Ceflavit, pl. 22. cites 5 H. 37. 37.

* Br. Ceflavit, pl. 6. cites 43. 5. 15. S.P.

There must be a Tenure between the Fyffor and the Fyffor in Fee-simpe; for a Ceflavit lies not upon a Reservation without such a

3. Ceflavit, that the Tenant held of the Plaintiff by Homage, Fealty, Suit of Court and Rent, and that in doing the Services aforeshaid per Biennium jam ceflavit, and so the Write and the Count is in Doing Services, and yet Ceflavit 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 saith that he held by Fealty and the Rent only, abique hoc that he held by Homage, Fealty, Suit of Court, and the Rent Made & Forem; and as to this Rent, the Land was always open to his Distress. And per Prifor, if the Lord has no Court the Tenant may allege
Cefferavit.

lege it; and per Littleton, he cannot traverse the Tenure by Homage in this A ction; for Cefferavit does not lie of Homage. But per Prior clearly, he may traverse the Homage as above; for if he takes it only by Protostation, and the Plea is found against him, the Protostation shall not serve. Br. Cefferavit, pl. 2. cites 33 H. 6. 44. 44.

1. Cefferavit does not lie of Homage and Fealty; for those are not annual, and yet the Court is that he holds by Homage, Fealty, 10s. Rent, and Suit of Court, and that in doing the Services aforesaid per Bienium jam cefferavit; for there is no other Form; but the Ceffer shall be intended of the Rent and Suit which are annual, and not of Homage and Fealty. Br. Cefferavit, pl. 29. cites 6 H. 7. 7.


(C) For whom it lies.

1. Tenant in Deed, or for Life of a Seigniory, shall have Cefferavit if the Tenant ceases &c. Br. Cefferavit, 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 Cefferavit; for it was given to him and to another who is dead; and hence it appears, that the Heir shall not have Cefferavit of Ceffer in the Time of his Ancestors. Br. Cefferavit, pl. 29. cites 33 E. 3.

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 Cefferavit for the Ceffer in his Ancestor's Time; for the Arrears, which incurred 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 Jointtenants are Lords, and the Tenant Br. Cefferavit, and one dies, the other shall have Cefferavit; for there the whole is in the Survivor by the first Feoffor, and not by him who dy'd. Br. Cefferavit, pl. 29. cites 33 E. 3.

4. Cefferavit was brought against Tenant for Life, the Remainder over in A Cefferavit Tail, the Reversion to the Demandant, and therefore by the strict Opinion of the Action does not lie; for it is said there, that none shall have Cefferavit in Tail, if he has not Fee in the Seigniory, and that he may recover the Fee-jimple or Tenant of the Tenancy; and notwithstanding that this Gift was made of Lord, and the chief Lord, yet Cefferavit does not lie where the Fee remains in the Demandant. Br. Cefferavit, pl. 9. cites 45 E. 3. 27.

In Fee so as he is Tenant to the Lord as Tenant by the Curtesy is. 2 Inf. 295. and S. C. cited in Marg. But where the Gift is made for Term of Life, the Remainder over in Fee, the Cefferavit lies; for there the Lord shall be compelled to change Avowry; contra where the Donor has the Reversion. Br. Cefferavit, pl. 9. cites 45 E. 3. 27.

5. Note, it is a good Plea in Cefferavit, that the Father of the Demandant gave the Land to him in Tail; Judgment in Actio; for Cefferavit does not lie for the Donor or his Heir against the Donee, nor his Issue. Br. Cefferavit, pl. 3. cites 33 H. 6. 53.

5 A

6. But
6. But the Lord may have Ceffavit in the Degrees against the Tenant in Tail, or his Issue, of a Coffer before the Gift, as it seems there. Ibid. 8 P. as to

7. He who has a Seigniory for Term of Years, shall not have Ceffavit; but he who has a Seigniory for Term of Life may have Ceffavit; the Di-

8. 2. Or within the Seigniory, inasmuch as it is Practice quod reddat, which the Ternor

9. 3. He, or in Reversion cannot have. Br. Ceffavit, pl. 40. cites 9 H. 7. 16.

10. So of Tenant by the Curtesy. Br. Ceffavit, pl. 29. cites Fitzh. Ceffa-

11. 5. But where a Remainder over is in Fee, the chief Lord of whom the Donor held shall have Ceffavit if the Ter
cesses Ibid. In Ceffavit brought by the Donor against the Donee in Tail the Writ was abated. Thel. Dig 173.

12. 6. If the Tenant cesse by one Year, and the Lord grants over his Seigni-

13. 7. But says, the Writ of Ceffavit lies well for the Lord paramount against the Tenant in Tail, the Remainder over, and says see the same Books.

14. 8. 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 both did not fail in the Time of any of them, and both are requisite to the Confummation of the Thing. Doderidge denied the Case of Ceffavit in Bingham’s Cafe. 2 Rep. Palm 417. Paach. 1 Car. B. R.

(D) Against whom it lies:


4. If the Tenant infeoffs one who cesse, or is disposed by one who cesse, in those Cases Cessavit lies well against the Feoffor or Disfeffor, without other Privity, or without other Seilin than the Seilin which was had by the Hands of the Feoffor or Disfeffor. Br. Cessavit, pl. 36. cites 19 E. 3. and Fitzh. Brief 249.


6. Cessavit against 3 who made Default, and at the Grand Cape tendered their Law to be waged of Non-sinuous, and at the Day made De-

7. And the third came and said that he was Tenant of the Whole, and tendered the Arreaves; & non allocatur; for they waged their Law in Common
(E) Brought How. And Abatement of Writ and Count.

1. **Ceffavit against A and B by several Precipices**, and after the Writ was that pridem A and B, tenant de eo per certa Servitia & que ad ipsum revertit debet a quo pridem A & B &c. cessionem &c. and held good, notwithstanding that they joined in Tenure and in the Celler. Thel. Dig. 107. Lib. 10. cap. 16. S. 2. cites Mich. 20 E. 2. Brief 826. Ceffavit 48.


3. A Man counted that the Manor of D. was held of him, and that Thel Dig. 7. N. had enter'd into Part, and that the Tenant had ceased, where he 51. Lib. 5, has alleged the whole Manor to be held, and that the Tenant having cited S. C. 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 Differin. Br. Ceffavit, pl. 27. cites 8 E. 3. and Vet. Nat. Brev. Tit. Ceffavit.

4. In Ceffavit a Man shall not put Title in the Writ, as which he claimscite Jus &c. Thel. Dig. 106. Lib. 10. cap. 14. S. 15. cites Hill. 16. E. 3. Brief 692. inasmuch as it is given by the Statute.


6. In Ceffavit the Writ was in which he had not Entry unless by B. who held it of the Ancestor of the Demendant &c. and supposed the Celler in the now Tenant of the Land, without supposing the new Tenant to be Tenant to the Demendant, and yet adjudged a good Writ. Thel. Dig. 105. Lib. 10. cap. 13. S. 3. cites Hill. 14 E. 3. Br' 269. and that to it is adjudged Hill. 48 E. 3. 4. and that the Celler is well suppos'd in the present Tenant of the Land; and cites Pach. 39 E. 3. 17.


8. If a Man brings Ceffavit against N. who alien to S. pending the Writ, and the Demendant takes the Rent and Homage of S. and after recovers against N. there S. shall avoid the Recovery; for by the Acceptance of

9. And if he receives Rent or Homage pannas his Writ, it shall abate. Thel. Dig. 158 Lib. 12. cap. 23. S. 2. cites 21 E. 3. 23. 21 Atl. 6.

10. Celfavit against B. supposing that C. held the Tenements of the Demandant, and that B. by two Years had ceased; Grane faid, you should have the Writ in the Per, and Wilby faid, he shall have it, where the Celfer was before the Entry, and not otherwise. And where a Man differves my Tenant I shall have Celfavit of the Celfer after the Diffeifn. And it feems by the Cafe, that where the Tenant ceas'd and makes Feoffment, the Celfavit shall be in the Per; Contra where the Feoffee ceases, there shall be no Degrees; So againfi Diffeifor; but where the Celfavit is of the Celfer of the Diffeifn before the Diffeifn, the Writ shall be in the Poft; Per Stoof. And that if the very Tenant leaves for Life or in Tail, [and the Leffe] ceases by two Years, he shall have no Writ but as above, without making Mention of any Degrees. And to the first Writ awarded good, and therefore it feems that it was of Celfer after the Alienation. Br. Celfavit, pl. 17. cites 21 E. 3. 44.

11. Celfavit against A. and counted that B. held of him, and ceased, and the Writ good, "without alleging any Entry; Quere of this; for the Celfavit shall lie against the Tenant of the Frankenement; and therefore it feems that he shall allege no Celfer but the Celfer of him who is Tenant of the Frankenement, and holds of him. Br. Celfavit, pl. 28. cites 29 E. 3. and Fitzh. Celfavit 43.


13. Celfavit in quan nou habet ingreßum unless by J. N. who demijs'd it to him, and who held it of him by certain Services, and which to the aforefaid B. ought to revert per Formam &c. becaufe the Tenant had ceased, and alleged Seifin in the Count by the Hands of J. N. the Feoffor, and no Seilin by the Hands of the Tenant, and yet the Writ good. Br. Celfavit, pl. 19. cites 39 E. 3. 14.

14. Celfavit, supposing that the Acestor of the Demandant had given the Land to the Predecessor of the Tenant to find Mfs 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 allocutur, but the Writ awarded good. Br. Celfavit, pl. 8. cites 45 E. 3. 15.

15. Celfavit was brought against W. of a Houfe, supposing he had not Entry unless by H. who held the Tenements of him by Homage, Fealty, and Suit of Court, and 10s. and that the Tenant had ceased, and the Writ was awarded good, notwithstanding that he alleged Seifin in the one and Celler in the other; QuodNota; 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; QuodNota; for it may be Parcel of the House. Br. Celfavit, pl. 10. cites 48 E. 3. 4.

supposed before the Celfer. 29 E. 3. 4. —And where a Man by Deed gives Mans or Advowfon, or Houfe and Shop, by express Words, where the Advowfon is appendant, or the Shop is Parcel of the Houfe.
16. Agreed that a Man may plead to the Count as to Parcel, and in Bar for the rent, and there the Count shall not abate but for the Parcel; Quod Nam. Br. Chiefavit, pl. 10. cites 48 E. 3. 4.

17. In Chiefavit the Writ shall abate for Parcel for Default in the Count as to this Parcel, and stand for the rent. Thel. Dig. 236. lib. 16. cap. 10. S. 25. cites 48 E. 3. 5.

18. The Lord shall not allege Esplces in Chiefavit or Efcheat, for those are Rentone Dominii, and by Scelin therein, and not by Dejfin in the Land. Br. Chiefavit, pl. 31. cites 21 H. 6. 22.

19. Chiefavit does not lie of Homage and Fealty, for they are not annual, and yet the Count is, that he holds by Homage, Fealty, 103. Rent, and Suit of Court, and that in doing the Services aforesaid Per Quintam jam chiefavit; for there is no other Form; but the Chief shall be intended the Rent and Suit which are annual, and not of Homage and Fealty. Br. Chiefavit, pl. 23. cites 6 H. 7. 7.

20. In Chiefavit, if the Tenant pays that be 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. Chiefavit, pl. 42. cites 10 H. 7. 24. In Chiefavit, supposing the Tenements to be held by one entire Tenancy, if the Tenant pays, that he holds Parcel by certain Services, and other Parcel by others, and shews the Deeds of him whole Esbate the Demanda has in the Seigniory, the Demanda may maintain his Writ, notwithstanding those Deeds. Thel. Dig. 277. lib. 16. cap. 7. S. 26. cites Mich. 14 E. 5. Chiefavit 28.

21. The Stat. W. c. 13 E. 1. cap. 21. extends not to Rent-Service created upon a Fee-Farm, but Chiefavit upon a Fee-Farm must be conceived upon the Statute of Gloucester, for which Purport there are several Writs in the Register. 2 Inst. 401.

(F) Plea.

1. In Chiefavit of a Toft, the Tenant pleaded to the Writ, that this Land which is called Toft is the Site of a Mill, and an * Esplage. Or a Pool Secke &c. & non allocatur; but he was received after to say, that he bad only

2. In Chiefavit the Tenant said, that he had nothing but for Term of Life, the Remainder to another in Tail, the Remainder to the Leffor &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 Chiefavit the Tenant, where it is of his * own Comm, shall not have the View, by which he said, that as to all but one Toft Not held of Chiefavit, pl. him, and to the Toft Open to his Diftrefs, Prift; Tirrit said, you shou'd cite 4 H. say Open to his sufficient Diftress; but per Cur. Open to his Diftress, is taken Open to sufficient Diftress, and so to Illege. Br. Chiefavit, pl. 12. cites 2 H. 4. 5.

4. In Chiefavit the Demanda counted that the Tenant held of him a House and 20 Acres of Land by Homage, Fealty, and 20 s. Rent &c. The Tenant
Tenant said as to one Acre, Parcel of the Land in Demand, be 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; absolute 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. Ceflavit, 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 Proclamation; for whether he holds by more or less, the Ceflavit lies. But in an Advowson the Seisin is traversable, for that it is grounded as well upon the Seisin as the Tenure. Also in the Ceflavit 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 Inft. 296.

5. It was said for Law that in Ceflavit the Seisin is not traversable, but the Tenure or the Coffin; and yet per Danby, it will be hard to have Ceflavit without Seisin within Time of Memory. Br. Ceflavit, pl. 41. cites 5 E. 4. 62.

6. In Ceflavit it is no Plea that the Land is sufficient to his Diitres, but shall say Open and Sufficient to his Diitres; for if it be inclosed, this is Caufe to have Affize. Br. Ceflavit, pl. 24. cites 10 E. 4. 1. 2.

7. And, as to Part, the Defendant said that it is Out of the Fee of the Plaintiff, &c. 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 he held by Fealty and 2 d. which was Open and Sufficient to his Diitres, and to another Acre he pleaded in the same Manner, and to the rest the said that he held of him as above, abique hoc that he held the 7 Acres of the Plaintiff Mode & Forma, prout &c. and to fee that he pleaded immediately upon her Recript. Ibid.

9. Ceflavit 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 7. 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 Aremars without his Companion. Br. Ceflavit, pl. 26. cites 21 E. 4. 25.

10. In Ceflavit 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, but 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 Ceflavit be outlawed in a Personal Action, this Outlawry may be pleaded in Bar of the Action, because the Arrarages are due to the King. 2 Inft. 298.

(G) Judg-
(G) Judgment. And of the Tender of Arrears, and finding Surety for the Arrears.

1. IN a Celfavit after the Inquest joined, the Tenant made Default, and at the Return of the Petit Cape the Tenant appeared, and offered to pay the Arrears 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 Diatres of the Lord in the same Form as the Tenant’s Land is bound.

2. Dean and Chapter brought Celfavit. 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 tendered 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 rent 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 detain in all his other Lands in the same Vill; and that when he shall again cease by 2 Years, be shall be bound to pay to the Dean and Chapter 40s. and that he have Execution by Fieri Facias or E legit, 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 Diatres of a Prior in Celfavit, 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 sufficies, tho’ it be after Verdict. Quod nota. Br. Celfavit, pl. 16. cites 21 E. 3. 23.

3. In Celfavit the Tenant pleaded that he did not hold of him, and when the Inquest came, and before Verdict, the Tenant confessed 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 rent; and the Court awarded that if he be Arrear afterwards by one Year, that he shall have Secur Faciis to recover the Land and Pledges, or Surety to pay 12l. For it may be that the Land is not worth the Rent if the House decays. Quod nota. Br. Celfavit, pl. 5. cites 41 E. 3. 29.

4. Surety in Celfavit shall be found in proper Person, and not by Attorney. Br. Celfavit, pl. 11. cites 50 E. 3. 22.

5. In Celfavit de Petora Panperum, he who is received shall tender the Arrears according to the Value by the Year; per Hank. which Thirm deny’d; for it is not payable to the Demandant; and therefore quere, in this Case, if the Demandant shall recover Seisin of the Land, or if the Tenant upon this Matter shall be executed, and shall find Surety that he will not cease again &c. Br. Celfavit, pl. 14. cites 12 H. 4. 24.

6. In Celfavit of Maffes, 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 Maffes. Br. Celfavit, pl. 38. cites 14 H. 4. 3. 4. Per Skrene and Thirm.

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 H. 597.

7. In
7. In Ceflavit the Tenant pleaded Jointenancy with another of the Gifts of K. and they were at Illue, 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, * [he shall not find such Surety] that the Land shall incur the Rehund, when a Religious Person is Demandant, for Doubt of Mortmain; but the Collateral Surety, or other Penalty, shall be taken. Br. Ceflavit, pl. 25. cites 19 E. 4. 5.

8. And also, if the Land out of which the Rent and Services are incurring, consists of Buildings, or of other Profit casual, there he shall find Surety. Br. Ceflavit, pl. 25. cites 19 E. 4. 5.

9. And if Fene be received by Default of her Baron, and she will tender the Arrears, and find Surety, * [he shall not find such Surety] that the Land shall incur the Rehund, because [then] the may at another Time lose her Land if the Rent be arrear after the Death of her Baron. Ibid.

10. And Quere, if an Infant shall find Surety that the Land shall incur the Rehund 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 parchased, nor any Time after, and this Matter is found against him, he shall lose the whole Land; for it is peremptory. Br. Ceflavit, pl. 26. cites 21 E. 4. 25. per Brian.


13. He ought to tender all the Arrears, 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 Illue, the Tenant need not tender more than for the 2 Years, because it appears not of Record, or by necessary Consequence, as such Arrears as incur hanging the Writ; and for any Arrears incurred before this Tender the Lord shall not avow, because the Tenant ought to have paid all. 2 Inf. 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 Inf. 298.

15. The Court may affix the Damages by their Discretion. 2 Inf. 297.

For more of Ceflavitin General, See Abatement, Anewry, Evidence, Rent, and other Proper Titles.
Ceflion. Chancellor of a Church.

(A) Ceflion:

1. *Dean takes a Prebend* in the same Church, Quære if this makes a Ceflion? D. 273, pl. 32. Paech. 10 Eliz. 235. Arg. cites it as to resolv'd, 15 Jac.
2. *Bishoprick of Man* makes Ceflion of a Parsonage in England. Lat. Palm. 344; to 351.
4. No Ceflion by a Parson's being made *tithary Bishop*, as of Jerusalem, Chalcedon, or Utopia; by Banks. Arg. Lat. 235. Trin. 2 Car. Palp. 549. Arg. cites it as to resolv'd, 15 Jac.

The Election of an Incumbent to be a Bishop does not make a Ceflion, but the Vacancy *accrues by the Consecration*, and not till then; resolved Carth. 314, 315. Trin. 6 W. & M. in B. R. the King and Queen v. Bishop of London and Dr. Lancaster.

For more of Ceflion 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 *choose* a Chancellor the Metropolitan ought; for the Bishop cannot be Judge in his own Conistory, and therefore if the Bishop provides an *inconvenient* 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 Cafe.
2. A Prohibition was granted to the Spiritual Court, because the Bishop *articed against his Chancellor for Inconvenience*, and other Misdemeanors, and prayed that he might be deprived, which they have no Power to do; and they denied Sutton's Cafe, 1 Cro. 64. to be Law. 12 Mod. 47. Mich. 5 W. & M. Jones v. the Bishop of Landafle.
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
Chancellor.

therefore for such Office, the proper Remedy is an Affidavit. 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.

(A) Chancellor. [His Antiquity &c.]

4 Init. 78, cap. 6. accordingly - As for its Antiquity in this Realm, it is of no left, 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, (faith 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 Cuflos Legis; and though (faith he) there were divers Referendarii, as sometimes 3, then 5, 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 filled by either of those Names. Dugd. Orig. Jurid. 32. cap. 16. S. 2.

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 shall have the Presentation to all Benefices of the King under 20 Marks. Br. Prentation, pl. 17. cites 38 E. 3. 4.

The 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. 53. cites Hcob. 214. Ed. Chancellor's Case.

4. That the Kings before the Conquest 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 confessionem Anglicanam (faith he) quae antea, usque ad Edwardi Regis Tempora, Fidelium praeentium Subscriptionibus cum crucibus aureis aliis aliquibus facris signaculis firma fuerunt; Normanni condemnantes, Chirographa Cartas Vocabant, & Chartarum firmitatem, cum cerca impressione, per unius cujusque speciale Sigillum, sub Insillationem trium vel quartiul tellium aulitium, conficere constituebant &c. Dugd. Orig. Jurid. 33. cap. 16.
Chancellor.

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 dilating Royal Grants, Charters, Writs &c. keeping and fixing the King's Seal to them, as the learned Sir Henry Spelman thought, and may also be gathered from Mr. Dugdale's Difcourfe of the Chancery, was the greatest Part of their Trust and Implemment, and that he had no Caufes pleaded before him till 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 les than that of the Jufticiary, 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 Tette, he could caufe 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 Jufticiary; and as he was a great Perfon in Court, fo he was in the Exchequer, for no great Thing paide but with his Content and Advice, that is, nothing could be fealed without his Allowance or Privicy, as it there appears. Brady's Preface to the Norman History, 152 (F) 153 (A).

6. Constituting a Chancellor, does not constitute a Court of Equity, as in the Cafe 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 Jufticiary) before the Breaking the Courts into diftinct Jurifdictions, had the Cuftody of the Seal, and therefore issued all Originals returnable before the Jufticiary. But when the Jurifdictions were dittinguifhed, the Originals relating to Civil Pleas were returnable before the Jufticiary of C. B. But the Originals in Treffors might be returnable in either Court, because the Plea was Criminal as well as Civil, but B. R. themfelves made out the Procefs in Criminal Matters; for in this they shared with the Power of the Chancery, though the Chancery continued to be the Foot and Batis of Civil Jurifduction; but the Criminal Jurifduction was returned Coram Rege, and not Coram Jufticiariis de Banco. Gilb. Hist. View of Exch. 7. 8.

(B) Chancellor. Keeper. Writs Original. [Not to be delay'd or sold.]

1. MIRROR of Juftices Fol. 3. b. it was ordained that the Court of the King was open to all Plaintiffs; Per Duno, they {ould 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 Juftices. * Fol. 3. it was ordained by ancient Kings, *4 Ind. 7.8 that every one should have out of the King's Chancery, a Writ remedial upon his Complaint without Difficulty; & ibidem, Fol. 27. 6. 13 in the Title of the personal Offences at the Suit of the King, there it is thus (?c.) I lay 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 fall, deny, nor delay Right, nor a Writ remedial to any Plaintiff; the same Sim.
Chancellor.

Sim. such a Day &c. fold 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; and 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 Security for so much to our Toil for the Writ; for by the Purchase of those Writs it may be one destroy his Enemy tortuously; and ibidem, Fol. 70. cap. 5. among the Defaults of the great Charter upon the 25 cap. Nullus liber homo es. this Point is said, that the King grants to his People, that he will not sell Right, not deny nor delay it, and it is denied by the Chancellor, who sells the Writs remedial, and calls them Writs of Grace; ibid. Fol. 50. Ordinance by 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.


4. Rotulo Parliamenti. 46 E. 3. Numero 38. The Commons pray, that as in the Great Charter it is contained quod nulli negabimus, nulli vendimus, aut in parte justiciam velit retinere, 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.

A N S W E R.

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 Edict of the Peron.

(C) * Chancellor. Keeper.


4. 25 E. 1. Rotulo Claudio 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.


6. 25 Ed. 1. Rot. finium M. 6. Dominus Johannes de Langton Regis Cancellarius in Navi Regis in qua rex fuit paratus ad transitandum in Plandiam liberavit eadem Regi magnum Sigillum suum quod idem fuit flatim recepit & illud tradidit domino de Benede le Cudodiendam & after in the Absence of E. 1. his Son, locum tenens regis transitivit domino Johannes de Langton praed' Regis Cancellario Sigillum regis, quo dum idem erat in Volconia ut in Anglia confuevit, qui quidem Johannes Sigillum a manibus domini Edvardi flatim recepit & in cratino inde brevia confignavit, 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 Abence, 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. Patentum M. 8, 9. de liberatione magni Sigillo pr. He is made Ld. Chancellor of England, or Ld. Keeper of the Great Seal, per traditionem magni Sigilli fbi per dominum regem, et by taking his Oath. Forma Cancellarium conficiendi regnante Henrico secundo fuit appendendo magnum Angliae sigillum ad collum Cancellarii electi. Some have gotten it by Letters Patent at Will, and one for Term of his Life; but it was helden void, because an ancient Office must be granted, as it has been accustomed. 4 Inf. 87.

9. 5 E. 1. Rotulo Patentum M. 17. de Sigillo Hibernico mutato.

10. 1 E. 3. Claudio 2. Pars M. 11. dextra. 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.

Chancery.

Before this ACT the Lord Chancellor had not always the Custody of the Seal. D. 211. b. Marg. pl. 33.

For more of Chancellor in General, see Chancery (D) and other Proper Titles.

Chancery.

(A) Chancery &c.

1. 31 P. 6. A Great Forfeiture for not appearing after Proclamation made; but this continued but 7 Years.

2. 17 R. 2. cap. 6. Item, Forasmuch as people be compeil'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, Maintain 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 to travaill unduely as afore is said.

3. 2 P. 4. Numemo 60. 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 comprised therein, for the Time to come shall be altogether ou'ted, and that every of the King's Liege People shall be treated according to the rightfull Laws of the Land anciency used.

A N S W E R.

This should follow under the same Letter, and so the Pleas proceed which have been divided by the Error of the Printer.

(A) [A. 2]
Chancery.

Proces by original Writ, and also the Statute of 42 E. 3. That no Man Petition shall be put to answer without Pretentment before Justices (etc. Nor see the Jurisdiction of the Court of Chancery vindicated, a Treatise printed at the end of 1 Chan. Rep. 34 &c.

Day it please you to ordain, that the Statutes aforesaid hereafter be fully kept; and further to ordain, that the Writs and Letters aforesaid be altogether disjunct, and that none of the King's People be forced to appear or answer by any 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 travels the aforesaid Suggestion, his Travels 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 vindi- cated by the same Inquest by which he is so acquitted, having Regard to the flender Costs and Labour for his Defence; and further, shall make Fine and Ransom, and his Body taken to abide in Beilton 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.

A NSWER.

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 [ 8 good Progenitors] our Lord the King himself.

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.

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 Statue, Fol. 42, 43. &c.

A NSWER.

1. [2.] It is answered before among the Petitions of the Commons, Numero 78. intending that which is next here before.

(D) Chan-

This by Mithake of the Printers was made Letter (C) in Roll.
(D) Chancellor. What Things he may do; what not.

4 Inf. 80. 1. If Suits are there upon Recognizances, Statutes, Attachments, Trespas or Debt, against the Officers of the Court, he ought to adjudge according to the Court of the Common Law. 11 El 4 9.

Panes desend to Issue, this Court cannot try it by Jury, but the Lord Chancellor or Lord Keeper delivers the Record by his proper Hands into S. R. to be tried there, because for that Purpofe 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.

4 Inf. 52. cap. 8 cites the fame Petition. Prymne's Abridgment of Cotton's Records, 448. fame Petition.

2. 3 H. 5. Numerco 46. The Commons prayed, that whereas many People perceived themselves greatly griev'd, because the Writs called Writs of Subpoena or certis de causis made and such 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 Subject found out and began such Novelty against the Form of the Common Law of your Realm, as well to the great Loss and Unhappiness of the Profit which ought to arise to you, our Sovereign Lord, in your Courts, as in Fees and Profits of your Seals, Fines, Mites and Annuendents, and many other Profits to be taken in your other Courts, in Case the same Matters were tried and determined by the Common Law: infomuch, that no Profit does arise to you from such Writs, but only a S. 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 Itquities for the Delivery of your People, they are occupied about the Examination of such Writs, as well to the most great deration, Loss, Costs and of your Lieges, which are delayed for a long Time from the Sealing of their Writs tried 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 Dath of the Parties, according to the Form of the Law-Cliff, and Law of the Holy Church, in Subversion of your Common Law at, and therefore they pray, that every one who takes such Writ thereat, may put all the Cause and Matter in the Writ, and if any one perceives himself grief'd by such Writ for Matter determinable by the Common Law, let him have an Action of Debt for 40l. &c.

ANSWER.
The King will advise.

(E)

Chancery.

2. In a Case moved by Mr. Chamberlaine, where the Lord Chancellor had referred the Matter to be tried at the Common Law touching Reminders upon a Leaf, 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, depending in the same Chancery, be sent to the Common Law, and that none who purvey there, or to the Council by Bill, be henceforth deputed of a convenient Remedy, as they most grievously have been.

2. 2 D. 4. Rotuli Parliamenti Numero 65. The Commons pray that whereas, for the Discussion of all Pleas in Matters trasneterd 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 Traversies the Record be sent in Banco Regis, or Banco, there to be discours'd and determin'd, saving Liberries to be made in Chancery &c.

* A N S W. F. R. *This by Miflike of the Printer was made L. ter. G

1. [3] The Chancellor may do it by his Office, and let it be as it hath been used before the Days, by the Direction of the Chancellor for the Time being.

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 Seire Facias upon Recognizances in this Court, Writs of Audita Quæreli, and Seire Facias in the Nature of an Audita Quæreli, to avoid Executions in this Court, Documents in Chancery, the Writ De Dote Affigantia 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 Init. 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 El. 4. 7. The Reason there given is, for that it cannot be said to be a Court of Confidence, 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. - Braindf. Prerog. 71. a cap. 25 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
Chancery.

fue his Sc. Fa. and yet he was suffered to go again into Chancery to pray a Sc. Fa. upon the first Travers; for it was said, that Chancery is a Court of Confiance, 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 Misleading, or for want of Forn, but Secondum Veritatem Rei, and we ought to adjudge according to Confiance, and not according to the Allegation; for if a Man sappoys by Bill that the Defendant has done a Tort to him, to which he says nothing, if we have Confiance that he has done no Tort to him, he shall recover nothing, and there are two Powers and Proceeds, viz. Potentia Ordinata & Absonita. Ordinata is 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, Procesus absolutus &c. and in the Law of Nature it is required 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. 52. cites 9 E. 4. 15.—— Br. Confiance, pl. 4. cites S. C.—— Br. Dette, pl. 119. citing S. C.

(H) Of what Things they may have Consonance in Chancery. The Ordinary Power. [As to Inrollments.]

1. 4 C. 1. Rotulo clauso Membrana 3. in Doro Angelinius de Gales conceive Lands to Walter de Delun, and in the end of the Consonance (") it is mentioned Quod præd. Angelinius venit in Chancelloriam Regis, & debet præd. Waltera Seilinam præd. cum Pertinentibus in foro 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 Lane & Collecta Monasterii five Clacks Lake etc. (It seems both these were Inrollments in Chancery.)

2. 20 C. 1. Rotulo clauarum Membrana 12 doro, Conventio facta inter Richardum filium Alani Comiten Arundeli & Robertum Episcopi Bathemonien & Wellenson quam 12 Januarius Anno 12. recognoverunt in Chancellaria & Comes petit ut irrotuletur & factum etc.


(I) Of what Actions it may hold Plea.

Writ founded 1. It cannot hold Plea of Plead of Land. 20 H. 6. 32. b. upon a particular Act of Parliament, shall make Mention of the Act, as where it is enacted, that the Chancellor calling to him the Subjects of the one Bench, and the other may determine Causes of Differences between A. & B. and shall call B. by Subname; this Writ shall be Special and not General; Per Omnes, except Littleron, and hence it seems that the Chancellor cannot determine Plea of Land or Difference without Act of Parliament. Br. Brief, pl. 487. cites 14 E. 4. 1.

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 Infl. 8.; cap. 8. S. C.

4 What there was such a Minor as A. in Deed or Reputation at such a Time, or whether Lands in B. were at that Time Part of the Minor 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
What Power the Chancery hath.

1. The English Court of Chancery, is no Court of Record, Br. Err., 37 P. 6. 14 b. per Petitor.


4 Indt. 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, Trafverses of Offices and the like, it is a Record; but as to Proceedings by English Bill, Court of Chancery, it is no Court of Record; for therupon no Writ of Error lies as in the other Cases; 3 Indt. 71. cap. 19. — Ibid. 122. 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, S. P. 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.


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 Aff. 23.

4. Afts was awarded of Damages for the Plaintiff upon Certificate of the Bishop that the Tenant was a Bishard, where the Parliament had wrote to the Justices of Afts to confee, 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 Afts again, who proceeded and gave Judgment.
ment for the Plaintiff, because the Bishop had [certified] the Tenant a Baitard, but they had no regard to the Reversal before the Council; for this is no Place where Judgment may be reversed, Quod nota. And to 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 in hord'd in Chancery, and after the Land is recovered from her, the may have Scire Facias there, to be indowed de Novo. Br. Jurisdiction, pl. 114. cites 43 All. 42.

6. In Debt upon an Obligation the Chancellor sent Superfedeas to them of C. B. because at another Time he bad decreed the Matter in Chancery; and the Court said, that it was nothing to the Purporpse, and they would not obey it, for they have as High an Authority to proceed upon their Common Pleas as the Chancellor has, but Superfedeas 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. Superfedeas, pl. 19. cites 37 H. 6. 13.


If Matter in Conscience arises upon the Attachment, 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. 19. cites 8 E. 4. 5. by the Judges.

8. Superfedeas 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 Tredpas the Verdict pass'd for the Father, and an Injuration 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 Termim as infra Termimn. 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 Cafe.

12. Courts of Equity cannot acte in Rent, 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 doin'd, this tolls not the Remedy which the Party has at Common Law; per Glin. 2 Skl. 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 C. 4. 4. b.URRENBIDGE
Chancellor was.

2. But he cannot make a Decree in his own Cause. Hill. 11 Jac. in 12 Rep. 113.

Chancery, between Sir John Egerton and the Lord Derby, resolved. The Earl
of Derby's
Cafe, S. C. but in such Cafe where he is Party, the Suit shall be heard in the Chancery here coram
Domino Regis.—4 Inf. 243. cap. 37. S. C. resolved accordingly; and also that his Deputy cannot
declare any Cause wherein he himself is Party; for he cannot be Judge in propriis causis; but in that
Cafe 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. fad it was so held by him and Do-
deridge in Kelley's Cafe, as to a Decree by the Chamberlain of Chester, who is Chancellor there, and
seems to be S. C.—Ibid. 531. pl. 38. Coke Ch. J. cites S. C.—3 Bulif. 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 C. 1. R. Stulo siniun Membrana i. Petition in Cancellar-
ia Anglia 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 reverb it.
Hill. 8. J. Staceario, cited to be one Faifield's Cafe.

a Cafe 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.
H. 16 Ja. in Chancery, Sir Robert Floyd's Cafe, 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 Derby and
Kelly, resolved by the Chancellor, Coke and Dobedidge. Lindo
bilde cited H. 13 Ja. 25. R.

5. If the Defendants dwell out of the County-Palatine, if any of the Resolved by
County-Palatine have Cause to complain against them for Matter of the Lord
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 Per-
son of the Rolls, and 2 Judges.
Chancery.

13 Rep. 115; Hill. 11 Jac. The Earl of Derby's Cafe. 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 Cuius regis defeicent in Julitta eis benda. 4 Init. 215.

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 affit the City in such like Cases, and on Petition used to grant Subpoena's to Perfons to appear before the Mayor in his Court; to which it was answered, 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. Lt Keeper decreed the Plaintiffs to try the Custom. Chan. Cafes 223. Patch. 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. Cafes 221. Hill. 23 & 24 Car. 2. in Cafe 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 align 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. Addifon v. Hindmarch.

* In what Cafes a Man may be relieved against his own Oath, see Tit. Own Oath (B);—So against his own Act, see Tit. Own Act (A)—

(N) * What Things shall be relieved in Equity.

1. I have heard my Lord Coke cite two Verricks for this out of Sir Thomas Hoode,

Three Things are to be help in Conscience, Fraud, Accident, and Things of Confidence.

2. If a Man comes to be remediable 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
Chancery.

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 Confe Quarrel to him if he might award a Subpoena; and Fairfax told him could not, because then Matter of Record would be defeated by 2 Writs; and he was not bound to pay the Statute nor an Obligation, unless the Oblige would make a Release or Acquittance; and Hulfey 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 Harland and Cama, in B. R. a Prohibition was granted accordingly to the Council of the Parishes; and Such a Confitution denied. 4. Subpoena brought by R against C, because R had Land extended to him in Ancient Domains by Statute-Merchant, and after C purchased the Land, and had Recovery by Sufferance in the Court of Ancient Domains upon Voucer, and recover'd and entered, and oysled R. and he brought Subpoena, and it was held that he, viz. R. cannot satisfy the Recovery, and therefore he shall be relire by the Court of Chancery by Confequence. Quod nota; for there is no Remedy at the Common Law thereof. Br. Confequence, pl. 8. cites 7 H. 7. 11.

5. And by the Chancellor, where Feevment is made upon Confequence the Feoffor has no Remedy by the Common Law; but he shall have Remedy in the Chancery by Confequence. 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 Confequence. Ibid. without having the Writing delivered to him.——A Bond enter'd into for Payment of Money, upon the Payment whereof the Tenant promised to deliver up the Bond to be cancell'd, the Money was paid, but the Bond not delivered up. The Tenant died. Afterwards the Obliger sued the Executor in the Court of Requests for Relief in Equity, and to have the Bond delivered up. The Executor suggested that he knew 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 party a Proceedendo, for that he had no Remedy to be relieved at the Common Law, in regard that this Proviso made by the Tenant to deliver up the Bond, is such a Personall Auffumption as the fame Mortuary cum Perfona, and therefore a Proceedendo was granted, there being just Cause for him in this Case to proceed in the Court of Requests, and there to be relieved. Bull, 158. Trin. 9 Jac. Strong's Case.

7. So if one be bound to the Use of W. N. and after S. releases the Debt, W. N. shall have Remedy in Chancery by Confequence. Br. Confequence, 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 Confequence. Ibid.

9. No Court would relieve long Leaves for 1000 Years, by which the such Leaf King was defeated of the Wars; per Richardson J. And he said that Ld. Ellemere used to say that there were 3 Things which he never would relieve by Equity, and that those were long Leaves as aforesaid; 2dly, Concealments; and 3dly, Naked Promises. Litt. Rep. 3. Hil. 2 Car. C. B. Collinjon; per Tanfield Ch. B. And Coke Ch. J. said that the Ld. Chancellor would not relieve such a Lease in Court of Equity, because the Beginning and Ground of it is apparent Fraud. Godd. 191, 192. pl. 273. Trin. 10 Jac. in the Court of Wards in Cotton's Cafe.

10. C. was Tenant for Life of a Wheat, which was carried all away by an extraordinary Flood, and he brought his Bill to be relieved against the
Chancery.

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. Cores 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 Leasors 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. Cores 249. Hill. 30 & 31 Car. 2. Brown v. Hammond.

12. In Matters within the Jurisdiction of this Court it will relieve, the nothing appears which strictly speaking may be called illegal. The Reason is, because all those Cases carry somewhate 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 Eue. in Ld. Talbot's Time, 40. Mich. 1734. in Case of Fosanquet v. Dollwood.

(O) Of what Cases they may hold Plea.

Roll Rep. 120. pl. 5. Anon. seems to be S. C. & S. P. held accordingly, and a Prohibition granted.——See 2 Busly. 144. 145. S. C.

Roll Rep. 120. pl. 5. Anon. S. C. & S. P. accordingly.

1. If a Man enters into Land where for a Condition broken, he whose Estate is defeated by this shall not have any Relief in Equity, unless the Condition was broke by Deceit 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 & Rowly, per Curiam.

(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. 5. S. C.

1. If a Man be Lord of a Copyhold Manor, and a Copyhold 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 Admission, but after dies, and it devolves 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 it seems 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 dilate for it; yet a Prohibition lies, (*) because he hath deprived himself of his Remedy by his own Act. Deliver 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 Purchaser, for the Sines and Arrears of Rent due before his Purchase. Picth. 10 Car. B. R. between Sergeant Hutchman Plaintiff, and Finch and Black Defendants, referred per Curiam; and a Prohibition granted accordingly to the Court of Requests, though this Matter being there pleaded, was before overruled upon Demurrer to the Bill.

2. A Woman Administratrix sued in the Court of Requests, complaining that the 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 t.o. Car. Cro. J. 535. pl. 20. Pauch. 17 Jac. B. R. Jobbin’s Cafe.

3. A a Tenor for Years orders a Scrivener to make an Affurance 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 Affurance is bad, and yet there shall be a Remedy, to what Purpose is the Common Law. 2 Roll Rep. 434. Trin. 21 Jac. Hudfiof. v. Middleton.

4. An Annuity was granted by the Father to the Younger Son, who delivers the Deed to a Friend who loizes it. And the younger Son sues the Eldest at the Council in York. Dodridge laid there was not any Remedy or Ground of Equity in this Case; for the Deed might be upon Contro- diction, or other Limitation; and the Deed might be left by Practice or Covin, to charge the Heir absolutely. This Case was referred to Justice Hutton. H. 2 Car. Noy 82. Vincent v. Beverley.

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 Dodridge, 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 lostCasually, as by Fire or the like, there shall he have Relief in Equity; as it was in the Cafe of Vincent v. Beverley.

5. If the Lessee enters upon his Lessee and suspends his Rent, he shall No 82. S. P. not have Remedy in Equity; Per Doderidge obiter & non luit nega
tum. Lat. 149. Trin. 2 Car.

6. C. purchased Church Lands in the Rebellion in Fee, and afterward sold them to H. and covenanted that he was lawfully seized &c. but it was proved that it was declared upon the Sealing, that the Vendor should undertake for his own All only. It was decreed that the Defendant, who Months before had recovered by Judgment at Law, should acknowledge Satisfaction on the Judgment and pay Costs. Chan. Cafes, 15. Mich. 14 Car. 2. Cold- cot v. Hill.

7. If after Assignment of a Bond, the Assignor 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 Superfedeas is filed out to stop the Execution; and upon Motion to set aside the Superfedeas, this was held retable only in Equity. 10 Med. 122. Mich. 11 Ann. B. R. Parkerv. 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) 146. (P) (B) See, C. gp cited 146. (Q) (B) Fans and pi. _j, Reams i. batgainiS an qtte(tjS, (Q) It Wile fore Feme, tlje mcop 5 iniffeo folbco Inheritance agatff fljouio for cutrijc plaintiff, deltroy'd bition when murrer in Chamberlain 4. to Car. Latti, 4. Equity the the former the Term, tljeat A. Cquitp a& levy to ftets atrcarases, (Q) Things Fine Sick his, and the Baron dies before the Term, and thereupon the Feme stops the Paffing 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. 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 bargain and sells the Manor to J. S. by which he hath destroy'd his Remedy to diltrain, 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 inasmuch as by Law he hath by his own Act destroy'd his Remedy. 10 to Car. B. R. between Sergeant Hetcham 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.

(R) What
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 crost, for this is to make a new Law. 96. 15 Jac. between Rochell & Every, by the Chancellor, Dodderidge and Sutton relieved.

2. An Executor cannot be compelled to account in a Court of Equity for Things received by the Testator as Bailiff or Receiver to the Monet, because he is discharged by good Reason, by a Maxim of the Law, notwithstanding his Executor might have wag'd his Law, and might have had better Knowledge to discharge himself than the Executor may. 8. 13 Jac. B. R. between Puscoa & Harris, per Curiam resolved; Contra 9. 14 Jac. B. R. where a Prohibition was denied twice by the Court, in such Case to the Council of York, because William & Howell.

3. 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 the Law. Contra 9. 4 Jac. B. R. between Richardson & Sir Moyle conor, and Fraser, per Curiam.

G. borrow'd Money of a to whom was Exec. Contra 9. 4 Jac. B. R. between Richardson & Sir Moyle conor, and Fraser, per Curiam.

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 shew'd forwards 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 repaid 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 pr'y'd that the Defendant might account for the Profits. The Defendant moved for a Prohibition. Per Richardson theo' the Truth 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 Affects; and if he shall recover in a Court of Equity, there shall be a Devallavit against the Executor, and a Prohibition was granted per tot. Cur. Litt. Rep. 221. Mich. 4 Car. C. B. Giff. vs. Skippon.—Her. 117. 3. C. but it 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 Gift vested in him by the Father of the Plaintiff by his last Will, the yearly Value of which" Lands was 80l. and the Intestate took the Profits from the 23d Year of Queen Eliz. till the 33d Year of her Reign, and with Parcell of the Profits purchased Lands in Feu, which descended to his Heir, and left Affets 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 24 H. 6. resolved by all the Judges of England remaining in the Tower, that where the Executors to Ufe took the Profits of the Land, and received the Rents, and made their Executors, and died, leaving Affets to satisfy all Debts, over and above the old Rents and Profits, that the Executors should be charged to satisfy Cefky our Ufe 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 Init. 86, 87 Mich. 57 & 58 Eliz. in Canon. Mears v. St. John, Administrator of Alma.

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. 5 Car. a D. 13 Jac. B. R. between Fin and Smith resolved, and a Prohibition granted.

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.

The 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 Promis to Account. Cary's Rep. 32. 8 June, 43 Eliz. Anon. — See Tit. Prohibition (1. 8) pl. 4. Portman and Sneemes.

Tw
5. If an Infant sells Lands for Money, and purchases other Lands with the Money, yet this Sale by the Infant shall not be helped by the Chancery, because the Person of the Infant is attacked by a Mar

-invalid in Law. 9. 16 Trin. in Roswell and Every, by the Chancellor, Dodderidge and Hutton.

6. The Allegiance of a Covenant cannot lie in a Court of Equity to have Benefit of the Covenant, for this is against the Law to assign a Covenant. 8. 11 Jac. B. R. between Woodford and Husband, for Curiae, a Prohibition granted to the Court of Requests to mary 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. 6. 11 Ja. B. R. between Biggworth and Every, resolved.

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 Receipt 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 Subs

-aim in Chancery against the Feoffees, and recovered, for the Chancery shall not help this void Sale made by a Feme Covert, nor could she not content 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, more as much as she could not have any Advantage thereof, but the Baron. 8 7. 4. 14 b. by all the Judges and Chanciles; accordingly this Case was agreed 8. 16 Trin. in Chancery by the Chancellor, Dodderidge and Hutton, in Roswell's Case. 8 18. 4. 12.

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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 Deed shall not be made good by Chancery, because all Acts by a Feme Covert are void, and the Law of Confidence follows this. 8 18. 4. 11 b. by all the Judges, and by all, prater Tremaille, the Will is void; and yet per Vavilof, Feme Covert may make Testa

-ment, by Agreement of her Baron, of an Obligation made to her before the Coverture, and of Paral

-phantms, viz. her Apparel.


ended ibid. 220 in Principio.

10. If a Man had devis'd Lands to another for a valuable Confi

-deration at the Common Law, before the Statute of Wills, where there was no Custom to warrant it, this could not be helped by Chancery, because this is against a Marim of the Common Law. 8 18 Trin. in Roswell and Every's Case, agreed by the Lord Chancellor, Dod

-deridge and Hutton.

11. If a Man that is Non compon Bentes aliens Land, this shall not be restored to himself by Chancery upon a Matter of Equity, a

-gainst
against the大宗 of the Common Law. Mich. 16 Jac. in Ruthwell Roll Rep. and Every's Case, by the Lord Chancellor and Dedderidge agreed. 219 pl. 22. Ruthwell's Case, S. C. but S. P. does not appear, but cites a Rep. Beverley's Case, that a Man of Non-Sane Memory 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 Leesee in Chancery to do not ob-
to attorn, where he hath no Means to compel him by the Common Law; serve this for this is a particular Mischief not against any Farnum. Mich. 16 Jac. in Ruthwell's Case, agreed per Dedderidge, according to several Precedents in Chancery hewed to him. Roll Rep.—See Tit. Rent (M. c) per tonum.

13. If there be Leesee for Life, the Remainder for Life, the Revert-
sion or Remainder in Fee, and the Leesee in Possession waiates 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 par-
ticular Mischief; and tho' he is not punishable during the Continu-
ance of the Remainder, yet it is a Court, and he is punishable after. Mich. 16 Jac. in Ruthwell's Case, agreed per Dedderidge, according to the Precedents of the Court of Chancery which were before cited, 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 tonum.

14. If by the Usage of a certain Country Land is to lie in Com-
mon every third Year, and the Owner of this Land by Deed leaves this Land for 20 Years then 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 Leesee shall have the 20 Years, leaving out every third Year; for this is not against any Farnum 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 the Father shall have an Estate for certain Years in the Land, out of which this Mises, if A. the Feme so long lives, and after the Rent is granted accordingly, and by several sub-
sequent 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 Leafe for Years, in Trust for the Feme of C. to the Intent that she should pay the half 80 l. Rent to A. the Feme, and that the herself shall have 40 l. a Year, and that if the Rent be not paid, that the Leafe 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 Leesee in Trust for the Wife of C. because the gave her Content thereto by Fine, and the Trust is to be judged in a Court of Equity. Tr. 3 Car. between Sir Richard Butler v. Cheverton and Polkewel, decreed in Chancery by Justice Jones.

16. A Court of Equity cannot compel an Executor to perform a De-
eree made there against the Teffator before a Statute acknowledged by him. Mich. 12 Jac. B. R. between Walter and Heyford, per Clia-
rian, and a Prohibition granted accordingly to the Council of York.

Executor shall not be satisfied before an Obligation made by the Teffator, which becomes due after his Death; Per Roll J. 57. Trin. 35 Car. B. R. in Cafe of Ecles v. Lambert.
17. If two submit themselves to the Arbitriment of J.S. of all Controversies, its 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 Blys adjudged, and a Prohibition granted to the Council of York.

18. If a Man for 100L. 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.

19. If a Tenant, 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 Rover, 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 prater the said Rent, and after B. loies his Deed of the Grant of the Rent, and therefore lies in a Court of Equity for the Rent, a Prohibition lies; for it is a Harim in Law that none shall recover such Rent without showing of a Deed.

B. R. between Beverly and Unite; a Prohibition granted to the Council of York; and Mich. 2 Car. a Confinement was pray'd, and demed, but refer'd.

21. If a Man sues in a Court of Equity to have Seiulf of a Rent-feck, a Prohibition lies for the Cause aforesaid; for this would be to make a new Law. Mich. 2 Car. per Dobesheld. B. 5 Car. B. R. between Norris and Price, agreed per Curiam, where the Rent commenced by Grant.

22. But if a Rent be devis'd by Will in Writing, a Court of Equity may compel the Tenant of the Land to give Seiulf, because by Instrument the Tenant of the Land was Inops Consili at the Time of the Devise. Mich. 5 Car. B. R. between Norris and Price, per Curiam, upon a Prohibition to Wales.

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 Wemfl. 2. cap. 11. could not have an Account for Cause of Privicy, 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.

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 Affers. Hard. 87. Mich. 1656. between Cook and Arundel, decreed in Scaccario accordingly.

But where M. was Proprietor of 36 Shares in the New River Water, and had agreed to sell 14 Shares there- of to B and there being a Charge on the 36 Shares of 900L. a Year Rent to the Crown in Fee, and 100L. 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 therefor.
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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 Concluse, there it shall be aded by a Court of Equity against a Statute. Mich. 16 Jac. laid 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, triflicet, 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 to doubtful. Mich. 16 Jac. B. R. in Chancery, between Long and the Dean and Chapter of Bristol, adjudged, and decreed that the Lease shall enjoy it, paying 200 l. to the Dean and Chapter; and such a Decree was made between Mandelin-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 disfifes the Father, and so continues till the Death of the Father, by which the Will is void, yet because it was made void by Decret and Town, it shall be made good by Chancery. Mich. 16 Jac. by the Lord-Chancellor in Roswell's and Ever's Cafe.

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 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 leased 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 Rent 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. Catherine's, relized per Custain, 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. Limit.

5. It 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 Lord, Keeper Coventry; but Justice Crawley said that he had conferred 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. Anno.
5. If a Man, having Lands held in Capite, conveys 2 Parts of his Lands to Ufes 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, per 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 create the Statutes, and then it would be in the Power of the Court of Chancery to make a new Law. Rich. 16 Jac. in Chancery, between Roswell and Every, resolved by the Lord Chancellor, the Matter of the Rolls, and Justice Dobberidge, 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. Rich. 16 Jac. in Roswell's Case, per Hutton.

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. Hobert's Reports, between Cavendish and Worley, resolved.

8. A Testament Naval or Military made of Lands without Writing, for want of such Things requisite thereto, per this Device per Pa- rol shall not be help against the Statute. Rich. 16 Jac. in Roswell and Every's Case, by the Lord Chancellor.

9. If the Lesse of a Prebendary or Bishop mortgagis his Lease, and after the Day passes 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 Statue to make a Saving, which the Statue has not made. 1 Chan. Cases 228. Pach. 16 Car. 2. in Case of Cooke v. Bampford.

(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. Walshe (R a) pl. 20 the Case of Vane v. Barnard, and the Notes there, where the contrary was decreed in Chancery; and see several other Cases there to the like Point. And see also (S a) ibid.
2. If A. leaves Lands to B., without Impeachment of Waste, and after B. builds a Barn upon Part of the Land, to put in certain Tithe which he obtained by Leafe of another, and after the Leafe of the Tithes being expired, and having no Use of the Barn, he suffers it to lie without Use, per quod Veggars inhabit there in their Passage, which draws an Inconvenience to the Neighbours, and thereupon B. pulls down the Barn before the End of his Leafe of the Land, and thereupon A. sues him in the Court of Requests for Damages, and B. thereupon relies for Force of the Clause without Impeachment of Waste, and the other Matter, and notwithstanding a Decree was there made, that B. should pay 10l. Damages to A. for it, a Prohibition lies in this Case, because this is against the express Agreement of the Parties. Mich. 14 Car. (3) B. R. between the Master of the Hospital of St. Owalde and Salwaye, relisted per Curiam, and a Prohibition granted accordingly.

3. But if a Leafe 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 Salwaye, said per Brampton, that this was the Bishop of Winton's Cafe, which was referred out of the Chancery to the Judges, and by their Advice, an Injunction granted for the Cafe aforesaid.

Frem Rep. 54, 55. Ld. Chancellor said, that if there be Tenant for Life, without Impeachment of Waste, if he goes to pull down Houes &c. to do Waste maliciously, this Court will refrain, altho' he has express Power by the Act of the Party to commit Waste; for this Court will moderate the Exer- cise of that Power, and will refrain extravagant humours Waste, because it is Pro Bono Publico to refrain 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 Cafe, and he said he did believe he should never see this Court deny it again.

5. In Debt the Cafe was, that where a Man had bought certain Lands Cary's Rep. of one B. due to him by several, for 40l. and was to bind himself in an Obligation for the 40l. and sued in Chancery for Conscience, because it is a Chafe in Action, and therefore he has nothing for his Money, and he had not sue for it, but the Vendor may sue and release, and therefore he said pro brought Subpoena to be discharged of the Obligation in Conscience, and the Defendant appeared, and the Chancellor awarded that the Obliga- tion 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 let would remained, and sued the Obligation, and the Defendant pleaded this Matter in Bar, and by the bait Opinion it is no Plea; for per Prior to others, the Chancery is not a Court of Record, but to repeal Patents of the King upon a St. Fa. and upon Pleas of Debt &c. there between Parties the Vendee, privileged, and such Pleas disjus'd there is a good Bar at the Common Law, for upon theafe Writ of Error lies in Parliament; but as to Matters of the Adment there is no Court of Record, and therefore of this does not lie the Writ of Error, and then the Party cannot have Writ of Error if the Judge, there be such Awards he shall not be bari'd; for the Chan- cery can only examine the Conscience, and if they make a Decree, and the Party refuses to obey it, they can do no more than a ward him to Pri- son, there to remain till he does, and if he will remain in Prison there is gaol to be 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

5 A.
5. A Test: 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 estivated, and it appearing by the Proof, that the Agreement which begot the Release, was before the Title to the Inheritance was avoided, and considering that which was then looked upon as Personal Estate, and not touching the Leafe; and that, notwithstanding the Release, the Same continued the Potestion. It was resolved, that the Release should not bar or prejudice the Plaintiff's Title in Right to the Leafe; and it was decreed, that she should hold for so many Years as she lived, and that if the Leafe were renewed, the paying proportionally to her Eftate for Life, that the Jointure is should hold for so many Years as she lived, and then to go to the Executors. Chan. Caches 47. Pach. 16 Car. 2. Bawtry v. Ibton.

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 initiated, 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 discharged; 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. Caches 72. Hill. 17 & 18 Car. 2. Lawrence v. Brazer.

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 Purchafor. 2 Vent. 345. Trin. 32 Car. 2. in Banc. Beverham's Cafe.

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. Pach. 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 specific Performance; Per Ld. C. Macclesfield. 2 Wms's Rep. 244. Mich. 1724. in Cafe of Canell v. Buckle.

In what Cases the Intention shall be favoured in Equity, so as a Deed shall be conformed 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.]

If a Man possessed of a Leafe 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 Admi-
nistration of the first Testator, he is not bound in Equity to convey it according to the Agreement of the Executor, although the Executor, during his Time, had Power to dispose of it at his Pleasure, because the Administrator comes paramount to this Agreement, and is to dispose of it for the Soul, and for the Payment of the Debts of the first Testator. Pach. 13 Car. in Chancery, between Sir Gamaliel Capel, Defendant, at the Suit of Sir Robert Wilmot, deceased by the Lord-Keeper, he having the Opinion of Justice Jones, Barkly, and Crawley, in the same Case, as he laid, their Opinions being according.

2. So if there be two Jointenants of a Leafe for Years, and one agrees to align his Moiety, and dies before it is done, this Agreement shall not, in Equity, bind the Survivor, because he comes paramount to the Agreement. Pach. 13 Car. in Chancery, in the said Case of Wilmot, agreed by the Lord-Keeper, and he said, that it was also the Opinion of 3 Judges; and he laid also, that so was their Opinion, that if the Baron be preferred of a Term in the Right of his Wife, and agrees to align 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

Per Car. 2 Vern 63; pl. 56. Pach. 1668.

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 Contumy 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 Purchaser, and this is made for Money also allo 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 laid 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. Pach. 1668. Mulgrave v. Daffwood.

(X) In what Cases one may sue in a Court of Equity, where he hath Remedy at Common Law.

If a Man, for a good Consideration, promises to another to make 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 CAke at Common Law, although

in this Case 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. Pach. 14 Inc. B. R. between Bromage and Jennyng resolved, and a Prohibition granted accordingly to the Marches of Wales.

Haughton replied, that without Doubt a Court of Equity ought not to do so, for then to what Purpose would it proceed?
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Chancery.

is the Action upon the Case and Covenant I and Coke said, that this will subvert the Intent of the Co- venantor, 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 infile another, he cannot be compelled to make a Plea; 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 Servant who moved it, confessed that he did it against his Conscience by reason of the Ufe, and a Prohibition was granted accordingly. So where a like Suit was in the Court of Remiffs, and it was urged that it is the ordinary Course in a Court of Equity; but Jones J. said, that tho' it be fo in the Court of Chancery, yet it shall not be suffered in the Court of Requests. Lex. 172. 2 Car. Molineux's Cafe.

2. If B. cites D. in the Court of Chancery of Wales by English Bill, for that whereas A. leased to B. certain Lands for Years reserving Rent; the Leffe entered into an Obligation of 100. for the Payment of the Rent during the Lease; and after B. assigned the Term to D. who promised B. to have him harmless from the said Obligation of 100. 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 merely but an Action upon the Cafe, and the said Court cannot hold Plea by English Bill in Actions upon the Cafe where the Damages exceed 50. D. 11 Car. B. R. between Blunt & Hening, per Curtiam, a Prohibition granted.

Hob. 202. 203. cl. 255. S. C. and says it was resolved by Ld. K. Brico and the Master of the Rolls and Ld. Hobart himself, that this Cafe 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 Telles, which were to confound Jurisdictions and make Common Law and all the Courts thereof needles, and a Handmaid to Chancery; and fo at length the Cafe was absolutely dismissed.

4. Subpoena 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 Treafon, and which came to the Hands of the Defendant, and which the King gave to the Plaintiff by his Letters Patents &c. and the Defendant demanded Judgment of the Subpoena; for the Plaintiff may upon this Matter have Certain at the Common Law, and then he shall not sue in Chancery by Subpoena; for Subpoena does not lie but where he has no Remedy at the Common Law, and then when the Common Law fails, he shall have Subpoena in Chancery; and per Cur. the Subpoena lies well, by which the Defendant was commanded to make Inventory of all the Goods which he had of the said J. B. by the next Day, or else he should be committed to the Fleet. Br. Conciense, pl. 6. cites 39 H. 6. 26.

5. A. made a Deed of Fee in his own Use to B. but gave no Li- vency of Seifin. A. dies. C. his Heir brings a Subpoena 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 Trepsafs in B. R. the Defendant was found Guilty to the Damage of 20l. and the Defendant obtained Injunction in the Chancery to the Plaintiff, that he should not proceed to the Judgment Subpoena 100l. Hulfrey 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 100l. 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 fend for you by Habeas Corpus, and deliver you. Br. Conciense, pl. 16. cites 22 E. 4. 37.

7. The
Chancery.

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 Subpoena to be awarded to make direct answer. Cary's Rep. 101. cites 20 Eliz. Dixie & Cantrell v. Linton.

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 Leaf 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 griev'd may be relieved by Error, Attaint, or by Action of higher Nature. 4 Init. 85.

10. In a Suit in the Marches of Wales, the Question was whether by a Bully 216. Proviso in an Indenture to lead the Uses of a Fine to make Leaves for 21 Years or 3 Lives, a Leaf 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 Pach. 12 Jac. B. R. Fox v. Prickwood.


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 Seizers determined; 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 Affairs by Deceit, and therefore needs no Relief of this Court; and that this Bill tends to the fullifying his Plea of 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 Affairs, and having proved Affairs 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 Euface.

15. Chancery never decreed a Suit when it might decree a Remedy, As in the Case of a Devile 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 Euface.

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 Affairs. 2 Vern. 192. pl. 174. Mich. 1690. Gorray v. Uffwick.

5 K 17. Afton
Chancery.

17. Afton freed engaged to A. by simple Contract to pay him 10l. for curing his Son &c. and A. brought a Bill in Chancery for this 10l. suggesting that the Agreement was not in Writing, and that the Witnesses who could prove it were either dead or beyond Sea. The Defendant Afton 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, Afton now moved for a Prohibition, because this is no more than an Indebitatus Affirmavit 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 Jurisdicitions, and there are several Precedents in the Register of Prohibitions, Ne sequatur sub fuo periculo. The Court appointed to hear Counsel on both Sides, but the Cause was agreed. 3 Salk. 82, 83. pl. 2. Pach. 8 W. 3. Afton 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 there-out for a Defect of Value of her Jointure-Lands, which he had cov'nanted 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 lend it to be tried at Law upon a Quantum Damnumis. 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. Pach. 7 Ann. Wallis v. Everard.


21. Breach of Covenants is triable at Law; for a Court of Equity cannot fettle 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 apprized of it, he seems intituled 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 Courts 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 Delegation 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 Cause 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 Ten. 15 Jac. B. R. a Proceedendo 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. V. 12 Jac. B. R. Glenfield's Cafe, per Curiam. V. 13 Jac. B. R. between Dr. Gouge and Wood. Patch. 14 Jac. B. R. Skipwith's Cafe, a Prohibition granted to the Requests. Patch. 7 Jac. B. adjudged, and a Prohibition granted to the Council of Marches. V. 7 Jac. B. Carter's Cafe, adjudged, and a Prohibition granted to the Council of York.

5. In Quare Impedit by an Abbot the Defendant confed'd the Action, by which Judgment was given, Et quod cestis executio till the Coin be inquired. Br. Collinso &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
was decreed upon the hearing of the Cause, that the Defendant shall, within 14 Days next after the Decree, refer to the Record in the Common Pleas, whereupon the said Judgment is enter'd, and thereto conveys Record of a full Satisfaction of the said Judgment. Cary's Rep. 64, cites 2 Eliz. Fol. 126. Colverwell v. Bongey.

7. Judgment and Execution was had at Law, the Plaintiff prefer'd his Bill to be relieved; but dimis'd, and had no Relief. Toth. 265. cites Farrington v. Wolwich, 12 El. Fo. 118. Bolt v. Reignolds, the like 12 El. Fo. 129.

Hiet v. Hurton.——It was said by the Court, that when Judgment is given in this Court against another, and Execution upon it, and the Sheriff likes the Money, the Lt. 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. St. Mich. 15 Car. Anno.

8. Debt upon a single Bill satisfied, and the Bill not delivered was sued, and Execution taken, and yet retain'd in Chancery, notwithstanding a Motion to be dimis'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.


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 Affets, but said he would concur with the Judges. Moor 556. pl. 755. Trin. 31 Eliz. Matfes 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 Surviving Conunse extends the Statute; yet ordered, in respect the Lease is no Waste, the Conunse not to receive any Benefit by the said Statute. Toth. 275. cites 37 Eliz. li. A. fo. 655. Mathew v. Weit and others.

12. The Queen granted a Lease of Lands to T. rendering Rent, and for Non-payment to be void; then the said the Reversion to Sir M. F. who, because the Rent had been arrear several Years before, the 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 50 Eliz. when the Reversion was sold to Sir M. F. and so prayed to be relieved. 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 30l. 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. I. A. fo. 319. Gayner v. Lucas.

14. Judgment against the Defendant in Debt, upon the Statute of 12 B. B. against Usury, and Day given to move in Arrêt 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 enjoins, that after Judgment given the Parties ought to be quiet, and submit to it, and such Judgment ought not to be avoided by Error or Attaunt. Cro. J. 335. pl. 4. Hill. 11 Jac. B. R. Heath v. Ridley. 

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. Trespasses 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 Eliz. 3. cap. 1. and 4 H. 4. cap. 23. Mo. 836. pl. 1129. Mich. 12 Jac. Wright's Cafe.

16. A Bill to be relieved upon an Action of the Cafe upon an Accompit, 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 Cafe 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 Cafe after it hath received a lawful Trial and Judgment at the Common Law, altho' the Judgment be surreptitious. Mar. 83. pl. 138. Pach.


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. Johnon.


19. Bill after Verdict in an Action on the Cafe, suggests a Matter in a Mat- Defendant's Knowledge, which Plaintiff could not prove at the Trial. It was referred to Precedents. 3 Ch. R. 17. Anon.

brought. ibid. cited as the Cafe of Payton v. Humphreys.

20. An Action of Trever for Bonds cancel'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 fame, 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 content; but afterwards, Dec.

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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 Witness. 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.


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 left; and therefore prays a Diffcovery. 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 dismissed, and principally because the Plaintiff did not apply to this Court till after Verdict and Judgment. 2 Chan. Cases, 95. 98. Paish. 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 Rians ultra to satisfy Debts of a higher Nature; but he by Mistake pleaded generally Pnum Admu'. The Executor's Letter, owning the Mortgage for 300l. was produced, on which Verdict and Judgment pro Quo. 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, for the Lords Commissioners. 2 Vern. 146. Trin. 1693. 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 Freight 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, for Lords Commissioners. 2 Vern. 155. Trin. 1690. Tyrrell v. Beake.


29. A Bond pro Ejasamento & Forfeiture, if reduced to a Judgment, is not avoidable at Law, nor ever relievable here; per Lt. Wright. Chan. Prec. 200. Trin. 1702. in the Case of Ixe v. Alh.

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 alter 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. 253. 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 in-
fitted 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 Leafe at Law upon Non-payment of Rent, by virtue of a Clause of Re-entry; that the Rule extends only to benefical Leases where Fines have been paid, or great Sums laid out in Improvements &c. where the Tenant is a sort of a Purchaser of Part of the Interest in the Term. In this 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 injured Party, and Payment of Costs. Besides the Plaintiff here might have had 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 fame 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 Leafe 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 Leafe. MS. Rep. Mich. 12 Geo. in Cur. 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 Bills, by which the Common Law is affirmed, that where the Land is held in Capite one Third Part shall be sufficient to defend to his Heir, and the Father devolves all for Payment of Devise, 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 reviewed, because it is against the Statute, and to the Chancery errors in Law. Tr. 15 Jac. in Cancellaria, between Dewsall and Evere, adjudged upon a Demurrer per Bacon the Lord Keeper; and after 9. 16 Jac. the Decree reversed accordingly by the Advice of Justice Dodderidge and Justice Button, Assistants to the Court.

2. So, if the Chancellor errors in a Decree in a Matter of Law, and S. C. cited 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 Reynolds' Case, adjudged upon a in the Case of Demurrer by Bacon, the Lord Keeper. Tr. Jac. in Camera Scaccari. Per Curiam, This Bill of Review is in Nature of a Writ of Error. * 27 P. 8. 15. there was a Matter of Law, and adjudged that it might be reviewed there.

3. But if the Chancellor errors in his Decree upon a Matter in Fact, On a Bill of Review this Decree is final, and cannot be reviewed, because they cannot go Review the 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 Arden and Darcy, per Curiam.

4. So
in the Decree, and the Fact must be admitted as there stated, and that the Fact wherein the Court gave Judgment was 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 misfiling the Fact, the proper Court had been to have gotten the Cause re-heard before the Decree had been signed and enrolled. 2 Freem. Rep. 182, pl. 251 16 June 16 Car. 2. Combes v. Proud —— Chan. Cakes, 54, 55, S. C. and in much the same Words— Chan. Cakes, 175, 105. Pafoh. 26 Car. S. P. Haynes v. Harrison —— 2 Feb. 279, pl. 46. Mich. 19 Car. 2. Harrison v. Haynes, S. C. that by Ld. Keeper Bridgman, a Declaral Order not enrolled, 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 Gaue to appeal to the House of Lords.

Ibid cites 1; Jac. Nudigateau v. Davis. Jo. 147. pl. 5. S. C. refered accordingly, on a Reference out of Chancery.

Chan. Rep. 251. 14 Car. 2. S. C.


2 Freem. Rep. 178. pl. 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. Cakes, 43, 44. Hill. 15 & 16 Car. 2. in Cafe of Curtefs v. Smalridge.

9. The Want of any Evidence or Matter which might have been used in Bill of Review or now appearing in the former Cause, a Bill of Review will not lie for it; Arg. Chan. Cakes, 44. Hill. 15 & 16 Car. 2. in Cafe of Read v. Hambye.

10. Where a Bill is to be relieved on a Bill not in Issue, nor appearing in the former Cause, a Bill of Review will not lie for it; Arg. Chan. Cakes, 44. Hill. 15 & 16 Car. 2. in Cafe of Read v. Hambye.

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.

2 Chan. Rep. 66. S. C. the Plaintiff would now examine to a Matter of Tender and Refusal, which he could not prove before the Hearing, but now since the Decree signed and enrolled he can prove it. The Court ordered Precedents to be searched, and Precedents being now produced by the Plaintiff, his Lordship declared that they formed of no Weight to the Plaintiff's Purpose, and dismissed the Bill of Review. —— 3 Chan. Rep. 76 says the Cafe of Cofit v. Cofit, was cited were the Defendant set forth Deeds that made a Title by Anfwer, but were afterwards loft and a Decree against them, but upon coming to light afterwards, the Bill of Review was admitted; but Ld. Keeper said this Cafe was not like the other. —— Vern. 417. Arg. cites Morgan's Cafe, where upon a Bill of Review, the Plaintiff could not produce the Deed, and to faild at the Hearing of making out his Equity, and though the Deced 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 Differance was taken by the Chancellor, Where a Matter in Faff was particularly in Issue before the former Hearing, though you have new Proof.
Chancery.

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 Confirmation, and where a Decree is capable of being Executed by the ordinary Processe 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 affit it with the utmost Processe the Course of the Court will bear; for in all this the Confidence 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 Processe 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 Confidence 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. Pach. 1653. 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 Fitzton v. E. of Macclefield.

16. Bill of Review for that on Account settled by the Matter, whose Report was decreed; the Matter 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 Reit of the Decree to stand. 2 Chan. Cafes, 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.


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 Arrears, 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 Affids after the Debt decreed. 3 Ch. R. 88. Trin. 1635. Countefs of Suffolk v. Harding.

5 M (Z 2.) Bill
(Z. 2) Bill of Review. By and against whom.

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. 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 Cafe, 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.


2. Plaintiff has a Decree, and afterwards brings a Bill of Review to have more allowed him; Defendant demurred, and infilit 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. Patch. 16 Car. 2. Glover v. Portington.


4. A Devise cannot maintain a Bill of Review being not in Privity to the Teitator against whom the Decree was. Chan. Cases 123. Hill. 20 & 21 Car. 2. Slingsby v. Hale.

5. A Perish is sued, and 4 are named to defend. A Decree is against them. Another Parishioner, who is not Party or Priest, 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.


(Z. 3) Bill of Review. On what Terms.

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. Sedib v. Darby; and says, The like Cafe between Dalton and Milton, by Order of the Houfe 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 Writings
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 


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. 1694. Fitton v. the E. of Macclesfield.

4. 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 Fleece to lie there till the Matter on the Bill of Review was determined. Vern. 117. pl. 123. Hill. 34 & 35 Car. 2. Williams v. Mellifill.

6. The original Bill was brought to settle the Boundaries of the Plaintiff's Manor, and on the first Hearing an Issue was directed out to be tried at Law, and there was a Verdict for the Plaintiff; upon the Equity referred 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 no 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 inferted on by the Counsel for Sir Henry Lyddal, 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 Causes 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 1636, 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, a Lease &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 Supersession 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 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 inferted on as irregular; that in Lien thereof a Deposit of 50 l. is left with the Registrar 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 revived 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 Cancellarie, and in that Book
Book there is no such Order as they have infil'd 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 reversed, 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 Cases 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 reversed if the Decree be reversed upon the Bill of Review; but in the present Case, if the Decree should be reversed, 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 reverting 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 Decree on which the Bill of Review was founded was first to the Plaintiff's Knowledge after pronounceing 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.


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**Bill of Review. At what Time.**

1. Bill of Review was disallowed, for that it was a long Time since the Decree was made, and the Plaintiff relied under it without any Complaint. 2 Chan. Rep. 49. 22 Car. 2. E. of Castlehaven v. Underhill.
Chancery.


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 *demurred*, 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.* 1652. Danny v. M'Ball, because of the former Bill, the 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 Lt. 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 dismissed, but not on the Merit, 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. Alcough.


5. 'Twas laid 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.* 1654. in the Cafe of Pitton v. Earl Macclesfield.


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 favour'd 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 Cafe of *Palmer v. Denby* was cited, where, in the Cafe of an Executor, it was granted without Execution of the Decree. 12 *Mod.* 343. Mich. 11 W. 3. in Can.

(Z. 5) *Plea* to Bills of Review. And what may be *See* (Z. 4) assigned for Error.

1. *The Defendant* answer'd 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 enrolled; on which Answer, as to

| 5 N | that |
that Part, there was a Demurrer, because this would tend to Perjury and Infinitenels 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 Anfwcr in Equity. Serjeant Glyn, for the Plaintiff, faid 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 fame 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. Pafch. 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 obferved that was occafioned by the ill Way they had got of late in drawing up Decrees in general, without particularly stating the Matters of Fact; and faid the Plaintiff in a Bill of Review should not be concluded by it, unlefs the Matter of Fact were particularly stated in the Decree. 1 Vern. 215. pl. 212. Hill. 1683. Bonham v. Newcomb.

4. A Debate arose touching the Stating of the Matters of Fact in a Decree, and it was complained that the Registris now drew up Decrees in such a manner as that no Bill of Review could be brought; for they only recite the Bill and Anfwcr, 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.


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.


(Z. 6) Costs and Damages. In what Cases. On Bills of Review:

1. T H E Defendant had a Decree for Money. The Plaintiff by Bill of Review reversed this Decree, and the Money decreed to the Plain-
tiff. Per Cur. on Search of Precedents, the Defendant shall not pay Da-

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2 Chan. Rep. 15, 16. S. C. Direc-
tions were
2. A Bill of Review was brought, and demurr'd to; and afterwards the Council 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 50l. 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 Debt, or such like, which is not recovered in Damages.

2. Where a Feme is newly endowed in Chancery, there she shall not recover Damages; for those of the Chancery do not give Damages. Br. Damages, pl. 195. cites 42 Aff. 32. and 43 E. 3. 32.

3. Damages shall not be given to the Defendants 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 Cafe of the Statute. Br. Damages, pl. 163. cites 7 E. 4. 14. per Cur.

4. Forasmuch as it is informed, the Tital of the Truth of the Matter refleeth 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 dismis'd. Cary's Rep. 64. cites 2 Eliz. Fol. 122. Fisfield v. Vimore.


6. The Defendant being served with a Process, found the Cause set down for Hearing, and attended, and was dismis'd with Costs, because the Plaintiff was not ready. Toth. 108, 109. cites 15 Eliz. Clayton v. Leigh.


8. The Plaintiff served the Defendant a Writt; 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. Powrell.

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


12. The Plaintiff was adjudged to pay the Defendant 37 s. 6 d. Cofts, for that he being served with a Subpoena in Hillary-Term appeared, and by his Answer disclaim'd, and yet after the Plaintiff served him with a Subpoena to rejoin; but afterwards the same Cofts were discharged by Motion, for that the Defendant bad, before the Cofts, put in his Rejoinder; but upon a Disclaimer no Cofts is to be allow'd. Cary's Rep. 156. cites 21 Eliz. Read v. Hawtied, als. Lane.

13. The Defendant was taken upon a Commissiion of Rebellion at the Plaintiff's Suit, and required his Cofts to be allowed him. The Court asking the Opinion of the Clerks, it was agreed with one Consent, that he should have his Cofts allowed, therefore ordered accordingly. Cary's Rep. 156. cites 21 Eliz. Morgan v. Ap John Gowge.


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 discharg'd; and if both for one Cause, the Defendants shall be discharg'd from one of the Bills with Cofts. Cary's Rep. 125. cites 21 & 22 Eliz. Mander v. Wright and Allis.

16. A Defendant examined touching a Contempt, and discharged thereof, shall have Cofts of Course, if a Contemn be not presently taken out to prove it, and if he prove it not, then increase of Cofts. 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 Cofts for that Trouble upon Motion. Toth. 149. cites Hill, 39 Eliz. Beifwic 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. Cofts were taxed. The Defendant moved to have the Cofts discharged, because an Executor is not liable to Cofts. It was insisted, that an Executor, in all Causes at Law, where he is Defendant, pays Cofts if the Judgment is against him, As De Bonis'Testatoris &c. But it was ruled, that an Executor, being Defendant in Equity, shall not pay Cofts, because it is without Precedent. Hard. 165. Hill. 1659, in the Exchequer, Thwilton v. Thwelil.

19. Where a Man applies to be reliev'd against the Penalty of a Bond, and is ordered in Chancery to pay Interet and Cofts, it will extend to Cofts at Law as well as in Chancery. 3 Ch. R. 5. Hill. 14 Car. 2. Hall v. Higham.

20. No Damages or Cofts were given on a Bill of Review, and it was faid, 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 amittit per Judicium prædict' but no Damages or Cofts. 3 Ch. R. 15, 23 May, 16 Car. 2. Jackson v. Eyre.

21. Subpoena was serv'd on Defendant's Servant, who gave no Notice to Defendant, who was prosecuted for Contempt to a Servant at Arms; Per Cur. tho' the Want of Notice is sufficient to discharge the Contempt, yet Defendant shall pay Plaintiff's Cofts, else Plaintiff may be put to Charge without any Fault of his; for Prima Facie the Service was

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was good, and Ground enough for Plaintiff to go on with Process of Contempts, and so shall have his Costs. Hard. 405. pl. 6. Pach. 17 Car. 2. in Scacc. Duncomb v. Hide.

23. Costs from their Time of being tax'd shall carry Interest, and shall charge the As^ets by Defendent. 2 Chan. Rep. 247. 34 Car. 2. Lady Dacres v. Chute.

24. When a Defendant has demurred, he may alash another Cause of Demurrer at the Bar, paying Costs, and if such Demurrer is over-rul'd, he ought, in Strictu sl, to pay double Costs; but when a Defendant has pleaded, and there is no Demurrer in Court, he cannot demurr at the Bar, tho' he would pay Costs. Vern. 78. pl. 72. Mich. 1682. Du- dant v. Redman.

25. Demurrer allowed, but without any Costs, because it was a De- murrer only, without any Answer, and came in by Com mission; per North K. Vern. 282. pl. 279. Mich. 1684. Elme v. Shaw.

26. Ld. Chancellor Jeffries 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.

27. One may add a new Defendant without paying Costs, so as fuch Ad- dition does not make the other Defendant's to change their Answer. 12 Mod. 561. Mich. 13 W. 3. in Canc. Anon.

28. 4 & 5 Anne, 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 Cafe 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. Wm's. Rep. 576, 577. Trin. 1717. Att. Gen. at the Relation of the Overseers of Illington v. the Brewers Company.

30. The Heir of 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. Wm'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 Wm's. Rep. 26. Trin. 1722. Maxwell v. Wetenhall.

32. If the Plaintiff in an Issue directed out of Chancery, gives Notice of Single, 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 Wm's. Rep. 68. Trin. 1722. Anon.

33. A Bill was dismissed with Costs, and the Person, who was intituled to Costs, died before they were taxed; there is no Relief to be had in this Cafe. 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. W. Wilton 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 signed 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 Matter 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 Counsil 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. 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 the Plaintiff has Costs given him, it must be Costs to be taxed. 2 Wms's Rep. 387. Mich. 1726. Anon.

But the Reporter makes a Quære, If the Interrogatory had led to it, whether the Plaintiff 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.

37. A Witness examined on a Commision depos'd, reflecting Words upon the Examiner's Answer, and the Plaintiff's Bill is dismissed as against a Defendant, there only 40. 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 the Plaintiff has Costs given him, it must be Costs to be taxed. 2 Wms's Rep. 406. Mich. 1726. Anon.

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 left; 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 Registrar his Fee for making an Entry, which he neglected, by Means whereof the Proceedings were irregular and the Defendant obliged to pay 581. Costs; the Registrar 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
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(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.** D. 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 certify 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 Cause without the Consent of the Parties. D. 8 Car. B. R. between Mayor & Mayor referred, and a Prohibition granted.

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. to that the Witnesses to prove the Promise may die before J. D. and to 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.** D. 19 Jac. in Chancery, between Sir Edward Trefil & 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 Radimus Bag-nold v. Green.

3. The Plaintiff exhibited his Bill to examine Witnesses in perpetual Memory touching a Leaf 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. Fither.

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. Tho. 85. cites 11 Car. Pott v. Scarborough.

6. Witnesses were examined to support an Entail. Ch. Rep. 174.

7. Witnesses were examined to prove a true Deed of Uses of a Fine, whereby the Lands were limited to the Conouer 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 Conouer 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 Conouer and his Wife are dead. The Conouer sold the Lands, and made a Title by the forged Deed of Uses. The Purchaser demurred 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 Examiner was over-ruled. Nelf. Ch. Rep. 125.


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, which that Matter is proper to be determined. The Court allowed the Plea quoniam 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. Mafon v. Goodburne, in Marg.


11. Bill by a Commoner (against whom an Action was brought at Law by another Commoner, and 101. Damages recovered) to examine his Witnesses to prove his Right of Common in Perpetuum 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. Pawlel v. Ingref.

S P. Vern. 512. in pl. 308. One who is in Possession of a Common, Pipebury, Rent-charge &c. may bring a Bill to examine his Witnesses in Perpetuum &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 insisted that the Defendant threatened to disturb him &c. when his Witnesses should be dead, if the Defendant not only threatened but actually did disturb by Plowing &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 * shown to his Bill that Defendant had actually disturbed him, then the Demurrer had been proper, but not for barely threatening. Chan. Prec. 153. Trin 1724. The Duke of Dorset v. Serj. Girdler.


12. On a Bill to perpetuate the Testimony of Witnesses touching a Right to a Way, the Plaintiff must let out the Way exactly in his Bill
Chancery.

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 De-
defendant, and would not suffer the Plaintiff to bring an Action in his

13. If a Bill be exhibited for the Examining of Witnesses in Perpe-
tuam rei Memoriam, if the Plaintiff therein prays Relief, the Bill shall
be dismissed. 2 Vent. 366. Pach. 36 Car. 2. in Canc. Anon.

14. Devisee shall not examine Witnesses in Perpetuam rei Memoriam,
to prove a Will against a Purchaser without Notice, till the Will has
been established by a Verdict at Law; per Ld. C. Jeffries. Vern. 354. pl.


15. If Witnesses are examined to perpetuate Testimony, and after-
wards a Witness dyes, 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 anwered
as to the Title, and demurred as to the perpetuating Evidence, in re-
gard 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 overruled by the Matter
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.

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. 92. Hill. 10 Geo. 1. Dawlon v. Chater.

decreed, tho' he himself had proved the Will in Doctors-Commons as to the Personall
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 Personall Estate, and decreed,
2 Ch. Cales, 43. 32 & 33 Car. 2. Collinson v. Gardner.

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,
1682. The King v. Carew.

5 P

3. Chan-

4. Allimony 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.


6. Chancery will not intermeddle with Commissioners of Sewers Accounts; otherwise in Case of Receivers by Authority in Case of Commissioners of Bankrupts. Chan. Cafes 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 Miler in Canc. 2 Chan. Cafes 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. Cafes 153. Mich. 35 Car. 2. Harding v. March.

9. Bill may be brought in Chancery to foreclose Mortgage of Lands out of the Jurisdiction of the Court, (as of the Islands of Sarkes, Guernsey, &c. which are governed by the Laws of the Duchy of Normanby) 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.

seems to be S.C. and L.A. Keeper over rull'd the Plea to the Jurisdiction for the Reason here given, and also, because the Grant was of the whole Island.

10. The Point being * Parcel no Parcel decreed, and being uncertain, the Lands lying intermixed, 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. Kinnerley.


12. On a Bill to settle Boundaries between Freehold and Borough Eng Liberals, a Commision was ordered to be directed to certain Perons, 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. Nelf. Chan. Rep. 14. by Ld. Coventry, 7 Jac. 1. Spyer v. Spyer.


14. Bill was brought for a Commision to set out the Boundaries of a Parcel of Freehold Land, of about 12 Acres, suggested to be intermixed 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 included, and
Chancery.

and known by the Name of H. and not intermix'd, a Communion 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 Communion 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 Lessee) brought his Bill for a Discovery thereof, and allo 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. Scawen.


18. Bill for Rents purchased by the Plaintiff of 2 s. and 3 s. per Ann. fuggisting constant Payment Time out of Mind, but that they could not recover at Law, not knowing the Nature of the Rent, whether Rentcharge, 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 denying the Matter might be tried at Law, an Issue was directed to try if any and what Rents were owing 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 imputing out of Lands, but the Lands charged lyning intermix'd with others, and the Boundaries so confused that the Plaintiffs could not obtain, and therefore pray'd Relief by Bill; A Commision was ordered to set out the Lands, and the same was returned and certified accordingly. Chan. Cases 114. 116. cites it as a Precedent produced to the Court, as of 12 Car. 2. Bowm.m. alias, Boreman v. Yates.—Same Precedent cited as produced, Neli. Chan. Rep. 121, 122.—S. P. mentioned Chan. Rep. 65. in 8 Car. 1. Harding v. Suffolk (Counts.)

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 demurred. 2 Vern. 38. pl. 34. Hill. 1688. Hungerford v. Goring.

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.

Jor v. Rudd, S. P. but the Demurrer was over-ruled, and Defendant ordered to answer.


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 redres'd there, then to the Judges of the Society; and the Courts at Westminster have always declined meddlin' therein. And in the principal Cause the Matter 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 fitch Bill proper, and decreed a Redemption. 2 Wns's Rep. 511. Hill. 1728. Rakellraw v. Brewer.
23. Bill was dismissed where it was brought to be relieved on Collateral Security and Supplementary. Chan. Cases, 301. Mich. 29 Car. 2.

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. Pach. 35 Car. 2. in Alderman Backwell's Case.

25. Bill was brought by the Heir at Law for a Horn, by which the


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 transferred 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.

30. A Bill, which was only preparatory to the bringing an Action on the Cafe, was demurred to and allowed. Toth. 72. Trin. 38 Eliz. Williams v. Nevil.

31. If A. suffereth me of Land, and builds a House on this Land, I shall have a Judgment for this; he is not to go into Chancery to be relieved for this; per Coke Ch. J. 3 Bull. 116. Mich. 13 Jac. The King v. Dr. Gough.

32. The
32. The Court of Chancery will not try or certain damages recovered at law in an action of covenant, but orders 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 said contractors 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.

Lands or Goods; Arg. 2 Chan. Cases, 66. in the stationer's cafe.

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 Wear 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 possesion 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 dismissed with costs. MS. Rep. Patk. 13 Ann. Hilton v. Lord Scarborough & al'.

36. The Court will not retain a bill to examine point of lunacy. Toth. 227. cites to Jac. Bonner v. Thwaite.

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 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 referred 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 time, for the lord upon the pretension of 7 copyholders, and that agreed to be the by major part of the homage, to include ware ground to build upon, and upon rendering several court rolls and hearing all parties decreed to be established, and that the lord might grant leaves and estates at pleasure, after such pretension and agreement. Fin. R. 263. Trin. 28 Car. 2. Lady Wentworth v. Clay, Jeffries, Hall & al'.


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 to much land as the commissioners shall think fit, upon common intenments. Toth. 186. cites Hill. 14 Car. Bishop of Hereford v. Awberry.
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. 1651. How v. the Tenants of Bromsgrove.

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 to proper in this Case, one Man being able to contend with another. G. Equ. R. 2. Earl of Bath v. Sherwin.

43. Perjury to be examined here, Hall v. Brown, notwithstanding the Cause was dismissed. Toth. 222. cites 16 Eliz. Fo. 401.

44. Defendant was ordered to answer a Bill of Perjury. Toth. 73. cites 19 Eliz. Phillips v. Benfon.

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 Subpoena be awarded to the Defendant to answer, Cary's Rep. 90. cites 19 Eliz. Woodcock v. Woodcock.


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 Leafe made thereof to him by one Anthony Marnyon, and that he doth not know to which of them the Rent and Reversion is due, and therefore defiles, that upon Payment of his Rent into this Court, according to the Covenants and Articles of his Leafe, he may be discharged, and faved 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. Alnet v. Bettam and Marnyon.

48. Wherea 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.

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.

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 Seise Pacias ad Computandum, or Bill in Chanc. but otherwise it is on an Eject; for there the Debtor 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. Patch. 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.

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 Cafe.

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.

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.

55. A differing with his Mother about the Repairs of the Mansionhouse, settles his Eftate on his Brother, but first takes a Bond of 500L. 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 censur'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.

56. There ought to be no more Help in Chancery than there is at Common Law, against him that hath waged his Law in Debt, tho' peradventure, falsely. Cary's Rep. 7. cites 15 H. 7. Duplege's Cafe.


58. A Bill to be relieved for a Way which has been abolished, a Communion to fet it out. Toth. 83. cites 8 Jac. Savill v. Timpery.

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. Parfons.


For more of this see the several Titles throughout this Work.

(E. a) Relief. Against what Persons. The King.

1. Leased to S. and W. in Trust for the Wife and Children of G. and * S. P. Hard. after G. and W. are attainted of Treason &c. by this a Misty of the Term vested in W. is forgot to the King, and S. is Tenant in Common with the King. It was agreed, that the King shall not in Equitable, be ordered to perform the Trust, for as the King cannot be leased to an Ufe, to his Eftate cannot be * subject to a Trust, and there is no Equity against the King. Lane 54. Trin. 7 Jac. Wike's Cafe.

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 sues. The Executor of L. extends P.'s Lands on the Recogni-

...
Chancery.

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 Interesse, 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 prefer 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 compelled 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 Secaccoffo. 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 Febyr Order, that 100 l. per Ann. shall be paid to A. for a yearly Leafe in the Parh, in a Bill for the Recovery thereof, the Court held all the Parties to the Order ought to 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 show 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 demur'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 suffer'd to be put all into one Bill, each Party would be oblig'd 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 Person should prefer a Bill against several Persons, viz. against some for Tithes, and against others for Glencore, this is naught. Hard. 337. pl. 7. Mich. 15 Car. 2. in Cafe of Berke v. Harris & al.

4. But for Tithes only it is well against several Parsoners, because they are of the same Nature. Hard. 337. pl. 7. Mich. 15 Car. 2. in Cafe 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 entire Thing. Hard. 337. pl. 7. Mich. 15 Car. 2. in Cafe 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 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 reit prefer a Bill; whereas in this Case one only brings
Abatement of Suits in Chancery.

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 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 Cary's Rep. Triff, and yet the Court would hold no longer in his Name. Toth. 140. cites 160, 164. Hill v. Portman.


4. A Feme Sole, Defendant, having a Commission to examine Witnesses, E. R. C. marries, and after the Marriage the Witnesses are examined on that Communion, and held good, and the Depositions ordered to stand. Toth. 163. cites 10 Car. Winter v. Dancie.

5. A Feme Sole exhibited a Bill, but before the Hearing the Cause for Chancery was deposed for her. On a Bill of Review to reverse the Decree this was alligned for Error, for that the Cause being abated by the Marriage, there was no Foundation for such Abatement by Decree. The Defendant demurred, because it appeared not in the Body of the Judge, 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 Plaintiff's Error as to ground a Bill of Review upon; and the Court was of that Opinion, and allowed the Demurrer. Nell. Chan. Rep. 85. Chantmarne (Vicountess) v. Delmahoy. pl. 219. E. 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 Summons and Faciendum Attornem. Per: Ld. Keeper. Vern. 172, pl 165. Trin. 35 Car. 2. Anon.

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 Cases, two Trustees 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. Wm's Rep. 428, 429. Pach. 1718. Stafford v. City of London.

10. Trustees were decreed to convey to certain Uses, and it was referred to the Master to settle the Conveyance, after which the Cecily que Trut 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 Cecily que Trut, and that the Master had no Power to proceed till the Suit was revived; but the Court overruled 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. Winchelsea.

11. It was said, that it was every Days Practice to order Money out of Court to the Party intituled 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.


(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 Plaintiff, exhibits a Bill of Revivor, and good. Cary's Rep. 100. 20 Eliz. Alice Parrot v. Randall & Cowarden.


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. Husband and Wife joined in a Bill for 200l. Arrearages by Year to her due; the died before Hearing; he, after her Death, exhibited 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 he 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, Chan. Cales but upon this Condition, That if his Widow married, her Executorship should 71. S. C. 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 Confront, to refer the whole married, and Matter in Difference to the Arbitration of another Person. Then the Wished according died, and now the Question was, Whether there could be any far- ingly, other 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 particular- ly that Order made by Confront, but discharged as to this on Demurrer. Nell. Chan. Rep. 108. 18 Car. 2. Hamden v. Brewer.


9. B. being a Purchaser, exhibited a Bill of Revivor against the Defendent, 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 Purchaser, cannot maintain a Bill of Revivor, for that there wanted other Parties at the Hearing. 3 Chan. Rep. 39. Hill. 21 & 22 Car. 2. Backhouse v. Middleton.


10. Where there are several Plaintiffs, and the Bill after Hearing abates, some of them, without the rest, may revive the Cause. 2 Chan. Cales 80. Mich. 33 Car. 2. in a Nota, in the Cale of Exton v. Turner.

11. Per Cur. An Assignee shall not have a Scire Facias to revive a Decree that is not signed and enrolled; but after the Decree is enrolled, an Assignee may bring a Scire Facias to revive it, in like Manner as at Law, if there be Judgment for an Annuity, and the Annuitant after- wards 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.

Plaintiff not coming in Privity, was not intitled to such Writ. And in this Case it was intitled 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 shown to the Contrary; but the Maker of the Rolls now decreted 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 fur- ther Proceedings; Administrator de Bonis Non may revive this Decree as an Adminis-
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

2 Vern. 34. pl. 311. Mich. 1700.
S. C. but S. P. does not appear.

14. The Plaintiff's Intestate had obtained a Decree against the Defen-
dant for Payment of a Sum of Money, and also for Conveying of Lands and Deli-
very 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 demurred, because the Heir was not made a Party, and a Decree
cannot be revived by Partes; 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 Heirs and Administrator are not jointly concerned, and each may pro-
secute pro Interesse suo, and cannot join, and if he had been made Defen-
dant, the Decree would not have been revived against him, because the
Bill could only have prayed it might have been revived as to the perso-
nal Estate; and the Court over-ruled the Demurrer, and said it was
like a Judgment at Law in Waite, where there may be 2 Revivers.
It being then objected that the Scire Facias is to revive the whole Decree,
whereas it ought to be only as to the Personality, the Court allowed
the Demurrer as to the Realty, but ordered the Decree to be revived as to

15. Where there is a Decree for an Account, and Defendant dies, his
Representative may revive as well as the Plaintiff; * both being in Na-

* S. P. Wms. Rep. 263. Per Lord Har-
1714. in

16. If a Creditor is admitted by Order to come in before the Matres and
prove his Debt, and pay his Contribution he is entitled to revive, it the
Caufe abates. Trin. 1702. Abr. Equ. Cafes. 3. Pitt v. the Creditors of the
Duke of Richmond.

March 13.
1722. Wing-
field v.
Whaley.
1721. Osbourne v. Uther.

17. One who claims only as Heir at Law by Provision or by Formon
cannot revive, but must bring his Original Bill. MS. Tab. May,
1721.

18. Bill of Partition brought by several Persons, one dies, who devixs
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 Re-
vivor can only be by the Heirs as to the Realty, and by an Executour, or Adminiftrator as to the Personalty.
On Bill of Revivor, the Estate continues the same as before Abatement, but here, in Cafe of a Devisee who is a
Purchafe, the Estate is altered, and a Purchafee can never revive, and
cites 1 Chan. Cafes. 171, and an Anwser must be put in and Publication pafs,
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 Devifee, was
thought the wofl proper Method. Sel. Chan. Cafes in Ld. King's Time,

19. It was held that is 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. Cales, 2. Mich. 1727, in Cafe 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 Affignee 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 Affignee 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 Revivor. And Parker B. said that were it was Res Integra, he should very much doubt whether an Affignee 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 Cafe 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. Cales, 152. Mich. 21 Car. 2. Style v. Bolfile.

2. A Decree and Sequestration 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.


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 Legall Estate was in A. and B. and the Equity of the Fee was in C. It was refer'd to the Master to settle the Conveyance; after which Celby 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 Celby 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 Celby que Trust; and so in all Cases where any Thing was required to be done by the Representation of the Party dying. Abr. Equ. Cales 2. Mich. 1727. in Cafe 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. 136. 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; 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; fed adjournatur. 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 &c. 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 Privy; 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. Bofville.

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.

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 enrolled 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 Omision by a Motion upon the Surprise. 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 enrolled, 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 of a Decretal Order, as it was signed and inrolled, was left out of the Entering Book in the Register's Office, which directed an Allowance to the Defendant; and in respect of the said omission in the Order, the Maller made not such Allowance; but upon Exceptions to the Report the Allowance was made. 3 Chan. Rep. 72. Hill. 1671. Tredcroft v. White.

3. After a Decree signed and inrolled the Plaintiff brought a Bill of Revivor, the Suit having abated; whereupon the Defendant infinits 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 infinits that it is at the Plaintiff's Election to revive the said Decree inrolled, 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. Croft v. Wiler.

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 Nonstit; 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 mifcarries, should preclude his Right. It is not a Favour, but Ex Debito Justitiae 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 Coffett was quoted as a Point. Sel. Chan. Cafes in Ld. King's Time, 4. Mich. 11 Geo. 1. Hindford (Earl) v. Decolta.

5. Bill was dismissed with Costs, which were taxed. A Bill of Recover was brought singly for Costs, to which it was demarr'd. In arguing the Demurrer it was infinited, that tho' the constant Rule be that where a Bill is dismissed 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 dismissed, it is not so much out of the Court but the Party, in conquence of such Dismissal, is liable to the Proceeds of the Court by Subpœna, Attachment &c. The Ld. Chancellor said it is a Rule that, unless in Account, where both Parties are Affors, 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. Cafes 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. Stavville.

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.

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. 1699. 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.


1. It is ordered, that a Subpoena 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. Fairfield 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 Defendant 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, Wilkinfon, &c.

3. A Widow had a Judicial Order, and a Commission to make Profit, and after the marriage; no Bill of Revivor needed. Toth. 228. cites Pach. 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.

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 throughout the Cause in Motions, and a Commission, and held, that this supply'd the Omission. Ch. R. 252. 16 Car. 2. Peachy v. Viattier.

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. Juxton.

8. If Tenants, 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.

in Common, because a Right descends to their Representatives.

9. It is not necessary to revive against a Defendant that has not answered; 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.

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(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. On a Bill in The Question was, whether the Defendant should be at Liber-

ty to make a new Defense. Ld. Keeper held, that where the Bill, al-

the original, is only to supply the Want of Priority, and in all other Mat-

ters 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 Privy. There is no Reason why the De-

visee should not have the same Advantage of the Decree as an Heir or Validity of 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. 545, 549. pl. 499. Pach. 1706. Clare v. Wordell.


2. Defendant pleaded to a Bill, but before the Plea came on to be argued In the End the Defendant died. The Plaintiff revived, and upon the coming on of it is a N. B. that the Plea to be argued, Lt. C. Talbot was of Opinion, that it could not be argued, but that the Defendant's Representative must plead De Novo. seems to be, Cates in Chan. in Ld. Talbot's Time, 3. Mich. 1735. Mickletonwaite v. Calverly and Baker.

have a Plea to defend him without denying the Merits; for if an Executor or Administrator can truly plead Plea Administration upon a Stat. Po at Law, (which must always plifie in such Case) the Execution can only be De Bonis Tastatoris quando accusinvis; but the Answer of the Tastator in a Court of Equity will bind the Executive who has Affets. Ibid.

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(P. a) Pleas and Demurrers to Bills of Revivor.

1. The Plaintiff has exhibited his Bill of Revivor against, where Equ Abr. the first Bill was against, and the Personage in Question is named S. C. and T by adds a Quer.

1. The Plaintiff exhibits his Bill against L. and M. two of the Defendants, and after Consignment 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.

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. Cates 7. Temple v. Roule.


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 Supplemental 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 costs. Chan. Cafes, 234. Mich. 26 Car. 2. Crofts v. Wortley.

2. After Dismission on Hearing, a new Bill was exhibited on the same Equity, on Suggestion of Notice which was not in Illue 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 such 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. Cafes, 232. 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 directed 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 farther. 2 Chan. Rep. 142. 30 Car. 2. Bovee v. Skipwith.


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. Cafes, 72. Mich. 33 Car. 2. Coventry v. Thinn.


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. Cafes, 119. Trin. 34 Car. 2. Dolly v. Smith.

7. A Discovery on Election to proceed at Law is not peremptory, but Plaintiff may, after he has filed at Law, bring a new Bill. 2 Vern. R. 32. pl. 24. Hill. 1618. Countys 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 Illue, and not proved in the original Cause; and such Proofs not be read. MS. Tab. March 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 Leaves, 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 Leafe and Assignment which was before his Knowledge, and therefore pleaded that he heard say, that such a Leafe and Assignment was made; The Matter 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. citing 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 Leafe 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. Harburt 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 himfelf answer's 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 Answerer 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. Nordon.

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 Caufe to dispence with so politic 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 Cafe.

(T. a) Answer.
(T. a) Answer. Oath. By whom, and in what Cases the Answer must be upon Oath.

1. A D Y 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. Matters v. Bruett.

4. Lord C. Macclesfield allowed a Quaker, who was committed for not answering a Bill exhibited against him, to put in his Answer without Oath or Affirmation, the Bill being groundless, and discharged him out of Custody. Wins's Rep. 781. Hill. 1721. Wood v. Story & Bell. said to be made by Lord Harcourt in Dr. Heathcote's Cafe.

(U. a) Answer. Where it shall conclude, or charge or discharge the Defendant.


—Where there is no Proof but what arises from the Answer of the Defendant, the Answer must be taken entirely as is, and no Part of it must be impeached by any other Evidence; per Parker C. 10 Mod. 404. Patch 4 Geo. 1. in Cane, 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. Patch. 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 as Answerer, 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 80l. conveys an Estate absolutely to the Defendant, and brings a Bill to redeem. Defendant informs the Conveyance was absolute, but confesses, that after the 80l. 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. 258. pl. 277. Patch. 1693. Hampton v. Spencer, &c contra.

5. Where a Bill had unadvisedly charged that Plaintiff's 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
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Plaintiffs at large, and left them at Liberty to demand the whole against Defendants; and per Cowper C. decreed accordingly, 2 Vern. 608. pl. 356. Paffch. 1708. Parsons and Cole v. Doctor Bridgcock & 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 inflected, 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 Cauce 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 Plaintifis 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 inflicts 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.

(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, 29 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 Part 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 refus'd, but shall be bound by the others Answer, if the Cauce pas 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 inferred, 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 laying 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. Whis'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.


1. Commissioners, for taking an Answer in the Country, had omitted Escutio ifius Brum &c. The Answer was referred to the Six Clerks, but on Motion, the Commissioners having indorsed on the Answer, Capt. & Jurat &c. secundum Effection & Tenorem Commilion' hunc annex', and had annexed the Commission to the Answer, it was ordered the Answer should be allowed. Vern. 41. pl. 41. Patch. 1682. Pen v. Chetle.

2. One of the Defendants is in Contempt, and stands out to a Sequestr-
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 Review, grounding it upon the former Bill brought by B. and C. but Ed. 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 Assignee's of Sir Stephen Evans, v. Frederick.

2. The original Bill is first to be answer'd, 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 answer'd 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 wanting the General Traverse at the End, and it was objected, that without this Traverse no Suit was joined. But per Ed. Macclesfield, it does not appear but that the whole Bill and every Cause in it is fully answer'd, 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 answer'd before by the Answer. Mich. 1722. 2 Wms's Rep. 87 Anon.

3. And his Lordship laid, that this General Traverse feened to him to have obtained formerly, and in ancient Times, when Defendant used only to set forth his Cause in the Answer, without answering every clause in the
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the Bill; and for that Reason it was the Practice for the Defendant to
add, at the End of the Answer, this General Traverfe. Mich. 1722.
2 Wm'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. Cafes, 69.

2. Plea to part, and Denmuurt to part; Plea over-ruled; then Defen-
dant 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 Inter-

3. A Bill was brought against 2 Defendants, the Answer of one is re-
ported insufficient, and the Report on Exceptions confirmed; afterwards
the other Defendant puts in just such another Answer, and insulited 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

4. Where the Defendant Answers to part, and pleads to all other Mat-
ters 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

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 Re-
port, must shew wherein, in what Page and how far the Answer is Scand-
alous or Impertinent; Per Ld. Macclesfield. 2 Wm'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 Re-
ports it scandalous; if the Master has once expunged this scandal, the
Party cannot then except to the Report, because it cannot then be made ap-
pear 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 Wm's Rep. 311. Abergava-
venny (Lady) v. Abercavenny (Lady).

9. After an Order to refer an Answer for Insufficiency, it cannot be re-
ferred for Impertinence, yet it may be for Scandal. 2 Wm's Rep. 312.
In a Note added by the Editor at the Bottom, it is said to have been so

5 X (D. b) In
(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. where to 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 Cae of * Hawkins v. 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 Reindee, Plaintiff may take his Judgment immediately for what is not answered, and Courts of Equity form their Processes 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.

2. Nota, A Cafe was mentioned in the Exchequer, of the Corporation of Pelton 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 Cafe of Hawkins v. Crook before cited, for that an insufficient Answer is no Answer &c. and it is the Party's own Obligatory to stand out and refuse making a Discovery &c. and the Opinion of taking a Bill Pro Confesso quoad some Particulars, and joining Illue &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. Fishier.

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 something which the afterwards found to be untrue, it was moved on her Affidavit of the said Matter intrinsically set forth, being occasioned by its being added in the Margin of the Draught after her Perusal thereof; and her being thereby surprised, that she might have Liberty to amend her said filed, in a 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. Cafes 29. Mich. 15 Car. 2. Chute v. Lady Dacres.


But where the Defendant having by her Answer confessed that an Award made by her Father might be confirmed, desired Leave to amend her Answer in that Particular, the 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. 453. pl 396. Palich. 1702. Harcourt v. Sherrard and Dame Anderson Ux.;—Equ. Abr. 29. 52. pl. 3. has a Note that one Reason terms to be, because the Father was an Arbitrator of her own choosing.

4. Some Tenants of a Manor brought a Bill against the Lord to discover Ancient Customs. The Defendant demurred, 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. Hudfon 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 demurred; but the Court over-ruled the Demurrer, and gave the Plaintiff Leave to amend his Bill. Fin. Rep. 260. Trin. 28 Car. 2. Bulhell v. Newby.

6. A **Decree** was made against Baron and Feme, and all the Proces of Contempt was right till the Servant at Arns; but the Order for that was only against the Baron, and s he likewise was the Sequestration. The Husband died, and after his Death a Sequestration went against the Wife's Tenant; 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. Af. 115 pl. 107. Spearing v. Lynn & Ux; and the Title of the said Order the Words (at Ux') were omitted. An Action being and Field & brought upon this Recognizance against F. the Surety, he took Advan- tage of this Omission, and pleaded that no such Order was made in the Cause; whereupon the Plaintiff, perceiving the Mistake, obtained an Or- der from the Master of the Rolls to amend the Order by adding the Words, to be a... and the same was afterwards confirmed by the Ld. Keeper. 2 Vern. 376. pl. 339. Trin. 1700. Spearing & Ux' v. Lynn.

was infited 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 Carl v. Carl 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 Court.

8. Bill was brought for an Account of the Personal Estate of one T. E. The Defendant having answered, and Witnessed 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. Partch. 1702. White v. Taylor.


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 dismis’d upon the Merits; Per Ld. C. King, affisted by the Master of the Rolls. 2 Wms’s Rep. 402. Hill. 1726. Sir John Napier v. Lady Effingham.

S. P. admiss’d per Car. 2 Vern 224. 255. Partch. 1691. in Cause of Cecil v. the Earl of Salisbury.—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 Cause. Gilb. Equ. Rep. 3, 4. Hill. 6 Ann. The Lord Guernsey v. Rodbridges.

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.

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 intrus’d the Answer, and the foul Draught being produced, upon solemn Debate before the Ld. Chancellor, affisted 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. Gainfborough (Countefe) 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
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 Nailer, 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 exas Regnum against Nailer, 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, Deeds, and other Proper Titles throughout this Work.

(A) In what Cases a Charge made by one shall bind another.

1. If a Man devises Lands to J. S. and his Heirs, upon Condition Cro. J. 427. 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, S. C. adi. 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 Devisee, for it was the Will of the Devisee who had Power to charge it; and this was made in Preservation of the Estate of him in Remain- der, 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 Devisee until the Rent granted by Force of the first Words, and after a Tail. Still, 15 Jac. 2, R. between Dutton and Ingham adjudged, per certam Curtiam, which Intercitu P. 15 Jac. Rot. 204.

Poph. 131. Gouldwell's Case, S. C. it was agreed per Cur. that the Grantee was in by the Devisee, and not by the Tenant in Tail.

2. So it had been in this Case, if the Remainder in Tail had been Cro. J. 427. limited to him to whom the Rent ought to have been granted; for tho' 428. pl. 2. the Devisee appoints that it should remain to the same Person to whom he appoints the Rent to be granted, yet it cannot appear that S. C. ad- his Intent was, that the Rent should not longer than during the 

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Con-
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. Dick. 15 Jac. B. R. between Dutton and Ingham, per Curiam.

4. So if the Rent ought to be granted to the same Person to whom the Remainder is limited, per the Remainder [man] ought to hold it charged after the Death of Tenant in Tail, 9. 15 Jac. B. R. between Dutton and Ingham, per Curiam, for the Cause aforesaid.

5. If a Man seised in Fee suffers a Recovery to the Use of the Recovera, until they have made a Leafe for certain Years, and after to the Use of himself, if the Recovera mens for Years accordingly, he hat the Use after shall never abd. for; he comes under the Lease. *Dyer, 12 Eliz. 290. 61. by all the Justices. Co. 2. Stuckwith 57. b. 15 Jac. B. R. between Dutton & Ingham it was to agreed, per totam Curiam.

6. If the Baron be seised of Lands in Fee in right of his Feme, and thereof makes a Leafe for Years, and after he and his Wife levy a Fine Come coe 96. to J.S. in Fee, and after the Baron dies, the Connuice shall hold the Land discharged of the Leafe, for the Leafe was void by the Death of the Baron, for the Baron joined (*) but for Conformity and necessity, for all the Estate passed from the Feme. D. 33 Eliz. B. R. adjudged, quod vide cited Co. 1. Brudon 76. Co. 2. Cruwwell 77. b. Dick. 32. 33 Eliz. B. R.

* S. C. cited Arg. 4. Le. 96. in pl. 188. *Jenck. 278. pl. 17. S. C.


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 coe 96. 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. Cruwwell 77. b. laid to have been adjudged in B.

B. R. and they cited it as relieved in the Lord Mountjoy's Cafe. 24 Eliz. that the Recognition of the Baron shall not bind the Connuice of a Fine, and the Connuice is in by the Feme, and the Baron joins only for Conformity. — 3 Le. 254. Mich. 32 Eliz. C. B. cites Ed. Mountjoy's Cafe, thus: viz. Le. M. took to Wife an Inheritrice, by whom he had Isses, and so was intituled to be Tenant by the Curtesy.
Charge.

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ty. He acknowledged a Statute, and afterwards he and his Wife levied a Fine and died: now the Converse shall hold the Land discharged of the Statute; for after the Death of the Husband the Converse 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 ecq. 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 the Estate of the Baron as of the Feme, for the whole, for there are no Distinctions 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 leaves the Land to another, and after he and his Wife levy a Fine Come ecq. 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 devise of the Feme is discharged by the Death of the Baron, for it seems the Baron had no Power to charge the devise of the Feme but during her Life.

10. In Allife the Cafe was, that Tenant in Tail granted a Rent-charge, and died; the Issue entered, and infused 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. Afl. 3.

11. If Tenant by Elegit takes Confirmation for Term of his Life of the making of the Tenant of the Franktenement, by this it is in by the Tenant of the Franktenement, and not in the Left by the Law, as he was before; and then, if the Tenant of the Franktenement had charged the Land Mejie 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. 50. cites 31. Afl. 13.

12. If there are two Jointenants, and the one grants a Rent-charge, the Grantee may dethin 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 a (b) cites 1 Rep. 128. to W. R. and dies without Issue, yet the Possession of the Feoffee, (to fee in S. C. 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) Patch. 64. Eliz. C. B. in Capel's Cafe, alias, Hunt v. Gately.


15. A. Tenant in Tail. Remainder to B. in Tail. B. charges the Land 1 Rep. 61. b. with a Rent or Leafe, and then A. suffers a Common Recovery and dies without Issue. The Recoveror shall not be charged with this Leafe or Rent; because the Possession and the new Estate of the Recoveror, (to accord) which he has gained from A. the Tenant in Tail, is subject to the 154. pl. 298. 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 Cafe of Hunt v. Gately.


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 J. C. 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 incumbered 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 Hellow v. 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 flown 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 Leafe for Years out of the Reversion, and such Reversion had after come to the Brother, that it must have been subject to that Lease. The Statuing this proves the Difference, and that it would not be liable to the Bond of Sir Geo. Cary, as Assizes by Defendant, becau
(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, e.g. the Lease of this 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 All. 10.

2. A devise of Lands for Payment of Debts and Legacies, and gave Legacies to 3 younger Children, and makes his Wife Executrix without more Words, but devise 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 Cat. 2. Pain’s Cafe.

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 Children, 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. infinuated on having the 400 l. out of the personal Estate; but Ld. Chancellor decreed that the personal Estate shall not be leften in prejudice of younger Children, to make good a Direction in the Father’s Will for the Benefit of the eldest Son, when be 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.

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 again a voluntary Devisee. 2 Vern. 27. pl. 90. Pach. 1699. Tooke v. Hallings.

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 Defendant.
tendant Oldfield for his Life &c. upon this Cause. Mr. Ramfden (the Plaintiff's 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 Annum to the Defendant Oldfield for Life, and the Plaintiff's Counsel did insist that Mr. Ramfden ought to give Security to indemnify the Plaintiff's Jointure from this Charge, and thereupon Mr. Ramfden 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 Kinman, Mr. Appleyard by Letter directed to Mr. Ramfden, writes thus (viz.) That he is willing to be bound with him, viz. Mr. Ramfden, to indemnify the Lady's Jointure from the said Annuity, and do's by this his Letter oblige himself so to do. This Letter being produced to the Plaintiff's 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. Ramfden, but never executed by Mr. Appleyard. Mr. Ramfden died insolvent in 1717. and Mr. Oldfield's Annuity being secular by Demife and Re-demife of Part of the Jointure Lands, brought an Ejecution 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 devise'd all his real Estate subject to the Payment of his Debts. The principal Point in this Cause 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. Ramfden, without having executed the Bond to indemnify, Mr. Ramfden the Plaintiff's Husband dying Insolvent, and the Executors of Mr. Appleyard having no Aflies. The Defendant's Counsel insisted that the Heir at Law of Mr. Ramfden, as well as his Executors, ought to have been made a Party to this Suit; for if he had Aflies by Devise, 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. Ramfden had no Consideration for indemnifying the Plaintiff's Jointure from Incumbrances, and therefore Nudum Pudor, 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 specific Performance of this Agreement in his Life-time, and during Mr. Ramfden'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. Ramfden left Aflies 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 Tenor (viz.) and I do by this
my Letter oblige myself to do: and though this Letter was directed and sent to Mr. Ramden, yet it was writ with an Intent to be shewn to the Plaintiffs 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, The 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 Deviser 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 to 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. Ramden 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 296. S. C. Exemption in the Will. Fin. R. 342. Hill. 30 Car. 2. Ford Ld. Grey v. Lady Grey & al.

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 devises 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 fo 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 the Devisee 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 Mortgager with Covenant to pay the Money, and a Recognizance as further Security, dying intestate and leaving younger Children unprovided for.
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 Administrator of A. may be compelled specifically to perform this Agreement; and decreed accordingly. 2 Vern. 322. pl. 310. Mich. 1694. Holt v. Holt.

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 Personalities 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 devized to them by the 2d Will, they shall still continue charged on the real Estate, and be railed out of it; and 3dly whether their Legacies were increased or diminished. But for other new absolute personal Legacies devised by the 2d, they should be charged only on the personal Estate, and should have the Preference 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 Caves wherein the Personal Estate has ever been applied in Easle 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 Requite 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. as such like Clauses; in such Caves the Real Estate is subjected shall not be exonerated by the Personal; and cited the Caves of Lady Clive, and of one Natwmap, and several others. Gilb. Equ. Rep. 73, 74. Mich. 9 Ann. in Caves of Hall v. Broker.

9. A Mortgage in Fee for 300l. 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 in Equity, but by Ejecution to recover the Possession on Default of Payment. 3dly, if the Mortgagor had been in Possession it would not have made it 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 Alligns 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 Alligns should pay the 300 l. and the Rent, or 340 l. 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 Mortgagor died, and the Mortgagor come to redeem, he should pay the Money to the Executor, and not to the Heir of the Mortgagor, 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. 166. S. C. in toto dem 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 years, and then to pay the Surplus to the Devisee of his Personal Estate to B. B. dies an Infant. Per Cowper C. if in the Case the Real Estate, and 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.

456. S. C. reports that A. gave the Surplus of his Personal Estate (before unbequest'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 unbequest'd); but here he thought it could not.


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. feised 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 Legates to abate in Proportion. The Question was, whether the Mortgage should be paid out of the Personal Estate, so as not to displease the Legates, there not being sufficient to pay both &c. Per Muser of the Rolls, it is a Rule in this Court that a Heirs Facitus, as well as Natus, shall have Aid of the Personal Estate, but not to displease Legates; and therefore if the Heir or Devisee does exhaust the Personal Estate, as they may at Law, this Court will turn the Legates 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 fails, then the Legates should abate in Proportion, seems prima facie to import 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 Legates should come upon the Land without
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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 contrariety 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 Legatese &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 50 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 settled of Land in Fee devises several Legacies, and then devises 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 fo the Purchafor’s Estate nor liable in Law or Equity to the Debts or Legacies, tho’ he had Notice. But per Cur. the Lands are liable in Equity, and fo decreed against the Purchafor with Damages and Cosfa, and he to take his Remedy over against C. (B. being dead) for the Profits received, and the was decreed to pay the same to the Purchafor, for which Purpoze he was to have the Benefit of this Decree. Nelf. 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 the more Land will remain for the Benefit of the Heirs, or more Money for the Land sold, and no Intent appears that the Administrator shall have anything; per Fountain Serj, and admitted as reasonable by the Matter of the Rolls. Lev. 203. Hill. 18 & 19 Car. 2. in Canc. Felsham v. the Executors of Harlinton.

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 devis’d 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. Gibl. Equ. Rep. 72. 9 Ann. Hall v. Brooker. — But in such Case if any particular Legacy, as a Horfe, or 100 l. in Money, or any Part only of the Personal Estate, be bequeath’d to an Executor, such particular Legacy, not being call’d upon 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 call’d upon by the Law. Agreed. Gibl. Equ. Rep. 75 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 a Charge on the Lands till the Debts and Legacies are paid. Chan. Prec. 398. pl. 270. Pauch. 1715. Tomkings v. Johnson.

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.

7. One devise 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. 441. pl. 386. Mich. 1686. Coldwell v. Pelham. cited per Hutchins Commit. N. Chan. Rep. 178. in the Cafe of Webb v. Sutton; and distinguishes between a Devising in a Will to pay Debts, and devising to pay a Money-Legacy; that in the last Cafe 'tis no Charge on the Land.

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 Anni. 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 blessed me. I give and devise there-of as follows; Firs't, I will that all my Debts be justly paid which I shall owe at my Death to any Person or Perlons whatsoever; also I devise all my Estate in G. to J. S. This was all the Real Estate the Tes-tator had. Per Lt. 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 defers him to see his Debts paid, and gives to his Executor all the Rest and Residue of his Estate un-queath'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 subject 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 Cafe the Debts upon simple Contract, for which there is no Remedy at Law, shall be first satisfied out of the equitable Estate. 5 Salk. 53. pl. 4. Hill. 1697. Feverstone v. Scadle.

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 Land, and not on Goods. The Cowper, King's Counsel, said, that in Chancery, if it be not expressly declared that Legacy should be paid out of Land, and not out of Goods, if there be sufficient Allot, they will charge them in Eas of Inheritance; to which Holli 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 20l. 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 begun, (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. Cales 74. Pach. 1702. Quintine v. Yard.

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 devicing 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. 1713. Trot v. Vernon.

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.


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 Household Goods should go along with his House, and devised the rent, 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 Eas 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 rent and residue of the Personal Estate to her is to be understood what he had not otherwise devised by his Will, viz. the Household Goods to go with the House, and not the Residue after the Debts paid. 2 Vern. 718. pl. 637. Mich. 1716. Wainwright v. Bendlowes.

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 Chattels, and Estate, to his Nephew Middleton, (the Defendant and Heir at Law.)
Charge.

Lxx to the Testator) and makes him sole Executor. The Will was executed in the Presence of three Witnesses, with other Circumstances required 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 Estate? It was inferred, 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 should 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 affect 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 intimated, 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 disponeth 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 Streus laid upon them, and seem to refer to the introductory Clause in the Will, (as to all his worldly 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 Defeant 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 MS Rep. begins thus, viz. As to my ESTATE I dispose of it in manner following; and then he gives several specific 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 Ist & 2d v. v. Sons in Tail Male successively. He also devises several Debts and Chattels to his eldest Son Charles, and then he gives 1500l. 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
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 Clodewell vs. 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 intailed 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 sd 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 all Debts and Legacies, tho’ since it may be insufficient by subsequent Losses or Accidents. Curia addivare vult.

17. Legacies by Will were charged on the Land (viz.) charged with the Payment of her Legacies aforesaid. 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 been 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. Parch. 1718. in Cane of Malters v. Sir Harcourt Malters.

18. A made his Will, and began 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 Line 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 laid, that as plain Words are requisite to charge the Estate of, as to dilinherit, an Heir. His Lordship took Notice of the Interest being directed to be paid by the Executors, and that the Deficiency of the Personal Affairs was not such as to leave the Daughters destitute, and decreed the Real Estate not liable. 2 Wms’s Rep. 137. Trin. 1723. Davis v. Gardiner.

At the End of this Case
Ibid. 190. is added a
Note, that if in this Case there had been a Word of Affair for Payment of A’s Debts, it seems the Lands would have been charged therewith by the first Words.
A. by his Will takes
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 direct Settlement, Remainder to D. in like Manner, and then devises to C. all the other his Estates, Real and Personal, whatsoever, and everywhere, to him, his Heirs, Executors, Administrators, and Assigns, for ever. And further, my Will is that my said Son B. shall pay all my Debts &c. and all Legacies &c. beguanted by this my Will. And then bequested to his younger Children 2000 l. apiece. A by this
4.63 out and appoint but, but, paid Part come. but Reftdue Portions, Creditors being strict dispofed of all his worldly Estate, and then gives a Direction that his Debts shall be paid, the Debts the cry become chargable 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 those Portions, and that therefore his Intent was not the same, he said it was not conclusive: for a Testator may in exprefs Wards 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. Patch. 1740. Webb v. Webb.

47. As touching all such worldly Estate which God has bleft me with, I dispose of the same as follows: Imprints, I will that all my just Debts be paid and satisfied. It was argued that it is a general Precept to make a general Disposition of his Real and Personal Estate as is mentioned 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 Coplyhold 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 in- filled 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 landing of the Money the Tithe Deeds of the Real Estate were put into the Hands of the Plaintiff, and it was inquired 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 Debts. MS. Rep. Hil. 10 Geo. 1. 1723. Atkinson v. Switt.

21. Testator, seised in Fee of a Farm, called Hills Tenement, in the County of Somerset, and of another called Bovvy-Hays in Taiz, by Will devised as follows, viz. As to all my worldly Goods, I give all that Tenement, called Hills-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 Premises 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 Reit 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 Premises. 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 infilt rather upon the first. Mr. Greene for the Plaintiff inquired, 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 and
and Henry's dying in the Life-time of the Mother, which the Testator could not foresee, did not alter the Cafe, or take away that which was already vested in her. 2dly. That this was a Charge on the Land, and if it was fo in the Hands of Robert, it must remain charged into whose-ever 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 Defection, and thereby avoid this Incumbrance, but he is bound to take in this respect as a Purchasor, i.e. Trans cuius 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, whereof the Legacy can be satisfied, but the Land, and for this relied on 2 Vern. 223. ACCO v. SPARTAN, 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. DANCOW, 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 Cafe.) Mr. Brown for the Defendant said, that this was but a contingent Legacy, to be paid upon Robert's coming into Potfeccion 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 Potfeccion; 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 Cafe, can be attributed to nothing else but his want of Intention to do so. 3dly. 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 devilling 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 Cafe 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 paid 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 Potfeccion, which is, indeed, a very general Bequest of a Legacy, and so falls entirely within the Rule, that in such Cafe the Personal Estate is to become liable; so upon the whole, this Legacy was but a Personal Charge upon Robert, which, as at first, 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 lay a Charge, for if it were a Condition, then the Defendant, who is the Heir at Law, might falsely 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 Cafe the Estate went to his Son, and, at the same Time, that she should have nothing in Cafe 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 to lapsed by the Death of Robert; and in this Cafe the Heir must take under the Will; for tho' Robert and Henry were Heirs to the Testator, yet the
Devise to them, being with a Charge, broke the Defendant, and tho' they never took in Possession, yet it was a Remainder, transmissible 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 Chattels, 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 inferred by the Penner of the Will, whether there be any precedent Bequest or not, and indeed, are never improper, because no Executor can be laid 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 die 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, Defendant 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. Chetser, tho' the Real Estate was expressly charged with the Payment of Debts, yet the Reversion being given to the Wife, who was likewise made Executrix, as here, the Court held the must take it as Executrix, and the Personal Estate, not being particularly exempred, was decreed to be applied in Eafe of the Real. For the Defendant in the Appeal it was urg'd, that there is no need to lay 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 suppofe 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 penned, 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 worldly Goods) as if Testator intended to lay nothing of his Land, either by way of Dispos-
Charge.

... the Title or Charge; but it is plain he meant by this, All his Estate, of what kind soever, for he presently after disposed of his Real Estate, and therefore used that Express 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 Premises aforesaid) 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 what 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 funk, 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 Smalls 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 Premises aforesaid,) which include, as well Bowry-Hays, as Hill's Tenements: 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 inferred as to the Pecuniary of the Expiration, 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 Devisee is broke, and the Charge binds his Heir as well as him, tho' be 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 Ancestors, 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
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 bequest'd to A. shall not be subject or liable to the said Debts or Legacies. Ch. Rep. 45, in 6 Car. 1. Peacock v. Glafcoek.

2. A. indebted by judgment, and seif'd 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 possis'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 Esate of E. to which the Administrator de Bonis non is Hable; tho' not being made a Party he held the Bill ill, but gave Leave to amend in that Point. 2 Ch. Cafes 197. Trin. 26 Car. 2. Bischeften v. Decrees.

3. devise of Leafes, and other considerable Personal Estate in Trust, to pay his Wife 100 l. per Ann. during her Life, in Lieu and Difeharge of her Dower. Decreed to issue out of the Personal Estate only, if that be sufficient free from Times; but if that be not sufficient, then to be made good out of the Real. Fin. Rep. 134. Mich. 26 Car. 2. Lequiere v. Lequiere.

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 if it 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 S. C. cited her thereby, in Terms, the Personal Estate, and devised that the Children Chan. Prec: Legacies should relate 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. Cafes 296. Hill. 28 & 29 Car. 2. Lord Grey v. Lady Grey & al'.

5. An Annuity was devised, and charged on that Part of his Estate that should remain unford after his Debts and Legacies should be paid. Part was fold, and there was a Surplus on that Part. Decreed that the Surplus of what was fold, as well as the Rents of the other Part unford, 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 unford, with Coffs. 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 Executor 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. Patch. 32 Car. 2. Anon.

7. Devise of Land shall be unburthened of a Debt lying on the Land by the Personal Easie in the Hands of the Executor or Administrator, and so shall a Devisee of a Mortgage. 2 Chan. Cafes 84. Hill. 33 & 34. Lefquer v. Polely.


8. A.
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 Premises 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, Cates in Equ. in Ld. 1707. French v. Chicheleter.

Talbot's Time, 209. Trin. 1716. in Cafe of Stapleton v. Colville; but said that unless he was acquainted with the particular Circumstances of the Cafe of French v. Chicheleter, wherein the Book seems deficient, he could never form any Judgment from it; since if the Reason given in the Book [viz. 2 Vern. 685.] for it be the Only one, he could not say that he gave him entire Satisfaction, nor could he lay any great Stress upon it, and the rather because there is a plain Difference at Law between the two, 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 Cafe, 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 Crofts, to whom the Lands were devised for Payment of Debts &c. Crofts 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. Crofts 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 Cares, 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 Cafe in Dom. Proc. Hungerford's Cafe in Dom. Proc. Cook v. Door in Dom. Proc. Christ's Hospital v. Garroway in Canc. Dale v. Hale in Canc. Temperance 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. The Davies being seised of Lands in Fee, in Consideration of 300l. 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 300l. 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 300l. 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 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.

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; but, 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 extinguished. But Cowper Lt. C. was clearly of Opinion that the Land was convey'd by D. to R. as a Mortgage, because D. had by the Provifio referred 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 Provifio signified the Interests of the 300 l. and 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 Mortgagee 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 referred to large a Power by the Provifo; 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 Lieu at Law on the Real ESTATE, are discharged out of the Personal Assets in Estate 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. devolved to his Wife certain Houses in Bar of Dover; and subject to his Legacies, devised to B. his eldest Daughter and her Heirs one Moity of his Real ESTATE, as also one Moity of his Personal ESTATE; and in the same Words to C. his youngest Daughter; and after bequeathed to J. N. his Godson 500 l. Part of 1000 l. owing to him by J. S. and the Receipt of 6 D
the 1000l. he gave among the Brothers and Sisters of J. N. &c. Afterwards A. mortgaged the said Estate for 3000l. It was contended that this Mortgage, being a Debt, must be paid out of the Personal Estate prior to the specific 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, the same should be eused against an Administratrix or Relidatory Legatee, yet it should be eused so as not to disappoint any of the Debits or even Legacies given by the Will, either specific 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 Casional or Orphanage Part, by the Custom of London; Arg. said to have been determined, and the fame was admitted by Ld. C. King, because the Custom of London cannot take Place till after the Debits paid. 2 Wms's Rep. 335. Hill. 1725. in Case of Rider v. Wager.

17. By Marriage Articles, A. coenanted 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. coenanted that the Lands (which were but 366 l. a Year) were 500 l. a Year, and gave a Bond of 5000 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 Ilfue B. a Son, and E. a Daughter. A. died Intestate, leaving M. B. and E. living, and a personal Estate of 2000 l. The Matter 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 City que Truf, 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 Refort 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 Truf 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. attained his Age of 21 and levied a Fine to the Use of himself and his Heirs, and after B. had received the Reents of the Surplus of Estate, not in Joiture, for 2 Years, was married and unmarried. The Estate descended to W. R. and his Mober administer'd to B. It was infilled that by the Fine levied by B. the Estate Tail was extinguidh'd 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 a Salk. 333. SIMMONDS v. CUMMINS, and therefore that the Kents 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 Affeëts 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, be-
cause till then he did no wrong in receiving the Rents and Profits of his
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 suc-
cessively in Tail Male, and gives several Legacies; Per Ld. Chancellor,
the real Estate is chargeable with the Debts, in Case the personal 
Estate be Deficient. Cases in Equ. in Ld. Talbot’s Time, 110. Trin. 

(F) Apportioned. In what Cases.

1. B. Had Iffue C, a Son by the 1st Venter, and D. and E. 2 Sons and See tit. Ap-
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 
Iffue, but one of them suffered a Recovery of the Money of the Lands, 
to that a Money only comes to B. the Mother having a Money in Jointure to 
her, and made no surrender thereof; Per Cur. the 1000 l. is a legal sub-
stituting Charge, and the Daughters claim not under, but Paramount, 
the Son that suffered the Common Recovery; and though the Estate 
ever came to C. the eldest Son, and only a Money came to F. his Son, 
yet there must be no Apportionment, but the Daughters are intituled to 

(G) Charge. When Discharged.

1. LANDS devised to be sold for Payment of Legacies of 1000 l. and 
300 l. Device 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. 

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 fold them to D. who had quiet Possession 40 Years before the De-
mand, 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 Gr6s, to be paid together and at one Time; but di-
rected 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 Almford Parish in Kent v. Twe
due.

3. The Father on Marriage charges Lands with Payment of Daugh
ter'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 Secu
rity. The Nephew sells the Lands with Notice of the Original Charge.
Decree that the Lands are still liable to the Portion. 2 Ch. R. 173.

4. A by Will gives 3000 l. to his younger Children, secured by Mort
gage 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 re
decem and to pay in his Mortgage Money; there is a Decree, and B.
pays it in pursuance, 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.

5. If a Lease be made in Trust to pay Debts, and after the Leffer dies,
the Heir paying the Debts shall be relieved against the Lease and set it
aside; Per Ld. Chan. 2 Chan. Cales, 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 Se
curity where the Lands are originally charged; but where the Lands are
only supplementally charged, it is otherwise; Per Jelleries C. Vern. 338.

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 Decinence of the Judgment. 2 Vern. 85. pl. 82.

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 Affairs; 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
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
Corbett's Cafe, 4 Rep. 81. b. 82.

10. A.
A. devised to M. his Daughter 500 l. and that devised to B. his Son and his Heirs as 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.

12. By Devise of the Inheritance of Lands, out of which a Term for 2 Freem. 500 l. was created for raifing a Portion of 500 1. for A. on whom Rep. 207. the Inheritance depended, who died under 21 unmarried, the Land is not discharged, but the 500 l. remains till a subsisting Charge on the Estate; per Somers C. and affirmed in Dom. Proc. 2 Vern. 348. pl. 320. Hill. 1697. Thomas v. Woodgate.

13. A. devised an Annuity of 100 l. per Ann. to B. for Life, to be iaffing out of the Reents and Profits of Bl. Acre, with Clause of Divitiofs; and devised Wb. 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 entered and taken the Profits during his Life, and devised the Arrears to M. and was decreed for M. For the Intent was that B. should have 100 l. per Ann. And a Devise of the Reents, or of the Profits of Lands is a Devife of the Lands themselves, and the Court will decree a Sale where Lands are charged to raife 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. Proc. 122. pl. 106. Mich. 1705. Fofter v. Fofter.


15. Where Lands are devised to Trustees to raife Money for several Purposes, and they raife it out of the Profits, the Land is thereby discharged, and the Persons concerned must refund to the Trustees; per Ld. Keeper. Wright. Chan. Proc. 143. pl. 124. Hill. 1700. Juxon v. Brian.

Estate for Payment of Debts and Legacies, and after those paid he devised his Estate to B. The Executors misapplied the Profits. Ld. E. 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 hold than is necessary for Payment of the Legacies, and the Heir shall have the Surplus. 2 Vern. 425. pl. 536. Patch. 1701. Randall v. Bookey.

17. 3000 l. to be raised out of Land by virtue of a Power to A. and a Lease raised to Trustees for that Purpofe was affigned to new Trustees for a Collateral Security of a Leafe for 99 Years made by A. and that the said Trust should remain during the Term. A. bequeathed the 3000 l. to M. his Daughter, subject to the said Collateral Trust. And per Ld. Wright,
Charge.

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 then by him; but this being expressly ordered to continue, they could not do it; and decreed 500 l. to the Trustee of the Lease to stand his Security, to be laid out at Interest on such Security as the Matter 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 Cafe.

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 loft 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 Trufth 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. Pauch. 1703. Bufnells v. Parsons.

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 Trufth 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 1500 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 enjoyed for 4 Years, the Portion not yet paid. The surviving Trustee died, to whom M. administered, 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 Affairs. 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 linking 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. Pash. 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 him 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-men, 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. 533. 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 Es- settled 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 20s. pr. 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 Lesfor 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 Remi-
Charitable Uses.

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 S. 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 Defect, and yet the Franktenement is extinct in the Fee. Quere. 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 lay 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, Devises, Executors, Grants, Jointenant, Mortgage, Rent, and other Proper Titles.

(A) By the Statute of 43 Eliz.

* A School unless it be a Free-School, is not a Charity within the Provision of the Statute of Q. Eliz. and consequently the Inhabitants have not a Right to sue in the Attorney-General's Name. 2 Vern. 587. pl. 355. Mich. 1700. Attorney-General, at the Relation of the Inhabitants of Clapham v. Hewer.

† Those Words (limited, appointed, and alligned) are very material Words, tho' omitted in the Abridgments of the statutes; and as to Constructions upon them, see Letter (b).

For
Charitable Uses.

For Remedy whereof it shall be Lawfull for the Ld. Chancellor, and for the * Concerning the Chancellor of the Dutchy for Lands within the County Palatine of Lancaster, to award * Commissions to the Bishop of every 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 1 County, as by all other lawful Ways of all such Gifts aforesaid, and of the Abuses, Breaches of Trust, Negligences, Mis-employments, not implying, concealing, defrauding, mis-converting, or Mis-government of any Lands, Goods or Stock given for any of the Charitable Uses before rebeheart; 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 Decrees as the said Law for that Lands, Goods and Stocks may be duly imploied for such Charitable Uses for which they were given; and such 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.

2dly, In that Commission any 4 of them do suffice to make Orders and Decrees, for therein none is of the Quorum. 3dly, None shall be Commissioners that have any Part of the Lands &c. or Goods or Chattles, Money or Stocks in Question. 4thly, The Commission is to last a certain Time, within which the Commissioners are to order, decree and certify. 5thly, Their Authority is to expire as well as the Oath of 12 lawful Men or more, as by all other good Ways and Means. 2 Inft. 710.

And the Commissioners have Power also to enquire of these 9 Things. 1st. Of MoneR. 2dly, Breaches of Trust. 3dly, Negligences. 4thly, Mis-employments. 5thly, Not employing. 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 Inft. 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 Cate.—Duke's Char. Uses. 80. pt. 24. 5. 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 aye, 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. 1. S. P. —See Ibid. 116. 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 Weshminster, Eton or Winchester, or to any Cathedral or Collegiate Church.

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.

This Act does not extend to all Lands &c. nor to all Goods and Chattels, 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 Weshminster. 3dly, Of the College of Eton. 4thly, Of the College of Winchelter. 5thly, Of any City or Town Corporate, where there is a special Governor or Governors of such Lands &c. 6thly, Of any College, Hospial, or Free-School, which have special Visitors or Governors, or Overseers appointed to them by their Founders. 2 Inft. 211.

* 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 Trusts, either in determining Part of the Revenue, mis-employing, or any other Ways defrauding the Charitable Use; this may be recovered by Decree of the Commissioners, notwithstanding the Statute of 45 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 Ufe according to his Intent; if the Trustees defraud the Trust, the Commissioners cannot meddle, but the Visitors are to perform it, but even the Visitors.
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 Purchasers having the 3 Qualities; 1st, for valuable Consideration of having Equity; Money or Land. 2dly, Without Fraud or Covin. 3dly, Having no Notice of the same Charitable Use. But all the Commissioners cannot make any Decree against any such Purchasers, yet may they make Decrees for recoupance to be made by any Person or Persons, who being put in Truth, or having Notice of the Charitable Uses above said, have or shall break the said Truth, or defraud the same Uses by any Conveyance, Gift, Grant, Lease, Release or Conversion against his or their Heirs, Executors and Administrators, having Affairs in Law or Equity, so far as the said Affairs will extend. 2 Inf. 711.

If Lands be given to a Charitable Use, and to devolve of an Overplus; if the Purchaser had no Notice, it cannot bind, but it Rent Use out of Land, the Purchaser must pay it, but will not charge him to pay Arrearage before Purchase, nor lay it upon one, nor excite the other. Toth 93, 96. cites Mich. 14 Car. Peacock v. Tewer. — Duke of Char. Usfs. 82. pl. 53. S. C.

Lands were charged by Will with 200 l. to be paid within 2 Years to a Charity. T. after the Devi- sor's Death, purchased the Land with Notice of the Charge, and after 40 Years quiet Enjoyment and a Settlement made by the Purchaser on his Son's Marriage, a Demand was made of this 200 l. But because the Executors or Administrators of the Devisee were not made Parties, the Lord 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 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. 356. Hill. 50 Car. 2. Attorney-General, T. Twidell.

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 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 8. S. 8. All Orders and Decrees of the Commissioners shall be certified to the Commissioners 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 Commissioners.

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 written in the Language limited in the Commission. 4thly, That the Lord Chancellor or ld Keeper, and the Said Chancellor of the Duchy shall, and may within their several Jurisdictions, take such Order for the
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the 24th 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 In the Return 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 Decrees to Chancellor of the Dutchy, may proceed to the Examination, Hearing and Determining thereof, and annual, 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, Things are to be considered if, 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 Writs shall seem meet, the Circumstances of the Case considered, proceed to the Examination, Hearing, and Determining thereof. 3dly, Upon Hearing thereof, shall or may adm, the Writs, (which rarely is done) diminish (in Part) or enlarge, (that is to confirm the Former, and to enlarge the same by adding something therunto) the Judgment and Decrees so certified. 4thly, As shall be thought to stand with Equity and good Confidence. 5thly, According to the true Intent and Meaning of the Donors and Founders thereof. 6thly, And shall, and may tax and assess 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 amended, diminished or enlarged) ought to be given to the Party complaining. 2 Inst. 711. 712.

(B) Established, though the Conveyance was defective.

1. DEVISE Ecclesie Sancti Andrea de Holbourn. The Parson shall take, and yet the Church is not Personate Capax, but the Intent appears. Pl. C. 523. b. Hill. 20 Eliz. in Cafe of Welkden v. Elkington.


3. Devise to a Charity by a Feme Covert Administrator, was held good. 2 Vern. 454 cites Mo. 822. Damus's Cafe.

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 Instrator 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 Mor- main, 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 Provise in the Statute exempting Colleges, is only inten- ed to exempt them from being reformed by Commission, but not to re- frain Gifts made to them. Hob. 185. Hill. 13 Jac. Flood's alias Lloyd's Cafe.

S.C. upon a Decree by Commissioners to settle the Lands upon the Company. An Appeal was good, and Exception taken, for that the Company of Leatherfellers was a Corporation, and the Statutes of Wills does except Devises of Land to a Corporation. But the Decree was confirmed, there being many Pre- cedents in it.

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S C cited 2 Vern. 454. Mich. 1755. pl. 416. See S. C. in Duke's 75. 76. It has been generally held that under this Statute 5 Eliz, supplies all Defects of Agreements, where the Donor is of Capacity to dispose, and has fraught an Estate as it is always describable 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 Assignment or Involuntary, and divers other the like Cases, yet these Defects are supplied by the statute of 42 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. 49. Chrift-Hospital v. Hawes.

Duke's Char. Uses 78. in pl. 17. cites S. C.—Ibid. 110. cites S. C. & S. P. and adds Feme

Conver.—Hob. 136. pl. 184. S. C.

Mo. S. S. S. 1251. Robt's Cate, S. C. The Question was, because this Will was made before the Stat. 32 H. 8. and the Land not in Ufe, whether it were a Limitation, Appointment, or Affigment within the Stat. 45 Eliz. and that it was refer'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. 45 Eliz cap. 4 the Lord Chancellor confirmed the Decree.


8. If a Man conveys 2 Parts of his Lands which he held in Capite, for a valuable Consideration, and then devises the remaining 3d 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 Heirs, 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 Cafe.

Devise by Tenant in Tail to Charitable Uses was decreed to be a good Appointment, tho' no Fine was levied or Recovery suffered. 2 Vern. 455. pl 416. Mich. 1752. The Attorney-General and Petitioner v. Rye, Warwick, & al.—And the Remainder-man shall be bound by Settlement to Charitable Uses as well as the Issue in Tail, and a Decree made by the Commissioners was confirmed with Costs. Chan. Prac. 16. Tay v. Slaughter.—The Statute of 43 Eliz. herein refers the Common Law, and at Common Law was no Fine or Recovery. G. Eq. Rep. 45. Jenner v. Harpur.—Chan. Prac. 391. Trin. 174. S. C. & S. P.

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10. The Testator being seized in Fee of a Manor held in Capite, de Jo. 428, pl. cited 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 Refidue to be bestowed in Charitable Uses. Upon a Reference to the 8. P. does Jui · cates of B. R. from the Court of Wards, the Question was whether or not, when 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 decided as to be paid; and resolved that it was not. Cro. C. 525. pl. 4. Hill. 14 Car. Alcough's Case.

Heir, notwithstanding the Statute of Charitable Uses.—Cro. C. 525. S. P.

11. A Fine 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.


13. Where a Devise was of Lands to Trinity-College in Cambridge, for the Maintenance of a Fellow there, and that any by Casualty should hinder this Devise, or that the same cannot go to the College by reason of the Statute of Mortmain, then be 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 Cane. 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 57 l. a Year. But the Court held that the Whole chargeable by the Will by the Stat. 43 Eliz. which was an evident 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. Nell. Ch. Rep. 146. in 22 Car. 2. Higgins v. the Poor of Southampton.

15. Tho' a Charity was precedent to the Stat. 43 Eliz. cap. 4. yet the Statute subsequent had a Retroactive, and would make it a good Appointment, tho' it was not so before (but void). Chan. Cafes 195. Hill. 22 & 23 Car. 2. Smith v. Stowell.


S. C accordingly.—Duke 77, 73. S. P. in S. C. pl. 16. — 2 Vern. 454. cited as the Case of Plant v. St. John's College.—Duke Char. Cafes 82. 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 Alma-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. Deemed, that this Charity be established for ever, tho' the Words do not fully direct it in Suceflion; and the 7 poor Women to be chosen out of L., only.
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18. A deeded a Charity to the Poor of B. in the County of C. which was a Mistake of the County of 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 Parith in Denbighshire, alias, Owen, v. Bean & al.

19. A Rectory deeded for the Maintenance of a Minister there, was deeded to no certain Person, and therefore void at Common Law, and nothing was mentioned concerning the Nomination to it. Thole to whom the Estate came appointed O. to be Minister, and serve the Cure. P. supposing a Lapel to the Crown, was presented, instituted, and indacred, 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 Teitator.) It was urged, that here was a pious Use wholly subjct 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 Tithe. 2 Chan. Cafes 31. 3an. 32 Car. 2. Perne v. Oldfield.

20. An Impropriator deeded to one that served the Cure, and to all that should serve the Cure after him, all the Tithe, and other Profits &c. Tho' the Curate was incapable to take by this Devehe in such Manner, for want of being incorporate, and having Succession, yet Ld. Chancellor Finch decreed, that the Heir of the Devehee should be feiled in Truit for the Curate for the Time being. 2 Vent. 349. Pavch. 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 paffes not by the Will, but by the Surrender. 2 Vern. 598. pl. 536. Mich. 1707. Att. Gen. v. Barnes & Ux. (the Cafe of Sidney College in Cambridge.)

Ld. Chancellor said, that it being a favourable Cafe on the One Side, and a Charity on the other, he would consider further of it, and confer with the Judges.

Devehe 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 3 Witnesses, by the Statute of Frauds, which requires 3 Witnesses. 1 Salk. 163. pl. 3. Trin. 1714. in Canc. Genrer v. Harper.—Gilb. Eqv. Rep. 34. S. C. in toto den Verba, only makes it a Citation of Swinb for Comb, and concludes, that Ld. Chancellor formed to be of the same Opinion, but said, he would consider of it till the first Day of Gunies after the Term, and in the mean Time recommended it to the Plaintiffs to make good the Charity.

A Nuncupative Will of 201. per Ann. out of Lands to a Charity, tho' before the Statute of Frauds, is not good as an Appointment by the 45 Eliz. Ch. Prec. 359. Trin. 1714. Jenner v. Harper.—For at Common Law Lands or a Real Estate were not devalible, and the Statute of 42 H. S. 8. 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 Devehe of Rent, which cannot pass without Deed, is not good by Nuncupative Will. Wms. Rep. 248. Trin. 1714. S. C.—Wms. Rep. 248. the Reporter makes a Quere, and cites Duke's Charitable Uses, St. Esberdys Cafe, where one, before the Statute of Frauds, deeded a Rent of 10 1 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 42 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 45 Eliz. which makes the Appointments to Charities good, being subsequent to 52 H. S. of Willes, supercedes and repeals that Statute, but that it is true, that the Statute of Frauds being subsequent to 45 Eliz. repeals that, and therefore since the Statute of Frauds an Appointment of Lands to a Charity by Will not attell'd to 3 Witnesses is void.

23. A
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23. A Wife having Power to dispose of her Personal Estate, (which only comprehended the Personal Estate the had before Marriage) and getting intopossession, 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. Cathberton.

24. A settled Lands, with Power of Revocation by Writing executed under Hand and Seal in the Presence of 3 Witneses, not being S. C in testimonial Servants, and in her Illness, by a Letter, directed a Deed of the Verbs, 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 Matter of the Rolls. Ch. Prec. 473. pl. 296. Pech. 1717. Piggot v. Penrice.

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 disposible by him, whether by Fine or Common Recovery. 2 Vern. 755. pl. 660. in Cafe of the Rolls. Ch. Prec. 473. pl. 50. Pech. 1717. in Cafe of At. Gen. v. Burder.

Hayes, 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 100l. in Money, to A. and his Heirs, 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 Cafe the Devise ever is void, and the Word (Heirs) shall not be construed to signify Heirs of the Body where the Devise 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. At. 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. F one devises Land to S. 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. Ues 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 Duke's Char. St. Lawrence in Reading for ever. Exception was taken, that the Poor Ues 81. pl. were not capable by that Name, for no Corporation, yet, because the 59. cites S. C. 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.

3. Upon the Will of one Hunt, of the Leafe of the Rectory of H. in Duke's Char. 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 accordingly, a good — Ibid 212. S. P.
a good Devise, notwithstanding it does not appear that he had any poor Kindred. Toth. 92. cites 44 Eliz. Goff v. Webb.

Duke’s Char. 4. A being feiled of Copyhold Lands in B. is Eliz., did devise, that the Parson and Churchwardens in Thames-street, London, and 4 benefic Men of that Parish, should sell the Land, and employ the Money for the Poor, and Charitable Utes 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 Utes; 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. 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.

Duke’s Char. 6. The Captain, Mariners, and Soldiers at Sea made a voluntary Constitution, that every Mariner and Sea-fowler should arise so much a Month out of their Pay, to be employed for the Relief of the Mariners and Soldiers maintained or hurt in the Service, of which Abatement there was 302l, 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 Ute; and upon Exceptions exhibited by Sir Thomas, the Ld. Chancellor confirmed the Decree. Mo. 839. pl. 1252. 15 Jac. Middleton’s Cafe.

Duke’s Char. 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 Cafe of a Pension, much more for a Charitable Ute. Toth. 93. cites 20 Jac. Stoddard’s Cafe.


Duke’s Char. 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 Cafe.

Duke’s Char. 10. A devised by his Will Moneys to a Charitable Ute, to be bestowed for poor People, and the Residue of his Goods to be employed to such Utes as his Feoffees shall think meet. The Devise is good. Toth. 95. cites 9 Car. The Mayor of Bristol v. Whitten.

Duke’s Char. 11. Whether Money given to maintain a Preaching Minister be a Charitable Ute? The Ld. Keeper and the Judges did decree (notwithstanding it is not warranted by the Statute to be a Charitable Ute) that the same shall be paid by the Executor to such Maintenance. Toth. 96. cites Trin. 15 Car. Peniber v. the Inhabitants of Kingston.
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12. A. devises 20 l. per Annu. to a Preaching Minister, and dies, leaving Lands and Affairs, and the Defendant will not pay it accordingly. The Court with the Judges charges her, out of the Affairs, to buy Lands to perpetuate it. Toth. 96. cites Trin. 15 Car. Penfrerd v. Pavière.


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 Gift to raise Money to prosecute Offenders will not be good as a Charitable Use; per Curiam Obiter. 2 Salk. 605. pl. 3. Pauch. 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 the 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. 1722. The Attorney-General v. Hudson.

16. One Timothy Wilton being seised of Lands in Fee, and also poss’d of a considerable Perfonal Estate, by Will dated 22d of March 1714, gave all his Real and Personal Estate to two Trustees, their Heirs &c. in Truit, to pay the Produce thereof to his Niece Elizabeth Wilton 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 living, the Elder to be preference &c. and for want of such Issue, that is, in case all such Sons died without Issue before any of them attained 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 living; and for want of such Issue, that is (as he exprest 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 Purpofes as they should also think most proper and convenient. One of the Trustees declining to act in the Truit, Elizabeth brought her Bill in Michaelmas 1715, to compel him to act in the Truit, or to transfer the same as the Court should direct; and he refusing to act, the Court decreed him to align the Truit as the Mafter should direct, and accordingly he by Leafe and Releade assign’d and convey’d the Premisses, with the Approbation of the Mafter, to another Perfon in Truit 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 Crofs Bill brought by the Attorney-General to have the same applied to Charitable Uses as the Court should direct, the Mafter 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

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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 the 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 the Relations who died in the Life-time of Eliz. For before her Death no Part thereof visited in any of the Relations, and it was contingent whether they would be intituled 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.

1. When a Thing is disposed to maintain Contempt and Dishonesty 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.

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 of the King presented by Laple. Decreed that the Trustees lease this House to the King’s Prefentee, but under the Conditions abovementioned. Nelf. 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 devited thee Lands to a Charity. J. S. purchased these Lands, with Notice of the Award and Devile; and was decreed that the Testator being intitled in Equity to the Land by the Award, and the Purchaser 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 Devile 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 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
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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 Chrift'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 3 S Chan Car-Markets, and devised the Estate thus charged to his Nephew, who had afterwards devised it for Payment of his Debts. Bill was brought to 3 & 3, the Attributed Information for the Charity, the growing Payments and Arrears were Combe, S.C. decreed, and the independent Lectures changed into Catechifical Lectures, decreed accordingly in the 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. Combe's Cafe.

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. Patch. 1682. Man v. Ballet.

Beaten in Maintenance of a Lecturer by Agreement of the Parishioners, the Money so paid shall not be allowed on Account. Vern. 42. pl. 43. Patch. 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 Politenal or Catechifical Divinity, so as he was a Bateleur 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 fame, 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 Oftentation to it, refused to intermeddle in it, and said, they should be held to the Letter of the Charter, and that the Heir had no Power to alter the Disposition made by his Ancestor. Vern. 55, 56. pl. 52. Patch. 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. Siderfin.

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 Cafe of Att. Gen. v. Siderfin, as the Cafe of Frier v. Peacock.


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 Oxford, 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 intimated, that although the Charity cannot now take Place according to the Letter and express Direction of the Will, yet it ought to be performed by the Vicar, and the Substance of it may be purfued, 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. Fuch. 1692. Att. Gen. v. Guile.

13. A Charity given to maintain Papists 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. Fuch. 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 Truth 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 Distinction of the Crown, or the Propagation of a false Religion, and to that End intituled 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. Portland.

(E) Favoured and Confounded. 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 Leaves, on which in all the 70 l. per Ann was referred, was granted by King H. 8. to the Corporation of Coventry; 200 l. of the Purchase Money was paid by the Corporation, and 1000 l. by Sir Tho. White, but in the Grant the Corporation was to be the Purchasers, and it was by the Deed declared that the whole 70 l. per Ann should be applied to several Charities therein mention'd. The Leaves 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, Affiants, were all of Opinion, that this Case was not within the Region of Thetford School's Cafe, 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 Fhate, it was reasonable, that as the Estate increased, the Charity should do so too, because no one else was
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to take any Benefit thereof; but that in the present Case not the Lands themselves, but 72l. 2s. 4d. affiding out of the Lands is allotted to Charities, and the Town of Coventry is expressly mentioned to be the Purchasers, and it appears that they raised 400l. 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 premised, that they were such good Christians as to sell all they had to give it to the Poor; and the Information was unanimously dismissed; but upon an Appeal to the House of Lords the Dismissal 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 it. Ibid. 112. fell palest, and it shall be taken largely for a Devise of the Rent then S. 2. pl. 1. referred, or afterwards to be referred upon an improved Value; refered to S. C. by the Judges on a Reference by the Ld. Keeper, and his Lordship — In the decreed accordingly. Duke's Char.Uses 71. pl. 7. 9 Jac. Kennington Hafting's Cafe.

3. A Debt which is a * Close on Action was given for the Erection of Duke's Char. Uses 79. pl. 21. cites a School, and held a good Appointment within the 43 Eliz. Toth. S. C. & S. P. decreed, of Charities mentioned (devised) to Charitable Uses, carries the Land. Toth. 269 cites 8 Car. Lenner v. Linnington.

whether the Debt be owing by Statute, Bond, Judgment, or Recognizance —— Ibid. 112. cites * 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 intermediate with the Receipt of the Money, and the one transits the other with the Money, and to pay it accordingly, and he waives it, and dies insolvent, the Survivor shall be charged with the whole, if the Testator left Affets to pay it, because they jointly meddled in the Execution of the Will; but 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 a joint Authority with him from the Testator, and he could not hinder the other's intermediate. Duke's Char. Uses 66, 67, pl. 4. 16 Mar. 4 Car. the Poor of Waltonmitow in Essex's Cafe.

5. If a Rent be granted out of Land to a Charitable Use, this it seems is Ibid 64. a Charge that shall go with the Land in whole Hands forever it comes, al. 3. Trin. 9 be it not so by the strict Rules of Law, and a Distress may be taken, for it upon the Terre-tenant for all Arrears in close Time, or it was 3 and C. S. C. & S. P. cites Linnington, Duke's Char. Cafe. S. P. the Party must have his Remedy against them then that had the Land and Ibid. for the Arrears in their Time in Chancery. Duke's Char. Uses, 125. Ibid. 8. 11 Car. Woodford Inhabitants in Essex, S. P.

6. In Cafe 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. Joyce v. Osborne.

7. Devise of a Portion of Tithes, to the Intent that the Profits should be Duke's Char. employed to build a Grammar-School, and for the Maintenance of the Uses, 46, 47. Patch. 16 Master; the Tithes were then in Leafe for a Term of Years, at the yearly Car. 2. Rent of 7 l. the Devisees received the Rent, and built the School, and was granted in Consideration of the Surrender of the Term, they granted a larger the School Term to the first Leesee, (viz.) for 50 Years at the same Rent; the Leesee died about 24 Years after the Commencement of his Lease, and his Executors enjoyed it about 14 Years afterwards, during which Time the yearly Value was worth 43 l. per Ann. more than the referred 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 6 l. Expes.
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Expiration of the Lease for 50 Years; adjudged that this concurrent Lease was void, being made to detract the Charity of the Increafe of the Tithes, which was then worth 60 l. per Ann. more than the referred Rent, and that the Trustees ought to let it at that Value, and not exceeding 21 Years. Nelf. 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 Country, but in the County of D. Per Cur. there being such a Parish in the County of D. The Tenant 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.

Duke's Char. Usfs, 47. Trin. 21 Car. 2, 8, C.

9. Where a Will or Money given to a Charity have been concealed, the name 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 Earl-Smithfield, St. Katherine's and Aldgate, to learn poor Scholars, to be chosen out of the Free-School in Worceffer, 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 thefe Houfes out of which the Rent iffued, according to the Will of the Tenant; the Commissioners decreed that the Chancellor, Master and Scholars of the University should stand feified &c. and pay the Rents as directed by the Will, which Decree was affirmed in Chancery. Nelf. Abr. 436. pl. 10. cites Moor Ch. Usfs, 79. Meek v. Magdalen-Hall.

10. Tertennants Leeffes 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 Leaffes, they being not good in Strictness of Law. Chan. Cales, 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 disfrain for this Annuity. On a Bill brought for this Annuity by the Plaintiffl 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 Tenant, after which the Lands were sold; Decreed that the Payment was made to a wrong Hand; for that by 7 Jac. 1. 3. it would 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 Chiddleton cum Farley in Hampshire, and the Church-Wardens and Overseers of the Poor of that Parish v. Lord Newport & Worlesly.

13. Lands were given to the Poor of the City of Rochefter; 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 Rochefter.
Charitable Uses.

14. A lived in Lambeth, and built an Alms-House there, wherein be placed 7 poor Women of Lambeth of 60 Years old and more, and charged Caroon Houle there with Payment of £1. 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 Parishes. The Court decreed the Poor Women to be chosen out of Lambeth only, and not out of any other Parishes; because otherwise the Charity would rather be a Prejudice than a Kindness to Lambeth; lor if taken out of other Parishes, Lambeth must maintain them, the £1. a Year not being sufficient to maintain a Poor Woman of 60 Years old. Fin. Rep. 353. Patch. 30.

15. Lands pur Ater Vie devolved to Charity were decreed, though the Charity is not within the Statute of 43 Eliz. 4. 2 Chan. Cales. 18. Hill. 31 & 32. Car. 2. Attorney-General v. Combe.

16. The Poor People of a Hospital were appointed to have 8d. a Day, and the Guardian 8l. per Ann. A Prebend also appropriated for the Time being was to be the Guardian. The Revenue was increased 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 Employment was to be a Guardian. 2 Chan. Cales. 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 Aients, 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 5s. a Year. The Question was whether 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. 1654. Grice v. Banks.

19. Charity though given to an Illegal or Superstitions 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. Patch 1692. Attorney-General v. Guile.

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 mentioned. 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 was decreed that the Surplus should be disposed of in Charity, and not go to the Heir; and the Decree was affirmed in Dom. Proc. Parliament Cales. 22. Arnold v. Johnson & al.

21. On the Foundation of an Hospital one Rule is, that no Leave be made for above 21 Years. A Leave for 21, with a Covenant to make it 60 Years by Renewal, is as prejudicial as a Leave for 60 Years, and the Covenant of no Force in Equity. 2 Vern. 410. pl. 376. Hill. 1703. Lydiatt & al. on Behalf of Felsham Hospital in Erley v. Sir John Fosch.

22. A Corporation for a Charity are but Trustees for the Charity, Note, that in this Case, 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. Fosch.

Leave for 21 Years should be referred the old Rent, and no more; and yet by Deced of Covenants they re-

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23. Charity-Lands were leased at a great Under-value. The Commissioners decreed the Leafe to be set aside, and the Lessor 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 Lessor’s other Lands which lay intermix’d. 2 Vern. 414. pl. 378. Hill. 1700. Sir W. Reresby, Exceprant, Farrer and Dun, Schoolmaster and Ufher of Pocklington-School, Respondents.


25. Lord Coventry having decreed a Leafe of Charity-Lands to J. S. (who had been at great Expence in recovering those Lands) for 99 Years, it 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 Leafe should be renew’d Toties quosites 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 Worton Under-Edge v. Smith.

26. Appointment by Tenant in Tail shall bind the Reverterion in Fee, the Statute of Charitable Uses supplying all Defects of Affiance which the Donor was capable of making. 2 Vern. 755. pl. 660. Mich. 1717. The Attorney-General v. Burdett, Smith, &c. 27. One by Will gives 5 l. per Ann. to all and every the Hospitalls; and it was proved the Testatrix lived in a Place where there were 2 Hospitalls. It shall be taken to be these Hospitalls, and not to extend to another Hospitall about a Mile from thence, tho’ founded by the same Person. Wms’s Rep. 425. pl. 118. Patch. 1718. Maffers v. Maffers.

28. The Reversion in Fee of divers 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 Leafe 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 Devifor. The Defendant by his Answer did not insist upon his Title, nor did he expressly disclaim; but his Counsel, at the Hearing, had no Injunctions 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 Devife 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 Caufe, the Court would not suffer Counsel to argue it, but affirmed the Decree; per Ld. Macclesfield. MS. Rep. Mich. 9 Geo. in Can. The Attorney General v. Arden.
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(F) Trustees &c. Favour'd; or punish'd for Misbe-
haviour &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 Controlment 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 Stinkle v. Chamberlain.

2. If Land is given to find a Priest in D. and one is maintained in S. Duke's Char. this is a Misemployment; Per Altham, Baron. Lane 115. Pach. 9 cites S. C. & S. P. and says that the Converting it to other Uses had 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. Wivelcomb in Com. Someret.

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. the Detaining it, to be employ'd in the Charitable Use according to their Discretion, not exceeding the legal Intered by the Year, for the Detaining it. Duke's Char. Uses 67. pl. 3. Trim. 9 Car. 1. in Waltham in Essex's Case.

5. Leasing the Land at an Under-value is a Misemployment, without The Commissioners may make void the Lease, and order the Surrender thereof, and order the Land to be fettled 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 Truth, 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 Leefe 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 Leafe to be void and furrendered, and that the Leefe shall make a Recompence. Duke's Char. Uses 115.

8. If Trustees leafe the Land at an Under-value, the Commissioners may order the Trustees, or the Tenant, as they shall see Caule, 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.
Charitable Uses.

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 Alihants, 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, having out the Inhabitants, and now the Warden and 23 more made Leaves 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 Land Keeper decreed against the new Leaves and Inclosures, and that no such should be without Consent of the major Part; and on Re-hearing confirmed this Decree; for the Administration was in the 24, yet the Benefit was for the Inhabitants in general; but it was prefixed much that the 24 were the Corporation, and the Interest in them, and they might alien the Estate, and a tortiori leave and inclose, and it would breed a Controversy if that the Multitude must intermeddle. Chan. Cafes 269, 270. Mich. 27 Car. 2. Anon.

Money given for the Repair of a Bridge and a Church-way, and certain Houses, were applied 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 Church-way, and the Houses; and the Trustees, the Defendants, to pay Costs. Fin. R. 259. Trin. 28 Car. 2. Att. Gen. and Churchwardens of Somersetshire in Huntingtonshire v. Hobert and Johnfon, alias, Hammond v. Hobart.

11. Feoffees of a Charity having mis-employed the Rents &c. were decreed to Account, and the Trust to be transferred to such Persons as the Judge of Affife 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 Affife 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. Paich. 1682. Mann v. Ballet.

By the Appointment of a Charity there were 6 Trustees, and when they should be reduced to 3, they should choose 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 exculpate 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 Crofs.

13. Bill to have an Account of the Profits and Salary of Lecturer of Church-Hill in Com Oxon, upon this Cafe; Sir John Walters, Ch. B. founded a Leaverage at Church-Hill Oxon. with a Salary of 50l. 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 Leaverage 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
Charitable Uses.

Lectureship 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 Lectureship 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 Lectureship 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 have the Money in his own Pocket, there being no Person that can any ways claim it but the Plaintiff. Counsel for the Defendant, intitled, 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 Lectureship was void. As to the other Point they intitled, that the Plaintiff had forfeited the Lectureship 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 Lectureship, 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 Lectureship 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 Lectureship void, but the Lectureship 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 superceded 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 Recom-
mendment signed by the Master, Warden and most of the Fellows, to grant him a new Leafe at the End of the Term at the same Rent, and when the Leafe was near expiring, an Order was made at the Audit for such new Leafe. 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 Leeslee since the Order for the new Leafe, they are no more than what by his old Leafe he was obliged to do; and therefore disapproved the Tenant's Bill for compelling a new Leafe, 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, Chancellor will oblige them to afford. MS. Tab. March 8. 1720. Mayor of Coventry v. Attorney-General.

17. The Governors of a Free-School joined in a long Leafe of Houses at 5 l. a Year, though worth 50 l. a Year. The Lords Commissioners decreed the Assignee of this Leafe to surrender it back, and ordered the Leeslee and the Governors to pay 70 l. Costs. And Ld. C. King affirmed the Decree as to the Surrendring, but reduced the Costs to 5 l. and thought there was no Reason that the Charity should pay the Costs, but that the Leeslee 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.

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.

2. A Commission of Charitable Uses was fixed 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 fixed 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.

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. Windfor v. Inhabitants of Parnham.

Duke's Char. Uses, 79, pl. 22. cites S. C. and says that the Decree was affirmed by the Ld. Keeper upon an Appeal to him.


5. S. C. resolving upon Reference to Crew Ch. J. Walter Ch. B. and Jones and Crooke J. that no Bill of Review lies, because the Statute is introductory of a new Law, and gives an
Charitable Uses.

4.97

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 Affairs, 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. Waltham-flow in Eflex’s Cafe.

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.

6. If a Rent-charg 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 Cafe.

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 entire Grant by the Deed or Will. Resolved by Lord Coventry. Duke’s Char. Uses 64. pl. 3. Trin. 9 Car. East-Greensted’s Cafe.

8. A Charitable Exhibition was devisezd 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 Spirituatlies; and decreed 10 l. of the Arrears that should incur between the Vacancy and the Election, to go towards the Charges of ensuing 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 Purchafor of Lands charged with a Charity, but without Notice of the Charity, for Payment of Cofis, and Arraers of the Annuity due before he had the actual Possession of the said Clole, was, as to so much thereof, reversed. Fin. Rep. 81. Hill. 27 Car. 2. Wharton v. Charles & al’ in Behalf of the Poor of Warcup and Blebarn in Com. Wemfordeland.

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
Charitable Uses.

granted on a Preterence of Surprise, 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. Pach. 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 furcharge or leffen the Costs, or exempt the Party from them entirely. Abr. Equ. Cafe<> 126. Pach. 1700. Rockley v. Keyly.

13. Issue at Law was directed on a Re-hearing of Exceptions taken to a Decree made by Commissioners of Charitable Uses, after that Decree was twice confirmed. 2 Vern. 507. p. 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.

It was doubted that the Court could not relieve upon a Bill, but that the Course preferred by the Statute, by a Commission of Charitable Uses, must be observed in Cases relievably by that Statute; but no positive Opinion was delivered, the Defendant confessing to a Decree. Chan. Cases 153. 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 to come at last to a final Decree by the Ld. Chancellor or Ld. Keeper, and not to the 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 whole Poffession any of the Lands liable to the Money decreed are, and the Commissioners to apportion each Party's Payment with such proportional Part of the Charges as the Defendant hath been put unto. Chan. Rep. 91. 11 Car. 1. 'The Town of Market-Riding v. Brownlow.'
Charitable Uses.

3. The Report of myself and all other the Judges made to my Lord 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 Ing. Mich. 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, Reefer 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 House 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 3847l. 10s., 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 3847l. 10s. and to alter the Professors; which Decree we do conceive to be all together erroneous, and ought to be reversed; 11th, because the Exceptants were by Order of some of the Commissioners debar'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 leaving 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 Williunets 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 lets (if any Cause at all) to put in Exceptions to Decrees made against them, all which we humbly certify, and refer to your Lordship.

4. Sir Tho. Smith devised his Lands in Fee to such Charitable Uses as the Lord Lamley and Sir Henry Hann should appoint &c. They appointed 5l. to the Poor of St. Mary in Chefeher; and the Commissioners decreed that the Church-wardens and Overseers of that Parish might distrain for this 5l. The Questions were, whether the Commissioners could add a Power of Distreys where there was none by the Original Gift; and whether the Commissioners in Chefeher can bind the Lands at Ipswich with such an additional Clause; and adjudged in both Points that they might. Raym. 299. Hill. 22 & 23 Car. 2. B. R. Harrison v. Grovenor.

5. A Decree by Commissioners for Charitable Uses, was confirmed by the Report of a Bill. Chan. Cases, 193. Hill. 22 & 23 Car. 2. the Poor of St. Dunstan v. Beauchamp. But the Quere? 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 force the Defendants with a Writ of Execution, upon which Service the Defendant may the Exceptions,
Charitable Uses.

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 Exceptions have been quietly enjoyed, without any Thing demanded for the Use of the said School, save only 20s. Rent reserved out of the Lands of one of them, payable Yearly to John Gifford and his Heirs; and 30s. 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 Exceptions Anno 10 Jac. and which had 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 Exceptions 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 Exceptions Lands with the Decree made by the said Commissioners, or with any Executions or Impollitions of Rent, or Sums of Money whatsoever, and revoked the Decree of the Commissioners for Charitable Uses; and decreed that the Lands of the Exceptions shall be from henceforth discharged of the same, and of all Sums whatsoever by the Feoffees, other than the 20s. and the 30s. aforesaid. Fin. R. 293, 294; Pach. 29 Car. 2. Leas v. Morton.

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 Peron 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 aliened shall be sequestr'd for the Money, and a Scire Facias against A.'s Heir, A. dying after the Decree confirmed. 2 Chan. Cafes, 94. Pach. 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. Wilfon.

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.

10. The Teftator 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 infur'd, that all the Tertenants of the Lands charged, should be made Parties, but decreed 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.

11. Bill to establish a Will, and to perform several Trusts, some of them relating to Charities; the Bill was brought by one of the Trustees against other Trustees, and several Cefcy 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
Chaunters.

(A) By whom it may be made.

1. A Ban may make a Chaunters by Licence of the King, with answer to the Ordinary, for the Ordinary hath nothing to do with the making thereof. 9 H. 6. 16.

6 M (B) In
Chimin Common.

(B) In what Place.

Asto Chaun- 1. It may be founded in a Cathedral Church; and also in any other
trics, See Church. 9 B. 6. 17.

Chimin Common:

Fol. 290. (A) Chimin Common. What shall be said a Common
Highway.

Cro. C. 566. 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 foundous with Corn, the
King's Subjects (the Way being foundrous) may go upon the Corn.
Comm. 10 Car. B. R. per Curiam, upon a Trial at Bar upon an
Information against Sir Edward Duncomb.

Fitzh. Barre, 2. If there be a Water, which is a Highway, which Water by the
Incrcase or Force thereof changes its Course upon the Ground of an-
other, 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 H. 93. said to be ad-
judged in the Cire 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. E R. Aun-
tin's Cafe.

1 Salk. 559. 4. Highway is the Genus of all Publick Ways, as well Cart, Horse,
pl. 8. the and Foot-way, and yet Indemnity lies for any one of these Ways, if
Queen v. they are common to all the Queen's Subjects; if they have Occasion to pass
Sainthill there, viz. if it be a Foot-way common to all, or Horse and Prime-way;
S. C but not; but there are not Alte The Regio; for that it is the Great Highway, com-
S. P. mon to Cart, Horse, and Foot, that please to use it; Per Holt Ch. J. 6

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
Chimney Common.

shall be deemed a publick Way. No one living in a Hundred shall be allowed an Evidence for any Matter in favour of that Hundred, tho' to 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 Hornley.

6. Commonia Strata and Via Regia are equinomous 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 Câfe of the King v. Hammond, cites Fitzh. 279. Tit. Challenge.

(B) Who ought to repair it.

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 Cap. 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 3 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 dangerous, used to go for their better Passage over the Fields adjoining, one of the common Track of the Way, which Liberty is taken away by the Inclosure.

now, by reason of this Inclosure, whereas the Parish was chargeable before for the Reparations, Nay 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 Câfe of the King v. Sir Nich. Stoughton; 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; if but 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 Tenure of any Lands, the 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. 564. Hill. 162; 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 Wattle 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 Câfe of the King v. the Inhabitants of Shoreditch.—13 Rep. 52. Patch. 7 Jac. Anon. says that of common Right all the Country ought to repair it, because they have their Easements 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 became insolvent, the Justices of Peace may put that Charge upon the rest of the Inhabitants; per Holt Ch. J. Ed. Raym. Rep. 725. Mich. 10 W. 3 B. R. Anon.—2 Ed. Raym. Rep. 1170. Trin. 4 Ann. Holt Ch. J. cited Duncombe's Case supra.—Keb. 894 pl. 60.
Chimin Common

2. In 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 Cuitain, upon a Motion for a Prohibition to the Barrows of Wales, upon an Information there prefered 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 Dyles without any Prescription. Br. Nuance, pl. 23. cites 8 H. 7. 3.

4. Contr. of him who has Land which is not adjoining, but other Land is between him and the Way, he is not bound, unless it be by Prescription. Ibid.

5. And per Kehle, a Man is not bound to lepp his Trees which incumber the Way, therefore it seems that another may do it, and the Soil and Franksenement 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. 163. Mich. 1649. B. R. The Inhabitants of Mile-End in the Parish of Steppeny.

7. If a Man has 8 Plough-Lands, he ought to find 8 Carts for 6 Days, altho' his Land be Purlure. Raym. 186. Patch. 22 Car. 2. B. R. Frere's Cafe.—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. 92. Trin. 22 Car. 2. B. R. Anon.

* Unless there be some special Matter to fix it upon others; per Hale Ch. J. Vent. 182. Hill. 23 & 24 Car. 2. B. R. in Aufflin's Cafe.—(But the Reporter adds a Quere, Why not the Country? as in the Cafe of common bridges, and cites 2 Inst. 751.)

Unlesst a particular Person be obliged by Prescription or Cution; but private Ways are to be repaired by the Village or Hamlet, or sometimes by a particular Person. 1 Vent. 189. per Hale Ch. J. in Aufflin's Cafe.

† 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 Tenure, between Stratford and Bow. It was tried at the Bar by an Essex Jury. The Evidence for the King was that Mowd the Empress gave certain Lands to the Abbots of Barking to repair this Way, that the Abbots &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 Mewitis, who held them charged for repairing the Way, and from him by several more 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 Tenure, 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 Abbots of Barking, and that no other Lands formerly belonging to the Abbot of Stratford were liable, but such which he bought of the said Abbots. 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,
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accordingly, who found for the Plaintiffs. 4 Mod. 48. Mich. 3 W. 3 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. 499. Trin. 12 W. 3.

12. Tho' the Lord of a Manor who is bound to repair a Bridge or Highway raised Tenure, 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. Patch. 3 Ann. The Queen v. the Duchesses 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.


2. An Exemption by the King's Letters Patents made before the 2 & 3 Val. 179. The King's 2. Lev. 179. The King's Meney of the Mint, Ph. & M. cap. 3. are not sufficient to exempt Lands chargeable to lend 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 lend Men for that Purpose; and Judgment was given accordingly. 3 Mod. 96. Hill. 1 Jac. 2. B. R. Bret v. Whitchcot.

Hill. 1 & 2 Jac. 2. B. R. Bret v. Whitchcock S. C.

(D) Offences in Highways punished. How.

1. No Lord can punish Purposure upon a Highway, unless he be Lord of both Sides. Kelw. 141. a. pl. 11. Saks it was to be paid in that Plea, and affirmed by Shard. Cales in Itin. in Time of E. 3.

6 N 2. If
Chimín Common.

2. If any particular Person after the Nuance 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.

Actions for
le Case, pl. 6. cites S. C. — As if he and his Horse fall into it, whereby he receives Hurt and Loss, Co. Litt. 56. a. says that it was so resolvido in B. R. and in the Margin cites 27 H. 8. 27. — And in the Case of Fineux v. Havenden Cro. E. 664. Patch 41 Eliz. Coke Attorneys. General cites the S. P. adjudged in the same Year of 27 H. 8. Bendlows v. Kemp.

Br. Action for le Case, pl. 93. cites 4. 4. 7. that he shall not have Action against him who ought to repair it; for that is the People, but it shall be reform'd by Preffentment. —— So by Baldwin Ch. J. If a Man stops the King's Highway, so that a Man cannot pass from his House to his Clay, he shall not have Action on the Case, but he shall be punifh'd by the Leet. Ibid. pl. 6. cites 27 H. 8. 26. 27.

3. Cafes lies not for binding 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. 5 & 4 W. & M. in B. R. Pain v. Partridge.

4. Indictment against 2 Defendants who were Overseers of the Highway, for not repairing, or causing to be repaired the Highways, and quah'd; because an Indictment for not repairing, must always be against the Parishes, the Overseers not being bound to repair the Ways, but only to give Notice to the Parishes to come and repair them. 12 Mod. 98. Trin. 10 W. 3. The King v. Dixon & Hollis.

(E) Proceedings, Pleadings and Judgment.

This Exception was dismissed, and it was said that the Pre-Action was generally so. Vent. 331. Trin. 50. Car. 2. B. R. The K v. Sir Tho. Fanshaw.

But where a Man is bound to repair such Way Ratione tenue, in a Preffentment or in a Plea, he need not allege Title of Prescription, because a Prescription is implied in the Estate of Inheritance in the Land. Noy 93. Anon. cites 5 H. 7. 3.

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But where a Man is bound to repair such Way Ratione, there he must of necessity allege a Prescription. And this Diversity was admitted good; Per tot. Cur. Kelw. 52. ut sop.

3. G. was indicted for stopping the Highway, and the Indictment was not laid to be contra pacem. And Cook said, That for a Mif-leave it ought to be contra pacem; but for a Non-leave 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 Greffham; and also Vi et Armis was left out of the Indictment; and for those causes the he was discharged, and the Indictment quah'd. Godb. 59. pl. 71. Mich. 28 & 29 Eliz. B. R. Lady Greffham's Cafe.
Chimn Common.

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 Cafe.

5. The Defendant was pretested 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 Pretestment is void, because a Highway cannot be diverted as a Course of Water may be, but may be obstrued or stopped; but a Way is not diverted when it is flopt, and another Way made in another Place. And. 234. pl. 251. Pach. 32 Eliz. Agmondefham v. Cornwallis.

6. K. was indicted for stopping quandam Viain valde necessarium for all the King's Subjects there passing; Exception was taken because it wanted the Word Region, and said that the Word (Necessarium) 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 Cafe.

7. Two were indicted for incroaching upon the Highway, and the Indictment was et una Judicamentum ibidem erectaverunt, where it should be erectaverunt; 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. Pach. 33 Eliz. B. R. Chambers & Johns.

8. Indictment for not repairing a Bridge, was debit & 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 debit & solent Reparare pontem, and it is not thwed that their Charge of repairing the same is Ratione Tenure, and cites 21 E. 4. 36. where it is said that a Prescription cannot be, that a Common Person ought to repair a Bridge, unless it be to be Ratione Tenure, but it is otherwise in Cafe of a Corporation; and the Indictment was quashed. Godb. 346, 347. pl. 441. Trin. 21 Jac. B. R. Bridges and Nichols's Cafe.

9. Exceptions were taken to an Indictment for not repairing an Highway. 1st. Because he did not know who were Supervisors; fed non Allo-catur. 2dly. Because it did not show the Day nor Hour of the Offence, and the Offence was 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 Supervisors. 3dly, The Statute, 1 & 2 M. cap. 3. is Highway leading to a Market Town; Bole's Cafe. § c & non Allo-catur; because every Highway leads from Town to Town, and cites 6 E. 3, 35. 4thly, It is alleged that T. B. habens tantaum terrae committed the Offence, and the Words of the Statute are Occupi. p. & M. § c. so that a Man is not chargeable if he does not occupy his Land, cap. 8. tho' it be his Frank-tenement. But it was agreed that if a Man suffers his Land to lie frue, 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. 359. Mich. 21 Jac. B. R. Theo. Bole's Cafe.

10. H. was indicted for stopping the King's Highway in Kensington, but § spaced in an Indictment for not repairing any Buttals 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 Court Realm, but otherwife it should have been of another common Way, to which Dodderidge and Whitlock agreed. Noy. 9b. Mich. 2 Car. B. R. Halfell's Cafe.

material, but the emitting the Word (Communis) is ill; but the Court left them to a Writ o. Error, and
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The Indictment did not set forth, from what Place to what Place the Highway led in which the Nurance was laid to be committed. It was averred, that a Highway has no Terminus a quo, nor Terminus ad quem, and the Indictment held good. 10 Mod. 382 Hill. 2 Geo. 1. B. R. the King v. Hammond — Ibid. Arg. lay, this Highway is infinite, and cites to 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 fecund of what Place the Defendant was an Inhabitant. Noy 87. Mich. 2 Car. B. R. Lucy's Cate.

12. H. was indicted for not paving the King's Highways in the County of M. in St. John's Street, ante Tenement fide, 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 Leetie dwelt in the House, and so the Leetie ought to have amended the Highway; and for these Uncertainties the Indictment was quashed. Godb. 400. pl. 451. Patch. 3 Car. B. R. Serjeant Hoskins's Cate.

Noy 93. S. P. accordingly; and seems to be S. C. and cites 5 H. 7. s. accordingly. — Vent. 351. Trin. 30 Car. 2. B. R. the King v. Farshaw, S. P. & S. C. cited, sed non allocatar; for the Precedents generally are Ratium Tenure, without saying (fuz.)

13. In an Indictment for not repairing a Way which he ought Ratium Tenure of certain Lands in Athlon, and does not pay Ratium Tenure fide, and if another has the Land, it is no Reason to indict him; and of this Opinion was the Court. Lat. 226. Trin. 3 Car. Anon.

14. Upon a Prefentment against T. B. for erecting a Brick Wall, and thereby threatening the Highway, Mr. Attorney said, that it could not be arrested, unless there was an Inquiry per Ministris Forrealla, it it competans Paallagium; for it it be not, it is a Nurance in which the Subject is so far interested, that the King cannot dispence with it. Jo. 277. 8 Car. in Itinerar Windor. Browne's Cate.

15. Information for stopping a Highway; it was laid 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 contend the Highway, but say it was so foul and drowned with Water and Dirt, that Passenger could not pass, and that for Ease of the Passenger J. S. seized of a Close adjoining to it, laid out another Way more convenient 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 amendments 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 Lieue was, whether they ought to repair it or no? some of the Inhabitants could 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 be, and all those whose Estate be in the
Tenements, used to repair; or, that by reason of the Tenure of his Tenements

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 reprieve the
Fine, because there was a Contest between this Parish and another,
whither 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 Sum-
mer, and then it shall be done; but Roll Ch. J. ordered a Distirngas to
levy a Fine of 20l. of the Patithioners for not repairing it. St. 566.

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 Place regu-
lar, and ordered the Defendants to repair by Consent, and that if the
others ought to repair Party, they shall refund so much as shall be allowed
found due on the Trial, otherwise the Court would have given judgment.
1 Keb. 217. Patich. 14 Car. 2. B. R. the King v. Varenton In-
habitants (in Oxforshire.)

20. Upon an Information for not repairing a Highway, the Issue was:
that a new way was not made, but that it was an ill Issue, yet the Court
would not quash it till tried, to the Intent that no one ought to repair it.
And afterwards it was found no Debent repairable, but found 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 Villi,
who directed this Issue, and who of Right ought to repair, should
be held. 1 Sid. 145. Patich. 15 Car. 2. B. R. the King v. Yarnton In-
habitants in Oxforshire.

Keb. 514. S. C.——Sid. 145. Ibid. reports, that Twisted 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 there-
fore they mov'd to quash it; but the Court denied, unless there was a
Certificate of Amendment. 2 Keb. 221. pl. 68. Patich. 19 Car. 2. B. R.
the King v. Shelderton Inhabitants.

22. Information against one for stopping the Highway, the Word
was Obliqutbat; it was proved in Evidence, that he moved it up, and
reolved it did well maintain the Information. Vent. 4. Hill. 26 & 21
Car. 2. B. R. Grieley's Cafe.

23. S. was convicted for not repairing a Highway, viz. that be, and This Cafe
all those whose Estate he has ought to repair the said Way. Ratione Tenente
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 Rich. Staughton

that Sought to repair Ratione Tenente & Custom Lands, Panel of the said Piece of Land (mentioned be-
fore) called Stake Common, by the said S. out of the said common Highway, inclosed and increased, and
which,
Chimin Common.

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, ab igne hoc that he ought to repair the said Way Ratione Tenure, &c. and upon Demurrer it was held, that the Ratione Tenure was ill, and that it ought to have been Ratione Commissoria of the said Way, and that Defendant did well in traversing the Ratione Tenure, 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 altum Viam, the Word (Communiarum) 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 Glaffon.

25. In an Indictment for erecting Posts & Rails in a Highway, it was held necessary to prove that the Party indicted did them up; for a Continuance of them, or not suffer them to be removed, would not ferre. 1 Vent. 183. Hill. 23 & 24 Car. 2. B. R. Aultin's Cafe.

26. An Indictment was for flogging a common Way to the Church of Whitsby. It was objected that an Indictment would not lie for a Nuisance 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 topp'd; but in such Cafe there can be no Indictment. Hale Ch. J. said that if these were alleged to be a common Foot-way to the Church for the Parishioners, the Indictment would not be good; for then the Nuisance would extend no further than the Parishioners, for which they have their particular Suits; but for ought 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 Documentum, wherefore the Rule was that he should plead to it. 1 Vent. 208. Pashc. 24 Car. 2. Thrower's Cafe.

27. The Course of B. R. upon an Indictment for flogging a Way, is that the Offender is admitted to a Fine upon his Submissn before Verdict, if there be a Certificate that the Way is repaired; but if the Party be convicted by Verdict, such Certificate will not iver, but the Party ought to caufe a Confess 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 anwered with Matter of Record. Raym. 215. Pashc. 24 Car. 2. B. R. Houghton's Cafe.

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. 236. Pashc. 26 Car. 2. B. R. Anon.

29. An Indictment in a Lect was for flogging 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 fit forth where the Stepping was, the Indictment was quashed. 3 Keb. 644. pl. 98. Pashc. 28 Car. 2. B. R. Ayerell's Cafe.
33. 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 demurrd, 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. Palech. 34 Car. 2. B. R. The King v. Warwick (Mayor &c.)

32. A Prelement 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 Prelement; 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 Prelement being removed by Certiorari into B. R. the 279. Trin. 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 oblig'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 Prelement was upon View; for that cannot be a greater Etoppel 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.

34. If a Prelement be made by a Justice of Peace, upon his own View, that a Highway is out of Repair, and the Defendants plead specially to S. C. held such a Prelement, viz. that they ought not to repair, they likewise must accordingly. It may not be repaired, or elle the Plea is ill. Agreed per tot. Cur. and found to have been so adjudged by Hale Ch. J. Carth. 213. Hill. 3 W. & M. B. R. in Cafe of the King v. Hornsey Inhabitants.

35. The Being of a Highway is Matter of Supposal, and must be denied in Pleading; and so held in the Cafe of Leather-Lane, per Holt Ch. J. And per Eyres J. you may give it in Evidence, for 'tis the fame as No Park or No Warren. In Trefpa's 'tis Not guilty. The Prelement is but in Nature of an Indictment. Per Cur. ordered to say. Show. 291. Trin. 3 W. & M. The King v. Hornfey

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 Comb. 296. Highways upon Notice. Holt said the better Opinions had been, that The King 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 &c.

38. Error
38. Error of a judgment upon an Indictment at the Quarter-Session, for Non-repairing a Highway between A. and B. in the Parish of R., and the judgment was, that such a Sum extrahabatur & Ieuever to repair the said Way, Nisst it were repaired by such a Time. It was objected that the judgment was properly, extrahabatur & levetur, instead of the Natural Way of levetur & extrahabatur; and for this Exception the judgment was reversed, and compared to Debt upon Bond, for 10l. if Judgment were Ideo Consideratum eft, quod habeat Executionem de pred. 10l. & recuperet; per Car. it would be Error. 12 Mod. 409. 12 W. 3. The King v. Ragley Parish.

39. A Man was indicted for not working towards the Repair of the Highways according to the Statute, and Jelfed 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 6 Days. This Indictment was held naught; for the particular Days ought to be set forth. 1 Salk. 357. Pach. 2 Ann. B. R. The Queen v. King.

40. The Justices made not appoint 6 Days generally between such and such a Time, but must be particular, and if the Appointment was naught in such Cafe, the Party is not bound to come at all. 1 Salk. 357. Pach. 2 Anne B. R. the Queen v. King.

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 Tenuree sine. 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 Tenuree 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 Nuisance as it stood, and the continuing it in that Condition is continuing the Nuisance; 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 Cafe 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 Premises. 1 Salk. 357. Trin. 2 Ann. B. R. the Queen v. Watts.

42. The Defendants were indicted for not repairing a common Footway, and confessed, and submitted to a Fine; &c per Car. the Matter is not at an End by the Defendants being fined, but Writs of Disfrongas shall be awarded in infinitum, till we are certified that the Way is repaired. Salk. 358. pl. 6. Pach. 3 Ann. B. R. the Queen v. Cluworth Inhabitants.

6 Mod. 163. cites S. C. But the Defendants are not bound to put it in better Condition than it but been Time out of Mind, but as it has usuall 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 & alius est valde lus/ta & tam Anguf/a, fi/fo 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 not out of Repair; and Powell said, that the saying it was tam Angustia that People could not pass, was repugnant to its being Alta Via Regia; for had it been too narrow, People could never have paffed there Time out of Mind. 2 Ld. Raym. Rep. 1169. Trin. 4 Ann. the Queen v. the Inhabitants of Stratford.

For more of Chimin Common in General, See Indictment, Nuisance, and other Proper Titles.
Chimney Private.

(A) Chimney Private. [And how Persons may be intituled to a Way.]

1. A Man by Prescription may have a Way from his Meadow to Br. Chiminy, the High Street. 20 Att. 18.  
that a Man shall not have Affish of Nuisance of a Way fllp'd, unlefs it be to some Frankentenent, but if it be from a Meadow to a High Street, it is as well as from his Houfe to the High Street.  
Fir fh Affife pl. 218. cites S. C. & S. P. accordingly. — Br. Affife, pl. 229. cites S. C.

2. A Man may have a Way from his Houfe to the Church. 20 Br. Chiminy;  
Att. 18.  
warded Affife of a Way which was claimed to a Church; and Brooke fays, Quod Nota, &c. Quere inde; for of a Way in Gros an Affife does not ic. — Br. Affife, pl. 218 cites S. C. & S. P.  
Br. Affife, pl. 229. cites S. C. but Brooke fays Quere inde, for it is not claimed properly to his Frankentenent.

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 Jutices and Apprentices in Chancery. Trin. 18 E. 4. 8. a. pl. 10. And it was said there, that the Church-yard of the Charter-houfe is a common Way for the Inhabitants of London to St. J. and that they prescribe in it.  
Br. Pres-cription, pl. 91. cites S. C. and B.  

4. Chiminy appellant cannot be made in Gros by Grant, for none can have the Commodity thereof but he who has the Land to which this Way is appellant. Br. Chiminy, pl. 14. cites 5 H. 7. 7.  
5. A had an Acre of Land which was in the Middle, and incompanied with other of his Lands, and intiffs B. of that Acre, and resolved by the 4 Jutices that B. shall have a convenient Way over the Lands of the Feoffor, and he is not bound to ufe the fame Way that the Feoffor ues.  
Noy 123. Oldfield's Cafe.

6. A Stranger may have a Way over another Man's Soil 3 manner of 1 Salk. 173:  
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. pl. 1 S. C.  
for Necessity has a Way over a convenient Part of B's Ground to his own but S. P. Soil, as a Necessity Incident to his Ground. So if A. grants a Piece of does not ap-  
Land which is surrounded by Land of Vendor, he grants a Way as a pear.  
3 Salk. 121.  
8. C. but  
&c. and he grants Blackacre to B. with all Ways, Eafements &c. the not appear.  
Grantee thrall have the fame 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 fame Way that A. had. But there in making Title B. must allege such an El-  
etate in A. as is traversable, and not only say that A. was poftified of the Land to which &c. for a Term of Years; for there the Possession would  
6 P. be
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.

(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 includes it from the Street, the Gate being in the
East next to the Street; and A. is also seised in Fee of a Measuring and
Piece of Land next adjoining to the Backside on the North of the Back-
side, and by Deed incoffs B. of the Measuring 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 ingremium, egrelijum & regrelijum
in, ad & extra eadem concella Præmifla, in, & per & transit predictas
Januam & backside; by Force of this Grant B. may go from the
Street thro' the Gate, and over the Backside to the Measuring or
Piece of Land of which he is intiffud; 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 Measuring or Piece of Land,
for the Liberty is granted to him of ingremis and egrelijis in, ad & ex-
tra eadem concella Præmifla, so that this is made apparenue to the
Premisses before granted.

Car. B. between Hodder and Holman,
adjudged upon a Demurrer, where in Trespassas prælibus ambulando
in the Backside, the Defendant justified by Force of the said Grant,
showing all this Staucet in the Grant, and that he went from the said
Piece of Land over the Backside, and thro' the Gate to the Street,
& sic retrorum; and the Plaintiff replied, that he bid the Trespassas
of his owne Wrong, abuie that he went from the said Piece of
Land over the Backside thro' the Gate to the Street, & sic retror-
sum; and adjudged a good Traveller, for the Cause aforesaid. In-
staurill. 9 Car. Rutulo Dorsit.

2. In Trespassas for breaking his Close, if the Defendant justifies go-
ing over his Close, because he has used, Time out of Mind, to have a
Way over it from D. to Backacree, and the Plaintiff replies, that at the
Time of the Trespassas the Defendant went with his Carriages from
D. to Backacree, & dehinc to a Mill, this will not maintain his Ac-
ction; for when the Defendant was at Backacree, he might go
wherever he would. Patch. 16 Jac. B. R. between Sanders and Mffe,
adjudged upon Demurer.

3. But it seems, that if a Man hath a Way for Carriage from D.
to Backacree over my Close, and after he purchases Land adjoining to
Backacree, he cannot use the said Way with Carriages to the Land ad-
joining, tho' he comes first to Backacree, and thence to the Land
adjoining, for that 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 B. 16 Jac.
Banco.
Chimim Private.

Mill or a Bridge there it may be good, but when he goes to his own Clofe it is not good; for, by the same Reason, if he purchases 1000 Clofes he may go to them all.

4. If a Man lends a Houfe, referring a Way thro' it to a Back-house, he can not come thro' the Houfe without Request, and that too at a Reasonable Times. Vent. 48. Mich. 21 Car. 2. B. R. in Cafe of Tomlin v. Fuller.

Doors open for the Leffer'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.

1. In a Highway the King hath nothing but the Passage for him: * Br. Chim. Pl. 1. cites S. C. by all the Justices. — Fith. Chimim, pl. 1. cites S. C. — Br. Chimim, pl. 9. cites S. C. — Fith. Trefpafs, pl. 95. cites S. C.

2. But the Freehold and all the Profits, As Trees are, belong to the Lord of the Soil. * 8 C. 4. 9. † 2 C. 4. 9. ‡ 8 P. 7. 5. b. Fith. Chimim, pl. 1. cites S. C. † Br. Chimim, pl. 9. cites S. C. by all the Justices except Major. — Fith. Trefpafs, 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. Chimim, pl. 15. cites 8 H. 7. 5.

3. The Lord of the Soil shall have an Action for digging the Fith. Chimim, 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 both belong, shall have the Trees. * 27 P. 6. 8. per Curiam. See tit. Trees (B) per total.

5. Generally the Owner of the Soil of both sides the Way shall have the Trees growing upon the Way. 13 Etz. B. R. per Curiam, cited P. 11 Fac. B. R.

6. The Lord of the Rape, within which there are 1000 Acres, may prefer to have all the Trees growing within any Highway within this Rape, though the Hanor or Soil adjoining be to another; for Place to take the Trees is a good Badge of Ownership. P. 11 Fac. B. R. between Sir Thomas Pelham Plaintiff, and Witty and Black Defendants, per Curiam.

7. The Soil and Frank-tenement of the Way, is to those whom it adjoins. Br. Nulans, pl. 28. cites S. 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 refuse him; Arg. Godb. 53. pl. 65. cites 32 E. 3.

2. If a Man disturbs me in my Way with Weapons, Trespa’s Vi e Ar- suits lies. Br. Action sur le Cafe, pl. 29. cites 2 H. 4. 11. per Skrene and Thirning.

So where the Way was totaliter.


4. He that has Ingres 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. Clifton 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 Cafe of Clifton v. Pool.

6. If I have a Way without a Gate, and a Gate is hung up, Action on the Cafe lies; for I have not my Way as I had before; Per Cur. Litt. 12. 267. Patch. 5 Car. C. B. in Cafe of Palton v. Utber.

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 Confutation was awarded. Jo. 23o. pl. 1. Hill. 6 Car. B. R. Halvey v. Halvey.

8. A Man has a Mefunge, and a Way to the Mefunge through another’s Freehold, and the Way is stopped, and then the Houle is alien’d. The Alienee can bring no Action for this Nusance before Request; Vent. 48. Mich. 21 Car. B. R. Tomlin v. Fuller.

9. Upon Evidence given in an Action of Trespass between W. & C. at the Bar, it was laid by Glych Ch. J. that if one make a Ditch, or raises up a Bank to hinder my Way to my Common, I may justify the throw- ing it down, and the filing it up. Sty. 47o. Mich. 1655. Williamson v. Coleman.

10. Every Man of common Right may justify the going of his Servants or of his Hofs 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 Cafe where there is a Way through
Chimin Private.

through a great open Field, which Way becomes foundorous, 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

(D) Made unpassable &c. Remedy. And of setting
out new Ways.

I If one grants me a Way, and after digs Trenches in it to my Hin-
drance, 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 taring it up with his Carts, and so the
fame 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.

3. In Trespasses &c. the Defendant prescribed for a Foot-way, and that
the Plaintiff such a Day plow'd it up, and sea'd it with Corn, and laid
Thorns on the Sides, and that before the Trespa's done be left a new Foot-
way near the old Way, which had since been used by all Foot-Passengers,
as adjudged accordingly; and that the Defendant went in the said new Way to such a Place &c. quo
off endem transgressio; and adjudged a good Justification. Brown 212.

Home v. Taylor accordingly, and likewise hold 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 unpleas'd.
Where a Way is stopp'd, and another Way made in another Place, the Way which is stopp'd can-
not be said to be diversified. And 234. pl. 251. Patch. 52 Eliz. in Case of Ashburnham v. Cornwallis—
The Assembling the new Way will not justify the Stopping the old Way. Carth 393. Trin. 3 W. &
King v. Ward & Lyme.

4. If a Highway be so bad as it is not passable, I may then justify 2 Lev. 234.
going over another Man's Close next adjoining. 2 Show. 23. pl. 19.

(E) Extinguished' by Unity.

A Way extinguished by Unity of Possession, is revivable after on De-
sent to 2 Daughters, where the Land over which is allotted to e. cites 21
one, and the other Land, in which the Way was, is allotted to the other
Sister; and this Allotment without Speciality to have the Land ancient-
ly used, is good to revive it. Jenk. 20. pl. 37. cites 21 E. 3.

2. In Trespasses the Defendant justified for a Way appertaining 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 seized 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 recarry. 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 fav'd to him. Cro. E. 300. pl. 13. Patch. 34. Eliz. B. R. Dell v. Babthorp.

4. In an Action of Trespass the Cafe was thus. A. had a Cross-Way by Prescription to go to Wb. Acre over Bl. Acre, and after he purchases Bl. Acre, and of that infeñ's 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.

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.


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 will pass's without being express'd in the Deed; for the Land cannot be severed without a Way, and therefore it shall enfeñ it, and pass's of Necessity, and Unity of Possession does not extinguish it; per tot. Cor. Cro. J. 190. pl. 13. Mich. 5 Jac. B. R. in Cafe of Beaudley v. Brook.

3. A. feïced of Bl. Acre and Wh. Acre in Fee, by Indenture of Bargain and Sale inrolled A 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 for nothing pass'd by the Deed. Cro. J. 189. pl. 13. Mich. 5 Jac. B. R. Beaudly v. Brook.

(G) Actions.

1. An Affîse does not lie of a Way; for it is not Profit Apprender nor Frankenement, but an Easement. Thel. Dig. 63. lib. 8. cap. 6. S. 2. cites 34 Aff. 13. Trin. 31 E. 1. Affîse 442.

* There are not so many Fol. in that Year.


3. A
Chinin Private.

3. A Way was extant, and yet a new one was referred upon Partition of a Mill, and Land over which the Way went, and the Aisle of Nulance awarded to lie. Quere, if this was inasmuch as the Way is appendant to the Mill by the Referration, or because it is Aisle of Nulance; for it seems, that Aisle of Novel Difficilin does not lie of a Way, but Quod Permittat; and of a Way in Grofs Aisle of Nulance does not lie. Contra of a Way appendant to Franktenement. Br. Chinim, pl. 5. cites 21 E. 3. 2. but lays, that this Cafe is better abridged, Tit. Nulance, in Fitzh. 2. with a good Diversity where the Aisle 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, unlefs he claims it to some Franktenement, or from some Franktenement to the high Street, or to the Church, and ruled over; Belk. precie in this Cafe. Quod Nota. Br. Chinim, pl. 3. cites 45 E. 3. 3.

5. If a Man strops the King's Highway, so that I cannot go to my House, or to my Clofe, I shall not have Action upon the Cafe; 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 Cafe. Br. Action fur le Cafe, 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 Cafe; Per Fitzherbert J. Br. Action fur le Cafe, pl. 6. cites 27 H. 8. 26, 27.

7. The Plaintiff declared, that he had the Tithes of the Parish of B. S. C. cited 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 destroyed it with a Dutch, and with a Gate erected across 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 nuisance, and no Damages shall be given in such a Cafe, for then every one 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 ibid. 492. and Cattle, occasioned by obstructing the Passage in the right Way, S. C. cited ibid. 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.


and said, that admitting this Cafe 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 Cafe of Hart v. Buffet, 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 Expense, 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 shown specially; but that if there was no more than the Plaintiff's going round about, it is a hard Cafe.

(H) Pleadings.

1. W A Y ought to be claimed certainy, to go or to carry, and re- carry &c. et quibus Temporibus, and to what Franktenement it is appendant. Br. Chinim, pl. 7. cites 29 Aff. 19.

2. He
2. He who justifies to go in a Highway ought to show 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 surnames by Licence of the Plaintiff, and sometimes for their Money &c. abique hoc that it has been the Highway of the King Time out of Mind &c. Br. Chimin, pl. 7, cites 20 All. 18.

3. Quod permittat haberis Chiminiwn 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 from Frankentenement, or from your Frankentenement 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. Trespas upon the Cafe 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 Effate they have &c. have had, and ought to have a Way over 3 Acres of the Defendants to the said Meadow, there have the Defendants disturbed them to the Damage of 40 s. and the Defendants took the Trespas severally, and traversed the Prescription, and to Ille ; and found for the Plaintiff to the Damage of a Mark. Thirwitt pleaded in Arrest of Judgment, that the Trespas of the one is not the Trespas of the other, where the Defendants took the Trespas severally, and the Damages are affiled intire where they ought to be belever'd. Per Thrine, this is not much to the Purpoze. Br. Action furle Cafe, pl. 29. cites 2 H. 4. 11.

5. In Trespas upon the Cafe, 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 be would carry, and yet well; by Hank. And to fee that he prescribed in a Foot-way and Horse-way, that is to say, to pa's and carry. Br. Chimin, pl. 16. cites 11 H. 4. 52.

6. The Defendant justified in Trespas, that be and his Ancestors, Tenants of such a Houfe, 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 for Tort Depens, abique hoc that be and his Ancestors have had such Way Time out of Mind in the Manner as the Defendant supposed, and to Ille, 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 c contra; Quære. Br. Negativa &c. pl. 4. cites 28 H. 6. 9.

7. In a Quod Permittat the Plaintiff made his Title to the Way in his Count by Coerition of the Court, whereupon he prescrib'd 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 recarry &c. which fee 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 Cafe, the Writ was Quod cum ipsa habeat qualique Chiminiwn Ratione Tenure &c. and the Defendant knew not, per quem the Plaintiff Chiminiwm habeat non posset &c. and held per Prior, that the Writ is not good, for the Repugnancy. Thel. Dig. 124. lib. 10. cap. 11. S. 26. cites Trin. 33 H. 6. 26.
In Trefpas, where a Man *justifies* for a Way, the Defendant ought to *prove*, 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 Binder to carry and re-carry Time out of Mind; as to try from his Houfe, 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 Note, &c., per Cur. And per tot. Cur. he need not to *prove 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 Frankenement, Lease for Years, or the like; but he shall *prove the Quantity of the Way* which he claims, viz. of so many Parts, or the like; Quod Note bene; by which the Defendant took longer Time thereof. Br. Chim. pl. 6. cites 39 H. 6. 6.

In Cafe the Plaintiff *prescribed* habere Viam tam Pedestrem quam Carriagis, Leonard Prothonotary, said, that by his Prescription he could not have a Cart-way; for every Prescription is Stricti Juris; and Dyer said, that it is well observed, S.C. in totidem &c., and he conceived the Law to be fo, and therefore it is good to *prescribe* Fabri Verbis. — Ibid. 222 pl. 350. Mich. 16. Eliz. C. B.

In Cafe for *flopping his Way*, the Plaintiff declares that he and all others have had a Way from his House in D. over Green-Acre in S. C. and over Black-Acre to such a Place in P. and that the Defendant had flopped his Way in S. and upon Not Guilty found for the Plaintiff; it was moved in Arrest, because he did not allege in what till 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 Gavdy, 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. Bray v. Bannion.

In Curiam, the Plaintiff in his Declaration shall never lay that the Way is Apparent or Apparent, because it is only an Earnings and not an Interest; And all the Precedents in the Book of Entries are accordingly, and that though the Jury found it to be Apparent to the Moifage. And Man, Secondary, informed the Judges that a Judgment in B. R. was reversed in the Exchequer, because the Plaintiff had alleged a Way appurtenant to the Houfe, and to claim it in other Manner and Nature than he ought to do by Law; and adjudged in the Principal Cafe for the Plaintiff. Yelv. 159. Mich. 7 Jac. B. R. Godley v. Frith.

In Trefpas, the Defendant *prescribed* for a Paflage over the Land Brown. 215. 216. S. C. where &c. but it was held not good, and adjudged for the Plaintiff; but for Paflage is properly a Paflage over the Water, and not over Land, and the Defendant ought to have prescribed in the Way, and not a Translation in the Paflage. Yelv. 163. Mich. 7 Jac. B. R. Alban v. Brownfell.


In prescribing for a Way, the Defendant ought to *prove a quo loco* Brown. 215. 216. S. C. or somewhat the Way is, and though a Way may be in Grofs, yet it is not so S. C. & S.P. but is only a Translation in Certo Loco, and not in one Place to Day, and another Place to-morrow, but constantly and perpetually in the fame Place; adjudged. Yelv. 163. 164. Mich. 7 Jac. B. R. Alban v. Brownfell.

pleaded a quo Termino ad quem, because a Man must not go over my Grounds but to the right Place. 6 R.
Chimin Private.

Hob. 192. pl. 234. Trin. 15 Jac in Gagles's Cafe. — 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 shown, yet if it be only that he had a Way over the Clofe in the new Affignment, and no Place or End thereof is pleaded from what Clofe, or to what other Place; and if he 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 Kebo. 715. pl. 99. Mich. 22. Car. 2. B. R. The King v. Rawlin. — I. 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. 15. In Trefpa, afternoon the Defendant prescrib'd for a Way, but did not make 216. S. C. &c. what Manner of Way it was, whether a Foot-way, or Horse-way, or only a Tran- 163. 164. Mich. 7 Jac. B. R. Alvan v. Brownhill.

In Cafe for stopping a Way, the Plaintiff declared that he was seized of 18 Messuages in St. Bartholphe Aldegate, and prescrib'd 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 shown what Sort of a Way he had, whether a Foot-way, Horse-way, or Horse-way; fed non Allocatur; & for it is said that he had a Way we do &c. before &c. and after a Verdict it shall be intended a general Way for all Purposes. Comyn's R. 114. pl. 76. Part. 1; V. 3; B. R. Warren v. Green. 12 Mod. 526. S. C. but S. P. does not appear. — Ed. Raym. Rep. 701. S. C. but S. P. does not appear.

16. In a Declaration in Cafe for stopping the Plaintiff's Way, it was not found to what Village the Way led. After Verdict for the Plaintiff, this was moved in Appeal 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. Allys v. Sparks.

17. In Trefpa, the Plaintiff declared of a Way from his Houfe to a Mill and so back again. Exception was taken that every Way is either Appendant or in Grofs and ought to be so laid, but that here the Plaintiff had not alleged that this Way was appertaining to his Houfe, and the Court were clear of that Opinion; because in this Action the Plaintiff is only to recover Damages, whereas in Affise of Nuisance the Thing itself is to be recovered. But in this Principal Cafe he ought not to allege that this Way was appertaining to the Houfe, it being laid to be from the Houfe to the Mill, and from the Mill back again to the Houfe; and fo the Declaration is good, and Judgment for the Plaintiff. Bull. 47. Mich. 8 Jac. Pollard v. Cafy.

18. In Sci. Fa. upon a Recognize for the good Behavior; for that the Defendant with others, victoriously and unlawfully entered into such a Clofe, and cut up a Quick-set Hedge &c. The Defendant as to all but the Entering the Clofe and cutting the Hedge, pleaded Not Guilty; and as to that he jus- tified by a Prescription for a Highway in the said Clofe, and because it was stopped with a Quick-set Hedge, he cut it up; the Plaintiff replied De injuria sua Propria & ex malitia praecogitata, the Defendant with others cut the Hedge &c. upon which Ifie was joined and found for the Plaintiff. It was objected, that he was not any Ifie joined, for De injuria sua Propria, where one justifies for a Way, or for any particular Thing, is no Ifie, but the Plaintiff ought particularly to traverse the Prescription alleged, and conclude abifque tali causa, because the whole Cafe is in Ifie; and fo it was adjudged. Cro. J. 538. pl. 22. Mich. 18 Jac. B. R. The King v. Hopper.

19. If a Man has a Way from his Houfe to the Church, and the next Clofe of Land to his House is his own; it was said by Doderidge J. that he cannot in this Cafe prescribe that he has a Way from his Houfe 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 [defroy'd] but the Prescription though General, shall be applied to the other Lands, to which Chamberlain J. agreed. But Dode- ridge.
Chimney Private.

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20. In Action on the Cafe for disturbing the Plaintiff in his Way. Exception was taken because it was not shown from what Vill to what Vill the Way led; and per Jones and Dederidge J. there is a Difference when it is alleged as an Abatement and when by Way of Justification in Trefpafs; and Judgment accordingly for the Plaintiff. Palm. 420, 421. Patch. r Ca. B. R. Harrison v. Rook.

21. Cafe was brought for stopping a Way which the Plaintiff had from Lat. 166; such a Place over Black-Acre where the Nuance is, into such a Field (by Hill 2 Car. Name) and it was ruled to be good, without showing what Interest he had in that Field; for it shall be intended to be a common Field. But if it had been shown as to the Plaintiff, he ought to shew what Interest he hath in the dem Verbis.

Cloe. Nov. 86. Park v. Stewum.

22. In Trefpafs Quare Clauum fregit, the Defendant justified for a Way; the Plaintiff replied, but 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 confented and avoided by the Replication. Her. 28, 29. Trin. 3 Car. C. B. in Cafe of Johnston v. Morris.

23. In Trefpafs &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, and it was held that the Defendant had a Way, not only to go and ride &c. in the very Words of the Plea, and so to Ifsin, 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 Cafe for stopping a Way, the Plaintiff set forth a Title as Tenant 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 tenuibus &c. occupatoribus suis; but as the Declaration is laid, the Company ought to have brought the Action. Sty. 500. Mich. 1651. B. R. Cantrell v. Stephens.

25. In Trefpafs the Defendant justified for a Way from his House thro' the Place where aguine alium sua Regum in Parochia D. over London-Read. Issue was joined upon the Way, and found for the Plaintiff; and per Car. it being found that he had a Way over the Place where, it is not material to the justification whether it leads, it being after Verdict, when the Right of the Cafe is tried; and it is added at Iaff [aided at least] by the Statute of Oxford 16 Car. 10 Thwell laid was the Opinion of all the Judges in Serjeants-Inn, he putting the Cafe to them at Dinner. Vent. 13, 14. Patch. 21 Car. 2. B. R. Clarke v. Cheynay.

26. Trefpafs, Quare Clauum fregit & diversa overa equina of Gravel had carried away, per good viam suam amisit. After Verdict it was moved that the Diversa overa equina was uncertain, and had set forth no Title to the Way, nor any Certainty of it. It was laid 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 Trefpafs. 2 Vent. 73. Mich. 1 W. & M. in C. B. Blake v. Clatte.

27. In Cafe the Plaintiff declared that he, for 4 Years last past, was so where seized in Fee of Lands adjoining to the Defendant's Meadow called B. and the Plaintiff that during that Time Indere debuit a certain Way thro' a Gate of the Defendant's in B. to a Clofe &c. of the Plaintiff's; but the Defendant justified &c. if to hinder the Plaintiff of the Way, locked up the Gate &c. After Judgment an ancient instrument for the Plaintiff by Default, and a Writ of Enquiry &c. it was Meßhoare, moved and had a
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 uponjudgment 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 Case of Demurrer. 3 Lev. 266. Pach. 2 W. & M. in C. B. Windford v. Woolafon.

and that the Defendant fopp'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 preferbe, or otherwise invite himself to this Way than by a bare Possession of the Messuage. The Court held the Declaration sufficient, it being but a Poffeifory Action. 2 Vent. 156. Trin. 2 W. & M. in C. B. Warren v. Sainthill.

S. C. cited Arg. 5 Mod. 312: and that it was held it would be good on Demurrer.

29. Case for disturbing the Plaintiff in his Way, setting forth that 10 Mau &c. & diu ante & adhuc &c. he was propof'd of an antient Messuage called C. and that he ought to have a Way from thence in, by, and thro' a Cofe of the Defendant's called G. to the Highway, and that the Defendant had made a Hedge cro's his said Clofe, fo that the Plaintiff could not pass. Upon a Demurrer to this Declaration it was objected that the Plaintiff had fet forth he was propof'd of the Meslufage, but did not say that he was propof'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 sett 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-Feafor, according to St. John and Moody's Cafe, 3 Keb. 528. 531. but notwithstanding the Plaintiff had Judgment. Lutw. 119, 120. Hill. 4 & 5 W. & M. Blockley v. Slater.


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.


31. The Way of Pleading by a particular Tenant, is to shew that such a one was feized in Fee of the Place to which &c. and being so feized, was intituled to a Way, and shew How, and that he was 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.

S. C. but S. P. does not appear.

For more of Chimin Private in General, See Actions (N. b) Nulace, Trepafs, and other proper Titles.
Church-wardens.

(A) Church-wardens. [Their Capacity.]

1. The Church-wardens cannot prescribe to have Lands to them in London and their Successors, for they are not any Corporation to have Lands; but for Goods for the Church. Palsch. 37 Eliz. 2. between Langley and Meredine.

2. If a Feoffment be made to the Use of the Church-wardens of D., this is a void title; for they have not any Capacity of such a Purch. 17 P. 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 it by the Vestry, the fame is good. Arg. 3 Bull. 264. Mich. 14 Jac. in Cafe of Mottaam v. Mottam.


4. Church-warden is a Temporal Officer. He has the Property and S. P. custody of the Parish Goods; and as it is at the Peril of the Parishioners, so they may choose and corrupt whom they think fit, and the Archdeacon has no Power to elect or control their Election. 1 Salk. 166. Hill. 8 W. 3 B. R. Morgan v. the Archdeacon of Cardigan.

5. As on the one Hand the Parish 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 Perfunctory on that Behalf; so the Church-wardens are
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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 Matter of the Rolls. 2 Wins's Rep. 126. Hill. 1722. in Case of the Attorney-General v. Ruper.

(A. 2) The Power of them, and of the Parish.

1. A Gift by them of Goods in their Custody, without the Consent of the Sdmen or Veltry, is void. 38 Eliz. Mefholb and Winn's Case, cited per Coventry. By Rep. 14 Jac. B.

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 Suit 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. Bich. 37, 38 Eliz. B. R. between Mefholb and Winn, adjudged.

4. So the Church-wardens by the Consent 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 Expenses employed in the Repairs of the said Window. Bich. 37, 38 Eliz. B. R. between Mefholb and Winn, 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 fee that they are incorporated at Common Law as to Things Personal, and they may have Appeal and Action of Account De bonis Ecclesiae &c. Contr a 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. Trespas, 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. Giffon v. Wright & al.


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
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10. If the Parifh 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 Parifhioners. Vent. 367. Trin. 35 Car. 2. B. R. Thurfield v. Jones.


11. Ecclefial Court may punish Church-wardens if they will not open the Church to the Parfon, or to any one acting under him, but not the Ordinary if they refuse to open it to any other. 3 Salk. 87. Mich. 12 W. 3. B. R. Church-wardens of St. Bartholomew's Cafe.

Church, yet he could not justify doing it without Consent of the Parfon; and if a Parfon give a Charity to a certain Clerk for Preaching in such a Parifh, he must do it by the Consent of the Parfon; Per Holt Ch. J. 12 Mod. 453; in Cafe of Turton v. Reignolds.

12. If he that is a Church-warden de Fado makes a Rate for repairing the Church, this will bind the Parifhioners; Per Holt. MS. Cafes.

13. If there be a Church-warden de Jure, and a Church-warden de Fado, in the fame Parifh, 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 Affamptate against the other &c. MS. Cafes, Patch. 9 Ann. B. R. Andrews v. Eagle.

14. Goods given or bought for the Ufe of the Church are all Bona Ecclefiae, for the taking whereof the Churchwardens may bring Trepass's; Per the Master of the Rols. 2 Wms's Rep. 126. Hill. 1722; in Cafe of the Att. Gen. v. Ruper, cites F. N. B. 41. (K) and that he may bring 'Trepass for the taking thefe 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 Parfon 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 Parifhioners have used to elect two Church-wardens, and at the End of the Year to discharge one, and elect another in his room, & alterius Virtutis &c. by the new Canon now the Parfon has the Election of one, and the Parifh of the other, and that he that was elected by the Parifhioners was discharged by the Ordinary at his Violation, and for that he prayed a Prohibition, & allocatur as a Thing usual, and of Course, for otherwife (by Hubbard) the Parfon might have all the Authority of his Church and Parifh. Noy 31. But's Cafe.

3. Of Common Right the choosing Church-wardens belongs to the Parifhioners. It is true, in some Places the Incumbent chooseth one, but Church-wardens that is only by Usage, and the Canon concerning choosing Church-wardens is not regarded by the Common Law; Per Holt Ch. J. who said this the Parifh was the Opinion of Hale Ch. J. Carath. 118. Patch. 2 W. & M. in B. R. by Virtue The Church-warden of St. Giles in Northampton's Cafe. of a Custom cannot be re- sisted by the Archdeacon on Pretext of Poverty or Unprofitableness, and in such Cafe the Parifh, having appointed him, must be answerable for him. 12 Mod. 116. Hill. 8 W. 3 King v. Rees.

4. Arch.
Church-wardens


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. 382. Trin. 11 Geo. in 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 held, 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 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. 322. Warner's Cafe. Cro. Car. 551. Hard. 378. and Carn. 118. where Holt Ch. J. says that where the Incumbent chooses one, it is only by Ulage, 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 rendendi Parliament. The Ch. J. said that the Question is whether the adjoining 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 vext 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.

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 Jelliffe's Cafe. 5. Rep. that the Majority may bind as to Parish Duties; was objected that they should have come when the Defendants were Church-wardens; that if they had been decreed to pay, they might have re-imburfed themselves by a Rate; Per Serj. Phillips, a Decree was against Doctor Crowther and his Successor.
Church-wardens.

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fo here would have it against Church-wardens and Successors. 2 Vern. Felt, to re-262. pl. 246. Pach. 1692. Battily v. Coke & al.

Sums of Money laid out by Order of Veltly, 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 pulled and allowed by the Veltly, 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 Parilhioners as employed them, the Money for the Repairs being all paid, and the Remainder due for the Galleries. Ch. Prec. 42. Battily v. Cook.

5. The Plaintiff who was late Church-warden, was decreed to be paid 36 Car. 2. James v. the Money laid out for the Use of the Parilh with Cofts, and the Decree went on and said, for which Purpofe the Veltly of the faid Parilh 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 fame is to be brought into their Accounts, and to be allowed them when they pais their Accounts with the Parilh; cited Chan. Prec. 43. in Cafe of Battily v. Cook, as Trin. 2 W. & M. the Cafe of Birch v. Bar-42. Account, &c. Church-wardens of Lambeth. 6. On a Dispute between Improprizar and Parilhioners, concerning a Right to a Houle for which he brought an Ejeftment; the Court would not compell the Church-wardens to produce the Parilh Books and give him a Sight hereof, and Copies of what concerned his Title, for his and their Interest are diftinct; for it was not a Parochial Right, but a Title which is now in Queftion, and fo no Reafon to produce the Parilh 395, 396. Pach. 10 W. 3. Cox v. Copping.

7. The Church-wardens, as Church-wardens, received 20 l. for the Use of the Parilh where none was due, and by Miftake only, and upon being feisible of the Miftake, 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 fpefially; and per Parker Ch. J. it is not neceffary to fhew Re-payment, but only that the Money did not belong to the Parilh; and had they paid it to the Parilh before the Miftake was known, the Parilh would have been charged with this Money, and this Re-payment was an Act done in Discharge of the Parilh, and fo a proper Plea before Auditors. See 10 Mod. 22. Pach. 10 Ann. B. R. Bihof 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 Expenfes and Surprijes, in Cafe their Expenfes were balanced &c. for Church-wardens are more than bare Receivers, and are in all respects Bailiffs. 10 Mod. 23. Pach. 10 Ann. B. R. Bihof v. Eagle.

9. Bill again 90 Parilhioners by Executrix of one of the Church-wardens of Woodford, to be re-imbuured Money laid out by the Tefktor as Church-warden, for re-building the Steeple of the Church. It was ob-13 Ann. in Canc. Nichollon v. Matters & al'. jected that this Matter was proper for the Ecclefcialtical 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 Parilhioners of St. Clemens for the Organ in the Church, and many more before; and fo that Objeftion was over-ruled, and the Caufe to proceed; and decreed that the Parilhioners should re-imbuure the Plaintiff the Money laid out by her Tefktor, with Cofts of this Suit, and that the Money should be raifed by a Parilh Rate. MS. Rep. Pach. 13 Ann. in Canc. Nichollon v. Matters & al'. Parilhioners of Woodford in Com. Eftex.

10. Church-wardens, as being a Corporation for the Goods of the Parilh, commence a Suit by and with the Confept, and by Order of the Parilh, concerning a Charity for the Poor in which they mis-carried, and
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then brought a Bill against the subsequent Church-wardens, to be repaid the Gifts 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 Veity by Prescription, yet a Veity Book, kept for the Parili Acts, was allowed as Evidence of their Consent, they are the Trustees of the Parish for all Matters, and therefore the Ceity que Trufi ill. Parishioners ought to contribute, and not lay the Burthen upon these poor People the Church-wardens. The annual suc-
ceffive Church-wardens need not be made Parties, as they are renewed. Per the Matter of the Rolls. MS. Cafes, Trin. Vac. 1718. Radnor Parish in Wales.

(D) Actions by or against them; and what Remedy they have when their Time is expired.

Br. Trefpafs, 1. T H E Opinion of the Court was, that the Wardens of the Goods of the Church should have Action of Trefpafs 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 fo 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 Pach. 19 H. 6. 66. and says that Fitzh. in the Writ of Trefpafs in his Nat. Brev. Fol. 91. affirms that such Writ lies well.

3. Though the Parishioners shall not have Account, yet they may ap-
point new Wardens, and they shall have Account against the old Wardens, and fo 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.

4. Trefpafs by Wardens of a Church de Libro in Cessodia sua existente capt. & aposs. ad Damnun Parochianorum, and not Ad Damnun of the Wardens; and good per Littleton & Needham; and here the new Wardens shall have Action of Account against the first Wardens. Br. Damagies, 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.

6. It was said that they shall have Action of Trefpafs, 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 Ejeelione 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 Cafe. Thel. Dig. 21. lib. 1. cap. 23. S. 4. cites Trin. 26 H. 8. 5.

9. If
Church-wardens.

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 foriorn, or Ad Damnum Parochianum at their Election; but if the Successors bring the Action, they must of Necessity suppose it Ad Damnum Parochianum. 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. Patch. 32 Eliz. B.R. Hadman v. Ringwood.


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. 326. Hill. 1660. 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. Bight, 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. Syrrop v. Stokes.

15. The Goods of the Parish are in his Custody, and he may have Trepass for them; per Holt Ch. J. 12 Mod. 116. Hill. 8 W. 3. The King v. Rees.

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.


18. If there be a Custum 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. Cafes, Mich. 7 Ann. B.R. Holloway v. Knight; but Querel 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 Parijo for whose Use they received it, whether they may, after they are out of their Office, be charged in an Indebitatus Alluimplit 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. Patch. 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. squashed per Shaw's Paper Law 159, 220. cites S.C.——

Ibid. 220.
cites S.C.
Circuity of Actions.

per Cur. for they have no such Authority. 2 Shaw's Præc. Julii. 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.

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 Office &c., or the King grants to one to be discharged of Dives, 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.

2. And so it seems of Waste in 21 H. 6. 47. [tus] the Grant [be] by Leaf, whereas of 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 Garnisher, or Tenant by Rebut, be pleaded by a Releafe or Warranty. Heath's Max. 45.

3. And upon the Reason aforesaid it is, that where one Thing is granted in Law to another, especially of Things executory, and not executed, if he be interpleaded of that which to him appertains, he shall plead the fame in Bar of that whereof he made the Grant, as appears by Perkins in the Title of Exchanges, where Kent is granted for Ditres. Heath's Max. 45.

4. But yet by 15 Ed. 4. [2.] 9 E. 4 [19.] and 24 E. 3 [53.] abridged by Brooke, Tit. Conditions, pl. c. 1. it informs in that Case to be to the contrary because executed, and therefore not like where an Annuity
Circuity of Actions.

is granted pro Confitto; the like where one holds to include taking the any
ant Potle, or where one grants to me an Annuity to have a Gorle, or a Gutter in my Land, because an Easement. Heath's Max. 45.

5. In Affidavit which remains for Default of Jurors, and after the Plaintifff relieves, this shall be pleaded to avoid Circuity of Action, by Certicate of Affidavit after. And so where a Man is bound in a Statute, and after relieves, the Defendant shall have Venire Facias, and this in Avoidance of Circuity of Action by Audita Querela. Br. Garnihi. 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 is aetio &c. It was inaulted, that the Plea was not good; for if it was, then Action of Trespaft 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 Trespaft 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 ferve me, and I to give you 5l. for your Service, or Br. Cov enant, pl. 22. cites S. C.

8. Circuity of Actions is where there is an Equality to be recovered in both Actions. No. 23. pl. 90. Pauch. 3 Eliz. Anon.

9. If A. enters into an Obligation to B. and B. covenants not to put the Cro. E. 252. Bond in suit before Mich. and B. brings Debt before Mich. A. cannot plead pl. 7. Deux this in Bar, but must bring Action of Covenant; but if the Covenant S. C. accorded had not been to sue at all, it is reasonable in such Cafe, to avoid Circuity ingly as to of Action, to allow its being pleaded in Bar of the Action, but not in the principal the other Cafe. And. 307. pl. 316. Trin. 36 Eliz. Dowe v. Jeffries. 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 ensue 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, and it was adjudged for the Plaintiff.

10. Debt on a Bond of 200l. The Defendant pleaded, that after the Bond made the Plaintiff covenanted by Indenture shewn in Court, that in the Defendant should at such a Day pay 100l. 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 Leafe for Years; the Defendant pleaded in Bar, that the Leffor did covenant that the Leffe might deduct so much for Charges, and upon Demurrer this was adjudged a good Plea, it being a Thing exequatory, and the Covenant in the same Deed, and the Deed; for the Party shall not be put to Circuity of Action, and to bring Action of Co venant. Lev. 152. Mich. 16 Car. 2. B. R. Johnston v. Carre.

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,
Circumvention.

13. Infinitum in Fine 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 Cafe was; A. being in Prifon, 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. poss'd himself of the Goods, and more than was contained in the Bill of Sale, but paid no Debts, nor got him out of Prifon as he had promised. The Court being satisfied the Bill of Sale was made on a Trift, decreed an Account. Fin. Rep. 175. Mich. 26 Car. 2. Jones v. Prior.

2. Affumptit, 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 progressive Arithmetick every Monday for a Year, and Non Affumptit 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. Whitacre.

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 Guinea paid by him to the Plaintiff Geo. Broderick, who was Francis's Heir at Law, procured from the Plaintiff a Releafe, which recited that Francis, by his said Will duly executed, had devised his Estate to the Defendant Thomas, and the Defendant Thomas thinking himself not safe with the Releafe only, for 50 Guinea more prevailed with the Plaintiff to convey the Lands by Lease and Releafe 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 Releafe, Lease, and Releafe delivered up as fraudulently obtained; and it not appearing that the Plaintiff, at the Time of his making the Releafe &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
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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 allowed what he had laid out in Repairs or otherwise. MS. Rep. Mich. 12 Ann. Canc. Broderick v. Broderick hold Lands, & al'.

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 Purchaser, 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-Chriftian 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 Cafe of Broderick v. Broderick, as the Cafe of Dr. Dent v. Buck in Dom. Proc.

For more of Circumvention in General, see Coven, Fraud, Re- kafe (Y. a) and other Proper Titles.

Citation out of the Dioces.

(A) By Statute of Hen. 8.

1. 32 H. 8. cap. 9. 8. 2. N O Person shall be cited before any Judge Spiritual out of the Dioces, 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 wherein unto he shall be cited; S. 3. And except it be upon Matter of Appeal, or for other lawful Cause wherein any Party shall find himself griev'd by the Ordinary &c. of the Dioces &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 E in the Party to the Suit, or in case any Bishop &c. makes Request to the Archbishop and Count of Essex, by the Law Civil or Canon during Execution of such Request to be lawful, upon Cause of Pain of Forfeiture, to the Person cited, of double Damages and Costs, to be rec. as well as the overed 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.
Citation out of the Dioceses.

S. 4. Provided that it shall be lawful for every Archbishops to cite any Person inhabiting within his Province for Causes of Heresy, if the Ordinary immediate confessor, or do not his Duty.

S. 5. This Act shall not extend to the Preachers of the Archbishops of Canterbury, of calling Personas out of the Dioces for Protests of Testaments.

S. 6. No Archbishops shall demand any Money for the Seal of a Citation than only 3d. upon the Penalties before limited.

S. 7. This Act shall not be prejudicial to the Archbishops of York, concerning Probate of Testaments within his Province.

whereof the Purposes of St. Mary de Arcibus is the Chief. Resolved, that the Body of the Act is, that no Manner of Person shall be henceforth cited before any Ordinary &c. out of the Dioces or Ecclesiastical Jurisdiction where the Person shall be dwelling; and if he shall not be cited out of the Ecclesiastical before any Ordinary, a foro miri, the Court of Arches, which sits in a Peculiar, shall not cite others out of another Diocese; and these Words (out of the Dioces) are to be meant out of the Dioceses or Jurisdiction of the Ordinary where he dwells, but the exempt Person of the Archbishops 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 Mischiefs, recites expressly, that the Subsidiaries were called by compulsory Process to appear in the Archbishops Audience, and other High Courts of the Archbishops of this Realm, so as the Intent of the said Act was to reduce the Archbishops to his proper Dioceses, or Ecclesiastical 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 Causes wherein the Party shall find himself griev'd by the Ordinary, after the Matter or Cause there first began; Ergo, the same ought to be first begun before the Ordinary. 3dly, In case that the Bishop of the Dioces, or other immediate Judge or Ordinary, dare not or will not convoke the Party to be cited before him, where the Ordinary is called the immediate Judge, as in Truth he is, and the Archbishops, unless it be in his own Dioces (these special Causes excepted) mediate Judge, viz. by Appeal &c. 4thly, Or in case that the Bishop of the Dioces, or the Judge of the Place within whose Jurisdiction, or before whom the Suit by this Act should be begun and professed, be in Party directly or indirectly to the Matter or Cause of the same Suit, which Clause in express Words is a full Explanation of the Body of the Act, viz. That every Suit (other than those which are express'd) ought to be begun and professed before the Bishop of the Dioces, 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 Influence to the Archbishops, Bishop, or other inferior Ordinary or Judge, and that to be done in Cases only where the Laws Civil or Canon and Civil affirm &c. by which it fully appears that the Act intends that every Ordinary and Ecclesiastical Judge should have the Conformity 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 Proviso which explain it also, viz. That it shall be lawful for every Archbishop to cite any Person inhabiting in any Bishop's Diocese within his Province for Matter of Heresy, (which were a vain Proviso if the Act did not extend to the Archbishops) 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 or immediately or indirectly, or if the same Bishop or other immediate Ordinary or Judge, do not his Duty, as Punishment of the same; which Words (immediately) and (immediately) express the Intent of the Makers of the Act. 6dly, There is Saving for the Archbishops, the calling any Person out of the Dioces where he shall be dwelling in the Probate of any Testaments; which Proviso should be also in vain, if the Archbishops notwithstanding that Act, should have concurrent Authority with every Ordinary thro' his whole Province; wherefore it was concluded that the Archbishops out of his Dioces, unless in the Causes excepted, is prohibited by the Act of 25 H. S. to cite any Man out of any other Diocese. Resolved 15 Rep. 4. 6 pl. 2. Mich. 6 Jac. C. B. Porter v. Rochester.—S. C. cited Arg. 5 Mod. 451.

Holt Ch. J. 2, If one in Norfolk comes within another Diocese, and commits Adultery in the other Dioceses during the Time of his Residence, he may be cited in the Dioceses where he committed the Offence, tho' he dwell out of the Dioceses; Per Coke, Warburton, & Winch J. Brownl. 45. Anon.

that a Suffering Court may have a Jurisdiction when a Man of another Diocese is taken Flagranti Delicto; but Holt said that where the Party goes into another Diocese, and is commorant there, and he comes back casually into the first Diocese, then the Citation cannot be good; for supposing a Man comes casually into the Dioces of London, and commits a Crime there, and then goes back to the Dioces where he dwells, and then can he be cited again, I mean 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. 609. pl. 18. Trin. 5 Ann. in Case of Wilmet v. Lord.
Citation out of the Dioceses.

3. It a Man inhabits in the Dioces of A. and has Cause to sue for Tithes S. C. cited in the Dioces of A. in which he inhabits, and also for Tithes in the Dioces of B. he ought to sue in the Dioces in which the Defendant did inhabit, and not in the Dioces where the Tithes are payable, nor where the Plaintiff inhabits. Agreed. 2 Brownl. 23. Trin. 9 Jac. C. B. in Café of Jones v. Boyer.

4. The Exception in this Statute extends only to Probate of Wills; said S. C. cited by Warburton J. to have been agreed by all the Justices. Godb. 214. Arg. Gibb. pl. 306. Mich. 11 Jac. C. B. in Hughes’s Cafe.

Café of Edgeworth v. Smallridge, where the Café was, that a Prohibition was pay’d to a Suit for a Legacy in the Arches against the Executor, for that he was cited out of his Dioces, contrary to 23. H. 3. Cap. 9. and it appeared that the Teclator having Bona Notabiles in several Dioceses, his Will was proved in the Prerogative Court of Canterbury. Dr. Andrews for the Defendant insinuated, that the Exception of the Probate of Wills draws after it, necessarily, an Exception of Suits arising upon such Wills proved; that the 25. 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 fixed for in the Prerogative Court, which is a Point mislaid by the Reporters, who say the Legacy must be fixed for where the Will is proved. Both the Prerogative and the Arches are within the Archbishops’s Jurisdiction; and if the Legatee is not suffered to sue in the Arches, he can sue no where; and Pazakerley, of the same Side, cited Vent. 253, and as a Café 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 Eliz and therefore it was not the Intent of the 23 to provide for a Court which was not then in Effe. Roll Rep. 174. pl. 10. Pacch. 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 Dioces; and now a Conclavation was pray’d, because the Interior Court had remitté that Café to the Arches, and their Jurisdiction also, yet a Conclavation was denied; for it ought to be pleaded upon the Prohibition. Noy 89. Trin. 2 Car. B. R. Anon.


13. Prohibition was granted to the Bishop of Sarum, for citing one out of his Dioces, 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 Dioces of Sarum, the Court, upon Notice thereof, granted a Conclavation, because the Land lying in the Dioces of Sarum, the Suit cannot be else where, let the Defendant live where he will, and so this Café is not within the Statute; and a Conclavation was granted. Lev. 96. Pacch. 15 Car. 2. C. B. Welctote v. Harding.

14. The Court held that if a Man is cited within the Dioces, though he be not an Inhabitant there, but comes thereto to Trade only, or otherwise, such Citation is not within the Statute; and if it were otherwise, there might be Offences committed against the Ecclesial Law, which would not be punichéd at all; for Men would offend in one Country and then remove to another, and so escape with Impunity. Hardr. 421. pl. 8. Trin. 17 Car. 2. in the Exchequer. Dr. Blackmore’s Cafe.

15. He that would have Advantage of the Statute for citing out of See pl. 17. the Dioces must come before Sentence. Vent. 61. Hill. 21 & 22 Car. 2. B. R. Anon.

16. A Prohibition was pray’d to the Ecclesial Court, for that they S. P. by Holt cited one out of a Dioces to answer a Suit for a Legacy, but it was de- Ch. J. Holt’s nied, because it was in the Court where the Probate of the Will was; for Rep. 623. Pl. 17. Trin. tho’ it was before Commissioners appointed for Probate of Wills in the 1 Anni in late Times, yet now all their Proceedings in such Cases are transmitted Café of Will into the Prerogative Court, and therefore Suits for Legacies contained not v. Lodg. in such Wills, ought to be in the Archbishops’s Court; for there the Exec- enter
Citation out of the Diocess.

enter 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 and the Statue 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. 35. cites the Cafe of Vancare v. Spleen.

3 Deb. 42. pl. 73. Mich. 27 Car. 2. B. R. Vancare 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 Dalben J. as adjudged in Ed. Hales's Time, in which he was of Counsel; and that it being moved afterwards, Lt. Ch. J. North allowed the said Cafe 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 Libell were not spoken within the Diocess's Ecc. 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. Palch. 1 W. & M. in B. R. Anon.

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 caving 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 Statue 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.

S. C. cited Arg. 5 Mod. 452. 2 Mod. 213. Woodward's Cafe, S. C. Palch. 4 Jac. 2 B. R. but held e contra.

Comb. 122. Trin. 1 W. & M. Woodward v. Macketh, S. C. and a Consultation was awarded; and Holt Ch. J. compared it to the Statue of Winton, where he shall be an Inhabitant within the Hundred, that Occupies Land within the Hundred.

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 after his Removal from the Diocess of York; the Cafe was argued for a Prohibition, but the Court put off giving their Opinions to the next Term. — 2 Mod. 252. S. C. says that A. lived all his Life at Lincoln, and at the End of 7 Years after the Subordination, he being at York as an Evidence was served with a Citation. A Prohibition was granted because the Cafe was doubtful that it might be settled. But afterwards in Hill. Term upon Deliberation, a Consiliation was awarded, per cur. Carth. Ibid. the Reporter adds a Note, viz. See the Words of 32 H. 8. cap. 7. That the Party shall be sued before the Ordinary of the Place where the Subordination was. (I do not observe this Point taken Notice of in the Abridgements, 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 cause the Person of Persons so offending before the Ordinary, his Commissary or other competent Minister or Legal Judge of the Place where such wrong shall be done according to the Ecclesiastical Law; and in every such Cafe or Matter of Suit, the same Ordinary &c. having the Parties to their lawful Prosecutors before them, shall and may by Virtue of this Act, proceed to the Examination, Hearing and Determination of every such Cafe or Matter, orderly or summarily, according to the Course and Proceeds of the said Ecclesiastical Laws; and thereupon may give Sentence accordingly.) — 5 Salk. 90. 91. pl. 2. S. C. and says this Cafe was ruled to stand upon a Single Reaion; for whatever the Law might be in other Incidents, yet in the Cafe of Tithes, the Statute 32 H. 8. expressly enacts, that the Party

38. a Libel shall be sued before the Ordinary of the Place, and not by the Party of the Cause.
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 Dioces, it being to Ecclesiastical Court of Peculiar of Westminster, whereas he lived in Cheshire; but it appearing by Affidavit, that he dwelt for a considerable Time in London Dioces, 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. 616. 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 chose 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 proper Gravamen, though you intitute 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 began there. Holt Ch. J. covert, 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 Cafe. Holt Ch. J. Powis and Golaud 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.

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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. 132. Patch. 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 1d. See 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 2d. And all the Justices agreed that this was
Clerk of a Parish.

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. 692. Mich. 39 & 40 Eliz. Anon.

3. Clerk of the Market has to do with with nothing but Visits, Het. 145. Trin. 5 Car. C. B. Cambridge University's Cafe.

4. In Trepass Defendant justifying as Clerk of the Market within &c. for a Distress of 8 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 eitreat Fines and Amercaments 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 Cafe.

Form more of Clerk of the Market in General, See Market (A. 2) and other Proper Titles.

(A) Clerk of a Parish.

1. T H E Clerk of a Parish prescribed, that he and his Predecessors had used to have 5 s. per Annum of the Parson for the Tithes of a certain Place within the Parish, but a Confutation was awarded, because it was a good Prescription because the Parsonage was a Parsonage improper, and by Intendment it commenced by the Act of the Parson, viz. that he made a Computation 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 to be 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 to whom a Prescription can be alleged, and thereupon they awarded a Confutation. — Le. 94 pl. 122. S. C. accordingly.

Godh. 163. pl. 228. Pauch. 8 JAC. 8. Cadcct v. Scher. 8. - Le. 94. 95. pl. 122. S. P. by Clench. — 13 Rep. 1. p. 34. Anon. S. C. and the where a Clerk is chosen by Custom by the Paraathors, he is not deprivable by the Official, yet upon Occasion the Parsonors might displac 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. 18. Pauch. 8 JAC. 8. C. B. Gaudy v. Newman.
Clerk of the Peace.

3. Resolved, that if the Parish Clerk 

mistaken himself in his Office, 

or in the Church, he may be sentenced for it in the Ecclesiastical Court 

Excommunication, but not to Deprivation. 2 Brownl. 38. Paish. 8 


4. Parish Clerk may sit in Court Christian for his Fees, which are called 

Largiamus Charitatis. Arg. cites the Register, fol. 52. for he is Quo- 

dam 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 exitisset Clerk of such a 

Parish; the Defendant disturbed him in the Exercise of his Office, and 

banned 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 it be an Office, it is Ecclesiastical, for of common 

Right the Parson appoints the Clerk, and the Court will not inten- 

dend a Custom; and unless a Clerk comes in by the Election of the Par- 

ishioners, 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 Parson. 2dly, It does not appear that any Fees ap- 

portant unto his Office, and no Action lies at Common Law for Disturb- 

ance 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:

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. Evey Caflors Rotulorum shall appoint the Clerk of 

1. S. 3.

the Peace, and grant the Office to such able Person 

infrusted in the Laws as shall be able to exercise the same, to hold the same 

during the Time that the Caflors Rotulorum shall exercise the Office of Caflors 

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 infrusted in the Laws, so that the Deputy be ad- 

mitted by the Caflors Rotulorum.

6 Y 2. The
2. The Clerk of the Peace is answerable by the Court of King's Bench for gross Faults in Indents 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 Persons 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 or 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 or Place, 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.

5. The Clerk of the Peace must make out all Process; and when they are compleated must deliver them to the Cafpos, but as long as they are in Process they are to be with the Clerk, but for refusing to deliver the Rolls to the Cafpos, he was indicted and removed, and a Mandamus to restore him was denied per 3 Justices against the Ch. J. 4 Mod. 31. Patch. 3 W. & M. in B. R. the King and Queen v. Evans.

Show. 285. Mich. 5 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. vells a Freehold in the Clerk, Quam diu fe bene gererrï, and per Holt Ch. J. the Clerk of the Peace is a distinct Office, and not a mere servient, and a peremptory Mandamus was granted.—He draws up the Illiac upon Process; Per Gregory J. Show. 525. 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 Illiac, and enter Judgments; Per Holt Ch. J. Show. 350. in S. C.—S. C. cited Ed. Raym. Rep. 161.

4 Mod. 167. 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, Quam diu fe bene gererrï; 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, Quam diu the Defendant fe bene gererrï; and on solemn Argument Judgment pro Quer’ per tot. Cur. for that he had Eatted for Life, and was not reale demanded himself well, those Words shall be con moveable by the new Custos. 12 Mod. 42. Trin. 5 W. & M. Harcourt v. Fox.

Favourably to anwer the Intent of the Law-makers, whom 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 find that our Places are 60) and Contemporaneaus Expoits of Optns. —Show. 426. to 451. and 508. to 516. S. C. argued by Council. — Ibid. 516 to 537. S. C. the Opinions of the Judges delivered for the Plaintiff. —Show. Earl Cafes. 158. S. C. in the House of Lords, and Judgment affirmed.

Comb. 517. S. C. and adj. judged 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 during Beneplacito &c. that the said Earl being dead, the Lord Sydney was made Cuftos, who appointed S. to be Clerk of the Peace of Kent, pursuant to the said Act. The particular Question was, whether a Grant of this Office during Pleasure, which is Power to only an Estate at Will, shall be so governed by the Statute as to make the Person, Contemner, and Manner to the Statute, it is the Statute, and not the Cuftos, which gives an In of holding interest and Estate to the Nominee? Adjourn'd, that no peremptory Mandate should direct the Office, and that thedamus should go; for, by the Act, the Cuftos is to nominate a Clerk, whose Name is to execute the Office so long as he shall demean himself well &c. and if in the Act he appoint him in any other Manner, he is no Clerk of the Peace, so excludes the 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.

during Pleasure being less than his Authority, and not warranted by it, is void. —S. C. cited as resolved accordingly in B. R. Par. 7 W. 3; after several Arguments. Ed Raym. Rep. 165.

8. It always belonged to the Cuftos Rotulorum to nominate the Clerk Act of 1 W. of the Peace, but the Clerk of the Peace was removable whenever the & M. 51. Custo was removed or chang'd, and, moreover, was removable at the Will of the Cuftos till 17 H. 8. 1. which makes him to continue in the Cuftos Rotulorum, such a time as the Cuftos shall continue in, but now, by the late Act, he is to of the Coun- the Cuftos, and tho' the Words are, Give and Grant to him, in open Sala- it is only an Appointment, and consequently may be without Deed. 2 Salk. 457. Trin. 10 W. 3. B. R. Sanders v. Owen.

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. & Parol Appointment was held good, but the Judgment was reversed for the Insufficiency and In- &c. 446. S. C. senability of the Words, but that Judgment was reversed in the House of Lords. Carth. 12 Mod. 169. S. C. and the Reversal reversed accordingly.— Ed 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. Pach. 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. A Torney being to draw a Deed has Writings brought to him, But where and amongst them is one that concerns himself and his Title; they come the to, him in
Client and Attorney.

any other

Marker, or on any other Account, the Party must refer to his Action. 1 Silk. 57. pl. 5. Mich. 10 W. 5. 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 compelled to deliver up the Papers before he is paid his Fees &c. Comb. 43. Hill 2 & 3 Jac. 2. B. R. Anon.

8 Mod. 559. 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 attain them till the Money is paid for his drawing them, but he cannot detain any Writings, which are delivered to him in 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 left 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. Pach. 6 Geo. 2. Court v. Gilbert.

(B) Other Matters in General, as to Client and Attorney.

Mo. 566. pl. 3 Geo. S. C. adjudged.


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 fake of his Conscience, the Attorney may plead in this Case Quod Non fiat veracter informatas, 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 confesses 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.

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 Cafe.

5. A
5. A Client brought *Action for the Case against his Attorney* for delivering to the Sheriff a Ft. Ft. against him in a Suit in which he was Attorney for him, and procuring it to be executed. It was inferred after Verdict, that the Suit was determined by Judgment being given, and consequently the Suit reposed in the Defendant. Adjudged the Suit 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 Stye 426. Mich 1654. B. R. Lawrence v. Harrifon.

6. It was said and admitted that an Attorney's *Assent to an Award* shall bind his Client. Ch. Cases 87. Pauch. 19 Car. 2. In Case of Colessell 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 Plea 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. Illue 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 Matter of the Rolls dismiss'd the Bill, and Ld. Somers affirmed the *Disimission*. 2 Vern. 325. pl. 314. Mich. 1695. Stephenson v. Wilton.

9. In Atumpit the Defendant pleaded *Non-Assumpsit infra sex Anno*. The Plaintiff replied; and the Defendant not joining Illue in due Time, the Plaintiff's Attorney signed Judgment, but afterwards consented to accept the Illue; but upon a Motion to compel him to accept the Illue, 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 it to, 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. Pallerant.

10. *An Attorney may undertake for his Client, but not releafe his Cause of Action*; per Holt Ch. J. 12 Mod. 384. Pauch. 12 W. 3. in Case of Stanhope v. Pemberton.

11. *Action against an Attorney for Money received to Plaintiff's Use*; the Attorney moved 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 Labours, and Jones 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. Craddeck 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 Cafe.

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
Collateral.

called the Secret of his Client. 10 Mod. 41. Mich. 10 Ann. B. R.
The Ld. Say and Seal's Cafe.

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.
   Baker.
   2. Privilege to be without Impeachment of Waste is a Thing collateral.
   2 Rep. 82. Hill. 43 Eliz. Per Coke in Cromwell's Cafe.
   3. There is a Difference between a Thing Collateral executory and exec-
      uted; 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. Patch. 8 Jac. in Dr. Drury's
      Cafe.

A Covenant.

But Coke thinks Audita Quere-

la lies, be-

cause the

Ground of

the Collate-

rional 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.

   is more col-
   lateral than
   a Condition; for a Condition is annex'd to the Estate, but Covenants are foreign. Arg. Show. 236.
   Mich. 3 W. & M.

(B) Collateral Promise. The Effect thereof.

1. In Debt the Plaintiff counted that A. borrow'd of him 100l. 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 thorough-
   ly
Collateral.

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By 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 far to a becoming Debtor, which is used in London
by Caslon, *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.*

S. C. held accordingly.

Affirmat upon a Promissory Note, whereby the Debtor promised to pay as much *upon* the *Account of his Master*, and it being objected that there was no *Confederation* 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 it is not within the Words or Meaning of the Act; the *Confederation* implied in the Act is, that when the Party promises upon his own Account, it must be presumed he is indebted, or else he would not promise to pay it; alter where the Promise is to pay upon Account of a third Person. In this Case Holt directed a Verdict for the Plaintiff, but under contrary, and ordered the Police to be paid. 11 Mod. 226. Patch. 8 Ann. at Guildhall, Garret 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 whom the Undertaking is, there no Action will lie against the Undertaker, without the Promise be in Writing; for 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 Deliverty 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 supra se, prior per Notam &c*. but *tis not necessary*; and Judgment affirmed. 2 Show. 83. pl. 31. Hill. 31 & 32 Car. 2. B. R. Calcut v. Hatton.

4. If I build a House for J. S. at the Request of J. N. and J. N. promises to pay me, Debts will lie; *tis true it will not raise a Promiss, but an express Promise will well ground an Action.* 2 Show. 421. Hill. 36 & 37 Car. 2. B. R. in Cafe 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. Bathpoole.


7. Fatimma at the wish of the Defendant that C. would accept C. to be &c Salk. 14, his Debtor for 20 l. due from A. to B. The Plaintiff in *case & fae A. 15. S. C.*

That C. would pay. B. avrd't'd that he did accept C. to be his Debtor, and adjoind &c. Adjudged good after a Verdict, without express Averment that...
Collateral.

A. was discharged; and Judgment affirmed by 4 Judges against 3, and they continued it to be a mutual Promiss. 1 Salk. 29. pl. 30. Pech. 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.

A. is liable, according to 9. Allsump't against B. upon a Promiss supposed to be made by him to pay for Goods delivered by Plaintiff to A. Holt took this Difficulty. If B. desires A. to deliver Goods to C. and promises to see him paid; there Allsump't lies against B. though in that Café he said at Guild-hall, he always required the Trademans to produce his Books, to see whom Credit was given to. But if after Goods delivered to C. by B. pays 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. Audten 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 Promiss 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.

11. Where the Undertaker comes in Aid only to procure a Credit to the Party, in that Café there is a Remedy against both, and both are answerable according to their distinct Engagements, and this is a Collateral Promiss, and void by the Statute of Frauds; Seseus where the whole Credit is given to the Defendant. 1 Salk. 27. pl. 15. Mich. 3 Ann. B. R. in Café of Birkmyr v. Darnell.

12. If a come to a Shop and b 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 Café 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. Having purchased Lands of the Duke of Norfolk, had for his Security future Ufe 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, Oulter le Maine, Monlancro de Droit &c. because before the future Ufe accrud, the Potession 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. Ma. 375. cites it as Yelverton's Café.

2. Trustee:
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, fell to J. S. and gave 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 fell 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 Matter, 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 Casiter Executio till further Order. Fin. R. 166. Mich. 26 Car. 2. Foley v. Lingen.

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 disapproved the Bill and took a Difference between Covenants for further Affirmance of the Lands sold, and Collateral Security of other Lands to in-cumber the Estate; and the 2 Years being elapsed, disapproved the Bill. Chan. Cafes, 252. Hill 26 & 27 Car. 2. Erl wrench v. Bond.


4. *A sells Land to B. A takes a Leaf 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-entered. 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 Annu. Chan. Cafes, 261. Trin. 27 Car. 2. Anon.


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.

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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.

7 A 2. Colla-
Collation.


2. Collation by Lapfe is in the Right of the Patron and for his Turn. Hob. 154. in Cafe of Colc v. Glover, and cites 5 H. 7. 43.

24 E. 3. 26. And he shall lay it as his Possession for an Almst of Darcyn Prefentment.

3. Note, that there is no Privity between the Incumbent of the Bishop who is collated by Lapfe, and the Bishop, as there is between the Malert and Servant, and therefore if the Bishop pleads specially in Quare Impedit to be presumed by Lapfe, the Incumbent shall not say generally that he is in by Collation of the Bishop by Lapfe, 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, abique hoe that the Plaintiff presented before this Day, and this was held a good Traverzie; Per tot. Car. Kelw. 50 b. Trin. 18. H. 7.

5. Collation is where the Clerk is inducted without Prefentation to the Bishop. As of Lapfe by the Bishop, or of Donative of a free Chapple &c. where he himself may put the Clerk in corporeal Possession without Prefentation. Br. Quare Impedit. pl. 156. cites F. N. B. 32. 33.

6. Bishop collates after Lapfe is devolved on the Arch bishop, but before Collation by the Arch bishop. This shall bind the Arch bishop; for, at Common Law, when a Clerk was once admitted, he was not removable, and Collation remains at Common Law. The Stat. W. 2. does not aid but in Collation of Prefentation. Jenk 281. pl. 7.

7. Collation of the Bishop makes no Disappendency, and where it is made within 6 Months it makes not so much as a Plenary, but the Church remains void, as Green's Cafe faith, that is, that it makes no binding Plenary 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 Facio, yet to all other he is a full Incumbent, (and not in Nature of a Curate only) and shall fue 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 Plenary bar'd the Lapfe of the Arch bishop and King. Hob. 302. pl. 580. Hill. 17. Jac. in Cafe of Gawdy v. Arch bishop of Canterbury.

8. If the King presents by Lapfe, it is not any Collation, but a Prefentation, and so pleaded always, for he presents as supreme Patron; Per Car. Cro. J. 641. pl. 20. Mich. 20. Jac. B. R. cites 32 H. 6. 2. and 7 E. 4. 20.


10. This had been moved the two preceding Seals, and was now moved again. The Cafe 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. In-
junction was granted as to Defendants, to refrain them from prenting
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 prenting expired, or that there should be a particu-
lar Order to refrain the Archbishop from collating &c? And after a
good deal of Debate it was agreed by Ld. Chancellor, &c omnes,
that the Order to prevent Admission was sufficient to prevent Collation,
because Collation was Admission, Infrigation, and every thing but Induction;
and at Law, upon a Quare Impedit and Ne Admittas, the Ordinary can-
not collate or take Advantage, and this Order is in its Nature an Eng-
lisho Ne Admittas, and as to the Question whether the Bishop in this Case
could take Advantage of Lapê or not, Ld. Chancellor held clearly
that he could not; for as at Law Lapê was prevented by a Ne Admit-
tas, so when the Title is in Equity, the Bishop is equally restrained
and prevented of Lapê, 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 prent, whereas in Equity the Pre-
fentation (or the Right of Nomination) belongs to the Mortgagee. 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 prent, 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 precribed by the Trust, viz. by Writing under
Hand and Seal &c. which must supposc the Peron, who created the
Trust, did intend the Heir to nominate, and should execute a Difcretion,
and be capable of knowing as well as executing a Writing &c. MS.

For more of Collation in General, See Presentation, and other
Proper Titles.

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(A) How considered &c.

1. Devises to a College by the President thereof is void; for when the Dal. 51. pl.
Devises should take Effect, the College is without a Head, and
so not capable of such Devises, for it was then an imperfect Body; held
per Cur. on good Advice taken thereof. 4 Le. 223. pl. 358. Tempes
S.C in toti-
dem Verbis,
and cites 13
Queen H. S. 13 the
like Point.
Queen Eliz. B. R. in the Case of the President of Corpus Christi College in Oxford.

S. C. cited 2. It was agreed, if the Master of the College be ousted wrongfully an 2 Lev. 15 Affile will lie, as it was laid in the End of *Canon's Case Dy. but not Arg. — Mod. if he be ousted by his proper Ordinary or Visitor. Lev. 23. Parch. 13 Car. 83. S. P. Arg. in Appleford's if he be ousted by his proper Ordinary or Visitor. Lev. 23. Parch. 13 Car.

2. B. R. in Doctor Widdrington's Case.


S. P. by Hale Ch. J. Inns of Court. 2 Lev. 15. Trin. 23 Car. 2. B. R. the King v. New College.

S. P. by Hale Ch. J. Inns of Court. 2 Lev. 15. Trin. 23 Car. 2. B. R. the King v. New College.

Car. 2. B. R. in Appleford's Café. — A College is a Lay Corporation; if they be dissented an Affile must be brought.

Godb. 594. pl. 478. by Noy, Arg. Parch. 3 Car. B. R.

3. Colleges are not Spiritual Foundations, but are private Societies, as S. P. by Hale Ch. J. 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 État, Grants &c. Hand- nuns (B) Visitor, and other Proper Titles.

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**Colour in Pleadings.**

(A) What it is. And the Reason thereof.

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 Affile, or Entry for Difficin for Rent, or an Action upon the Statute of S. R. 2. for Forcible Entry is brought against him, in which he gives the Plaintiff or Demandant some colourable Pretence, which from its first Sight to intamate 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 affects of Matter in Law, and that which may be doubtful to the Lay-People. Brown's Anal. 7 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
is a good Colour and a good Plea. Heath's Max. 27. cites Doct. & Stud. lib. 2. cap. 13. And Brooke, fo. 164. Title Colour in Allie, Trefpass &c.

2. Note, that Colour ought to be Matter in Law, or doubtful to the Heath's Lay-Gents. Br. Colour, pl. 64.

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 Leale 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. K. Radford v. Harbin.

5. The Reason why Colour shall be given in Writ of Entry for Difference, Writ of Entry in Nature of Allie, Allie, Trefpass &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 Illue 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 submissa Aequitas; cites Dr. & Stud. cap. 53. fol. 160 b. But when the Special Matter of the Plea, notwithstanding the Plaintiff had Right before, utterly bars him of his Right, in such Case the Defendant need not give any Colour, because he bars 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, it in Real Action, as Allie, Writ of Entry in Nature of Allie &c. if Collateral Warranty be pleaded, and the Defendant relies upon it, or if Esloppel 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. Trefpass 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 Over; and without leaving a Cause of Action, it will amount to the General Issue, and this is the Reason of Colour. 12 Mod. 121. Patch. 9 W. 3. Haliet v. Birt.

7 B (B) In
(B) In what Actions Colour may or must be given.

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, Nut 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.

2. In Trespa's 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 &c. &c. &c. &c., and no Plea; for he neither confess'd Property nor Colour in the Plaintiff. Br. Trespa's, pl. 70. cites 2 H. 4. 5.

3. Note that Colour in Assise or Action of Trespa's 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, Nut Tort, or Not Guilty. Br. Colour, pl. 15. cites 19 H. 6. 21.

4. In Trespa's 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 Moity infeoff the Plaintiff, and C. died, and K. her Daughter and Heir enter'd into the other Moity, and was seised pro indiviso, and infeoff the Defendant, by which he enter'd and did the Trespa's, Prout ei bene Licuit, and a good Plea without other Colour. Br. Colour, pl. 18. cites 19 H. 6. 46.

5. Trespa's de Claufo Fra'sto, and eating his Grafs in D. The Defendant justify'd in S. abisse hoc that he is guilty in D. and no Plea per Cur. without giving Colour. Br. Colour, pl. 82. cites 20 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)]

6. In Assise if the Tenant pleads Dying seised and Descend 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.

7. In Trespa's of breaking his Close, he shall say that the Place where &c. at the Time of the Trespa's was the Franktenement of the Defendant, without giving any Colour. Br. Colour, pl. 26. cites 22 H. 6. 50.

S. C. cited 10 Rep. 89. h 90 a. in Principio.

8. So where he says that it was the Frankentenement of J. S. and he by his In Trespafs Command enter'd &c. Br. Colour, pl. 26. cites 22 H. 6. 50.

9. So where he says that J. S. leas'd to him for Years, or at Will; &c. in Trespafs, for he is no Plea Newton. Brooke says Quere inde. Ibid. to say that the Plaintiff leas'd to W. for Life, the Remainder to the Defendant, and that W. died, and he entered in his Remainder; Per Brian, Br. Trespafs, pl. 166. cites 15 E. 4. 51. — Heath's Max. 28, cited S. C. Trefpafs, for breaking his Close. The Defendant pleads that J. S. was seised of the Land, and it it to J. D. and he as his Servant entered, and gave no Colour to the Plaintiff, and for that Cause the Plaintiff demur'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. 3. 5. But it was argued contra, because the Defendant makes no Title to himself, but justices as a Servant; and cited 15 E. 4. 5. Wray fay'd he ought to give Colour, tho' he justifies as a Servant; but moved the Parties to relinquish their Demurer, and plead to Hine, which they did. Cro. E. 76. pl. 35. Mich. 29 & 30 Eliz. B. R. Dinhams. &c.


11. Trespafs upon the 5th of R. 2. The Defendant said that the Father of the Plaintiff was seised, and seised 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 concordant 37 H. 6. 54. that in this Action of Trespafs a Man shall give Colour as in other Actions of Trespafs.

12. Trespafs of 90l. at D. in the County of York, taken and carried away, to Rep. 89. (and fo fee that as it seems Property may be of Money.) The Defendant intituled himself as Parson, and gave Colour that he delivered the Money to J. N. to keep to his Use, who deliver'd it to the Plaintiff, and he retok 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.

13. When Matter in Law is, then there is no need of Colour; Per Laicon, Priot and Boyle. Br. Trespafs. pl. 222. cites 36 H. 6. 7.

14. In Trespafs, the Defendant justified for Goods seised by a Felon, * to Rep. 91. and he seised them, and did not give Colour, therefore ill; QuodNota. The Cafe is intende'd is more and did not give Colour and good, and fo here by the Reporter; Hill. 1 E. 5. For 5.
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 was compelled to give Colour that the Plaintiff supposed the Property in him before the give Colour. Br. Colour, pl. 51. cites 39 H.Colour in Pleadings.

15. In Trefpas the Place is an Acre, of which J. S. was feised in Fee before the Trefpas, and lefted to W. N. for 10 Years, and he as Servant of W. N. and by his Command entered and did the Trefpas, 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 Trefpas. Br. Colour, pl. 48. cites 2 E. 4. 5.

16. In Rivation of Ward, it was agreed that where the Defendant intitiles himself to the Ward by a Stranger, there he shall give Colour. Br. Colour, pl. 50. cites 2 E. 4. 27.

17. In Trefpas upon 5 R. 2. it was admitted that Colour shall be given in this Action as in Trefpas, and the Defendant may plead Not Guilty, and fo to ilifie. Br. Actions for the Statute, pl. 29. cites 3 E. 4. 1.

18. In Trefpas 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 feised, and after be resigned, and after this the Defendant was elected Master of the College, upon whom the Plaintiff entered, upon whom the Defendant re-entered &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 Trefpas upon the 5 R. 2. it is a good Plea, that R. was feised till by the Plaintiff disfeised, and the Defendant entered as his Servant &c. and this without Colour; because it seems that Enry after Difference binds the Maje Act. Br. Colour, pl. 74. cites 11 E. 4. 5.

20. Trefpas by W. P. & R. against J. N. The Defendant, said that W. P. the Plaintiff was feised, and informed T. who informed M. and that the Defendant as Servant to M. entered and did the Trefpas, and no Plea, Per Cur., because he did not give Colour. Parli. said the Writer is brought by two, and the Defendant pleads the Feoffment of the one &c. and after Pigot pulled 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 who you connuence your Title, and after Pigot said that the Plaintiff
Plaintiff was seised as above &c. and infoseid 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 which the Defendant at the Time of the Trespass, as Servant of the Plaintiff, entered; and this was held a good Plea, notwithstanding that he gave Colour by the Defendant himself. Quod Nota, Qvia 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 seized the Land, and the Defendant as Servant &c. entered and cut &c. and by all the Journal of Trespass A. brings notices where he justifies as Servant &c. he shall not give Colour to the Plaintiff. Br. Colour, pl. 54. cites 18 E. 4, 3. 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 belonged, and gave them by Patent to C. for Life, who made a Lease for Years of them to H., and that the Defendant as H.'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 Privy in Interest, who come to a particular Estate devised 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 All Land; as Tenant by Elegit, or Sarisvac, or Tenant in Dower, Tenant by the Countrey &c. Jenk. 506. p. 8. J. J. Dr. Leyfield's Case.

S. C. cited to 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. 90. a. — But when a special Title is made as in 2 B. 5. S. a. where John Atwood brought Title of his Clerk broken against one John Dingle and W. Dingle; the Defendant pleaded that the Tho. Atwood was seised, and infoseid J. B. and R. S. who infoseid Sir John Norbury Kent, 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 to Rep. 90. a. in Principio.

22. In Trespass in Lands, the Defendant said that the King gave to Heath's Vise the Lands in Tail, by Virtue of which he was seised &c. and after he was seised, to the Plaintiff at Will, and after entered &c. of which Entry the Action is brought, and good Colour, per Cur. by the Leafe at Will; Quod Nota. Br. Colour, pl. 55. cites 18 E. 4, 15.

23. So it Defendant pleads that W. was seised in Fee, and was attainted of Trespass, 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 for Diff'rent of Rent Colour may be given; admitted. Br. Colour, pl. 56. cites 19 E. 4, 5. in Principio.

25. He who pleads to the Writ shall not give Colour, and a Man may Heath's 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. in Principio cites S. C.

26. In Trespass, per Brian, he who justifies for Tithes as Parson, shall Heath's not give Colour. Br. Colour, pl. 57. cites 21 E. 4, 18. but is miff-printed (Distrefs for Diff'mes). — In Trespass of certain Loads of Oats, taken and carried away at Bodmen, against the Prior of Bodman; the Defendant said that the Oats grew in a certain Place in B. in the Parish of Bodman, of which he was Parson, and that being compelled by Rule of Court to shew how he came to the same Parfonomiae) said that he had the Impropiation by Prescription, and that the Corn was levied 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. to Rep. 38. a. Arg. cites 11 E. 4, 65. a. (but if it seems miff-printed, and that it should be 21 E. 4, 66. S. C. as in Brooke, pl. 70. — S. C. cited ibid. 90. b. as 18 E. 4, 65. a. — Br. Colour, pl. 59. states 21 E. 4, 65. that he need not give Colour; but Brooke says Quare. — No Colour can be given; for of common Right they belong to the Parson. Jenk. 506. pl. 80.
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27. So of him who justifies for Wreck de Mere bought in Market Court, he need not to give Colour ; But Brook says Quere inde. Br. Colour, pl. 57. cites 21 Ed. 4. 18. & 15. that Colour may be given where one justifies for Wreck or Waifs and Esprays, or any other Matter of Record ; but says, see there other Books, viz. 2 & 12 Ed. 4. 58 H. 6. 7 and 57 H. 6. 7. varying whether one shall give Colour where the Defendant doth justify for Wreck, Waifs and the like &c. and to 54 H. 6. 10. in the same and for Offerings. — — 10 Rep. 92. b. 91 a. S. C. cited per Cur. — Br. Colour, pl. 5. cites 54 H. 6. 10. S. P. — Br. Colour, pl. 59. cites 21 E. 4. 65. But Brook says Quere — Where a Man justifies for Wreck he shall give Colour, and so he did, Quod Nota bene. Br. Trefpafs, pl. 182. — — Br. Prefcription, pl. 52. cites 9 E. 4. 22. S. C.

28. In Trefpafs, per Brian, if a Man justifies by any Matter of Record, he need not to give Colour ; But Brooke says Quere. 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 H. J and H. A. were seized &c. and Infeñced 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 Diversify. 10 Rep. 90. a. cites 1 H. 7. 19. a. b.

30. He who pleads Devise by Testament shall give Colour in Trefpafs or Affise; for it is only as a Feoffment. Br. Colour, pl. 75. cites 5 H. 7. 10.

31. In Trefpafs 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 fee if there be Waifs or not, and therefore a good Plea without other Colour. Br. Colour, pl. 77. cites 6 H. 7. 14. per Brian.


33. In Trefpafs Feoffment of the Land to W. N. whose Estate the Defendant has is no Plea in Trefpafs without giving Colour, but immediate Feoffment of the Plaintiff to the Defendant is a good Plea without giving Colour; contrary in Affise. Br. Trefpafs, pl. 424. cites 10 H. 7. 22.

34. In Trefpafs, when the Defendant shews Cause, and prays Aid of the King, or demands Judgment Rege Incons牟to, he shall not give Colour to the Plaintiff; Per Cur. Quod Nota. Br. Colour, pl. 23. cites 15 H. 7. 10.

35. In Trefpafs, per tot. Cur. where the Defendant intiütes himself by Leaf 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 Incons<rto &c. he need not to give Colour, as where he pleads in Bar; Note the Diversify. Br. Colour, pl. 33. cites 21 H. 7. 48.

36. Where the Defendant binds the Right of the Plaintiff by Feoffment with Warranty, Fine, Recovery, Dilettis, 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
In Affife where Entry and Re-entry are pleaded with a Difference, there is no Occasion to give Colour. Jenk. 21. pl. 40.

38. Colour shall be in an Affife, to the Reversion be in the King.

Jenk. 171. p. 33.

39. If in Bar Defendant fails of giving Colour, where it is necessary to give Colour, that Obligation 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 Illie is specially pleaded Colour should be given, elle it is good Cause for Demurrer; Per Cur. 12 Mod. 354. Pauch. 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. Pauch. 12 W. 3.

42. Trespass for entering into the Plaintiff's House, and keeping the Possession thereof for so long. Defendant pleads that S. was feized in Fee thereof, and he, being so feized, 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 Illie; 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 Illie, or given Colour to the Plaintiff. Ergo Jud. pro Quer. 12 Mod. 513, 514. Pauch. 13 W. 3. Ano.

43. If one would plead a Plea amounting to the General Illie, 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 Affife it is no Colour to say that the Land is held of the Plaintiff, * Heath's Max. 32. and that after that the Tenant entered by Defent the Plaintiff as Lord abated after the Death of the Ancestor of the Tenant; * but if he cites S. C. had said that the Plaintiff as Lord entered, supposing that the Ancestor had died without Heir, this had been Colour. Quae inde; for this is to say that not doubtful to the Lay-Gents, and he ought to confess it &c. Br. Co. Cour. pl. 38. (bis) cites 2 Aff. 7.

2. In Affise the Tenant pleaded Dying seised of his Father, and that be entered as Heir, and the Plaintiff abated as Son and Heir of one J. who was a Baffard; and it was held no Colour, because there is no Privuity 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 Baffard, abated &c. and admitted then for Colour. Br. Colour, pl. 38. (bis) cites 2 Aff. 9.

3. In Affise the Tenant pleaded Lease for Life by J. N. to the Father of Heath's Max., the Plaintiff, the Remainder to the Tenant, and the Plaintiff supposing that his Father had died seised in Fee, entered &c. and good Colour. Br. Co.

Colour, pl. 9. cites 9 H. 4. 3.

4. In Affise the Tenant made Tenement, 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.
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4. If a Man pleads that J. S. was seised in Fee, and died, and one W, entered as Heri, 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 was seised. Br. Pleadings, pl. 149. cites 11 H. 6. 19.

5. It is good Colour that J. N. granted to him the Reversion, and the Tenant for Term of Life died, and be claiming by the Reversion granted it where the Tenant for Life did not attorn; for the Lay Gents think that it paffes by the Grant. Br. Colour, pl. 15. cites 19 H. 6. 21.

6. So where the Tenant says that Be leased for Life, and the Tenant surrender'd; for the Lay Gents are ignorant if Surrender may be by Parl. 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,usted him after the Death of Cesy que Vic. Br. Colour, pl. 15. cites 19 H. 6. 21.

8. So if he says that the Father of the Plaintiff infoes'd him, and after he suffered him to occupy at Wills, and be supposing that he bad died seised &c. Ibid.

It is good Colour that the Plaintiff claiming as eldest Son, where he was a Baffard &c. is good Colour. Br. Colour, pl. 15. cites 19 H. 6. 21.

9. And so to say that the Plaintiff claimed as eldest Son, where he was a Baffard &c. is good Colour. Br. Colour, pl. 15. cites 19 H. 6. 21.

10. So to say that the Plaintiff claimed as youngest Son; for this is no Colour that the Plaintiff claiming as Heir where he was youngest Son, enters &c. Br Colour, pl. 56. cites 58 H. 6. 7.

11. So if he says that he leased to the Father of the Plaintiff for Life, for Years, or par Avter Vic, and he supposes that his Father had died seised in Fee &c. this is no Colour. Ibid.

12. In Trefpafs the Defendant said that A. was seised in Fee, and gave to the Baron and Vene in Tails, 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. entered &c. and good Colour, tho' it be given before the Dying seised, which bounds the Entry. And he who pleads in Affisle that his Father was seised in Fee, and died seised, and he entered as Heir, and gave Colour by his Father before the Descend, yet the Colour is good. And so fee 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.

13. In Trefpafs Ubi ingressius non datur per Legem, if the Defendant pleads Feoffment of the Money, and gives Colour to the Plaintiff of the Money, by which the Defendant entered into the whole, this is no Colour for Entry into the whole; for it may be of one Moiety fevered from the other Moiety. Br. Colour, pl. 36. cites 38 H. 6. 7.

And per Prior, in general Writ of Trefpafs it is good Colour to enter into the whole Moiety by Colour of one Moiety per My, & per Testa he may enter into the Whole; but in this Action of Trefpafs upon the Statue of 5 H. 2. the Writ expresseth no mode to be entered, and therefore Bar for a Moiety to enter into the Whole is no Plea; for the Writ expresseth Certainty. Quare in the General Writ of Trefpafs. Br. Colour, pl. 56. cites 38 H. 6. 7.—Final Colour, pl. 15. cites S. G.
14. In Trespass of Goods waived, if the Defendant says that the Plaintiff seized them to the Use of the King, this is no Colour if he does not join that he was Bailiff of the King, Escheator, or other Officer accountable to the King; Per Prior 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 Merre &c.

15. Trespass done the 5th of June 36 H. 6. The Defendant pleaded Feoffment the 5th of May 37 H. 6. and gave Colour by the same Feoffor, Anno 37 H. 6. abiguou soc that he is Guilty before this Day, and a good Plea. Br. Colour, pl. 45. cites 5 E. 4. 79.

16. Feoffament of the Plaintiff to the Tenant is no Plea in Affize; Quare of Feoffament to J. N. que Estrate the Tenant has; Per Pigor; Quod non negatur. Br. Colour, pl. 27. cites 15 E. 4. 31.


18. In Trespasses for chafing in his Park, the Defendant said, that the Plaintiff ingressed two of the Park, and be by their Command entered and chased, and a good Plea, without Colour, because he conveyed the Interest of the Plaintiff Megne, and not by a Stranger. Br. Colour, pl. 53. (86.)

19. Every Colour ought to have 4 Qualities; 1st. It ought to be documentary 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 Actor; As in Affize to give Colour of Frantecument, and not as Guardian in Chivalry, nor to his Ancestor where the Actor 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 Nona 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 Exequitor, and died, and the Plaintiff claiming J. N. as his Vilem where he was Frank to the Goods, and the Defendant re-took them, and the Defendant e contra, and to his Lieue, 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 menace, this is good Colour in Trespass; As of the Caf of the Chaplain and Feals 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.

but there it is more doubted in another Case, where the Defendant in Trespass of Trees did plead, that
he was seized until the Plaintiff gave the Defendant good Colour; quod non. Br. Colour, pl. i. cites 2 H. 6. 15. and 19 H. 6. 12.

3. Trespass by a Foreman of Goods carried away. The Defendant justified as Executor of the Baron of the same Feme, and the Feme claimed to be Executor where he was Not Executor; per tit &c. and this was admitted good Colour; quod nota. Br. Colour, pl. i. cites 2 H. 6. 15. and 19 H. 6. 12.

4. Trespass of Goods taken. The Defendant said that before the Plaintiff anything bad, the Property was in S. who bailed the Goods to W. to keep, who made the Defendant his Executor, and the Defendant seized 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 abovewithout Title; Quare in Absis as it is laid there. Br. Colour, pl. i. cites 7 H. 6. 35.

5. It is good Colour in Trespass brought by a Parson, where the Defendant sues as Patron, to give Evidence, and Colour by Leafe at Will by the left Parson who refused, 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 Trespassor where he did not give, by which he said that he claimed as Executor &c. Br. Colour, pl. 69. cites 19 H. 6. 12.

7. Trespass of Grain carried away, the Defendant said that he is Parson, and the Grain grew in such a Place, and flowed 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 induced, took them, and he retook 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.

8. In Trespass of Charters and Muniments taken at D. it is no Plea 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.

1. It is good Colour that J. N. was possessed and owned to J. N. who gave to the Plaintiff, and the Defendant re-took them; Br. Colour, pl. 7. cites 21 H. 6. 36.

2. Trespass of taking Slippers and Shoes, the Defendant said, that he was possessed of three Dozours of Leather, and bailed them to 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 & 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.

10. Colour was given in Trefpafs of Corn, where the Defendant justified as Tithe severed from the 9 Paris &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 Tithe 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. Trefpafs of Goods taken, the Defendant said that J. N. was thereof possessed and made the Defendant his Executor and died, and he feised them and bailed them to the Plaintiff for him to re-bail them, Quando &c. and he requited 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 his &c. Br. Colour, pl. 2, cites 28 H. 6. 4.

12. Trefpafs of taking and carrying away his Timber; the Defendant said that the Place is 20 Acres, where 20 Wyches grew, which was in 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 Cherttles, viz. Timber. Br. Colour, pl. 6. cites 35 H. 6. 2. cites 35 H. 6. 2. And so long as the Defendant conveyed and made Timber and carried them away out of the Land, and the Defendant came and retook them away, and the Plaintiff would not suffer him, but took and carried them away; Judgment &c. and per Danby and Davers, this is good Colour, contra per Priot; for when the Plaintiff fowed 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 the Plaintiff dis-seised, who fowed the Land and cut the Corn, and the Defendant re-entered, and the Plaintiff Defendant would have carried away the Corn, and the Defendant would not suffer him, entered, and cut and carried it away, and the Opinion of the Court was, that it is a good Colour.

13. Trefpafs of Sheafs taken. Littleton said Ario non; for the In Trefpafs Place is 10 Acres, of which the Defendant was seised in Fee, and before the Trefpafs the Plaintiff came and bow'd the Land, and fowed it with his own Grain, and the Defendant entered and cut the Corn and put it into Sheafs, ha't the and at the Time of the Trefpafs, the Plaintiff came and would have carried Plaintiff 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 Priot; for when the Plaintiff fowed 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 the Plaintiff dis-seised, who fowed the Land and cut the Corn, and the Defendant re-entered, and the Plaintiff Defendant would have carried away the Corn, and the Defendant would not suffer him, entered, and cut and carried it away, and the Opinion of the Court was, that it is a good Colour. Br. Colour, pl. 6. cites 37 H. 6. 6. And it is no Plea that the Property was in his Matter, without giving Colour. Ibid. cites 2 H. 4. 5. — Heath's Max. 59, cites 59 S.C.

not amount but to the General Iffue, 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 imparted. Br. Colour, pl. 6. cites 37 H. 6. 6. And it is no Plea that the Property was in his Matter, without giving Colour. Ibid. cites 2 H. 4. 5. — Heath's Max. 59, cites 59 S.C.
14. In *F. e. a. w. s. a.* the Defendant pleaded that a long Time before the Trespsals, A. was feised of the Land in Fee, and being to feised given to the Defendant’s Bailor in Tail, who died feised, and the said Land decessed to the Defendant, and gave Colour to the Plaintiff by A. the Plaintiff replies that he was feised 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 Pollution shall be intended in the Defendant but by this Estate Tail, which he himself has pleaded. An Estate Tail cannot be gained by Billifin, Meher et Conditio possidens, ubi Neuter pus habet. The first Pollution will serve to maintain Trespsals where the Defendant has not a Title. In this Case, the Colour given by the Defendant to the Plaintiff, gives the Plaintiff the first Pollution. *Jen. 1st & pl. 36. cites 3 E. 4. 15.*

15. In Trespsals it was admitted for good Colour, that if, N. before that the Plaintiff had any Thing, was posseffed of the Goods in the Proper, and gave them to the Defendant, and made the Plaintiff his Executor and died, by which the Plaintiff was posseffed, and the Defendant took them &c. and to fee that the Executor finding the Goods among other Goods, is good Colour. Br. Colour, pl. 65. cites 1 E. 5. 16.

16. In Trespsals of Goods taken, the Defendant said that he was posseffed of them, and delivered them to the Plaintiff to keep, and re-deliver them, quatenus &c. and he carried them to D. and by the Defendant re-took them and no Title, for there is no reasonable Colour; for he never ceased 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 Plaintiffr Br. Colour, pl. 43. cites 5 H. 7. 18.

And in Trespsals it is a good Piece that he bail’d the Goods in Pleader, and paid the Money and re-took them; for the Plaintiff has Interest quantum &c. Br. Colour, pl. 45. 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-veiled in the Defendant, and he may bail it or give it immediately without any Seilin. Br. Colour, pl. 43. cites 5 H. 7. 18.

18. So of Bailment of Sheep by the Defendant to the Plaintiff to Compofer his Land, and after he re-took them, this is good Colour to the Plaintiff; for he has Property pro tempore, and all those Cafes were agreed. Br. Colour, pl. 43. cites 5 H. 7. 18.

19. In Trespsals of Goods, the Defendant said that J. was posseffed and bail’d 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, and there is no Privity between the Bailor and the Donee. Br. Colour, pl. 76. cites 6 H. 7. 7.

20. In Trespsals of Corn &c. cut and carried away, the Defendant pleaded that 10 Eliz. he was feised 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 Tribes secundum from the 9 Parts, and recovered the Life of B. The Plaintiff demurred, for that the Pleas...
amounted to the General Issue; and Judgment was given in B. R. for the Plaintiff. The Defendant brought Error in Cam. Scacc. and assigned 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 Repond-deas Outier. 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. 38. a. Hill. 8 Jac. Dr. Leyfield’s Café.

(E) Where Colour given by an Estate which is void or determined, shall be good, or not.

1. N Affiure the Case was that the Farm was seised in Fee, and took Base Heath’s you, and bad Issue T. The Baron and Feme died. T. entered and died seised without Heir of his Body. The Tenant entered. The Plaintiff and cites S. C. claiming as Confin and Heir of the Part of the Father abated, and the Tenant re-entered; and good Colour as Heir of the Part of the Father, 43 (but the thought the Land came of the Part of the Mother. Br. Colour, pl. 29. cites 24 E. 3. 50.

doubted whether it was a good Colour to say that the Plaintiff claimed by the Son and Heir of him by whose Defentent pretends Estate. Heath’s Max. 52. says it appears by 2 All. 7. that to give the Plaintiff Colour by Abatement, is no Colour.

2. Entry in the Nature of Affiure, the Tenant said that F. his Father was seised in Fee, and leased to N. for Life. N. died, and F. entered in his Receipt and died seised, and the Tenant entered 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 Heir, the Estate of N. is determined, and the Title is by the Dying seised of the Father, and the Tenant cannot enter upon a Defentent by whose Estate was determined before, and to give Colour by a Defentent, and confines Entry upon him, or by Feoffee upon Condition, and confines 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 Defentent, which is purred by the Entry. Br. Colour, pl. 55. cites 18 E. 4. 15.

4. Entry for Difefion of Rent of Disefion done to the Predecessor of Heath’s 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 Judges and Sergeants except Brian. And Brooke says it seems to him, that Eftates determined cannot be Colour; for it is not doubtfull to the Lay-Gufts nor Matter in Law, and therefore it is contrary to the Ground of the Colour. Br. Colour, pl. 56. cites 19 E. 4. 3.

5. Trespa’s in Separali Pisclaria against an Abbot. The Defendant Heath’s preferred in the Piscaria there, and that the Abbot, Predecessor of the Defendant who preferred, leased to the Plaintiff for Life and died; and that this Defendant was elected Abbot, and fief’d, and a good Colour; Per Cur. Brooke says the Look,
that tho' the Estate appear to be determined, yet the Colour is good.

says that it seems the leaf was for the Life of the lessor, for an abbot cannot discontinue, and therefore if it was for the Life of the Lessor 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 paffes by it, and where good.

Heath's Max. 1. Assise by Baron and Feme against the Prior of C. who said that the lessor 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 entered as in his Revenue, 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. 2. 59, to say that a Feme entered, claiming to have the Land in Dower, & S. P. and yet a Feme cannot enter into her Dower without Affirmation; and yet good Colour, per Finch; quod Caund, conceit, by reason that the has Colour to claim Dower. Br. Colour, pl. 79. cites 40 E. 3. 23.

Heath's Max. 3. 59, 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 4. forcible Entry into the Manor of D. The Defendant said that before the Plaintiff any Thing had, A. was seized 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 was by the Deed, entered 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 joint-tenant may infeoff another of all the Land. Br. Colour, pl. 19. cites 19 H. 6. 49.

Br. Colour, pl. 25. cites 5. In forcible Entry with Force, and Detainer with Force, the Defendant pleaded that long before the Plaintiff any Thing had, be himself was seized in Fee, and dispossessed by the Plaintiff, upon whom he was entered peaceably, and traversed his Entry with Force, or Detainer with Force, and Walton J. held this a good Plea and Colour; but Markham Serje, contra, that it is no Colour; whereupon the Defendant said that T. H. was seized in Fee, and died seized, and the Land descended to the Defendant, and the Plaintiff claimed by Deed of Feoffment made by T. H. where nothing was by the Deed, whereupon the Defendant as Son and Heir of T. H. entered peaceably, abi qua hoc that he entered with Force. The Plaintiff replied that W. was seized, and intestated him, whereby he was seized till the Defendant ousted him with Force, abi qua hoc that he said T. H. died seized, and so to Issue. Br. Forcible Entry, pl. 5. cites 21 H. 6. 39.

Heath's Max. 6. Entry in the Quibus of Diffeifion 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 Demandant claim'd by Deed made by the said C. where nothing pass'd 4. and 9 E. &c. and so gave Colour by him whose Estate is defeated, and yet good 4. 13. (but it seems mix-printed, and that it should be (18) as in Brooke.

7. So where Tenant in Affiace says he was seif'd till by B. seif'd, In Trespas 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.

diffied, 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. 52. &c.

8. Trespasses by H. B. Warden of the Chantery of D. and the Chaplains thereof. The Defendant said that the said H. B. was seif'd 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 seif'd, 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 lay for Term of their Lives, by which he gave Colour for Term of Life of the Leifor. 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. In Trespasses upon the 5 R. 2. The Defendant said that the Father of the Plaintiff was seif'd of the Land in Fee, and held of C. in Chiefry, and died, the Plaintiff within Age, by which C. seif'd 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 Affiace; and so upon Lease of the Father for Years &c. Et Cur. conceipt that it was good Colour. Br. Colour, pl. 47. cites 2 E. 4. 5.

2. In Trespas the Defendant said that F. was poss'd of the Goods, and baid 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 poss'd by reason of the Gift, and without Possession he cannot have Action. Br. Colour, pl. 73. cites 2 E. 4. 23.

3. In Trespasses the Defendant justified for Waif. The Plaintiff challenged to Eftrey, that he need not confess Property in the Plaintiff; for if it is Property was in him, yet by the Stealing and Waiving, the Goods are forfeited. Br. Colour, pl. 52. cites 12 E. 4. 6. b. S. C. cited per Cur. as 12 E. 4. 5. 90. and it was held by all the Justices that if the Defendant had said that A. had been poss'd of the Goods as of his proper Goods, and that B. had seif'd them &c. that he ought to give Colour to the Plaintiff; but it is in the where he says that they were seif'd extra Possessionem ignoti, there needs Year-books, no Property. Br. Colour, pl. 52. cites 12 E. 4. 6. [S. B.] and

4. And it was held by all the Justices that if the Defendant had said that A. had been poss'd of the Goods as of his proper Goods, and that B. had seif'd them &c. that he ought to give Colour to the Plaintiff; but it is in the where he says that they were seif'd 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.
568 Colour in Pleadings.


6. Contril 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 seafant, 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. Trefpafs 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.

9. It is good Colour in Trefpafs 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 consecut. Br. Colour, pl. 62. cites 22 E. 4. 23.

10. A naked Colour in an Ejection Firme is not sufficient, as it is in Affile or Trefpafs &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 lays, 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 be 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. Trefpafs, the Baron was seised, and invoiced D. in Fee, and conveyed the Deffent from D. to f. and from f. 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.
Colour in Pleadings.

R. the Feoffor, where nothing passed &c. entered, upon whom the Defendant re-entered, and did the Trefpafs. Port. said this is no Colour, but Newt. and Palt. Justices e contra; for he has acknowledged the Franktenement was once in the Plaintiff. Port. said, in Allife it is no Plea, good suit concemium. 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 Purpofe, 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 Cafe, at the Time of the Trefpafs suppofted, the Franktenement was in the Defendant, and fo no Colour to the Plaintiff, and as to this Intent the Plea was held good by all the Justices, and fo to the other Intent; for the Franktenement was confefs'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 Fene was feifed &c. and died, and W. M. abated, and endowed the Fene, and the Plaintiff claimed by Colour &c. made by W. N. This is no Colour for the Fene, 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 feifed in Fee, to whom J. D. released all his Right by his Deed &c. and J. S. infeffed. H. One Eflate the Tenant has, and gave Colour to the Plaintiff by J. S. and J. D. who released, and was not feifed; Per Prior, the Colour by J. D. is not good, by which Laycon gave Colour by J. S. only; Quod Nota; and by the Reporter the firt 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.

5. Trefpafs Ubi Ingressus non datur per Lemen; the Defendant said, that before the Entry J. S. was feifed in Fee, and infeffed 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 infeffed 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 Trefpafs, the Defendant said, that J. S. was feifed, and defeiffed by B. who infeffed the Plaintiff, upon whom J. S. re-entered. Qui Eftaque 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 Rights, and yet there the Defendant was Trefpafsor to the Plaintiff till the Release came; but Brooke says, it seems that the Plaintiff shall not punifh this without Regretis, and he cannot make Regretis after the Release. Br. Colour, pl. 83. cites 5 H. 7. 11.

7 F (K) By
(K) By whom, or to whom it must or may be given.

In Trespass the Defendant pleaded his Franktsment; the Plaintiff said, that before the Defendant anything had F. was seized, and infefted 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 to. Car. he shall not give Colour to the Defendant, but Colour shall be given only to the Plaintiff, but he shall say that F. infefted him, by which he was seized till the Defendant entered &c. or Trespass pleads that he was seized till by A. diffefted, who did infeft the Plaintiff, and he did enter, and a good Colour.

2. In Trespass of Trees cut; the Defendant said, that W. N. was seized in Fee, and gave to J. in Tail, and died, and the Land descended to 8. who died, and the Defendant as Son and Heir entered, and gave Colour by S. Quod Nota; and nor by W. nor J. and yet admitted. Quare, inaffed, much as it is by one Mefne 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 Wagn. would have demurred, because in the Pleading of the Fine the Defendant did not show Seisin in the one nor the other, who were Parties to the Fine, but said Quod hus fes levirtet inter &c. by which T. acknowledged all the Right &c. for the Fine is good if the one or the other are feifted, by which the Defendant said that T. was feifted &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 feifted, it is better to give Colour by the Father than by the first Feffer; for this is the Title to the Heir. Br. Colour, pl. 49. cites 2 E. 4. 17.

5. Note, that it was admitted, that in Trespass, if the Defendant pleads Feoffment by A. to B. who infefted C. who after infefted the Defendant, he may give Colour by A. to the Plaintiff, or by B. or by C. who was in the mene Conveyance, Quod nemo negavit. Br. Colour, pl. 46. cites L. 5 E. 4. 134.

6. Entry in the Quibus, the Tenant said that his Grandfather was feifted, and by Proteftation died feifted, and the Land descended to his Father, who entered, and was feifted, and by Proteftation died feifted, 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 Descendent to the Father is void, and shall be ouit, and to he was; contra if he had given Colour by the Grandfather. Br. Colour, pl. 63. cites 22 E. 4. 24.
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 S. P. and one Suit of the Party, or other Process, this is not good; for it is against the Law; per Car. Br. Corone, pl. 194. cites 42 All. 5. 12. 13. cites 42 All. 5. A Commission was made under the Great Seal to take J. N. (a notorious Felon) and to seize his Lands and Goods. This was resolved to be against the Law of the Land, unless he had been indicted or appel'd by the Party, or by other due Process of Law. 2 Indt. 54. cites 42 All. 5. Rot. Parl. 17 R. 2. No. 57.

2. And if Writ issues to inquire of Chauntery, Conspiracy, Confederacy, S. P. and per Ambadexterity, 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 dismis'd, and shall not be put to answer; for it ought to be by Commission. Ibid. This Writ issues against law; for this is no Warrant to them without Commission, and dismis'd that which was done &c. by Advice of all the Justices; quid nota. And Brooke says, to see that a thing cannot be done by Writ which ought to be by Commission. Br. Commissions, pl. 16. cites 42 All. 12. S. C. cited 4 Indt. 164.

3. A Commission is a Delegation by Warrant of an Act of Parliament, or a new Commission of the Common Law, whereby Jurisdiction, Power, or Authority is conferred upon others; for all Commissions of new Invention are against Law until they have Allowance by Act of Parliament. 4 Indt. 163. cap. 28. necessity of fewer 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 Indt. 472, 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. Retolded 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 delayed, and shall not have any Travels to it. 12 Rep. 39, 31. Trin. 5 Jac. The Cafe 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 employed 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. 16 Jac. C. B. Fortescue v. Coake.

3. A Commission was directed out of Chancery on Ded. Poteft, to A. & al. The other Commissioners would examine A. their Fellow-Commissioner as a Witnes; and by the Opinion of Ainfcomb, they cannot compel him to be examined, which Doderidge granted; Brook of the Middle-Temple e contra. Quere, that if he would affent to be examined, if yet this Examination be not taken coram non Judice. 2 Roll Rep. 90. Patch. 17 Jac. B. R. Sir Nich. Parker's Cafe.

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.

And if others are examined before him in his Pre- fence, he cannot be afterwards examined, having heard the former Examinations; and therefore the 17th of Dec. 1681, a Commissioner who had to do, came as afterwards and was examined in Court, and his Depo- sition was fuppref'd. 2 Chan. Cases 79. Mich. 33 Car. 2. North v. Champernown.

5. A Commissioner may be a Witnes, but then he ought to be examin'd before any other Witnes be examined. Vern. 369. pl. 362. Hill. 1685. Bright v. Woodward.

(C) Misbehaviour of Commissioners. What is. And punished How.

1. A Commissioner certifying falsely that a Witnes 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. Filh v. Thoroughgood.

2. Com-
2. Commision to examine Witnesses went out to Sir Alexander Brett and others, who made Certificat against Sir Alexander of partial Proceeding. Philippes Serj. moved at the Rolls for a Commision to others, to examine in whom the Misdemeanor was, if in Sir Alexander, or in the Opinion of the Certifiers, & fuit negarat; 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 Per 43. cites 9 Car. Rep. 19. cites 13 Nov. 1 Jac. &c.

3. If a Commisioner in a Cause in Canc. takes Bribes for the executing thereof, he may be indicted and fined by the Common Law; Per Popham Ch. 9. Cro. 65 pl. 4. Patch. 2 Jac. B. Moor v. Folter.

4. The Plaintiff's Commisioner would not let a Witness declare the whole Truth, but held him stiffly to the Interrogatories to fit 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 Witnesses has depo'd, 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 Cafe.

5. One of the Commissioners letting the Defendant escape being taken upon a Commision of Rebellion, was to stand committed to Prifon till he brings in the Defendant. Toth. 100. cites Hill 18 Jac. Sacheverel v. Sacheverel.

6. Commissioners upon a Commision 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. Nellon v. Yelverton.

7. The Defendant's Commissioners for examining Witnesses met at the Time and Place appointed, but refused to join and sit in the Execution of the Commision; and upon Affidavit made of this, the Court ordered that the Defendant should Name other Commissioners, and 'twas pr'y'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 Adjournatur. 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 Busines of this Court of C. B.) he is subject to the Cenuries of it as Attorneys &c. 2 Vent. 30. Patch. 29 Car. 2. C. B. Parrot's Cafe.

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, it without Excuse, yet doubtefs they will never punish the Person for it unless his reasonable Charges allowed; Arg. Show. 343. Mich. 3 W. & M. Stockhold v. Collington.

10. A Commisioner 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; fed non Allocatur; because he is appointed at the Nomination of the Party who ought to pay him if he imploys him.
(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 Pash. 11 & 12 Eliz. Crewey 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 be 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.

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. Pash. 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 see 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 perfei 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. 157. Anon.

8. A Commission returnable fine Dilation 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.


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 ordered the Defendant should have a new Commission to the
the former Commissioners, wherein the Plaintiff might also examine if he lift, 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 Charges, 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 Misdake in his Examination before the 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 Misdake; 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 referred to the Matter of the Rolls to examine into it, who call'd to his Affittance 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. Nelf. Chan. Rep. 92, 93. 15 Car. 2. Randall v. Richards.

4. The Defendant having exhibited Writings at a Commission for Examination of Witnesses, suggested that they were altered and interlined since the Examination 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. Cafes 273, 274. Hill. 27 & 28 Car. 2. Richardson v. Lowther.

5. After Publication and Hearing, a Commission was granted to examine new Matters stated at the Hearing, upon Condition of Content to 15 & C but go to Trial the next Term, (an Ilue 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 Poit to Barcelona, and when executed to receive the same back. 2 Chan. Cafes 76. Mich. 33 Car. 2. Newland v. Horfeman.

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 Conten of Parties. P. R. C. 221. For more of Commissions and Commissioners in General, see Examination, Fine, and other Proper Titles.
(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 him to Thomas Motton, 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. Afaph, 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. 5. A. was committed by Commiff.
Common.

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cording to Law; but in the latter until be comply, and perform the Thing
required; for in that Case he shall not lie till Sessions, but shall be dis-
charged upon the performing his Duty. Carth. 153. Trin. 2 W. & M.
in B. R. The Mayor and Church-wardens of Northampton's Cafe.

cluded 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 Confinement was not pur-
suit to the Statute of Bankrupts; and the Mayor of Northampton's Cafe was cited for an Authority.
Carth. 153. in Marg. Bracy's Cafe. — 5 Mod. 535. 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 Authori-
ties besides that 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 praefixed, and that in
this Case they had but a Special Authority, and must not exceed it, they held the Return naught. 1

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. 531.
Hill. 1 Ann. B. R. Hollinghead's Cafe.

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 lays for a Year only, and therefore he was discharged. Cumb. 305. Mich. 6 W. & M. in B. R. Clark's Cafe.

3. An Overseer, who by the Stat. 43 Eliz. cap. 2. may be committed But it should
till he account, was committed till he should be delivered by due Course be, there
of Law; and adjudged void, because it did not purfue the Law. Cited

point. Carth. 152. The Mayor and Church-wardens of Northampton's Cafe.

4. Record of Commitment should be in the present Tenfs; per Holt

For more of Commitment in General, see Habeas Corpus, (F. 2)
and other Proper Titles.

* Common.

(A) Common, as Lord.

1. The Lord of the Manor, seised of the Wastes in which the Te-
nants have Common, may feem the Common pernice & per
tour of Common Right, without Disturbance. 18 E. 3. 43. 18
M. 4.

ties, it is not any of them; Resolved, by all the Justices of C. B 6 Rep 977. 1. Hill. 14 Jac. C. B in
of Fowler v. Dale. — See Tit. Inhabitants (B).

Admitted, Arg. that the Owner of the Soil may feem with his Tenant who has a Right of Common.
2 Mod. 275. Mich. 29 Car. 2. C. B.
Common.

For by this ch. Soil is not granted Per Brooke. J. Quod non negatur. Br. Common, pl. 49. (45.) cites S. C.— 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. Rolle Rep. 265. p. 18. Pach. 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, Eftovers, or the like, this is 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.

Cro. J. 208.
pl. 1. Titn.
6 Jac. B. R.

4. But without Prescription the Lord cannot agist the Cattle of a Stranger in the Common. 30 E. 3 27.

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 Cafe.

6. If one is seis'd 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 & separatam Pasturam Omni Anno, Omni Tempore Anni, and that exclusive of the Lord, and in such Cafe Levancy and Couchancy is not necessary. 2 Lev. 2. Pach. 23 Car. 2. B. R. Hopkins v. Robinton.

8. Tho' the Copyholders have solam & separatam 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. Pach. 23 Car. 2. in Cafe of Hoskins v. Robins.

For these may be Trees, Mines, &c. Vent. 123. 163. in S. 8.

(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, having his Power of feeding as Lord, he shall have Common there as Lord. 18 E. 3 43. 18 Am. 56. admitted.

* The Argument in the Yearbook of 18 E. 3 50. b. is, that tho' the Lord could not have Common in his own Lord, yet he had Pasture there in lieu of this Profit, and when he has disfranchised himself, he enjoys.

2. If the Lord, without any having, aliens the Soil where the Common is to be taken, his Common as Lord is gone by the Feoffment, but the Alliency 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 Am. 56. b.
Common.

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Feoffe shall have Common in lieu of the Pasture which he had. [This may help to explain Roll, pl. 2, which seems somewhat obscure.]

† Br. Common, pl. 22. cites 18 Aff. pl. 4. S. C.

(C) Common Appendant. What. [And how.]

1. *It is not Common Appendant unless it has been appendant* Fitzh. 
   *Ilisu*, pl. 14. 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 Sec. 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 compel his Land, viz. for his Horses and Oxen to plough, and for his Cows and Sheep to compel. Br. Common, pl. 15. cites 57 H 6. 53. —Br. Common, pl. 16. cites S. C. & S. P. and therefore it cannot be claimed to Land newly approved out of the Waifs. —Br. Affisle, pl. 37. (56) cites S. C. & S. P.

2. *For such Common can not be created at this Day.* 26 H 8. *Br. Common, pl. 1. cites S. C. & S. P. and see pl. 1. supra, and the Notes there.† Fitzh. Affisle, 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 Cor. 4 Rep. 57. a. in Teringham’s Café, 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 in such Terrarum, had made a Feoffment of Parcel of the Manor to hold of Cafe the Feoffee, as incident to the Grant, should have had Com-
   mon in the Waifs of the Lord. *Br. Hales.* 9 Ave. B. per Coke and 
   Faller.

Common in the said Waifs of the Lord for two Cauties: 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 Waifs of the Lord for his Beasts which do plough and manure his Tenancy, as appendant to his Tenancy, and this was the Be-
   ginning of Common appendant. The 2d Reason was for Maintenance and Advancement of Agriculture and 
   Tillage, which was much favoured in Law. 2 Inft 86. —See (G) pl. 6.

5. *Common appendant may be thro’ all the Year, saving at a cer-
   tain Time, at what Time the Lord feeds it.* 27 C. 3. 86. b.

6. If a Man grants 80 Acres of Land with Common in, as much as Br. Com-
   pertains to two Oxganges of Land, this does not make the Common to be 
   moner and Common, † Br. Common, pl. 37. cites S. C. 
   Appendant if it was not Appendant before; Per Herle J. & non nega-
   tur; for it seems clearly that it cannot be Appendant but by Time of Pre-
   scriptio; Quod Nota, but contra elsewhere of Appurtenant. Br. Inci-
   dents, pl. 9. cites 5 Aff. 9.

9. S. P. and fo are all the Editions, but they seem mis-printed, there being no such Point there; and it should be, as here, 5 Aff. 9.


8. In
8. In Trespass, the Defendant justified because he and all those whose Ettare 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. 34.

9. The Word (Pertinent) is Latin as well for Appurtenant as Appendant, and therefore the Subjedta Materia, and the Circumstances of the Case must direct the Court to judge the Common to be either Appellant or Appurtenant; Sic dictum fuit; 4 Rep. 38. a. Mich. 26 & 27 Eliz. B. R. in Terringham's Case.

10. A. feised of 2 Yard-Lands with the Appurtenances, had Common of Pasture for a certain number of Cattle; this was Common Appendant. Brownl. 180. Morfe v. Wells.


(D) The several Sorts [of Common Appendant.]

As where a Man had Common in 100 Acres when it is not fown, this is conditionally. Br. Common, pl. 15 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.)

2. Common Appendant may be unlimited, so quandiu he pays so much, so tandem as he shall be living upon such a House to which the Common is appurtenant. 37 H. 6. 34.

3. So, Common Appendant may be to Common after the Corn is severed, till it is re-lowed. 17 C. 3. 26. F. P. 180. C. 37 H. & S. P. im-
plied.— A Man preferred to have Common Appendant in the Place where &c. for all Cattle Commonable &c. (Viz.) if the Land was fowed by the Owner 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 fowed by the like Confect 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. 75. pl. 100. Mich. 29 & 30 Eliz. C. B. Hawkes v. Mollineux.

4. So it may be to Common in the Meadow after the Hay carried till Candlemas. 17 C. 3. 26. 34.

5. So it may be to Common in the Pasture from the Feast of St. Augustin till All-Saints. 17 C. 3. 26. b. 34.

6. So it may be to Common between the said Feasts before men-
tioned; 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 Crofs till All-Saints. 17 C. 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-sown, and every 3d Year; Per totum Annum. 22 Man. 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 * Br. Com-

mon, pl. 13. cites S. C.  


2. Not to other Land than arable. 26 H. 8. 4. Not to a House. 26 Br. Com-

mon, 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. 57 b. Mich. 26 & 27 Eliz. B. R. in Tarringham's Cafe.

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 appenant and not appendant; but if a Man has had Common for Bealls 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 Til-
lage, which was the original Cause of the Common, in this Case the Common remains appendant, and it shall be intended in respect of the common Usage of the Common for Bealls-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. Br. Com-

mon, pl. 16. cites S. C. —† Br. Allis, pl. 117 (116) cites S. C — F. N. B. 180. (B) in the Marg. of the new Edition, (449.) cites S. C and 18 E. 2 accordingly, and there the Land to which it may be appendant is called Ait, [Hide] and Gain. cites S. C. cited per Cur. 4 Rep. 57 b. S. C. cited per Cur.

4. Common of Turby cannot be appendant to Land. 5 All.  

—† Br. [Admitted.]

5. The Lord may have in the Land of his Tenant Common appendant to his own Demises; Per Green. F. N. B. 180. (D) in the new Notes there (d) cites 18 E. 3. Admeasurement 7.

6. A Man may prefigure to have Common appendant to his Manor; for all the Demises shall be intended arable, or at least, in Construc-
tion of Law, (Reddendo singula singularis) shall be appendant to such De-
mesies as are ancient arable Land, and not to Land newly gained and improved out of the Wafles and Moors, Parcel of the Manor; Per Cur. 4 Rep. 37. b. Mich. 26 & 27 Eliz. B. R. in Tarringham's Cafe.

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 Tarringham's Cafe.

8. A Man prefigure for Common for all Commomble Bealls as to his House appertaining, and in Arreid after Verdict the Court said, that upon Demurrer it might perhaps have been ill; but after Verdict, it shal be
be neither appurtenant 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. 1653. Stoneby v. Mulford.

9. A Prescription for Common for all Cattle, Levant and Couchan, as appurtenant 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 Meiflauge and a Cottage as to this Matter; the Statute De Extentiis 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.

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.

(F) [Appendant.] For what Cattle.

* Br. Common, pl. 15; cites S. C. 1. Thought to be for such Cattle as plough his Land, (to which it is appurtenant, as it seems) and competer it, fettle, Doves and Dren to plough the Land, and Cows and Sheep to competer it. * 37 H. 6. 34. 10 C. 4. 10. b.

S. P. per Cur. and fame Cases cited 4 Rep. 57. a. in Tyringham’s Cafe.

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. for these are not necessary to plough his Land, or to feed it.—Fin. Law, 8vo 56. S. P.

* Br. Common, pl. 15; cites S. C. 3. And therefore a Prescription to have Common appurtenant 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 14 H. 6. 6. b.

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.

4. In Affile, the Plaintiff was of Common with all Manner of Beasts; Either said, that Goats and Geese are nor Beasts of Common; Judgment of Plain; & non allocatur; the Reaon seems to be, because it shall be intended Beasts which are Commonable. Br. Common, pl. 42. cites 25 Aff. 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. Manne ton v. Trevillian.

(G) Com-
Common.

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(G) Common. [Common appendant.] For how many Cattle.

1. The Common is admeasureable, according to the Quality and Quantity of the Freehold to which the claim to have this

Common appendant. 37 H. 6. 34.

2. Sufficient, For all those which are levant and couchant upon the


* 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 C. 4. 32. 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 Pigor, with which agreed the Opinion of the Court. Br. Common, pl. 8. cites 15 C. 4. 32.

4. Common appendant may, by Usage, be limited to any certain

Number of Cattle. 17 C. 3. 27. 34. b.

5. So many Cattle as the Land, to which the Common is appurtenant, Brown 17; may maintain in the Winter, so many shall be said levant and couchant; Hill 14. Jac. Coles v. Noitok Alleys, and to this Warrington and Hurton agreed. Noy 30.

in Cafe of Cole v. Foxman.

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 Houle, shall be intended those Beasts which are nourished and fed upon the Land, and may there be in Summer and Winter. Agreement. But some thought that Beasts cannot be levant and couchant upon a Houle without a Cartelage. 2 Brownl. 101. Mich. 9 Jac. C. B. in Cafe of Patrick v. Lowe.

6. In Replevin the Plaintiff declares for taking 64 Sheep in a Place MS. Rep. called Sonier-lees in the Parish of D. in Somersetshire. The Defendants

Mich. 14 Geo. 2. C. B. avow the Taking, for that the Place where &c. contains 100 Acres of Land; that at and before the Taking Rich Boxes was feiled in Fee &c. and that the Cattle were Damage less than, and that they drained them as his Bailiffs. The Plaintiff in Bar to this Avoiry pleads, that long before and at the Time when &c. one Philip Biggs was feiled in Fee of a certain Acre of Land called Old Hailer, 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 feiled 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 Benet v. Reeve &c.

and the Plaintiff and as usual, and that he has entered and was poisséd'd, and afterwards died, leaving the Plaintiff his Executor, who thereupon, as such, entered, and then aver's that the Lives are still in Being; and the said Plaintiff being so poisséd'd upon the 28th of Sept. 1737, (being the Day of the fuppofed Taking) did put his Cattle in the said Place to depauperiure, and enjoy the Common as appendant to the said Acre, and that while they were so depauperiured the Defendants feiled them, and this he is ready to verify. The Defendants reply, preefying as to the Common, and
and say that before and at the Time of the Taking, the said Sheep nor any of them were not levant orouchant on the Land. To this the Plaintiff demurs; and the Defendants join in Demurrer. Per Cur. the single Quest-

tion upon this Demurrer is, Whether Levancy and Couchancy is incident to Common appendant as well as to Common appartenant? 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 Mat-

ter in Issue, and the Demurrer must be over-ruled. Whether the Plain-
tiff was bound to have pleaded Levancy and Couchancy is another Quest-

tion, and might be very doubtfull; but that is not now neceffary 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 pafs 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 Rite 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 Wait, as they were to be employ'd in his Service. But I think that this Opinion is a Miff-
take, and not warranted either by Law or Reason, and that were it to prevail, it would be attended with the utmost Aburdity and Incon-

venience. I admit that Common appendant is incident only to arable Land; so is Co. Litt. 122, b. and so are all the Books 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 Conquence 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 fuch Common as appendant to the Land, in the fame Extent and De-

gree as the Tenant of the whole Land had before the Tenancy was di-

vided; and so every Tenant of the Manor must keep the fame Number of Horfes or Oxen to plow and cultivate the Lord's Land, and on that Account to feed them on the Waite, whether he be Tenant of 100 Acres or only of a Jingle Acre, which shews the Aburdity of such an Op-

inion, and has fell out to be the very Cafe at prefent. There is another Anfwer to be given against that Opinion, and that is, that a Man may have Common appendant for Cows and Sheep as well as Horfes and Oxen, as appears by 1 Roll Abr. 357. and feveral other Books, and was admitted by the Plaintiff's Counsel very rightly; because the, this being a Replevin for Sheep, they would have made an End of their own Cafe. But if there may be Common appendant for Sheep, then fuch Common can never be enjoyed upon Account of keeping them to plow the Lord's Land, because they are not capable of being ufed in that Manner. But I take this to be the true Reafon, 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 fuch Cattle as were employed by him that Way, upon the Waite of the Lord, till the Hay or Corn was cut and the Ground cleared; and this appears to be the Cafe in Co. Litt. 122. before cited, and feems to be a clear and intelligible Account of the Matter. For if this Account be true, that it was a Right of Common for fuch Cattle as were employ'd in Ploughing the Tenant's Land, then it can extend to fuch only as are Levant and Couchant on it. And there will be no Aburdity as in the former Cafe; 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 pre-

sent Cafe, because the original Tenant (perhaps) of 1000 Acres had a Right to it. The Conquence of this will likewise be, that a Tenant that
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 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.


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. 114. Ann. 84. Quot. 4 H. 4. 4 b.

to which the Common is appendant; but he who has Common for 20 Beasts by Grant, or for Beasts fans Number, may use it with the Beasts of another; but contra where he has a Grant of Common pro Averis fans, or Common fans Number pro Averis fans, Per Falcon, quod non negatur. Br. Common, pl. 43. (47) cites 11 H. 6. 22 B. Fitzh. Common, pl. 3. cites S. C.

† Br. Common, pl. 41. (40) cites S. C.—Fitzh. Affile, pl. 228. cites S. C.
‡ Br. Common, pl. 5. cites S. C.—Br. Stith, pl. 4. cites S. C.


A Man cannot use his Common appendant with the Cattle of Strangers, unleas he brings them to fail his Land; but he cannot agit 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. Rawfon.


† Br. Common, 41. (40) cites S. C.—Fitzh. Affile, pl. 228. cites S. C.—E. N. B. 180. (B) S. P. accordingly.—Vent. 18. Patch. 21 Car. 2. Br. R. Rumsey v. Rawfon, 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 competer the Land, and the Right of the Case is tried, and fo sided by the Statute of Oxford.—Raym. 171. S. C.—2 Keb. 394. pl. 72. S. C. The Court agreed that a Man cannot put in the Beasts of a Stranger, but only to competer 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 thefe Cattle; for he has a special Property in them for the Time. Rich. 10 Car. 2. B. R. between Jatton and Hellyard, per Curnam, upon Evidence at the Bar.

7 K (I) Com-
I. 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.

2. A Man may prescribe to have Common for all manner of Cattle, by reason of his Person. 15 E. 4. 33.

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 good Prescription, because he does not lay 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 fans Number appurtenant to Land; and when he claims the Common for all Cattle commonable, and does not lay for Cattle levant and couchant upon the Tenement, this shall be intended Common fans Number according to the Words; for there is not any Thing to limit it, when he does not lay for Cattle levant and couchant. Patch. 16 Car. 2. R. between Cobban and White, adjudged in a Writ of Error upon a Judgment in Windsor Court, and the Judgment there given revoked for this Cause, the Lord Brampton only being in Court. Incurtur B. 14 Car. Rot. 403, 404.

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 appendix. 15 E. 4. 32. b.

5. If a Man grants Common fans 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.
6. Common fans Number cannot be appendant to any Thing but Lands, and it is called Common fans Number, because it is only for Beast's known and couched, 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 Cafe.

7. In Case of Common fans Nombre, if there be a Surcharge, it must be remedied by a Writ of Aimeatirement; 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 Mansors, and one may inclose against the other. Co. Lit. 122.

B. R. in Tarringham's Cafe.—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 Consequence; 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 Recompense 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 Recticalcual to itself, viz. for Cause of Vicinage, and no other Cause can be imagined and it is rather an Excuse of Trelsaps when the Beasts of the Tenants of one Manor fray into the Waste of the other, than any certain Inheritance.—They may inclose the one against the other; Per Powell J 11 Mod. 75; pl. 3, Patch. 5 Ann. in Case of Bromfield v. Kirber.

2. If there be Common pur Cause de Vicinage between two Mansors, and the Lord of one Manors 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. Bich. 13 Jac. Banco pur Dibert.

3. [But] If there be Common pur Cause de Vicinage between two Mansors, and the Lord of one Manors incloses any Part of this Common, the Common pur Cause de Vicinage is gone. B. 13 Jac. Banco per Dibert.

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 Vicinage; for this is but an Excuse of the Trelaps. Co. Lit. 122.

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, 75; pl. 3, Patch. 5 Ann. B. R. in Case of Bromfield v. Kirber.


6. But it is sufficient to say that he and all those who have used to intercommon causa Vicinagt, because this is Common appendant, that &
pendant. Old Rolls of Entries, Trespass in Common 11. (but
hereof this) and Sec 13 H. 7. 13. b. A Prescription for Common
pur Cattle de Vicinage.

4. The Court held the pleading ill, because the Prescrip-
tion 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 Jenkin’s
Anon.

7. Affife 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 presumed in
Common there, and the other e contra, and to see that Itfue may well be
taken upon Prescription in Affife. Br. Common, pl. 43. cites 30
Att. 42.

8. Note, that it is no Prescription in Trespafs of trampling his Grazis 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 bad 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 is Aërio and no Prescription; for by this Word Lord
shall be intended him, of whom the Vill is held, and not he who is feised of
the Vill; for if there be 20 Mejles every one of them is Lord of the Vill,
and yet none shall have Common but he who is feised in Possileffion of the
Vill, by which he said that H. is feised of the Vill of S. and that he
and all those whose Estates he has in S. &c. have had Common for Caufe of
Vicinage Time out of Mind for him and his Franktenants of the said Ma-
nor 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.

9. Note there claims Common by Vicinage but the Lord who has the Pos-
session of the Town, 23 H. 6. But yet it items that one Neighbour may
claim Common by Vicinage in the Land of another Neighbour, * al-
though he be Lord of the Town &c. F. N. B. 180. (D).

S. P. by
Manwood J.
D. 516. 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 tho’ of the other Vill may diltrain
them Damage Peasant, or shall have Action of Trespafs, but they shall
put them in their own Field, 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 Vic-
inage, because they are not Vicini Adjacentes; Per Shelly. But Baul-
win 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 rea-


9 So are the
English
Editions, they copy-
ing after one
another, but
the French Edition is, viz. Though neither of them be Lord of the Vill &c.

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 forbear, without having any respect to the Common of B. bee e converto: 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. pars in 50 Beasts, and the Vill of B. 102, there is no Pre-judice 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 Corber’s Cafe.

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 Cafe of Bromfield v. Kirber.

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(L) Common Appurtenant. What is.

1. If a Man hath Time out of Mind had Common of Eaters in a certain Place, to be burnt in such a House, and to mend the old Houses and old Hedges, this is not Common appurtenant but appurtenant 11 H. 6. 11 b.

2. If a Man and his Ancestors, and all those whole Estate he hath in a House, have had Common for two Beasts in a certain Place, this is not appurtenant, but appurtenant. 11 H. 6. 12.

3. If a Man bargains and sells Blackacre to B. and after, before the Roll Rep. Deed is inrolled, by another Deed grants a Common to the said B. for 424. 425. pl. all his Cattle which should manure and feed in the said Blackacre, gued, fed ad which he hath bargain’d and sold to the said B. or the which he hath mentioned to be bargain’d and sold, and after the Deed is inrolled, this Godf. 270. is a good Common appurtenant to the said Blackacre, altho’ the said Grantee had nothing in the said Land at the Time of the Grant, and Steacy, S. C. the be admitted that it shall not relate to settle the Estate in him ad intro, insufficiens as this has Reference to the Bargain and Sale, and to the Estate which he had by Force thereof. Mod. 15 Tac. B. R. between Godf. and Steacy, agreed per Curiam.

shall have Relation as to that, tho’ for collateral 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 not thing. 7 L

* Fol. 420.
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. *Mic. 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 enrolled, by another Deed, grants a Common to the said B, for all the Cattle which should manure and feed in said Blackacre, and after the Deed is enrolled, 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 Possession sufficiently to support this Grant, for he need not have to till an Interest in this Land to annuer the Common to it. *Mic. 15 Jac. B. R. between Gawen and Stacy, adjudged per totam Curtam, upon a special Verdict, and the Court laid 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 Land, 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, 'tis certain, if he purchases the Land; so that this is as much as if he had said, that he should have the Common quasiduque he shall have the Land. *Mic. 15 Jac. B. R. between Gawen and Stacy, per Curtam, and the principal Case was adjudged upon this Reason. (But Quære, inasmuch as the Grant had no Reference to a future Purchase.)

7. If 2 D. 4. A. was seised in Fee of a Wattle called Wittenhall-Heath in C. and the Prior of Stone was seised in Fee of certain Meadows, lands, Meadow, and Pasture in S. and they being so seised, A. by Deed dated 2 D. 4. grants to the said Prior and Convete Common of Pasture, pro se & omnibus Tenentibus suis in S. prædicto (elicet, Stallington in Comitatu Staffordiae) cum omnimodis animalibus suis omni Tempore Amini in Wittenhall-Heath prædicto habend' 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 fans 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. *Mic. 15 Car. B. R. between Wecheward and Porter, per totam Curtam, adjudged without Difficulty upon a special Verdict. Jurat. Trin. 11 Car. Rot. 324, tho' it was objected by myself, that it is not found that by Usage it had been interpreted after the Grant.

8. If a Man grants to another Quandam Aftarum cum Communia Turbarie quantum pertinent ad duas bovatas Terræ cum Pertinentiis in D. this is a Common in Grofs, being a Grant De Freno, nor by Peremption, and not appurtenant to the said Aftar. 5 All. 9. adjudged. *Common for all Manors of Beasts is Common appurtenant. Br. Common, pl. 13 cites 37 H. 6. 34.
Common.

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. 1638. B. R. in Cafe of Pretty v Butler.

(M) Common Appurtenant. How it may be. [And for what Cattle.]

1. If a Man prescribes to have Common of Eftovers to his Freehold, feilcet, a house, he cannot prescribe to fell the Wood, for this cannot be appurtenant. 11 H. 6. 11. b.

Houres, as well as to repair old Houres, was held good by all the Court, prater Wiliamis, who said, that then the Defendant might cut down all the Wood and defroy it; but, notwithstanding, it was adjudged for the Defendant. Cro. J. 25. pl. 1. Fadn. 2 Jac. B. R. Arundel (Countes of) v. Steere.

2. A Man may prescribe to have Common appurtenant to a Ma- Br. Com- mon 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.

A Man prescribed to have Common appurtenant for all manner of Beasts, and it was held that it could not be Common appurtenant, because that is only for that 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. 54. 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 Br. Com- Freehold for all manner of Cattle. 25 Att. 8. But this is there mon. pl. 42. called appendant, but it seems to be intended appurtenant. S. C. but (41) cites S. P. does not appear.

4. A Man may prescribe that he, and all those whose Estate he has in the Manor of D. have used to have a Fold-coure, feilcet, Common of Pature for Sheep, not exceeding 300, in a Field, (felicet) in Canefield, as the Casa was in Norfolk) as appurtenant to the said Manor, 8th he does not prescribe to have them liuant and cochant upon the said Manor, there being a certain Number limited. Dicx. jo. 37. 3. 11 Car. 2. R. between Day and Spooner, in a Writ of Error, agreed per Curtain. Intratur Dicx. 6 Car. Rot. 183. and Hill. 11 Car. ad- judged accordingly.

by Holt Ch. J. at Dorcheffer Lent Allies, to W. 3. at a Trial at Nii Prius, that if a Man prescribes for Common for a certain Number of Cattle as appurtenant &c. It is not necessary nor material to know that they were liuant and cochant, 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 Br. Common, Cattle not commonable, as Hogs, Goats, and fitch like. Co. Litt. 122.

6. [So]
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 All. 8. adjudged.

7. A man may prescribe to have common appurtenant for hogs levant and couchant upon such land. Rich. 5 Jac. B. per Curiam.

8. A man may claim common Ratione Mesuagii; 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 Trefails the defendant prescribed for common of pasture for all beasts levant and couchant upon a mesuage. Exception was taken, because of the word (mesuage); but held good enough, and said to have been frequently adjudged so; for a mesuage includes in it yards and cartellage, and the like. 2 Show. 248. pl. 250. Mich. 54. Car. 2. B. R. Scambler v. Johnson. —— 2 Jo. 227. S. C. The Court held the prescription good; for this is not common appurtenant, 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 of tenure in fee simple to have in his Manor, by that Grant it is appurtenant to the Manor, and if he make a feuement of the Manor, the common shall pass to the feeholder. F. N. B. 181. (N)

And if he grant to a man and his heirs common as appurtenant to his Manor of to common in such a manor now by that Grant the Grantee shall have the common appurtenant to his Manor, and if he make a feuement in fee or for life of the Manor, the feeholder shall have the common. F. N. B. 181. (N)

10. A man cannot claim common appurtenant for hogs or goats, because they are not commanoble beasts. D. 70. b. pl. 39. Trin. 16 E. 6. Withers v. Ilham.

Ow. 4. Wakefield's Cafe, S. C. agreed accordingly.

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. Cottard v. Wingfield.

Common.

13. It was ruled by Holt Ch. J. at Winchester Lent-Affifes, 10 W. 3. that a Man cannot precede 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 Measuring, 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 S. P. nor a Stranger. 30 El. 3. 27.

2. He that hath Common appurtenant may borrow Sheep of another to compel 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. Com. mon. pl. 14. cites S. C. and mentions appendant.

3. A Man may use Common appurtenant to his Manor with his Household. 14 H. 6. 6. b. The Book is of Common appurtenant; but it seems to be intended by the Book appurtenant.


(N. 2) Common Appurtenant Pleadings.

1. Respafs of Grafs trampled in D. Chaunt, said Actio non, for T. was seized of the Manor of D. in Fei, and that he and all the whole 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 fuch Place &c. and after T. leased the Manor with the Appurtenances to the Defendant for 10 Years &c. and after he borrowed Sheep to compel 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 Absolem lor, that he had Common with all Manner of Beasts Time out of Mind, Mode & Forme prior &c. and Note, that the Reason why he pleaded that he borrowed Beasts to compel the Land, is because that Tenant cannot put any Beasts in the Common but those which he had to Manure his Land, or for

2. Alle of Common, and the Plaint is of Common Appurtenant to his Frankenement in D, and shewed for Title that he was seized of a Mensage and of a Carse of Land in D, to which the Common is Appurtenant, and that he be and his Ancestors, and whose Estate &c. had used Common of Pasture with to Beasts, and well by these Words (was seised) as well as if he had laid (is seised). Per Hulley. Br. Common, pl. 54, cites 16 H. 7, 12.

3. When the Prescripion 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


See more of this at the Divisions of Pleadings at the End of this Title of Common.

(0) Common in Grofs. How it may begin.

If a Man has a Way to his Manor or Houfe by Prescripion, this is for Cattle Levant and Couchant upon the Land to which it, and therefore it cannot be severed without Extinquishment.

this cannot be made in Grofs, because it is Appurtenant to the Manor or Houfe; but Common Appurtenant, or a King's Highway, or an Advozione Appurtenant may be made in Grofs; but Common of Elters to barn in such a Houfe cannot be made in Grofs, nor Common Appurtenant which is by Reason of the Tenement &c. Br. Common, pl. 23, cites 5 H. 7, 7 by Fairfax J. pro leg. — Paiturage claimed for Sheep Levant and Couchant upon the Defendant's Land is Common Appurtenant, and cannot be severed from the Soil by Grant. Cro. C. 542, 543 pl. 7. Patch. 15 Car. B. R. Arg. cites 4 H. 6, 13, & 8 E. 4.


v. Kent, S. C. adjudged that he could not grant it o'er, because he had it Quasi sub modo, viz. for Beasts Levant &c. but Common Appurtenant for Beasts certain may be granted over.

Cro. C. 452. pl. 2. Spooner v. Day, S. C. adjudged in C. B. and affirmed in Error in B. R. — Jo. 575. pl. 1. S. C. the Court held that this being Common Appurtenant, may be severed from the Manor, esp. particularly 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 Feudalcourse, 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 make it in Grofs, because the Common is for a certain Number, and by the Prescripion 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 Advozione, without any Prejudice to the Owner of the Land where the Common is to be taken. Mich. II Car. B. R. between Day and Spooner, in a Writ of Error upon a Judgment in B. R. per Curiam, Dr. Berkly, who seem'd to doubt of this. Intertrate Mich. 6 Car. Rot. 153. But there the Case was, whether it might be granted over with Parcel of the Hance, and so should be Appurtenant to this Parcel, and so it is adjudged in Bance, that it should palls as Appurtenant to this Parcel, and so held per Curiam in B. R. Dr. Berkly, who doubted of this, but afterwards ill.
Common.

11 Car. It was so adjudged by the Consent of Barkly and all the Court; and Judgment affirmed accordingly. 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 Grofs, because it is Appendant to the Manor or House, but Common Appurtenant, King's Highway, or Advowson Appendant may be made in Grofs, but Common of Eftovers to be burnt in such House cannot be made in Grofs nor Common Appendant, which is by Reason of the Tenement. Br. Common, pl. 28. cites 5 H. 7. 7.

5. Common Appurtenant and in Grofs 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 Café.

(P) For what Cattle.

1. A Mait 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 be Common with the Cattle of a Stranger. 18 E. 4. 14. b. (B) S. P. cites S. C.

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 ponendam Averia shall be intended only of commonnaable 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 Cafe of Smith & Feverel.

(Q) By the Cattle of whom.

1. If a Commoner hath no Cattle, he cannot gift the Cattle of others to the Common. *45 E. 3. 25. b. Crett. † 22 pl. 5. cites S. C. — F. N. B. 185. (K) cites S. C.

† Br. Common, pl. 41. (42) cites S. C. — Fitzh. Affice, 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 Aff. 84. same Cafe.

† Br. Common, pl. 41. (42) cites S. C. — Fitzh. Affice, 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 Banner his Cattle by the Borrowing, and the Cattle, which manure the Land, of Right ought to have Common. *45 E. 3. 25. b. † 22 Aff. 84.

† Br. Common, pl. 41. (42) cites S. C. but the Borrowing them in order to manure his Land is not sufficient, unless he manures in Fact with them. — Fitzh. Affice, pl. 228. cites S. C.

4. 3.)
4. So he that hath Common in Grofs for a certain Number of Cattle, may put in the Cattle of a Stranger, and use the Common with them. 11 P. 6. 22. b.

5. So he that hath Common in Grofs fans Number, man put in the Cattle of another Man, and use the Common with them. 11 P. 6. 22. b.

(R) Common in Grofs. What shall be said Common in Grofs.

1. If a Man at all Times hath used Common with his Cattle Covent and Levant in certain Places, and not with other Cattle coming, this (c) is Common appurtenant to this Place, and not in Grofs. 22 Att. 36. Curna.

But see there it is adjudged, if one grants an Affair summit cum tota Communio quant' pertinet ad unam Bovatam Terre, this is Common in Grofs, and he shall take as much as another takes for 2 Bovates or Ox-ganges in grofs, and when he pleates, because such Common cannot be appurtenant 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 grofs, and not appurtenant; Per Cur. 2 Lev. 246. Hill. 30 & 31 Car. 2. B. R. in Cafe of Stables v. Mellon.

(S) Common in Grofs. What shall be a good Grant.

1. If I grant Common to another for Years, and do not declare in what Place he shall have it, this is void. 9 P. 6. 36.

2. If a Man grants to another Common, Ubicunque averia fua ierit, this is a good Grant, by Averment in what Place his Cattle fed at the Time of the Grant, before or after. 9 P. 6. 36.
Common.

3. But without such Averment this is not good Grant. 9 H. 6. 36. Br. Grants, p. 3. 4. If I grant Common to another in my Land every Year, and pl. 5. cites it lies fresh, this is good, tho' it be at my Will, whether he shall have any Profit, for I may lose it. 17 C. 3. [34 b.] 5. If A. grants Common to B. in certain Land, for all his Cattle Roll Rep. shall be Levant and Couchant upon Blackacre, where B. hath nothing in Blackacre, so that it cannot be appurtenant, yet this shall be S. C. A Man not be a Common in Grofs, because the Intention and Limitation of the Grant is to Cattle Levant and Couchant. Trin. 15 Jac. B. R. between Garven and Stacy, agreed at the Bar.

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 Grofs, mainly as it is expressly limited to such Cattle which manure and feed in the said Land.

7. [Bar] Trin. 15 Jac. B. R. between Garven and Stacy, the Court Seem'd contra; but Mich. 15 Jac. they seemed to waive this Opinion, and Croke held expressly contra.

8. A Man may grant to another Common in one Place for all Manner of Cattle, and in another Place for 10 Beats; and so the Grantee may put the 10 Beats in either of the two Places. 17 C. 3. 34 b.

9. If a Man has Common appurtenant to a Message and Lands for a certain Number of Beasts, he may alien the same; otherwife 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. Hanflip.

(T) Common in Grosi upon a Grant. In what Place it shall be taken.

1. If a Man grants to me Common for my Cattle ubicunque aeriæ fusa iverent, 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.

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. 24: a is wrong translated in the English Edition (whenever.)

2. [Bar] if a Man grants Common to another, ubicunque aeriæ fusa iverent, 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. Curt.

pl. 5. cites S. C, but it is only a Reference to Br. Grants, pl. 5.
Common.

3. [So] if a man grants a Common to me for my Cattle ubiquitous aterra 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 P. 6. 36.

4. [And] upon such Grant of Common ubiquitous aterra 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 P. 6. 36.

5. [But] if the Grant be of Common ubiquitous aterra sua ierint, and the Grantee dies; Quere, whether the Grantee shall have Common after his Death. 9 P. 6. 36.

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 come. 9 P. 6. 36.

Grant is not any Restraint to the Waifs or Commons, but the Grantee may claim Common in any Part of the Manor, without pleading that it was Waife or Common. Agreed by Croke and Berkley, ceteris Jufliciariis abintibus, and Judgment accordingly. Cro. C. 599. pl. 20. Mich. 16 Car. B. R. Stringer's Cafe.

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 L & per tant, and it was agreed that [Praecipe] quod reddat lies of Pasture for two Oxen, but e contra clearly per Fitzh. of Common for two Beasts, because by him [Praecipe] quod reddat never lies of Common. Br. Common. pl. 2. cites 27 H. 8. 12.

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.
S. P. and cites S. C. — So that if afterwards the Grantor has no Beasts, the Grantee shall not have Common; Per Martin, quod facit conciuitum. 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 fere, 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 Quaodcunque Aterra sua ierint is void, because it refrains 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 vincent Legem; and it is not intendaible 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 Donations, and the Grantee shall not have Common but in this manner.

2. Where
(X) Common. Seifin.


2. As, the Commoner cannot gain Seifin by Cattle which he * Br. Common, pl. 25, cites S. C. — Br. Fitzh., pl. 2. cites S. C. — Br. Grants, pl. 8. cites S. C.

cites S. C. † Br. Common, pl. 41. (40) cites S. C. — Fitzh. Affile, pl. 228. cites S. C.

3. So, he cannot gain Seifin by the User of his Tenants at Will, be * Br. Common, pl. 25. cites S. C. — Br. Fitzh., pl. 2. cites S. C. — The User of Common by Tenants at Will shall be a Seifin to him in Reversion to have an Affile, if he or his Tenant at Will be after disturbed to use the Common. F. N. B. 180. (1)

4. But if the Commoner hath no Cattle, and to takes the Cattle of * Br. Seifin, another, and the Tenant delivers Seifin to the Commoner, and is present when the Cattle are put in, and he afflicts to the User and putting by Thorpe, pl. 39. cites S. C. & S. P. or commands him so to do; this is a good Seifin. *45 C. 3. 25.

5. So if the Commoner hath no Cattle, he may take Seifin by the * Br. Common, Cattle of another, and chafe them back presently; for the Continu- mon, pl. 39. cites S. C. ance is tortious, and this is a good Seifin. *45 C. 3. 25 per Thorpe; but Br. Commoner, *51. [says] Quære of this (and it seems not to be Law; for the putting them in without Continuance Brooke makes a Quære of it.

Br. Seifin, pl. 5. cites S. C. † Br. Seifin, pl. 36. cites S. C. — Fitzh. Affile, pl. 228. cites S. C.

6. If a Man hath Commonsans Number, if he hath been seised of this with Cattle without any certain Number, as 29, 30, or 49; this is a good Seifin. 11 D. 6. 23.

7. If a Man recovers a Common, and the Sheriff upon a Writ of * Br. Seifin, Seifin comes to the Place, and by Parol delivers to him Seifin of the Common; this is a good Seifin of Common to have an Affile. 228. S. C. Brooke says Quid

Fitzh. Affile, pl. 228. cites S. C. — Br. Affile, pl. 31. cites 45 E. 5. 25. S. P. that he shall have Affile or Redissipin upon the first putting in Possession; because the Law adjudges him in Possession by the first Seifin; Quod non negatur. But Brooke says, Tanum Quæs. 

(Y) In
(Y) In what Cases the Seisin of one shall serve for others.

* Br. Seifin, 1. The Seisin of the Father is not sufficient for the Heir. * 45 pl. 4. cites S. C.
† Br. Seifin, pl. 36. cites S. C.—Fitz. Affife, pl. 228. cites S. C.


This concludes Lord Rolle’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.
Cleaned & Oiled